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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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| | |
|---|---|
| EDGAR A. McCULLOCH - - - | Chief Justice |
| CARROLL D. WOOD - - - | Associate Justice |
| JESSE C. HART - - - - | Associate Justice |
| WILLIAM F. KIRBY - - - | Associate Justice |
| FRANK G. SMITH - - - - | Associate Justice |
| WILLIAM L. MOOSE - - - | Attorney General |
| PEYTON D. ENGLISH - - - - - - | Clerk |

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# CASES DETERMINED

IN THE

# SUPREME COURT OF ARKANSAS

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## LEE *v.* MITCHELL.

Opinion delivered April 14, 1913.

1. SCHOOL DISTRICTS—TEACHERS—QUALIFICATIONS AND REQUIREMENTS.—The general law will be considered in the construction of statutes relating to the employment of teachers in special school districts; and under Kirby's Digest, §§ 7684, 7695 and 7615, none but qualified and duly licensed persons may teach in the common schools, but it is not necessary that such teacher shall have a license to teach upon the date of the execution of the contract to teach, if the school is not to commence until thereafter; the contract entered into will be valid, subject to be avoided if the teacher fails to provide himself with a license before the date of the commencement of the school. (Page 6.)
2. SCHOOL DISTRICTS—SCHOOL BOARD—TEACHERS—CONTRACT TO TEACH.—The terms of section 7615 of Kirby's Digest, imposing duties upon the school board with reference to the employment of a teacher, are mandatory, and when the board has entered into a written contract with the teacher, the contract is binding and the board can not thereafter invalidate the same by refusal to carry out the term of the statute. (Page 7.)
3. SCHOOL DISTRICTS—SALARY OF TEACHER.—Although a teacher can not draw his pay from the county treasurer upon warrants of the district until the statute be fully complied with, by filing an exact copy of the contract made with him, he may, by proper procedure, compel the filing of such copy with the county treasurer, or compel the payment of his salary in accordance with the terms of his contract after a performance of it. (Page 7.)

Appeal from Logan Chancery Court, Southern District; *J. V. Bourland,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellants three directors of Special School District No. 15, of Logan County, brought suit to restrain

W. B. Mitchell, appellee, a school teacher from taking charge of a public school of said district, as a teacher, etc., alleging that he was not a qualified teacher of the State; that he did not have a teacher's license, as required by law when the contract of employment, under which he was attempting to teach school, was executed; that by fraud and misrepresentation, he procured the contract entered into and alleged further that the contract was void, not having been made in triplet form, and because appellee had no license to teach in the State of Arkansas at the time of the execution of it.

The answer denied the allegations of the complaint and alleged by way of cross complaint that appellee was a school teacher by profession, duly authorized to teach in the public schools of the State of Arkansas, and regularly licensed by the Superintendent of Public Instruction. That on April 22, 1912, the school district, at a meeting of the directors at which all of the directors thereof voted elected him as a teacher in the school for a term of six months, beginning October 28, 1912, specifying the salary for each month, and that the board sent him a written contract, embodying the terms of the contract, signed by its president and secretary; that he immediately signed and returned the contract; alleged further that the district failed to furnish him with a duplicate and triplicate copy of the contract to be signed, and to file such copies, because the secretary thereof, one of appellants, refused to sign the other copies; that in fulfillment of the contract he had moved his family from Texas to the town of Magazine in the school district, in order to begin preparations for and be ready to teach the school. Prayed that the district be required to make a duplicate of the contract and deliver same to him, and to make another and file the same with the county treasurer, as required by law. Copies of his teacher's first grade license and the written contract were exhibited with the answer and cross complaint.

The testimony shows that at a meeting of the directors of the Special School District No. 15, in which all

participated, four voting for, and two against, the employment of appellee, he was elected and employed to teach a six months' school in the district at a fixed salary; that the school board thereupon wrote out a regular teacher's contract, and executed same in accordance with the resolutions authorizing it, by its president and secretary, which was forwarded to appellee at his place of residence in Texas and immediately signed by him and returned to the school board. Thereafter, dissatisfaction arose, and a petition was gotten up in the district, protesting against the employment of appellee and appellants refused to make out the other copies of the contract and attempted to enjoin appellee from its performance. The date of the written contract is April 22, 1912, and the teachers' license of appellee is a State certificate, authorizing him to teach in the public schools of the State, valid for life, unless revoked and dated June 8, 1912.

The contract recites that it is between Special School District No. 15 and W. B. Mitchell, a teacher, holding a first grade license; that said district employs him to teach the eighth grade in the common schools for six months, commencing on the 28th day of October, 1912, for the salary of eighty-three and a third dollars per month, and, further: "Said directors further agree that all steps required or allowed by law to be taken by said district and its officers, to secure the payment of teachers' wages, shall be so had and taken promptly, and the requirements of the law, in favor of the teacher, complied with by said district."

The court found that the contract was entered into, as stated, and at the time of the making of the contract, there were sufficient taxes to be paid in by the collector of the county to authorize the school to be taught, and that appellee had a sufficient license at the time fixed for opening the school authorizing him to teach and dismissed the complaint for want of equity, from which judgment this appeal is prosecuted.

*John L. Hill, John P. Roberts* and *J. O. Kincannon,* for appellant.

1. Notice must be given of special meetings. 64 Ark. 489. Otherwise the contracts made are void. 67 Ark. 236; 73 *Id.* 195; Kirby's Dig., § 7683.

2. Kirby's Digest, § 7615, is mandatory. 87 Ark. 93.

3. The district did not have sufficient funds, and appellee had no license. Kirby's Digest, § § 7684, 7615; 50 Am. St. 639; 4 N. D. 197; 26 Am. St. 605; 10 Ill. 643; 79 Ind. 575; 29 Hun. 606.

*A. S. McKennon* and *W. B. Rutherford,* for appellee.

1. All the members were present and participating. Notice was waived. 83 Ark. 491.

2. A failure to make the contract in triplicate does not render it void. 83 Ark. 491.

3. The statute only requires a license when the teacher commences school. Kirby's Dig., § § 7615, 7684.

KIRBY, J., (after stating the facts). It is contended that there was no contract of employment between said special school district and appellee, authorizing him to teach the school, and that the purported contract was void, because appellee was not a regularly licensed teacher in the State of Arkansas at the time of the signing of the contract and because same was not executed in triplet form, as the statute requires.

The undisputed testimony shows that the action of the school board authorizing the employment of appellee and fixing the terms thereof was participated in by all six of the directors of the district, and it makes no difference whether it was taken at a regular or a special meeting, or with or without notice, as all were present and participating as a board of directors at the time. *School Dist.* v. *Allen,* 83 Ark. 491.

A contract was drawn in accordance with the authority, fixing the terms for employment, signed by the president and secretary, of the board, and forwarded to appellee for his signature. He immediately signed and returned it to the board. This contract bears date of

April 22, 1912, and stipulates that the teacher is employed to teach school for a term of six months, beginning October 28, 1912, and at the time of the execution of it appellee was not a regularly licensed teacher in the State, although he had been for some years before, his present license being granted June 8, 1912.

The law authorizing the employment of teachers by the board of directors of special school districts provides that they "shall have power * * * to hire teachers for all public schools of the district; * * * provided, no teacher shall be employed who does not hold a certificate from the State Superintendent or County Examiner." Section 7684, Kirby's Digest.

And the general law, authorizing the employment of teachers of common schools embodied in section 7615, of Kirby's Digest, as amended by act of April 24, 1911, provides:

"They shall hire for and in the name of the district only such teachers as have been licensed according to law, and employ no person to teach in any common school of their district unless such person shall hold, at the time of commencing his school, a certificate and license to teach, granted by the county examiner or State Superintendent; and they shall make with such teacher a written contract in triplet form, specifying the time for which the teacher is to be employed, the wages to be paid per month, and any other agreement entered into by the contracting parties, and shall furnish the teachers with a duplicate of such contract, keep the original, and immediately file an exact copy of such contract in the office of the county treasurer of the county in which the contract is to be enforced; and the county treasurer shall not pay the warrants of any school district until a copy of such contracts have been filed with him."

The general law will be considered in the construction of the one relating to employment of teachers in special school districts (section 7695, Kirby's Digest), and, from the reading of both, it is clear that it was the intention of the Legislature not to authorize the employ-

ment of teachers for the common schools of the State, who are not qualified to teach therein, and whose qualifications do not appear from the holding of a teacher's license. If it had been the intention that no person should be employed to teach in any of the common schools of the State unless he should hold a teachers' license at the time of the employment and execution of the contract, without regard to his holding such license at the time of the commencement of the school, there was no reason to go further and provide, "And employ no person to teach in any common school in their district unless such person shall hold, at the time of commencing his school, a certificate and license to teach, etc."

It was the evident purpose that none but qualified and duly licensed persons should teach in the common schools, but it is not necessary that such teacher shall have a license to teach upon the date of the execution of the contract, if the school is not to commence until thereafter; the contract of employment may be entered into and will be a valid contract, subject to be avoided by the failure of the person to provide himself with a teacher's license before the date fixed for commencement of the school. The teachers and the directors know the law, and that none can teach who do not hold a teacher's license, and the contract is entered into with that understanding, and will be void if the license be not procured before the date for the commencing of the school.

The law further provides that they shall make with the teacher a written contract in "triplet form" specifying the terms of the contract, "and shall furnish the teacher with a duplicate of such contract, keep the original and immediately file an exact copy of such contract in the office of the county treasurer of the county in which the contract is to be enforced; and the county treasurer shall not pay the warrants of any school district until a copy of such contracts have been filed with him."

There can be no doubt but that the action of the board in specifying the terms of employment and authorizing the making of the contract and the execution of the

written contract by the president and secretary of the board of directors for the district, and by the teacher constituted a binding contract subject only to be invalidated by the failure of the teacher to procure the requisite license before the date fixed for commencement of the school, unless the provisions of the statute requiring the directors to make a written contract with the teacher "in triplet form," and furnish him a duplicate of such contract and file an exact copy of the contract in the office of the county treasurer are mandatory. Neither can there be any doubt under said section of the statute, but that the treasurer is prohibited from paying the warrants of any teacher of any district until a copy of the teacher's contract has been filed with him, in accordance with the provisions of the statute, but it is made the duty of the board of directors to file a copy of the contract with the treasurer, and to furnish the teacher a duplicate thereof to be kept by him, the original contract being required to be kept by the school directors.

The terms of the agreement between the parties are included in the written contract signed by them, and when it was reduced to writing and signed by the parties, it became effective and binding under the law, and the fact that a director or an officer of the school board refused thereafter to do his duty and execute duplicate contracts that the teacher might sign in order that the law might be fully complied with relative thereto could not release the district from the performance of the contract entered into. *School District* v. *Allen, supra; McShane* v. *School District,* 70 Mo. App. 624.

Although the teacher can not draw his pay from the county treasurer upon the warrants of the district until the statute be fully complied with, by filing an exact copy of the contract with him, he could, by proper procedure, compel the filing of such copy with the treasurer or the payment of his salary in accordance with the terms of his contract after a performance of it.

The decree is affirmed.

## WESTERN UNION TELEGRAPH COMPANY v. DUKE.

Opinion delivered April 14, 1913.

1. TELEGRAPH COMPANIES—DUTY TO TRANSMIT MESSAGE.—While a telegraph company does not insure the prompt transmission of messages, it is required to exercise ordinary care, and it will not be liable for failure to transmit and deliver a message between the hours upon which its offices are closed upon a national holiday. (Page 11.)
2. EVIDENCE—WEIGHT AND SUFFICIENCY A QUESTION FOR JURY.—In an action against a telegraph company for damages for failure to deliver a message promptly, when the issue before the jury is the question of defendant's negligence in handling the message, the jury has the right to consider the evidence in its most favorable light to the plaintiff. (Page 11.)
3. TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE PROMPTLY—EVIDENCE SUFFICIENT TO SUPPORT VERDICT.—In an action for damages against a telegraph company for failure to deliver a message promptly, the evidence held sufficient to warrant the jury in finding that if defendant had used ordinary care in transmitting the message, that the plaintiff could have reached her daughter's bedside before the death of the daughter. (Page 13.)
4. NEW TRIAL—SUFFICIENCY OF ASSIGNMENT OF ERROR.—In a motion for a new trial the defendant assigned as a ground therefor that "the court erred in admitting evidence over defendant's objection, as shown by the defendant's exceptions made and entered of record." *Held* assignment of error too indefinite to call the court's attention to the particular error complained of. (Page 14.)

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

STATEMENT BY THE COURT.

This was an action brought by Mrs. Mollie Duke against the Western Union Telegraph Company to recover damages on account of mental anguish sustained by reason of the negligence of the defendant in failing to deliver a telegram to her notifying her of the serious illness of her daughter, in consequence of which plaintiff failed to reach the bedside of her daughter before she died.

The plaintiff resided at Hope, Arkansas, and her daughter at Camden, Arkansas. These towns are about sixty-five miles apart, and have railroad and telegraph

connections. A train leaving Hope at 3:00 o'clock P. M. makes connection with the train leaving Stamps at 8:30 P. M., and arrives at Camden at 10:10 P. M. On the 25th day of December, 1911, Whitfield Hamilton, the husband of the plaintiff's daughter, sent to the defendant's office at Camden for immediate transmission a telegram to the plaintiff, reading as follows:

"Mrs. Mollie Duke, Hope, Arkansas:

"Stella not expected to live.

(Signed) "Whitfield."

The city office was closed on account of it being a holiday between the hours of 10:00 A. M. and 4:00 P. M. The manager of the city office directed the bearer of the message to take it to the depot and send it from there. The message shows, on its face, that it was received at the depot for transmission at 11:29 A. M. on Christmas day. The answer of the defendant admits that it was received by the defendant at this time and the price paid for sending same. Another paragraph of the answer avers that the defendant promptly transmitted said message after receiving it to the relay station at Little Rock, but alleges that it could not be forwarded to Hope for the reason that defendant's only office at Hope was closed between the hours of 10:00 A. M. and 4:00 P. M. on account of it being a holiday.

Whitfield Hamilton admitted that he knew the office at Camden would be closed between the hours of 10:00 A. M. and 4:00 P. M. on Christmas day, but said that he did not think of this when he sent the message. The message was not delivered to the plaintiff until a few minutes after 7:00 o'clock P. M. on Christmas day. She left the next morning at 7:00 o'clock on the first train for Camden. Her daughter died at about 4 o'clock A. M. on December 26, and the plaintiff had received news of that fact before she started. The city of Hope is twenty-three miles from the town of Stamps. A witness for the plaintiff testified that he had traveled from Hope to Stamps in a buggy in two hours and thirty-eight minutes. That he left Hope at 9:18 and arrived at Stamps

at four minutes to 12. The plaintiff testified that had she received the message in time to have driven through the country to catch the train at Stamps, she would have done so. That her neighbors were very kind to her and would have helped her to get off at any minute.

The abstract of defendant shows that Mr. Herrin testified: On last Christmas day I was wire chief for the Western Union Telegraph Company, stationed at Little Rock, Arkansas. My duties were to look after the wires—take care of the wires and make necessary patches. I remember about a message arriving at Little Rock from Camden on Christmas day—the message in controversy. I don't remember the time it came to Little Rock; I just saw it. The Little Rock office was open with a reduced force; the message was going to Hope, and that office was not supposed to be open until 4 o'clock. When we got the message we called the Hope office; then we called Hope office at 4 o'clock and on up to 5 o'clock, when we discovered the wire was cut. It was 5 o'clock before we discovered that we could not get Hope office. The wire was grounded—broken in two between Gurdon and Prescott. We located the trouble about 5 o'clock. We then got the message through by Texarkana, around by Dallas; had to go a roundabout way to get it to Hope. We used every way in the world we knew how to ascertain the cause of the trouble with the wire. Such breaks often occur; there is no way they can be foreseen or anticipated. It is impossible to tell when or where a wire will get out of order. We tried to get the depot at Hope. The message was gotten off to Hope about 5:30."

The manager of the defendant company's office at Hope testified that the message in question reached her office at about 5:45 o'clock P. M. That without delay she sent a boy out to deliver it along with other messages. That the office closed at 6 o'clock P. M. and the boy had not returned at that time, and that she does not know at what time he delivered the message to the plaintiff. The testimony on the part of the plaintiff showed that she

resided only a short distance from the telegraph office and within its delivery limits. That the message was not delivered to her until a few minutes after 7 o'clock. Other facts will be stated and referred to in the opinion.

There was a verdict and judgment for the plaintiff, and the defendant has appealed.

*Geo. H. Fearons, Chas. S. Todd* and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

*McMillan & McMillan,* for appellee.

HART, J., (after stating the facts). At the outset, it may be said that in the case of *Western Union Telegraph Company* v. *Bickerstaff,* 100 Ark. 1, the court held:

"A telegraph company does not insure the prompt transmission of messages; it is required to exercise ordinary care, and is liable only for a failure to transmit as promptly as is reasonably practicable under all the existing circumstances."

It is earnestly insisted by counsel that the court should have given a peremptory instruction in favor of the defendant. It was admitted that the telegraph offices at both Camden and Hope were closed on Christmas day between the hours of 10:00 A. M. and 4:00 P. M., and that the sender of the message knew of this fact. Therefore, the trial court ruled that the issue of negligence in this case would be confined to the question of whether the defendant was guilty of negligence in handling the message after 4 o'clock P. M. In determining this question, the jury had a right to consider the evidence in its most favorable light to the plaintiff. It is true that Herrin, the wire chief of the defendant company at Little Rock, testified that they attempted to send the message from Little Rock to Hope at 4 o'clock P. M., the time at which the office at Hope would be open on Christmas day. He also says that they made attempts for an hour to get the message through, and it was not until 5 o'clock or after that they discovered there was trouble with the local wire to Hope. They afterward sent the message around by Dallas and back to Texarkana to Hope. The manager of the defendant's office at Hope states that the message was

received there at about 5:45 P. M. It will be noted, however, that the defendant, in its answer, admitted that the message was received at Camden, and promptly transmitted to Little Rock and was received there before 4 o'clock P. M. This fact may also be inferred from the testimony of Mr. Herrin, for he says, "When we got the message we called the Hope office; then we called the Hope office at 4 o'clock and on up to 5 o'clock, when we discovered the wire was cut." At the close of his cross examination we quote from his testimony as follows:

Q. You had no trouble in locating the right wire—the trouble was on the local wire?

A. Yes, sir.

Q. And you located it?

A. Yes, sir; in about thirty minutes.

Hence, the jury might have inferred that he discovered at 4:30 o'clock P. M. that he could not send the message to Hope over the local wire. We again quote from his testimony, as follows:

Q. You say you tried to get Hope at 4 o'clock and didn't succeed?

A. Yes, sir.

Q. And didn't succeed in getting them until 5 o'clock?

A. We didn't succeed in getting them until 5:30.

Q. Well, when you couldn't get them, didn't you know that either one or two things was wrong, either the wire was out of order or the operator wasn't in his office?

A. Well, there was something wrong, but we have lots of wires up there—

Q. But you didn't get Hope, did you?

A. No, sir.

Q. It was an hour or more before you got Hope?

A. Yes, sir.

We, also, quote from his direct examination as follows:

By Mr. Todd (counsel for defendant):

"We offer it (referring to the date showing the

exact time the message was sent), if your Honor please, to show the time of sending."

By Mr. McMillan (counsel for plaintiff):

"I object to it as hearsay testimony."

By the Court:

"The witness has already stated that the message was sent at 5:30."

The manager of the office at Hope testified that it was received there at about 5:45 P. M. And a witness for the plaintiff testified that ten minutes would have been a reasonable time in which to have delivered the message to the plaintiff. Therefore, the jury were warranted in finding that twenty-five or thirty minutes was a reasonable time in which to have transmitted the message around by Dallas, and have delivered it to the plaintiff after it was received at Hope. Then, if the defendant company located the trouble on the local wire to Hope within half an hour, and if an additional thirty minutes was a reasonable time within which to have sent the message around by Dallas and delivered it to the plaintiff, the jury were warranted in finding that the message should have been delivered to the plaintiff at 5:00 P. M. She testified that had she received the message she would have immediately driven through the country from Hope to Stamps, a distance of twenty-three miles. A train left Stamps for Camden at 8:30 P. M. and arrived at Camden at 10:10 P. M. This would have given plaintiff three and one-half hours in which to travel from Hope to Stamps. A witness for the plaintiff testified that he had made the trip in a buggy in two hours and thirty-eight minutes, and it is not unreasonable that the plaintiff might have procured a conveyance and have traveled the distance in three and one-half hours.

Therefore, we are of the opinion that from the facts and circumstances adduced in evidence in the instant case, the jury could have reasonably inferred and were warranted in finding that if the operator at Little Rock had used ordinary care in transmitting the message from Little Rock to Hope at 4 o'clock, the plaintiff could have

reached the bedside of her daughter shortly after 10 o'clock P. M. on Christmas day, and would have been with her daughter several hours before she died.

One of the grounds of the defendant's motion for a new trial is that "the court erred in admitting evidence over defendant's objection as shown by the defendant's exceptions made and entered of record." In the case of *McClintock* v. *Frolich,* 75 Ark. 111, the court held:

"A motion for new trial on the ground 'that the court erred in admitting evidence on the part of the defendant which was excepted to at the time by the plaintiff,' without naming the witness or pointing out the evidence is too general, and does not present any question for consideration."

Again, in the case of *Miller* v. *Nuckolls,* 77 Ark. 64, the court held:

"A ground for new trial because of errors of law in admitting evidence, 'as shown by the stenographer's transcript thereof,' is too indefinite to call the court's attention to the particular error complained of."

Therefore, it will be seen that the attention of the court was not called in the motion for a new trial to the particular error complained of in the admission of evidence, and the assignment is too indefinite.

The court expressly limited the right of the plaintiff to recover to negligence on the part of the defendant after 4 o'clock P. M. Therefore, there was no error in refusing to give defendant's instruction numbered 2 on the question of contributory negligence.

No argument is made by counsel in their brief to reverse the judgment because the verdict is excessive, and the judgment will be affirmed.

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MEMPHIS, DALLAS & GULF RAILROAD COMPANY *v.* STEEL.

Opinion delivered April 14, 1913.

1. RAILROADS—INJURY TO PASSENGER—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—In an action for damages for personal injuries caused by a collision between freight cars and a coach in which plaintiff

was sitting, where the brakeman testified that the collision occurred because the brakes which he attempted to apply would not work, although a few minutes previously they were in good order, the truth of this statement is for the jury, and where there was a verdict for the plaintiff, it can not be said, as a matter of law, that the brakeman's statement is so reasonable, plausible and undisputed that it was arbitrary on the part of the jury to disregard it. (Page 20.)

2. NEGLIGENCE—INJURY TO RAILWAY PASSENGER—PROXIMATE CAUSE—DAMAGES.—In an action for damages for personal injuries, where it appears that plaintiff had suffered from tuberculosis, but had largely recovered, but after the injury, had lost weight, been confined to his bed for ten days, it is a question for the jury whether the injury was the proximate cause of plaintiff's condition and suffering; and under the evidence a verdict for $500.00 damages is not excessive. (Page 21.)

3. APPEAL AND ERROR—FAILURE TO SET OUT INSTRUCTIONS IN BRIEF.—Where a number of instructions asked by appellant were refused by the trial court, but two which it asked were given, but not set out in the brief the Supreme Court will not inquire as to the correctness of any of the requested instructions which were refused. (Page 23.)

4. RAILROADS—INJURY TO PASSENGER—*PERMANENT INJURY AND FUTURE* SUFFERING.—In an action for damages against a railroad company for personal injuries, where there was evidence of pain and suffering following the injury. *Held*, the evidence warranted a submission to the jury of the question of permanent injury and future suffering. (Page 23.)

5. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.—Where the verdict of a jury indicates that no damages were allowed on account of permanent injury and future suffering, a submission of those questions to the jury was not prejudicial. (Page 23.)

6. CARRIERS—PASS EXEMPTING FROM LIABILITY—INVALIDITY.—A carrier can not defeat a recovery for damages by a passenger by showing the use of a pass at the time of the injury, even though the acceptance of the pass was shown to be upon the condition that all claims for damages are waived. *St. Louis, I. M. & S. Ry. Co.* v. *Pitcock*, 82 Ark. 441, cited and approved. (Page 23.)

Appeal from Pike Circuit Court; *Jefferson T. Cowling*, Judge; affirmed.

*J. W. Bishop* and *Sain & Sain*, for appellant.

1. The damages must be the natural and proximate consequence of the injury. 3 Hutch. on Car., § 1430; 70

N. E. 205; 105 U. S. 249; 7 Wall. 244; 94 U. S. A. 469; 43 N. W. 513; 74 Wis. 53; 32 Me. 946; 40 Am. St. 724.

2. Everything possible was done to prevent the injury. 69 Ark. 402; 77 *Id.* 157; 56 *Id.* 252. The want of care did not contribute to produce the injury. 78 N. W. 598; 53 Am. St. 391; 81 N. J. L. 661; 80 Atl. 495; 25 Am. & E. Ann. Cases, 525.

3. The appellee assumed the risk by accepting a free pass. 82 Ark. 441; 192 U. S. A. 44; 24 Sup. Ct. Rep. 515; 2 Hutch. on Car. 1075.

4. Appellee's instructions were erroneous, and appellant's requests should have been given. Appellant could relieve itself from responsibility by showing the injury was an accident it could not prevent. 34 Ark. 613; 33 *Id.* 816.

*Steel, Lake & Head,* for appellee.

1. Defendant was guilty of negligence. 3 Hutchinson on Carriers, § § 1413, 1415; 89 Ark. 574.

2. Appellant did not specifically object to the instructions asked and given. 83 Ark. 61-71.

3. Appellee was a passenger. 82 Ark. 441; Hutch. on Car., § 1004.

4. The instructions were correct. 51 Ark. 459.

5. The verdict is not excessive. 88 Ark. 12.

SMITH, J. The appellee began this action in the Pike County Circuit Court, alleging substantially the following facts as constituting his cause of action. That the defendant is a railroad corporation, organized under the laws of this State, owning and operating a line of railroad from Ashdown in Little River County to Murfreesboro in Pike County in said State and is a common carrier of freight and passengers for hire. That on the 5th day of December, 1911, plaintiff took passage on a mixed train from Murfreesboro to Ashdown, after having procured his necessary transportation; that he took his seat in the regular passenger coach, and when the said train reached Nashville, a station on said line, and while the same was standing on the main line, near the depot, and while the plaintiff was seated in said coach,

the engine and cars were detached from the caboose and passenger coach, and with two or three heavy loaded cars were violently, wrongfully, negligently, and with unnecessary force backed against said caboose, attached to said coach, whereby appellee was thrown forward against the seat immediately in front of him, and was permanently and seriously injured; that the said injury was caused by the straining and wrenching of the muscles of the neck, back and lungs, and the pleural cavity, the exact nature of all said injuries, he is not able to state.

That by virtue of the said injuries, he was confined to his bed for ten days and detained from his place of business for twenty days and has suffered and will continue to suffer great mental and bodily anguish; and that he will continue to lose much time by reason of the said injuries so negligently inflicted upon him by said defendant. That said injuries were permanent; and that appellee had been damaged thereby in the sum of three thousand dollars.

The appellant, in its answer, denied that the plaintiff procured the necessary transportation and became a passenger; and denied that cars were negligently and with unnecessary force backed against the caboose, attached to the coach in which appellee was a passenger; and denied that he was injured permanently or otherwise. It further denied that he had been confined to his bed or detained from his business, or that he had suffered or would continue to suffer any pain and anguish on account of his alleged injuries. Denied that his injuries were permanent; or that he had been damaged in the sum of three thousand dollars, or any other sum.

Defendant further alleged that if appellee had received any injuries upon any of its trains that he was not a passenger at the time of his injuries, but was using a gratuitous pass, which he had voluntarily accepted and signed with the following limitations and conditions endorsed thereon: "By its acceptance and use any and all claims on this company, whether due to negligence of its agents or otherwise for injury to the person or loss of,

or damage to, the property of the holder are waived and released. The holder further agrees not to use this pass in violation of any State or Federal law, and agrees to furnish proper identification whensoever requested. I accept the above conditions, and signed by appellee." And that by acceptance of the said gratuitous pass, appellee agreed to, and did release, appellant from any and all injuries to his person. That plaintiff's own negligence caused or contributed to his injuries if he received any; and that defendant is not liable for any alleged injuries claimed by the plaintiff, for the reason that he was at the time, and still is, suffering from tuberculosis, and should not have attempted to ride on a mixed train; and that he contributed to his own injuries in so doing.

The cause was tried before a jury and a verdict returned in favor of the plaintiff for the sum of five hundred dollars, and this appeal is prosecuted from the judgment pronounced thereon.

The evidence on the part of the appellee tended to show that he had taken passage on the local freight train at Murfreesboro for Ashdown; that the conductor looked at his pass, took its number and handed it back to him; and that the injuries occurred in front of the depot at Nashville. That the train stopped at Nashville to do some switching, but appellee remained sitting in his seat in the smoking compartment of the passenger coach; and that he had his feet resting on the seat in front of him, two seats being thrown together. The engine and all of the cars except the passenger coach and caboose were detached and taken up the road to do some switching. The caboose was immediately in front of the passenger coach, and the passenger coach was on the rear of the train. A Mr. Parks was sitting on the seat with appellee and the first they knew of any trouble was when they heard a yell and simultaneously felt the impact of the cars which had struck the caboose. Three cars which had been detached from the engine had been kicked down the track on the caboose and coach, which were standing still, striking the caboose and coach with a very great force. The appellee and Mr. Parks, who testified for him,

stated that in all their travels, which were extensive—and that they had ridden much on mixed freight trains—that they had never known a car to strike another with such force. There appears to have been no real question about the force and violence of the impact, the more serious question being, whether or not appellant was guilty of any negligence in allowing it to occur.

The brakeman and conductor in charge of the switching, undertook to explain the violence of the impact and to show that they were guilty of no negligence in permitting it to occur. The brakeman testified that when the cars got within about two car-lengths of the coach and caboose, he attempted to slow them up so they would not make the connection very hard and make only the usual coupling; and that when he undertook to set the brakes, he found that they would not operate. That he used all of his strength and energy to stop the cars with the brakes, but that while he checked them some, he could not do so sufficiently. His explanation being as follows:

Q. Now, then, state to the jury what you found?

A. Well, the brake-staff that runs up and down the end of the car where the brakes attach to where it works, the carrying iron at the bottom, and this carrying iron sets at a certain distance from this brake right down at the bottom of this brake-staff, and in winding this chain around there it might only wind right on top of itself right around, and in winding up taking up the slack the second time there was a link caught against the carrying iron, the piece that held the lower end of the brake-staff in passing there was a link caught there between there and the carrying iron that wouldn't let it pass through. If the link had been up flat-ways it would have gone through. If the chain had been over flat-ways it wouldn't pass through.

The conductor discovered that something was wrong with the approaching cars when they were about sixty feet from him, and he ran and climbed the ladder up the side of one of the cars, and just as he reached the brake, the collision took place before he could set the brake.

The brakeman testified that he had had fourteen years' experience in railroading, and during all that time he had known similar trouble with the brakes to occur only twice, and he further testified that when the cars were kicked loose from the engine, he tried the brakes to see if it would work; that this was done at a distance of about 190 feet from the caboose; and that he partially applied the brake and slowed the cars down to some extent, and when he saw the brake would work, he released it, expecting to apply it again when it became necessary to do so. This is the explanation which appellant says is sufficient to excuse it from any charge of negligence. But, however that may be, its truth was a question of fact for the jury, and we can not say that the brakeman's statement is so reasonable, plausible and undisputed that it was arbitrary on the part of the jury to disregard it. *St. Louis, I. M. & S. Ry. Co.* v. *Humbert,* 101 Ark. 536; *St. Louis, I. M. & S. Ry. Co.* v. *Landers,* 67 Ark. 514. If the brake was in fact in working order when it was first tried by the brakeman, no explanation is shown of its being out of fix when he undertook to set it and stop the cars a few seconds afterward; moreover, the brakeman should certainly have known as soon as the conductor did, that the brake was not working, and no good reason is shown why he did not run to one of the other brakes and have checked the cars. In view of the fact that the conductor ran sixty feet and caught the car and climbed up the ladder, and had reached the brake at the time of the impact, it was, at least, a question of fact as to whether the brakeman might not have averted this collision by applying one of the other brakes, and should have done so. Moreover, both the brakeman and the conductor admit that it is very much safer to do this switching with the cars attached to the engine and except to save a little time, there was no reason why the engine should not have backed these three cars and attached them to the caboose. The jury was properly instructed as to the duty of the carrier in operating its train, and as to the degree of care which it owed passengers riding

upon mixed trains, and we think the evidence above stated was legally sufficient to support the finding that appellant's servants were negligent in making the switch.

The serious question in the case is whether or not appellant's negligence was the proximate cause of the appellee's suffering and illness. In the fall of 1910, appellee had been suffering with tuberculosis, and in December of that year made a trip to Arizona, where he remained for three and a half months, and prior to going to Arizona, had taken treatment at the State sanatorium for that disease. He testified that he had regained his lost weight during his absence, and was about restored to health at the time of his return from Arizona, in the latter part of April, 1911. After appellee's injury, Doctor Alford, who attended him, and who visited him first on December 7, found appellee sitting before the fire and suffering intensely in the muscles of the neck, back of the neck and shoulder, but did not remember exactly how long he suffered; that he continued to visit appellee for about a week, but thinks he treated him for two or three weeks, and that appellee suffered more or less as long as he visited him, and that his treatment was for muscular rheumatism. The record contains an interesting discussion of the pathology of tuberculosis by the physicians, who testified in the case. The theory upon which appellee tried this case was that the tubercular trouble with which he had been suffering had been arrested; that he was not suffering with the trouble at the time of the injury; that by reason of having received this injury his physical condition became worse, his system run down and necessarily his resistance became less thereby, allowing the tubercular germs, which had been arrested, to be released and begin anew their work of ravage, and the expert testimony in the record tended to sustain this theory, and to show that a man may have tuberculosis, and the disease may become arrested; that anything which tends to decrease his vitality would tend to release the tubercular germs which were dormant; and that the attack of muscular rheumatism brought on by his jar

would likely never have occurred but for this collision, for his system might, and probably would, have overcome the conditions existing. Doctor Alford, the attending physician, testified as follows:

Q. In other words, what effect does the decrease in vitality have upon a dormant tubercular germ? What tendency does it have?

A. It just simply lessens nature's protective forces and gives the germ less resisting power to act.

Q. You mean gives the body less resisting power to act?

A. Yes, and gives the germ, of course, more power to act by reason of the lower vitality of the person or the patient.

Q. In other words, then, Doctor, as I understand you, the more the vitality is lowered in a man the more the tendency is to release dormant tubercular germs?

A. Yes, sir.

Q. Now, to receive a very severe jolt or jerk or blow upon some point of the body and thereafter rheumatism develops, what, in your opinion, would be the cause of the development of that attack of rheumatism?

A. Well, a jolt or strain might aggravate the condition and bring about the attack.

Q. Then in the absence of any other cause, you would state the jolt or jar probably caused the attack to come on?

A. Not in the absence of other cause. I could not say it was caused wholly or entirely from the jolt or wrench, but I would say the condition was there and was so aggravated by this jolt or jar that the attack developed when it might not have developed, had he, at that time, not got that jar.

Following this injury, appellee lost somewhat in weight, which he had not since regained, although most of the weight he had lost after his return from Arizona was lost before his injury. Under these facts, we can not say there was no question for a jury as to appellee's suffering and condition having been proximately caused

by the injury received while a passenger on appellant's train, and if this was true, the damages recovered are not excessive.

Appellant asked a number of instructions, most of which were refused, but it appears that instructions numbered 14 and 15, which it asked were given and not set out in its brief. Under these circumstances, in accordance with a number of decisions of this court, we will not inquire as to the correctness of any of its requested instructions which were refused. *Shorter University* v. *Franklin,* 75 Ark. 571; *Files* v. *Tebbs,* 101 Ark. 207.

No serious objection is made to any of the instructions given at the request of the appellee and which announced the general principles of the law controlling here, except the instruction on the measure of damages, the objection to which was that it submitted to the jury the question of permanent injury and future suffering. We think the evidence warranted the submission of these questions to the jury, but as we have said, the amount recovered indicates that nothing was allowed on that account, and their submission was not prejudicial under the facts of this case, because the pain and suffering shown to have been endured would warrant the recovery which was had. *St. Louis, I. M. & S. Ry. Co.* v. *Hutchinson,* 101 Ark. 434; *Mo. & N. A. Rd. Co.* v. *Daniels,* 98 Ark. 363.

The remaining question relates to the use of a pass by appellee at the time of his injury. That a carrier can not defeat a recovery of damages by a passenger by showing the use of a pass at the time of injury, even though the acceptance of the pass was shown to be upon the condition that all claims for damages are waived, has been settled by this court in its decision in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Pitcock,* 82 Ark. 441.

The judgment of the court below is affirmed.

## CITY OF MALVERN v. COOPER.

Opinion delivered April 21, 1913.

1. MUNICIPAL CORPORATIONS—POLICE POWER—SIDEWALKS.—Kirby's Digest, § 5542, which provides that cities may order and compel property owners abutting on a street or public square to build, rebuild, maintain and repair foot pavements or sidewalks there along and to designate the materials to be used and specifications to be followed and time for completion, is valid under the police power of the State, and thereunder, a city by its ordinance may compel an abutting owner to rebuild a sidewalk where he already has one in front of his premises. (Page 28.)

2. MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCE—PRESUMPTION.—While the presumption is in favor of the validity of a city ordinance, when the record is produced containing the ordinance, it may be overcome by proof that the essential requirements of the statutes have not been complied with in the enactment of the ordinance. (Page 30.)

Appeal from Hot Spring Chancery Court; *J. P. Henderson,* Chancellor; reversed.

*Henry Berger,* for appellant.

1. There is no statutory or charter provisions requiring municipalities to hold their sessions on any particular day, but the city council of appellant elected to hold its monthly sessions on the first Thursday in each month, which in August, 1909, fell on the fifth day of the month. The ordinance in question bears date August 5, 1909, as appears by the ordinance record book of the city. This is *prima facie* evidence of the legal existence of the ordinance and its contents. 90 Ark. 292. And the burden is on the defendant to overcome this evidence. Kirby's Dig., § 3066; 53 Ark. 368.

The council was not confined to the ordinance alone to require the building of the sidewalk. The city had authority to proceed under ordinance, resolution or order, or under all these methods. 88 Ark. 601.

2. The police power specially delegated to the city by the statute authorizes it not only to require property owners to build sidewalks, but also to rebuild them and to designate the materials out of which they are to be rebuilt. Kirby's Dig., § 5542.

The police power of the State may, in the absence of any constitutional restrictions upon the subject, be delegated to the municipalities, to be exercised by them within their corporate limits. 53 Ark. 373; 13 Ore. 538; 90 Cal. 617; 103 Tenn. 421; 183 U. S. 13.

Where express power is given to a municipality to enact ordinances of a certain kind, and an ordinance is enacted which, upon its face, is purely within the terms of the express power, the court will not interfere on the ground of unreasonableness, but is restricted to consider the constitutionality of the act granting the power. 64 Ark. 154. Here the ordinance appears on its face to be valid, and there is no evidence that it is unreasonable. 52 Ark. 301.

3. There is no merit in the contention of appellee that the action of the city council in ordering the rebuilding of the sidewalks in accordance with its ordinance without a trial or proceeding of some kind or an opportunity afforded him to be heard, was without authority of law and in violation of his right as a property owner. Every property owner holds subject to such general regulations as are necessary to the common good and general welfare. 7 Cush. 84; 2 Story on Const., § 1954; Dillon, Mun. Corp., § 93; 7 Cow. (N. Y.), 349; 12 Pick. 184; 11 Met. 55; 12 Me. 403. Appellee can not complain because the city required him to take up the old walk, which, the proof showed, had been down for twenty-five years, even though it had been put down pursuant to a previous ordinance requiring same, or by permission or acquiescence. 146 N. C. 527; 98 Ark. 159. See also 88 Ark. 597; 87 Ark. 85-92; 59 Ark. 494.

*Wm. R. Duffie* and *Andrew I. Roland,* for appellees.

1. Appellant could not properly show by parol testimony that the ordinance was in fact enacted on August 5, instead of August 6, the date the record shows. 21 Am. & Eng. Enc. of L. (2 ed.), 9; 24 *Id.* 193; 22 Ark. 119; 1 Elliott on Ev. 728; 105 S. W. 678; 35 S. W. 696; 1 Smith, Mun. Corp., § 389; *Id.* § 313; 61 Ark. 36; 94 Ark. 499.

2. Section 2 of the ordinance in question provides that the sidewalks and curbing be constructed as to grade "according to the grade which shall be established by an engineer employed by the city for this purpose," etc. In so far as the city delegates its authority in this respect to the city engineer, the ordinance is void, and his acts in the exercise of such delegated power are void. 96 S. W. 852; 123 Cal. 192, 55 Pac. 768; 3 S. D. 309; 53 N. W. 182; 11 Ill. App. 283; Dillon, Mun. Corp., § § 96, 97; 35 Fla. 446; 43 Mo. 352; *Id.* 395; 46 Mo. 100; 116 Mo. 248.

3. The burden of proving service of the notice to property owners provided for by the ordinance rested upon the appellant. A mere statement by the street commissioner that he gave notice as prepared by the city attorney, is not sufficient proof that such notice was actually served. 68 Ark. 238; 70 Ark. 427; 68 Ark. 548; 71 Ark. 133; 33 Col. 487; 3 Ann. Cas. 674, 676.

4. Appellee being the owner in fee of the property abutting on the sidewalk, retains the fee of the street and all the rights of property therein, subject only to the right of the public to use the same as a street or sidewalk. 24 Ark. 102; 51 Ark. 491; 77 Ark. 579; 50 Ark. 466; Elliott on Roads, § 886; 13 Cyc. 492.

The city, in tearing up the sidewalk already existing against the protest of the property owner, was a mere trespasser, and the subsequent building of the sidewalk without notice and without an ordinance properly passed, was but a further trespass in a series. 24 Ark. 102; 2 Ark. 45; 25 Ark. 436; 36 Ark. 268; 28 Am. & Eng. Enc. of L. (2 ed.), 584; *Id.* 576; 66 Ark. 175.

SMITH, J. This is a suit by the city of Malvern, a city of the second class, against W. H. Cooper and A. I. Roland to recover the sum paid by the city for the construction of a concrete walk, built by this city, abutting the property of appellees. The proof on the part of the city tended to show that the council passed an ordinance on the 5th day of August, 1909, requiring all owners of real property abutting on Main street in said city, be-

tween South First and South Fourth streets, or Page avenue, to construct sidewalks as provided for in said ordinance. That on and prior to the 7th day of November, 1910, the appelee, W. H. Cooper, was the owner of certain lots on Main street, between First and Fourth streets, but had failed to construct the walks in accordance with the provisions of said ordinance, and that a written notice to construct the walks within twenty days had been given him, and upon his continued failure and refusal to build the walks and after the lapse of more than thirty days after the service of the notice to construct them, the city, through its street committee, contracted with one Charles Bryant to construct said sidewalk in the manner provided for in said ordinance, which contract was ratified and confirmed by the city council and in accordance with said contract, the said Bryant built the walk at a cost of $69.25, which sum was paid to the said Bryant by the city of Malvern. That subsequently Cooper sold to A. I. Roland a part of one of said lots.

The city prayed judgment for this sum and for a penalty of six per cent and interest at the rate of 6 per cent, and that the whole amount thereof be declared a lien on said property and that the same be sold to satisfy said lien.

The answer denied the material allegations of the complaint and raised the following issues:

(a) That there was no ordinance; (b) nor any grade established; (c) nor any notice given the abutting property owners; (d) that section 5542 of Kirby's Digest, which it was claimed, gave the city the authority to pass the ordinance under which it had proceeded in the construction of the walk, applied only where no original sidewalk existed, but did not apply where the property owner already had a sidewalk, and that a property owner who had a sidewalk equal to the one which the city proposed to require (which appellee had) was entitled to a day in court, before determining whether his walk should

be torn up and destroyed and the property owner required to build another.

Under its police power, the Legislature of the State has the authority to pass laws permitting its cities to pass ordinances for the construction of walks and to prescribe the kind which the property owners therein shall build, and when the cities have exercised this power by the passage of by-laws and ordinances, property owners therein are under the duty of complying therewith, and the failure to obey can not be excused by such a showing as is here attempted to be made, that the property owner had a good and sufficient walk. The provisions of section 5542 of Kirby's Digest, so far as they relate to the authority of a city to pass an ordinance similar to the one under consideration, is as follows:

"In order to better provide for the public welfare, safety, comfort and convenience of the inhabitants of cities of the first and second class, the following enlarged and additional powers are hereby conferred upon said cities, viz: The council of any such city, by ordinance, resolution or order shall have the power to compel the owners of any property abutting on its streets or public squares to build, rebuild, maintain and repair foot pavements or sidewalks, improvements and curbing there along, and to designate the kind of sidewalk and curbing improvements to be made, the kind of material to be used, the specifications to be followed, and the time within which such improvement is required to be completed."

Thus it is seen that the power is conferred not only to require walks to be built, but also to be rebuilt and to be maintained and repaired according to prescribed specifications.

The ordinance passed pursuant to the above section will not be set out in full because of its length, but it may be said in answer to appellee's objection (b) that no grade was established; that the ordinance provides with great particularity and certainty how the walk may be constructed and to what grade and of what composition.

Upon the question of the sufficiency of the notice, it may be said that the deputy marshal, who was also the street commissioner, testified that he served a notice upon appellee, Cooper, notifying him to build the walk and that Cooper declined to do so upon the ground that he had a better walk than the one which the city proposed to build, and that he would take the case to the highest courts in resistance to the city's demands. Appellee, as a witness, did not deny the service of the notice, but upon the contrary there was offered in evidence a notice, dated April 10, 1911, which he gave the street commissioner, forbidding him interfering with his walk, and he alleged in his answer that he gave this notice not to tear up his walk before it was torn up.

The remaining and real question in the case is whether the city had a valid ordinance which authorized the action taken by it. It is contended by appellee that the records of the proceedings had by the city council as shown by its minute book, recites that the council held its regular session on August 6, 1909, instead of August 5, 1909, the date of the ordinance in question and that said records import absolute verity and can not be contradicted by parol testimony, and that as the recorder's record of the meetings of the council shows the meeting to have been on the 6th and not on the 5th, that no valid ordinance could have been passed on the 5th. This minute book does recite that the council met on the 6th, but that it is not the only recital it contains, as it appears from the minute book that the meeting was a regular one held on the 6th day of August. Now the proof is undisputed that the time for regular meetings of the council was on the first Thursday of each month, and the first Thursday of August was the 5th and not the 6th. Moreover, the said ordinance had been recorded in the book which section 5473 of Kirby's Digest required should be kept for that purpose, and was authenticated by the signature of the mayor and recorder, and as authenticated by them, showed its passage on August 5, 1909.

The section last mentioned provides that "all by-laws or ordinances shall as soon as may be after their passage be recorded in a book kept for that purpose, and be authenticated by the signature of the presiding officer of the council and the clerk." This is the permanent record, which the law intends shall perpetuate the evidence of the ordinances passed by the city's council, and the ordinances and by-laws as they there appear are not only presumed to be correct, but printed copies of them published by the city's authority, or transcripts therefrom, certified by the city's clerk, are received in evidence for any purpose for which the original ordinance would be received. Kirby's Digest, § 5471.

The burden was not therefore upon the city to establish the validity of its ordinance as that presumption in its favor is indulged when the record is produced, containing the ordinances which the law requires to be kept for that purpose. *Heno* v. *Fayetteville,* 90 Ark. 292; *Van Buren* v. *Wells,* 53 Ark. 368; Kirby's Digest, § 3066.

This, however, is a mere presumption and might be overcome by competent evidence that the essential requirements of the statutes of the State had not been complied with in the enactment of these ordinances. The proof here offered to accomplish that purpose has been set out and we think it insufficient for that purpose. Full recognition is given to the authority of those cases which hold that the courts do not take judicial notice of ordinances and that parol evidence is not admissible to prove an ordinance or resolution of a city council, and the conclusions here announced do not offend against these rules. The recital of the minute book that the council's meeting was on August 6, 1909, was a mere misprision of the recorder for those minutes also recite that the meeting was a regular meeting and the evidence is undisputed that the first Thursday of each month was the regular meeting day and that that date was in fact the 5th and not the 6th. *Butler* v. *Kavanaugh,* 103 Ark. 109.

Moreover, in addition to the ordinance, which we

have been considering, the town council passed on December 2, 1909, the following resolution:

"Be it resolved by the city council of the city of Malvern, that the city marshal of the city of Malvern notify all property owners in the city of Malvern abutting on both sides of Main street between South First street and Fourth street, be required to lay concrete sidewalks in accordance with the provisions of the ordinance of said city, passed August 5, 1909, and in default of same that the city will proceed to hire same built and when so constructed the charge for same will become a lien on the property abutting said sidewalk."

In the case of *Gregg* v. *Stuttgart,* 88 Ark. 597, a property owner was directed by a resolution of the council of the city of Stuttgart to build a sidewalk in accordance with the provisions of an ordinance of that city, the details of which were not set out in the resolution as passed, and it was objected that the resolution was void for the reason that the ordinance failed to designate the kind of sidewalk, the kind of material and the specifications. But it was there said that if the specifications were not sufficiently definite, that fact afforded no ground for complaint to the land owner, that when he builds such sidewalks as is called for in the notice served upon him, he has fulfilled his duty; and whether it is such an one as desired, can not be questioned by the city, because it did not specify more particularly the kind wanted. And it was contended that the validity of the city's proceedings must be tested by its ordinance and not by resolution. But it was there said, "There is no reason why the proceedings can not be tested under both. The resolution is evidently supplementary, and in aid of the enforcement of the ordinance. It is somewhat is the nature of an amendment, making certain some of the matters left at large in the general ordinance. The council is expressly authorized by the statute to require sidewalks to be constructed by ordinance, resolution or order, and, therefore, the form of the city's mandate may be in any one of these methods of procedure, which the council may

see fit to adopt; or, if it pleaseth the council, it may adopt all of them to reach to the same end. It is a mere choice of tools or weapons to require the property owner to lay a sidewalk."

The chancellor made no finding except that the complaint should be dismissed for want of equity and it was accordingly dismissed and all costs assessed against the city.

We are of opinion that the chancellor erred in his finding and order, and the decree is accordingly reversed and remanded with directions to enter a decree in favor of the appellant, city of Malvern, for the sum of $69.25, and the penalty of 6 per cent thereon, and interest also at the rate of 6 per cent from the date of the city's payment to the contractor and that the whole amount thereof be declared a lien on appellee's property, described in the complaint, and the same ordered sold, in satisfaction of said lien pursuant to the provisions of section 5542 of Kirby's Digest, if the same is not paid within the time fixed by the court.

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## PARKER v. BOYD.

Opinion delivered April 28, 1913.

SALE OF CHATTEL—FRAUDULENT REPRESENTATIONS—RESCISSION.—In order to entitle plaintiff to rescind a trade of a horse on the ground of false representations by the defendant, there must appear some representation of a material fact concerning the horse upon which plaintiff relied and which was understood by the parties as an absolute assertion concerning the condition of the horse, and not the mere expression of an opinion.

Appeal from Yell Circuit Court, Dardanelle District; *Hugh Basham,* Judge; affirmed.

*John M. Parker* and *Bullock & Davis,* for appellant.

1. The court erred in its charge to the jury. The false representations of defendant inducing the trade, and the concealment of latent defects avoided the sale. 22 Ark. 521; 24 Mo. 223; 27 *Id.* 530; 8 Am. & E. Enc. L.

794, 795 (1 ed.); 12 *Id.* 932-3, note 2; 1 Benjamin on Sales, p. 415, note 3; 80 A. & E. Enc. L. 802, 804 (1 ed.); 22 Ark. 454; 31 *Id.* 174; 30 Id. 691; 71 *Id.* 309; 20 Cyc. 117; 8 A. & E. Enc. L (1 ed.), 818; 92 U. S. L. Ed., Book 23, p. 471.

*Priddy & Chambers,* for appellee.

This case was submitted to the jury on proper instructions and the verdict is sustained by the evidence. The questions of fraud and deceit are settled by 38 Ark. 334; *Ib.* 344-5; 46 *Id.* 245; 47 *Id.* 148; 101 *Id.* 603; 98 *Id.* 44.

HART, J. This suit was commenced before a justice of the peace by John M. Parker against John Boyd to recover a horse which Parker alleges he exchanged with Boyd for a gray mare. He alleged that he was induced by the defendant to make the exchange by false and fraudulent representations that the mare was sound and that the mare turned out to be unsound. Upon appeal to the circuit court there was a trial anew by a jury and a verdict and judgment in favor of the defendant. The plaintiff has appealed.

The testimony on the part of the plaintiff was that Parker and Boyd talked about making the exchange two or three times before it was made. Parker says that he could not see anything wrong with the mare and that she looked like she was worth $125 or $150. That Boyd told him there was nothing wrong with the mare and that she was safe in every respect. Parker and Boyd traded late in the afternoon and Parker turned the mare in a pasture. She was in foal and lost her colt that night. The next morning Parker was informed that three of the grinder teeth of the mare had been pulled out before he traded for her. On the same day he went to Boyd and offered to return the mare and demanded his horse back.

Other testimony tends to show that the mare was suffering with chronic indigestion at the time Boyd traded her to Parker. Both the veterinary surgeon and a former owner of the mare testified to this fact. They said the mare did well enough when her food was ground

but that special attention had to be paid to the preparation of her food in order to prevent her from having indigestion. The former owner of the mare said that he had told Boyd of this fact. The veterinary surgeon said that the mare in the condition she was in when she was traded was worth about one hundred dollars and the horse was worth a like amount. He said the fact that a horse had lost three of its jaw teeth did not class it as unsound. The mare died from acute indigestion on the night before the trial in the justice court, while she was still in the possession of the plaintiff.

Boyd admitted that he had told the plaintiff that he considered the mare sound and says that he did this in good faith. He denies that the former owner of the mare had told him that the mare suffered from chronic indigestion, and said that during the two months he owned the mare she never suffered indigestion and had no trouble in masticating her food. He said that he knew that she had lost two of her teeth but did not regard this as rendering her unsound and on this account told the plaintiff that he considered her sound. The law of the case is well stated in *Hunt* v. *Davis,* 98 Ark. 44, where the court said:

"The principles on the subject of fraud which are applicable to contracts for the sale of property generally apply likewise to contracts for the sale of shares of stock. In order to charge the seller with fraud, it must be shown that he has made an active attempt to deceive the buyer relative to some matter material to the contract, either by statements which he knows to be false or by acts, conduct or representations which suppress the truth and induce in the buyer a false impression. Representations which are considered fraudulent in law must be of a nature that are material to the contract, and 'must be made by one who either knows them to be false or else, not knowing, asserts them to be true, and made with the intent to have the other party act upon them to his injury, and such must be their effect.' "

The court instructed the jury in effect that fraud consists in the misrepresentation or concealment of a material fact calculated to deceive and mislead the opposite party, and further told them if they believed that the defendant made the plaintiff any false representations or used any deceit as an inducement to the making of the trade or concealed from the plaintiff any latent defect in the animal traded him that they must find for the plaintiff. The plaintiff complains that the court refused to give certain instructions asked for by him. We do not deem it necessary to set out these instructions. They all in effect asked the court to tell the jury if they believed that the animal traded by the defendant to the plaintiff was unsound in that she had lost her grinder teeth at the time the trade was made or that she was suffering with chronic indigestion and the defendant knew of this and failed to disclose it to the plaintiff, that this was such a concealment of a latent defect as entitled plaintiff to avoid the contract. In short, the instructions asked and refused in substance asked the court to tell the jury, as a matter of law, that the fact that the mare had lost her grinder teeth rendered her unsound and that this, coupled with the further fact that the defendant knew of it, would entitle plaintiff to rescind the trade. This is not the law. The contract in this case was by parol, and the court properly submitted it to the jury for them to find whether the representations made by the defendant to the plaintiff in regard to the soundness of the mare were intended and understood by the parties as the representation that the mare was sound or whether they were intended as mere expressions of opinion. In order to entitle plaintiff to rescind the trade there must have been some misrepresentation of a material fact concerning the mare which the plaintiff relied upon and which was understood by the parties as an absolute assertion concerning the condition of the mare and not the mere expression of an opinion.

The jury found for the defendant under instructions which fairly submitted the contention of both sides, and,

under the uniform decisions of this court, the verdict must be upheld.

The judgment will be affirmed.

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## JOHNSON v. MANTOOTH.

Opinion delivered April 28, 1913.

1. LANDLORD AND TENANT—WHEN RELATION EXISTS.—Where the owner of land makes a contract with another whereby the latter is to cultivate the land and the crops produced are to be divided between the two parties in a certain proportion, the question whether the relation of landlord and tenant exists is determined by the construction of the whole contract, whether written or oral. (Page 38.)
2. EJECTMENT—ANSWER—AMBIGUITIES—HOW CORRECTED.—Where plaintiff brings an action of ejectment against defendant, and tne answer, while ambiguous, sets up grounds sufficient to warrant a jury in finding that defendant held possession of the land as a tenant of plaintiff for a year, it is error to sustain a demurrer to the answer, where, by a fair intendment, the inference may be drawn that facts exist sufficient to constitute a ground of defense. Defects in the answer must be corrected by a motion to make more definite and certain and not by demurrer. (Page 39.)

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

STATEMENT BY THE COURT.

Nettie Mantooth instituted this action against B. F. Johnson to recover possession of a tract of land in Jackson County, Arkansas. The complaint is in the usual form and alleges title in the plaintiff. The defendant filed an answer, which is as follows:

"The defendant, B. F. Johnson, for answer to the complaint of the plaintiff, admits that she is the owner of the land described in said complaint, but denies that he is in the unlawful possession of the same, or has been since the 1st day of January, 1912, and denies that during said time or now, that plaintiff has had or now has the right to the possession thereof. He denies that plaintiff has been damaged in the sum of $1,000 or in any other or further sum whatever.

"The defendant states that he is in possession of the premises aforesaid under and by virtue of a contract of rental which was orally made by him with T. E. Mantooth, the husband and agent of the plaintiff, on or about the first day of August, 1911, by which said oral contract the defendant was to remain in and have possession of the said premises and the use and occupation thereof for the year 1912, for the purpose of cultivating thereon crops of cotton and corn and hay, and plaintiff by her said agent agreed to furnish the defendant with sufficient teams, feed and tools as would be necessary to cultivate said crops and half the wire, oil and ferriage to gather, bale and market said crop of hay, and said defendant was to furnish all the labor to make, gather and market said crops; when said crops were gathered and harvested, the same were to be divided as follows: One-half to the plaintiff and one-half to the defendant.

"He therefore states that plaintiff is not entitled to possession of said premises until the expiration of the term aforesaid. Wherefore he prays judgment."

To this answer the plaintiff demurred. The court sustained the demurrer and the defendant declined to answer further. Judgment was rendered against him and he appealed.

*John W. & Jos. M. Stayton* and *Otis W. Scarborough,* for appellant.

The relation of landlord and tenant was created, and appellant was in possession and entitled to so remain for the year 1912. Wood on Landlord & Tenant, § 1, p. 93; 48 Ark. 264; 54 *Id.* 346; 30 *Id.* 339; 46 *Id.* 254; 54 *Id.* 347; 37 Am. Dec. 309, and note 314; 53 Md. 504; 70 Ark. 82; 94 *Id.* 451.

*Stuckey & Stuckey,* for appellee.

There was no relation of landlord and tenant. Appellant was a mere employee. 54 Ark. 347; 48 *Id.* 264; 32 *Id.* 435; 18 A. & E. Enc. L. (2 ed.), § 9, p. 173.

HART, J., (after stating the facts). The determination of the issue raised by the appeal depends upon the

question whether the defendant was upon the land of the plaintiff in the capacity of tenant or employee.

Where the owner of land makes a contract with another whereby the latter is to cultivate the land and the crops produced are to be divided between the two parties in a certain proportion, the relation of landlord and tenant may or may not result. The question whether it does result is one of intention, to be determined upon a construction of the whole instrument if the contract is in writing, or from the language used by the parties and their acts in carrying out the contract if the agreement is oral. Tiffany on Landlord & Tenant, vol. 1, p. 38. To the same effect are the following: *Birmingham* v. *Rogers,* 46 Ark. 254; *Tinsley* v. *Craige,* 54 Ark. 346; *Neal* v. *Brandon,* 70 Ark. 79.

The answer alleges in substance that the defendant is in possession of the premises under and by virtue of an oral contract of rental. That under said oral contract the defendant was to remain in and have possession of the premises and the use and occupation thereof for the year 1912 for the purpose of cultivating thereon crops of cotton, corn and hay. That defendant was to furnish all the labor to make, gather and market said crops. That when said crops were gathered and marketed the same were to be divided as follows: One-half to the plaintiff and one-half to the defendant.

It might be inferred from these facts and the circumstances surrounding the parties at the time the contract was made that it was their intention to create the relation of landlord and tenant and not that of landlord and cropper or employee. A jury might infer from the allegations of the answer that the defendant was already in possession of the land; that it was the intention of the parties that he should remain in possession and cultivate certain crops of cotton, corn and hay, and should market the same. That after the crops were sold, the defendant should make a division of the proceeds by giving one-half to the plaintiff and retaining one-half himself. In this view of the case the defendant would have the right

to the possession of the land for the year 1912 and would have the whole property in the crop until he made a division. This would create the relation of landlord and tenant between the parties and would defeat the action of the plaintiff for the recovery of the land. It may be admitted that the allegations of the answer are somewhat ambiguous and uncertain but in such cases, if the inference may be drawn therefrom by a fair intendment that facts exist sufficient to constitute a ground of defense, the defect must be corrected by a motion to make more definite and certain and not by demurrer. *Bush* v. *Cella,* 52 Ark. 378; *Citizens' Bank of Mammoth Spring* v. *Commercial National Bank of Chicago,* 107 Ark. 142, and cases cited.

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

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## WESTERN UNION TELEGRAPH COMPANY *v.* EVANS.

Opinion delivered April 14, 1913.

1. TELEGRAPH COMPANIES—DUTY TO DELIVER MESSAGE TO ADDRESSEE.—Where the sender of a message erroneously addresses it to Hot Springs, having meant to address it to Little Rock, Ark. the telegraph company is under no liability for failure to deliver when it discovers that there is no person by the name of addressee in Hot Springs; but if upon receipt of the message at Hot Springs, the telegraph company undertakes to deliver the message to the addressee at Little Rock, it may become liable for negligence in failing to deliver the message promptly. (Page 44.)

2. TELEGRAPH COMPANIES—DELIVERY OF MESSAGE TO WIFE OF ADDRESSEE.—The delivery of a telegraph message to the wife of the addressee at addressee's home, constitutes a delivery to the addressee. (Page 45.)

3. TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE PROMPTLY—GROSS NEGLIGENCE.—The failure of a telegraph company to deliver a message apprising addressee of the death of his mother, until four hours after receipt of same, when addressee had notified the company that he expected such a message, and had given the company his street address, amounts to gross negligence. (Page 45.)

4. TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE PROMPTLY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—Where a telegraph company negligently fails to deliver a message to addressee until four hours after it receives the same, and the message apprised him of the death of his mother, in an action by the addressee against the telegraph company for damages on the ground that he received the message too late to take a train and attend the funeral, it can not be said as a matter of law that the plaintiff was guilty of contributory negligence in not attempting to catch the train, but such question is one for the jury. (Page 46.)

5. REMITTITUR—EXCESSIVE VERDICT.—In an action against a telegraph company for damages for failure to deliver promptly to plaintiff a telegram notifying him of the death of his mother, when plaintiff's claim for damages is based on the ground that he was prevented by the delay from attending the funeral, and it appears that plaintiff's mother was buried in a distant town in a State other than that in which she died, and even had plaintiff attended the funeral he would not have had the consolation of relatives and friends, a verdict of $3,000 is grossly excessive, and the judgment will be reversed unless a remittitur is entered reducing the judgment to $500. (Page 46.)

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

STATEMENT BY THE COURT.

This is an action for damages for mental anguish alleged to have been suffered by appellee on account of the negligence of appellant company in failing to deliver a telegram, advising him of the death of his mother, in time for him to attend the funeral.

His mother, whose death was not unexpected, died in a sanitarium in Kansas City, and, on August 19, 1912, his brother sent him the following telegram:

"Kansas City, Missouri, August 19, 1912.

"Grover Evans, 1012 Gaines St., Hot Springs, Arkansas:

"Mother dead. Will bury at Lawton. Meet or notify us there.

"Bert Evans." 9:12 a. m.

A message of like kind was also delivered to the operator at Kansas City, at the same time addressed to his brother-in-law, Ward, at Hot Springs, Arkansas. This message was sent as a night message and received

at Hot Springs at 7:51 A. M., August 20, and upon the company's attempt to deliver it, the discovery was made that there was no such number on Gaines street in Hot Springs, and that Grover Evans did not live there; the operator, however, remembering the receipt of the other telegram to Ward, called him up on the phone and was informed that Grover Evans lived at Little Rock, at the street address given, and directed the operator to forward the message, which he did and notified the Kansas City office that he had done so. The message reached the Little Rock office about 9 o'clock on the morning of the 20th, was given to a messenger boy for delivery at 11:20, and was delivered at the house of appellee, about sixteen blocks distant from the telegraph office, to his wife, at 1:10 P. M., on the same day.

Appellant testified that he was the youngest child of his mother and that there was a close and tender affection existing between them, she seeming to think more of him than she did of the other children. That he had, with his wife, gone to visit her in Kansas City, in April preceding her death and remained with her four or five weeks. That he knew when he left that he would not see her alive again, she being sick with a fatal malady, but he expected to attend her funeral. Upon returning to Little Rock, he notified appellant company of his address and that he expected a death message, so that it might be delivered to him without delay. He had inquired once or twice at the office, if the message had been received and asked again if his address had been written down and was shown that it had been. He had also kept the return part of a ticket from Little Rock to Lawton, Oklahoma, expecting to attend the funeral there when his mother's death occurred. He had $9.87 in the German Bank and the plumbing company, for which he was at work owed him about $5.00, and would have advanced him some money. He said he would have gone to the funeral if the telegram had been delivered in time; would have departed over the Rock Island on the 3:40 train that afternoon and reached

Lawton the next day at 11:37 A. M. He stated further that he was at home on the day the telegram was received until after 12 o'clock noon, that he went down to the plumbing shop where he was employed and went out to do some work in the 1100 or 1200 block, on Scott street, being directed to the place by the man in charge of the office. That when he returned to the office from this work he was told that his wife had called him on the phone and asked to be called up and he called her and was informed of the contents of the telegram announcing the death of his mother, and concluded it was too late to get off to the funeral. He had his working clothes on and would have had to go home and change his clothing and get his ticket and then stop at the bank and get what money he had there and then reach the Rock Island depot in time for the train, which he did not believe could be done within the forty minutes, although he did not consider taking a taxicab, as he had not been accustomed to their use and was not able to ride in them. He called up the station, however, learned that the train left at 3:40, that the next train out to Oklahoma was at 4:50 the next morning, which did not connect with the train going to Lawton and nothing would be gained by taking it instead of the 3:40 train the next day to reach the place of burial.

He sent two or three telegrams to persons in Kansas City, asking whether and when they had started with the corpse to Lawton, and also wired his brother at Lawton, asking him when the funeral would occur. He started to take the 3:40 P. M. train on the 21st, but before getting on was given a telegram answering his message from his brother at Lawton, Oklahoma, in charge of the remains, advising that the funeral would take place at 4 o'clock that afternoon and he did not take the train. He said further that his wife was authorized to receive the telegram and it was not disputed that it was delivered to her at 1:10 P. M. on the 20th. She called up the office of the company for which he was working over the telephone and asked for him and,

being told that he was not in, left directions that he call her immediately upon his return. No further effort to reach him seemed to have been made.

The court instructed the jury, which returned a verdict against the telegraph company for three thousand dollars, and from the judgment thereon it appealed.

*Geo. H. Fearons, Trimble & Trimble* and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. The court should have instructed a verdict for defendant. The mistake was not that of the company. No duty devolved on appellee to deliver the message in Little Rock. 89 Ark. 402; 98 *Id.* 90. Its effort was voluntary. 86 Minn. 44; 90 N. W. 1; 63 S. W. 156.

2. It was the duty of plaintiff to exercise diligence to avoid damages, and a failure to do so was the result of his own indisposition or lack of ordinary diligence on his part. 29 A. L. R. 437; 84 Ark. 506. No cause of action was shown. 90 Ark. 203.

3. Negligence of the sender in giving a wrong address is chargeable to him, and to the addressee. 60 S. W. 687; 62 *Id.* 138; 92 Ga. 607; 32 Tex. Civ. App. 74; 74 S. W. 942; 98 Ind. 556.

4. The verdict is excessive. 84 Ark. 457; 90 *Id.* 57.

*Manning & Emerson,* for appellee.

1. It was the duty of appellant to use reasonable effort to promptly deliver the message. 95 Ark. 214; 97 *Id.* 198. Whether guilty of negligence or not was a question for the jury. 97 Ark. 198; 98 *Id.* 87-91; 153 S. W. 87; Jones on Tel., § 481.

2. It undertook to forward the telegram to Little Rock and is liable. 42 Ark. 41; 98 *Id.* 87-91; 75 S. E. 795.

3. A mistake in the address is no excuse for negligence, if the negligence is the proximate cause of an injury. 152 S. W. 190; 82 Ark. 117; 95 *Id.* 214; 18 S. E. 980.

4. No contributory negligence is shown. 84 Ark. 501; 90 *Id.* 203; 60 S. W. 876; 62 *Id.* 136; 74 *Id.* 942; 89 Ark. 375.

5. The verdict is not excessive. 151 S. W. 904; 98 Ark. 89; 99 *Id.* 117. But if excessive, the error can be cured by remittitur. 54 So. 844; 142 S. W. 854; 23 S. W. 998; 25 *Id.* 772; 29 *Id.* 66; 26 *Id.* 448; 73 *Id.* 79; 76 *Id.* 613; 100 *Id.* 354; 116 Pa. 925; 121 S. W. 893.

KIRBY, J., (after stating the facts). Appellant contends that the court erred in not directing a verdict in its favor and that the damages recovered are excessive.

The telegraph company was under no obligation to do anything further, after it sent the message, in accordance with its contract, to its agent at Hot Springs and discovered that there was no such person as the addressee living there and would have incurred no liability if it had stopped its efforts and failed to deliver the telegram, but, having undertaken to deliver it to the addressee at Little Rock, upon the direction of his brother-in-law at Hot Springs, at the usual additional charge for forwarding, it became liable for negligence in failing to deliver it promptly. No reason is shown for failure to deliver this telegram for four hours after its receipt at Little Rock at the office of appellant, and, unquestionably, if it had reached the home of appellee before noon, or before his leaving after noon, for his place of work, it would have been received in ample time for him to have reached the place of burial of his mother on the morning of the day she was to be buried in the afternoon. Neither will it be questioned, that a delivery of the telegram to his wife, at his residence, the place to which it was addressed at 1:10 o'clock was a delivery of the message and he, himself, testified that his wife was authorized to receive it. *W. U. Tel. Co.* v. *Trissal,* 98 Ind. 566.

Appellee's wife did not testify in the case on account of her condition, expecting shortly to be confined, and if she made any further effort to notify her husband of the arrival of the message than to call for him over the

phone at the office of the plumbing company for which he was at work and leave directions for him to call her immediately upon his return, it is not shown.

The telegraph company was grossly negligent in failing for four hours to deliver this telegram to the addressee, within sixteen blocks of its office, who had advised it beforehand that he expected a death message and had its agents to write down his address that there might be no unnecessary delay in the delivery thereof. The message on its face, apprised the company of the relationship existing between the parties and that damage might result from the delay in its delivery.

It was through no fault of appellee that the message did not reach him sooner and the question of whether he was chargeable with such contributory negligence as would bar his recovery after the message was in his absence delivered at his home to his wife at 1:10 P. M. in not being able to reach and take the 3:40 train thereafter, was a question for the jury.

Of course, he might have had ample time to have done so if, upon the phone call of his wife for him at the plumbing office, after the delivery of the telegram to her, a messenger had been sent to the place he was at work to notify him of the contents of the telegram and it may be that the wife was negligent in not notifying the man in charge of the plumbing office, under whose direction he was at work, of the contents of the message, and requesting him to send a messenger for her husband, instead of leaving directions upon not finding him in that he call her upon the phone immediately upon his return. Such procedure might have resulted in the receipt of the information by appellee in time for him to have taken the train and attended the funeral of his mother, but it might not have been practicable for the plumbing office to send a messenger for appelee and it might have refused to do so, and we can not say, as a matter of law, that this was such negligence, chargeable to him as would bar his recovery. Neither will this court say, as a matter of law, that appellee was guilty of such

negligence after receiving information of the receipt of the telegram upon his return to the plumbing office, forty minutes before the departure of the train in not reaching the station in time to take the train and arrive at the funeral, under the circumstances of this case. He was a poor man, accustomed to traveling upon the street cars, and concluded, knowing the schedule of the street cars as he did, that he would not have time to reach home, change his clothes, get his ticket, stop at the bank and draw his money therefrom and reach the depot in time. It, of course, could have been done, if he had resorted to the use of an automobile or taxicab, but he was not accustomed to this method of rapid transit, and this court can not say, as a matter of law, that he was negligent in failing to employ it under the circumstances and in the emergency and under the shock of the realization of the death of his mother, which, although expected, was necessarily a shock; it was properly a question for the jury under all the circumstances, as to whether or not he was guilty of such negligence in failing to reach the train after he received the information of the contents of the message in time for arrival at the place of his mother's funeral before the interment and the jury have decided the question in his favor, upon instructions which we do not find erroneous.

The court, however, is of the opinion that the verdict is grossly excessive. The burial was not to take place at the home of the man's dead mother among his relatives and the family friends, but in a distant town in another State away from the place of death, where the body was taken for burial and little opportunity could be afforded for consolation by being with the members of the family and friends. *W. U. Tel. Co.* v. *Garlington,* 101 Ark. 487, 142 S. W. 854.

If a remittitur is entered within fifteen days, reducing the judgment to $500, it will be affirmed; otherwise, it is reversed and the cause remanded for a new trial.

## BRINKLEY v. WALES-RIGGS PLANTATIONS.

Opinion delivered April 14, 1913.

1. JUDGMENTS—DEFAULT—SETTING ASIDE—DEATH OF COUNSEL.—When plaintiff, a married woman, brought an action to set aside a default judgment rendered against her, in an action in which she was original plaintiff, "for unavoidable casualty or misfortune, preventing the party from appearing," (Kirby's Digest, § 4431) on the grounds of the death of plaintiff's attorney; the judgment will not be set aside, when it appears that plaintiff took no interest in the suit, and her whole attitude was that of indifference, permitted a judgment to go by default, and did not move to set it aside for two terms of court. (Page 52.)
2. JUDGMENT BY DEFAULT—MARRIED WOMAN.—When it appears from the record that appellant is a married woman, a default judgment against her will not be set aside under section 4431, Kirby's Digest. (Page 53.)

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

*Block & Kirsch,* for appellant.

1. Snowden, a mere naked trustee with no duties to perform, took nothing under the partition deed, but the entire title, both legal and equitable, vested at once in appellant. Kirby's Dig., § 623; Tiedeman on Real Prop. (3 ed.), 505, 513; Perry on Trusts (2 ed.), § 298; 19 S. E. (N. C.), 375; 62 Ga. 743; 15 S. C. 277; 3 Kan. 292.

2. The saving clause in favor of married women in section 5056, Kirby's Digest, was not abrogated by the enactments giving them the right to hold property and to sue and be sued. 42 Ark. 305; 62 Ark. 316; 64 Ark. 412; 70 Ark. 371.

3. Under the circumstances of this case appellant, who knew nothing of the institution of the suit, nor of the filing of the cross complaint, whose agent, the trustee, the instigator of the suit had died, whose attorney employed by the trustee had died, of which fact she was ignorant, is not chargeable with negligence or laches in not seeking earlier to vacate the decree. The situation presents a case of unavoidable casualty or misfortune within the terms of the statute calling for relief, and,

having a valid cause of action and a valid defense to the cross complaint, such relief ought to be granted. Kirby's Dig., § 4431, subdiv. 7; *Id.*, § § 4433, 4434; 59 Ark. 162; 78 S. W. (Ky.), 1124; 126 N. W. (N. D.), 102.

*Chas. E. Robinson* and *A. B. Shafer,* for appellee.

1. Under Kirby's Dig., § 4434, plaintiff must show herself to have had in the original suit a valid cause of action. She has shown none. The complaint shows she is barred. 17 A. L. R. 836; 108 Ill. 184.

2. Our statute does not execute a passive trust. Kirby's Dig., § § 5802, 6902-3; 53 Ark. 358; 68 Am. St. 17.

3. Plaintiff was barred. The trustee could have brought suit. 68 Am. St. 17; 95 Ark. 438; 88 *Id.* 446; 45 Fed. 529; 113 Mo. 432.

4. Courts will declare the trust estate executed when the same is passive. 4 Am. St. 320; 29 Ga. 651; 36 Fed. 641; 113 U. S. 959.

5. The claim is stale. 55 Ark. 96; 70 *Id.* 374.

6. Unavoidable casualty or misfortune is not shown. 101 Ark. 398.

SMITH, J. Some time prior to May 16, 1895, Robert C. Brinkley died seized and possessed of the northeast quarter of section 28, township 9 north, range 5 east, Cross County, Arkansas. On that date his heirs executed a partition deed to his lands, dividing them among themselves. By said deed the tract above mentioned was conveyed to R. B. Snowden, trustee for Clara F. Brinkley, who was the wife of James M. Brinkley, one of the heirs of the said Robert C. Brinkley. Prior to this, in 1894, at the sale of lands delinquent for the taxes of 1893, said tract was sold to C. W. Riggs, but no tax deed was ever executed to him. Subsequently, in 1899, C. W. Riggs conveyed said tract of land to the Wales-Riggs Plantations, a corporation.

On October 17, 1907, Clara F. Brinkley and R. B. Snowden, as her trustee, brought an action in the chancery court of Cross County against C. W. Riggs and Wales-Riggs Plantations, alleging that the tax sale held in 1894, at which the tract of land above described had

been sold to C. W. Riggs, was void for sundry reasons; that said lands were wild and uninclosed; that plaintiff, Clara F. Brinkley, at the date of said partition deed and ever since has been a married woman; that the defendants had cut timber from said lands; and concluded with a prayer for the cancellation of the title of defendants; that the title of plaintiff, Clara F. Brinkley, be quieted as against them; and that a master be appointed to take an accounting of the timber cut. The attorney for plaintiffs in this action was T. E. Hare, by whom the complaint was signed and who made affidavit in their behalf for a warning order. The answer and cross complaint which are filed is not set out, but at the September, 1910, term of the chancery court, a decree was entered which dismissed the complaint for the want of prosecution, and the court found that cross complainants had paid taxes on the land for seven years under color of title and quieted the title of appellee as against appellant.

On May 6, 1911, the complaint in the present cause was filed by Clara F. Brinkley, in which the facts above stated were set forth, and in addition it was alleged that she and her trustee were nonresidents of the State of Arkansas, and that her said trustee had employed T. E. Hare, a practicing attorney of Cross County, to file her original suit and that her said trustee died on or about October 7, 1909; and that her attorney died on December 24, 1909; and that she remained in ignorance of her attorney's death until after the decree had been rendered against her. That the death of her trustee and attorney was an unavoidable casualty or misfortune which prevented her from appearing and prosecuting her cause of action. In this last complaint, she alleges the allegations of her original complaint were true and offers to prove them, and in addition offers to perform any condition which the court may see proper to impose to permit her to redeem from said tax sale. She alleged she was still a married woman and had been ever since the decree was rendered. There was a prayer that the decree be set aside and that she be permitted to prosecute said origi-

nal suit and for all proper relief. Subsequently, an amendment to this complaint was filed, in which it was further alleged that no cross complaint had been filed, and that if filed, it did not state facts sufficient to constitute a cross complaint, upon which a default decree could be rendered, because there was no allegation of the payment of taxes by defendants under color of title, and that as the plaintiff, Clara F. Brinkley, was a married woman, neither payment of the taxes nor adverse possession would be a defense to her right to recover the lands.

C. W. Riggs entered a disclaimer, but the Wales-Riggs Plantations answered and denied that appellee had been prevented from asserting her rights by reason of unavoidable casualty or misfortune; denied that she had any interest in the land in controversy, and specifically denied all the material allegations of the complaint and the amendments thereto. It affirmatively alleged that C. W. Riggs had purchased the land at a tax sale and in 1899 had conveyed it to the Wales-Riggs Plantations, thus giving that corporation color of title to the land, which was wild and unenclosed, and had paid the taxes under this color of title continuously since, and for more than seven years before the institution of the original suit. The answer pleaded the seven-year statute of limitations and also that appellant had been guilty of negligence and laches in the prosecution of her original suit.

Counsel for both sides devote much time and give evidence of much research in the discussion of the character of the trust under which Snowden acted. Appellant insists that Snowden was merely a naked trustee with no duties to perform and that therefore he took nothing under the partition deed, though named as trustee, but the entire legal, as well as equitable, title at once vested in appellant. Appellee contends that the rule barring *cestui que trustent,* when the trustee is barred, applies when the trust is passive, because of its being executed by the statute of uses, and that while the courts

will declare the trust estate executed when the same is passive, yet so long as the courts are not asked to declare a trust executed for such purposes as the right of the holder of the legal title to bring suit, for instance, the trust is not deemed to be executed whether the trust is active or passive. Appellee insists that the trust was an active and not a passive one. The chancellor probably made a finding adverse to appellant on this question when he confirmed appellee's title on its cross bill, but this we do not know. However that may be, under our view of the case, we deem it unnecessary to decide those questions for the reasons hereafter stated, and the facts out of which those questions arise are recited to some extent, because they bear upon the question which controls the decision of this case. There is no very serious conflict in the evidence and the facts are substantially as follows: Robert C. Brinkley was a man of large wealth and had extensive holdings in this State, and upon the partition of his lands, R. B. Snowden was named in the partition deed as trustee for Clara F. Brinkley. The objects of the trust and the powers of the trustee are not recited. From then on neither appellant nor her trustee appear to have given much attention to these lands, evidently regarding them as of but little value, as they were the source of no income. Appellant paid no taxes on these lands and had no knowledge as to whether the taxes were being paid or not, and as a matter of fact, since 1894, neither she nor her trustee had paid any taxes. Appellant owned some income-producing property in Memphis which was controlled by her said trustee, and at regular intervals he rendered her statements of his accounts. Appellant testified that she knew Snowden had employed Hare to sue for these lands and that she expected them to attend to the litigation, and that one or the other of them would give her any notification she should have of the progress of the litigation. But she also testified that Snowden had been an invalid for a year before his death, and during the last six or eight months of his life spent his

time away from home in search of health. Yet, notwithstanding her knowledge of these facts, she made no attempt to communicate in any way with Hare, who, she knew, had charge of her litigation and was unaware of his death until a short time before filing this last complaint. Yet in her original complaint she alleged "that her trustee, R. B. Snowden, has failed to look after her interests as he should and suffered her rights to become jeopardized somewhat, and caused much of said property to become a loss to plaintiff."

Under the facts stated is appellant entitled under section 4431 of Kirby's Digest to have the decree against her set aside? This is the section under which this suit was brought, and its provisions are as follows:

Section 4431. The court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order.

First. By granting a new trial for the cause, and in the manner prescribed in section 6220.

Second. By a new trial granted in proceedings against defendants constructively summoned.

Third. For misprision of the clerk.

Fourth. For fraud practiced by the successful party in obtaining the judgment or order.

Fifth. For erroneous proceedings against an infant, married woman or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings.

Sixth. For the death of one of the parties before the judgment in the action.

Seventh. For unavoidable casualty or misfortune preventing the party from appearing or defending.

Eighth. For errors in a judgment, shown by an infant in twelve months after arriving at full age, as prescribed in section 6248.

The fifth subdivision of this section avails appellant nothing even though the proceeding against her was erroneous for the reason that her condition as a mar-

ried woman appears from the record. But appellant does earnestly insist that the facts stated bring her within the provisions of the seventh subdivision. But we do not think so. Her entire conduct with reference to the land is that of indifference both before and after the institution of the suit and when she filed her original suit she made no tender or offer to pay any of the taxes for which the land had sold or those subsequently paid by appellee.

With the knowledge of the infirmity and inactivity of her trustee, and finally of his death on October 7, 1909, she made no arrangements for prosecuting the litigation, but allowed her complaint to be dismissed for want of prosecution and a decree to be rendered by default on the cross complaint at the September, 1910, term of the court, and then waited until the second term of the court thereafter to ask the vacation of these proceedings.

We are of opinion that the chancellor did not err in refusing to vacate the original decree "for unavoidable casualty or misfortune, preventing the party from appearing or defending," and the decree appealed from is accordingly affirmed.

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## STEPHENS v. STEPHENS.

Opinion delivered April 28, 1913.

1. DEEDS—PRESUMPTION OF DELIVERY AND ACCEPTANCE.—The acknowledgment and registration of a deed by the grantor, raises a presumption of its delivery to and acceptance by the grantee, and evidence to rebut that presumption must be clear and satisfying. (Page 57.)
2. HOMESTEAD—CONVEYANCE TO CHILDREN—VALIDITY.—A conveyance by A of his homestead to his wife and children is not valid as a conveyance to the children, unless the wife joins in the deed. (Page 58.)
3. PLEADING—AMENDMENT TO CONFORM TO PROOF.—While in a proper case the pleadings will be treated as amended to conform to the evidence, the pleading will not be treated as amended unless the evidence is sufficient to properly present the issues necessitating the amendment. (Page 59.)

4. HOMESTEAD—LANDS CONSTITUTING.—Under Kirby's Digest, § 3899, which provides that the homestead owned and occupied as a residence shall consist of not exceeding 160 acres, nor exceeding in value $2,500, the lands claimed as a homestead must be contiguous. (Page 58.)

5. EVIDENCE—JUDICIAL NOTICE—PUBLIC LAND SURVEYS.—Courts take judicial knowledge of public land surveys, and know that certain land in section 26 is not contiguous to certain land in sections 22 and 23 in the same township. (Page 59.)

6. PLEADING—COMPLAINT NOT AMENDED WHEN.—While a complaint may be treated as amended to conform to the proof, where A. seeks to set aside a deed executed by him to his wife and children, but makes no allegation in his complaint that the land conveyed was his homestead, the complaint will not be treated as amended to conform to the proof offered by A., the grantor, that the land was his homestead. (Page 59.)

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

*W. E. Beloate,* for appellant.

1. The doctrine of estoppel by deed is conclusive here. A person can not deny his own deed whether it had been actually delivered or not; but in this case, the deed having been recorded makes out a *prima facie* case of delivery. 25 Ark. 225; 8 Ark. 345; 10 Ark. 89; 30 Ark. 230; 50 Ark. 212. The presumption of delivery arising from the registration of a deed can be overcome only by clear and decisive proof, and the mere fact that the grantor retained the deed in his possession is not sufficient to overcome such presumption. 97 Ark. 283.

The deed from appellee to appellant is evidence of a gift from father to child, and there was no necessity of actual delivery. 11 Ark. 249.

2. The deposition of appellee was not competent testimony, because he could not deny his own deed; there was no proper notice given nor proper service of notice upon appellant, and because the deposition was not properly taken as is shown by the officer's certificate. 82 Ark. 198; Kirby's Dig., § 3185. Judgment can not

properly be rendered against an infant until after a *bona fide* defense by a guardian. Kirby's Dig., § 6023; 42 Ark. 222; 80 Ark. 519, and cases cited.

*G. B. Oliver, amicus curiae.*

1. The presumption of delivery arising from the registration of a deed may be overcome by proof. 97 Ark. 283.

The effect of recording a deed by a grantor depends wholly upon his intention in placing on record. 94 N. W. 1045; 62 S. W. 336; 57 S. W. 570.

2. The question of estoppel to deny the deed is beside the point. The execution of the deed is not denied, but the contention is that it was not delivered nor intended to be delivered.

3. Objections now made to the depositions can not be maintained because they were not made by the guardian *ad litem* in the court below. Kirby's Dig., § 3191.

4. The land was Stephens's homestead, and his wife did not join in the execution of the deed. Kirby's Dig., § 3901; 71 Ark. 283.

SMITH, J. This suit was commenced by appellee August 26, 1903, to cancel a deed executed by him to his wife and their infant children, the appellant being the oldest child. The deed sought to be cancelled was executed on the 21st day of July, 1898, and by it appellee conveyed to his wife, Jennie Stephens, and the appellant, Maggie Stephens and James R. and Grace Stephens, his children, the following described lands, lying in the Western District of Clay County, towit:

Northwest quarter, southeast quarter, section 22; northwest quarter, southwest quarter, section 23; northeast quarter, southeast quarter, section 22; northeast quarter, northwest quarter, section 26, all in township 21 north, range 3 east.

The complaint alleged that appellee had said deed recorded in the recorder's office of Clay County for the Western District, but retained possession of the deed, and has since retained possession of same, never having delivered it to any one of the defendants, or to any other

person for them; and that he has possession of said land at the present time and that said deed was executed for no other consideration than love and affection; that said deed is a cloud upon the title and appellee prayed that it be cancelled and set aside.

A regular practicing attorney of that court was appointed by the court as guardian *ad litem* and he filed an answer which contained a general denial of all the allegations of the complaint. The cause was heard upon the deposition of appellee which was all the evidence heard in the case; and he testified that he had inherited the land from his father and that he determined to remove to Oregon, and in explaining the purpose of the deed, said: "Before I started to Oregon, I thought if something might happen to me while there, if I should die, the land might be sold and my children beat out of it some way, that was the reason I made the deed to my wife and children so that if I should happen to die out there." He testified further that he never told his wife and children anything about the deed but he took it to the clerk's office and acknowledged it and had it recorded, and after it was recorded, he put it among his other papers. He testified further that he did not remember whether his wife or children had ever seen the deed and that he had had possession of the land since its date. He also testified that his wife had executed a mortgage on the land in which he had joined because the debt which it secured was his own debt. Appellee also testified that the lands were his homestead.

The court found that said deed had never been delivered to defendants nor to any one for them and decreed that it be cancelled and set aside. Appellant is the oldest child, and has just come of age and prosecutes this appeal from that decree.

Appellant insists that the court erred in admitting in evidence the deposition of appellee for the reason that no proper notice of its taking was given, and while that objection appears to be well taken, we are also of opinion that the deposition does not support the chan-

cellor's finding, and we will reverse the case on that account. The question of the sufficiency of the delivery of a deed was considered in the recent case of *Graham* v. *Suddeth,* 97 Ark. 283, where Justice FRAUENTHAL, for the court, said:

"A deed is defined to be a 'written instrument signed, sealed and delivered;'" and it is essential to the validity of a deed that there should be a delivery of the instrument. But in order to constitute a sufficient delivery thereof, it is not necessary that there should be an actual manual transfer thereof to the grantee or a formal acceptance thereof by him. The question of a delivery of a deed is largely one of intent; and if it clearly appears from the words or acts of the grantor that it was his intention to treat the instrument as his deed and to make a disposal thereof, indicating that it should be effective, then the delivery is sufficient. As is said in the case of *Russell* v. *May,* 77 Ark. 89: 'Any disposal of a deed accompanied by act, words or circumstances which clearly indicate that the grantor intends that it shall take effect as a conveyance, is a sufficient delivery.'

"The registration of a deed raises a presumption of the delivery to and acceptance by the grantee thereof. It is evidence of a most cogent character tending to show delivery. It is a solemn proclamation to the world that there has been a transfer of the title to the property from the grantor to the grantee, of which our law makes every one take notice. 1 Devlin on Deeds, par. 392; 13 Cyc. 567; *Hedge* v. *Drew,* 12 Pick. 141; *Robbins* v. *Rascoe,* 120 N. C. 79; *Snider* v. *Lackanour,* 38 Am. Dec. 685."

We think there was a delivery here within the rule announced. Here Stephens acknowledged the deed and filed it for record and when he had done so, put it with his other valuable papers. His statement is that he did this in order that his wife and children should have no trouble about the title if anything happened to him. Appellee may have had the secret intention that the deed should not be treated as delivered and that the title should not pass, but the presumption is to the contrary,

and the evidence to rebut that presumption should be clear and satisfying. Titles to land can not be permitted to rest upon the secret intention of grantors, who do so solemn a thing as to execute and acknowledge a deed and voluntarily place it of record unless it be clearly established that there was no intention of delivery for the purpose of passing the title.

A brief has been filed by an *amicus curiae* and it is insisted by him that the deed should be held to be void because it is a conveyance of a homestead in which the wife did not join. If this conveyance had been to the wife alone, she, of course, could not have joined in its execution, and be both grantor and grantee, in the conveyance to her, but the conveyance was to her and her three children and a conveyance to these children of the homestead would not be valid unless the wife joined the husband in the execution of the deed. *Pipkin* v. *Williams,* 56 Ark. 42. But that question is not presented by this record. The court made no finding as to whether the land was a homestead or not but granted the relief upon the ground asked for in the complaint, that is that the deed had never been delivered. It is true that appellee stated in his deposition that the property conveyed constituted his homestead, but he had not attacked the conveyance on that account and there was no allegation to that effect in his complaint. It is also true that in a proper case the pleadings will be held to be amended to conform to the evidence, but the pleading will not be treated as amended unless the evidence is sufficient to properly present the issue necessitating the amendment. The Constitution and laws of this State defines the homestead rights of the head of a family:

Section 3899, Kirby's Digest, is as follows: "The homestead, outside any city, town or village owned and occupied as a residence, shall consist of not exceeding one hundred and sixty acres of land, with the improvements thereon, to be selected by the owner. Provided, the same shall not exceed in value the sum of twenty-five hundred dollars, and in no event shall the homestead be

reduced to less than eighty acres, without regard to value."

Here the proof does not show that the land conveyed does not exceed $2,500 in value, but it does affirmatively show that the lands are not contiguous. It does not appear from the evidence on which part of this land appellee resided and as the courts take judicial knowledge of the public land surveys we do know that the land in section 26 is not contiguous to the land in sections 22 and 23, and therefore all of it can not be claimed as a homestead because the land claimed as such must be contiguous. The only evidence upon that subject is embraced in the following question and answer:

Q. Is this land your homestead?

A. Yes, sir.

He may have meant by this answer to have testified that the land was his homestead at the time of the conveyance, but that fact even is not clear. Under the state of the record the pleadings will not be treated as amended to conform to the proof. For three of these defendants were minors whose defense was being made by a guardian appointed for that purpose, and the rule is well established that there must first be a genuine defense made by the guardian and all material allegations denied, and the allegation as to the land being a homestead was not even made in the complaint. *Blanton* v. *Davis,* 107 Ark. 1, 154 S. W. 947.

We are, therefore, of opinion that the evidence is insufficient to support the chancellor's finding and to overcome the presumption of law which arises when a grantor causes a deed to be recorded and the decree of the chancery court is accordingly reversed and the cause remanded with directions to the chancery court to vacate its decree, cancelling and annulling the deed in question.

# CALDWELL v. DONAGHEY.

## Opinion delivered April 28, 1913.

1. STATE—CONTRACT TO BUILD CAPITOL BUILDING—AGENTS OF STATE—TRESPASS.—Where the State owned property and contracted with plaintiffs to erect a building thereon for public use as a State Capitol, it merely granted to plaintiffs the right to enter upon the premises for the purpose of constructing the building in accordance with the terms of the contract, and plaintiffs had no other right in or to the premises; and when the State by legislative enactment discharged plaintiffs and a legally appointed commission took possession of the unoccupied building on the State's property, an action against the commissioners for unlawful trespass can not be sustained. (Page 63.)
2. STATE—RIGHT OF CONTRACTOR TO POSSESSION OF PREMISES.—One who contracts with the State to construct a building on the State's premises, can not hold possession against the will of the State's authorized agents. (Page 63.)
3. CONSTITUTIONAL LAW—POWER OF STATE TO ANNUL ITS CONTRACT.—A State by legislative enactment may violate a contract, but the obligation, as in the case of an individual remains unimpaired. The State has power to annul, cancel and set aside a contract, although the obligation remains after the contract has been broken, so when the State enters into a contract with a firm of contractors to build a State Capitol building, the Legislature has the power to pass an act annulling and setting aside the contract, and such act is not unconstitutional as impairing the obligation of the contract. (Page 65.)
4. STATE—SUIT AGAINST—SPECIFIC PERFORMANCE.—A contractor who has entered into a contract with the State to erect a State Capitol building can not compel the State to perform its part of the contract by specific performance. A suit to compel a State to perform its contract can not be maintained. (Page 67.)
5. CONSTITUTIONAL LAW—POWER OF STATE TO ANNUL CONTRACT—RIGHT TO SUE STATE UPON ITS OBLIGATION.—While a State may, by legislative enactment, annul a contract made with contractors to erect a public building, and such annullment does not impair the obligation of the contract, the fact that the State can not be sued upon its obligation has no bearing upon the question of the constitutionality of the act. (Page 67.)

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

*J. W. Blackwood*, for appellant.

1. The State can not enact laws impairing or ma-

terially affecting its contractual obligations. The acts assailed are within the prohibited class and are no protection to defendants. 16 Wall. 203, 233; 15 How. 308; 16 How. 370; 6 Cr. 87; 103 U. S. 302; 105 U. S. (26 L. Ed.) 1090; 134 *Id.* 842, 849; 3 Ark. 285; 12 Wheat. 213, 327; 8 *Id.* 184; 6 How. (12 L. Ed.) 447; 14 Ky. (4 Litt.), 34, 35, 47, 69; 96 U. S. (24 L. Ed.), 793; 140 U. S. (35 L. Ed.), 363; 1 Kent, Com. 414-419.

2. This is not an action against the State. 140 U. S. (35 L. Ed.), 363; 70 Ark. 568, 583-4; 216 U. S. 165; 209 *Id.* 123; 221 *Id.* 636; 109 *Id.* 446, 452; 93 Ark. 519, 520; 6 Wheat. 264.

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

1. A contractor who has a lien does not acquire the right of possession. Phillips on Mech. Liens, § 9; Boisot on Mech. Liens, § 7; Overton on Liens, § 547. No public building is subject to mechanic's liens. 49 Ark. 94-7; 55 *Id.* 476.

2. The Patterson and Oldham acts did not impair the obligations of the contract. 1 Denio 317; 64 N. Y. 107; 89 *Id.* 45; 36 N. W. 794-7; 106 U. S. 96; 15 N. E. 422; 108 N. Y. 542; 15 A. & E. Enc. L. 1041; 70 Ark. 585.

McCULLOCH, C. J. The State of Arkansas entered into a written contract with appellants, Caldwell & Drake, dated August 14, 1903, whereby the latter undertook to construct for the State, on its grounds, a new State Capitol building for a certain price, payable in installments on certificates of the architect as the work progressed. The work of constructing the building progressed until the year 1907, when interrupted by failure of the General Assembly to make appropriation of funds for payments under the contract. Appellants, upon instructions from the State Capitol Commission, boarded up the openings of the uncompleted building and suspended work thereon until an appropriation could be made at the next (1909) session of the General Assembly. The General Assembly of 1909 passed an act discharging appellants as contractors, also discharging the

architect, George R. Mann, and the capitol commissioners, and creating a commission to "adjust the controversy between the State of Arkansas and Caldwell & Drake" concerning the performance of the contract. That statute is commonly known as the Patterson Act. Subsequently at the same session another statute was enacted entitled "An Act to provide for carrying forward the work on the new State Capitol and making appropriations therefor, and for paying any sums which may be found due the former contractors, and for the creation and appointment of a capitol commission and defining its duties." That is known as the Oldham Act, Acts 1909, page 727, and it provided that the new commission should be composed of the Governor of the State and four other citizens to be appointed by him. Appellee, George W. Donaghey, was then Governor of the State, and, pursuant to the terms of the statute, he appointed his coappellees, John I. Moore, H. L. Remmel, Chas. L. Thompson and R. F. Foster, as the other members of the commission.

A synopsis of each of the statutes above referred to is set forth in the two opinions of this court in *Jobe* v. *Caldwell,* 93 Ark. 503, and 99 Ark. 20, and it is unnecessary to set them out again.

The capitol commission, composed of appellees, proceeded, pursuant to the terms of the Oldham Act, to take possession of the uncompleted building and to let a new contract for its completion. According to the allegations of the complaint in this case, they broke the locks, took possession of the building over the protest of appellants, who claimed to be in possession thereof, and caused to be torn out, certain portions of the building which appellants had constructed.

Appellants assert that by reason of said acts of appellees in taking from them the possession of said uncompleted building and "by advertising to the world that these plaintiffs have been discharged" they sustained damages in the sum of $250,000, and they instituted this action against appellees in the circuit court of

Pulaski County to recover the damages alleged to have been thus sustained.

The circuit court sustained a demurrer to the complaint, and from the final judgment of the court rendered upon the failure of appellants to plead further, an appeal to this court is prosecuted.

This is characterized by learned counsel for appellants as simply an action to recover damages for unlawful trespass committed by appellees. The substance of the argument is that appellants were in lawful and peaceable possession of the State's property for the purpose of performing their contract with the State and had the right to retain possession until they completed the Capitol building according to contract; that the statutes enacted by the General Assembly of 1909, attempting to discharge appellants as contractors, and to complete the building through other agencies, were unconstitutional and void as impairing the obligation of the State's contract with appellants, and that all acts of appellees in going upon the premises and disturbing appellant's quiet possession, constituted trespass which rendered appellees liable in damages for any injury which resulted. This argument involves the inquiry, primarily, into the question as to what possessory rights appellants had, if any, as between them and the State, to the latter's premises and the building thereon in process of construction. The State owns the premises and merely contracted with appellants to erect a building thereon for public use as a capitol or seat of government. The answer is plain that the State did not cede to appellants, either partially or exclusively, its possessory right to the premises. It merely granted to them the privilege or license to enter upon the premises for the purpose of constructing the building according to the terms of the contract. That did not constitute either a right to the premises or a right in same.

Even between individuals, whether a lien be given by statute or not, a building contractor does not acquire, against the owner, the right to hold possession of the

premises. Overton on Liens, § 547; Phillips on Mechanic's Liens, § 9; Boisot on Mechanic's Liens, § 7. For a stronger reason one who contracts with the State to construct a building on its premises, can not hold possession against the will of the State's authorized agents.

With that question out of the way it remains to inquire whether the statutes of 1909, which discharged appellants and provided other agencies for completing the building, were valid, or whether they were unconstitutional as impairing the obligations of appellant's contract with the State. We speak of the Patterson Act discharging appellants as contractors. That is what we said of it in the opinion in *Jobe* v. *Caldwell,* 99 Ark. 20. "Whatever else may be said of the Patterson Act," is the language used, "it abrogated the contract with plaintiffs to the extent that the State refused to allow further performance, and it also amounted to an assertion that the condition of accounts between plaintiffs and the State called for an adjustment."

Let us say now that the Patterson Act was, at least, a determination by the State, speaking through its highest agency, not to permit appellants to complete the building. Whether or not the Legislature did right in that respect depends on the question of fact whether appellants had broken the contract (a question we do not have to decide in this case), for the State had no greater right than an individual to refuse performance of its contract. The exact language of the Patterson Act is that the contract with Caldwell & Drake "is hereby annulled, cancelled and set aside." We are only concerned, so far as relates to the present controversy, with the effect of the statute in withdrawing the State's consent to the completion of the building by appellants. That much is embraced in the language used, whatever else may have been intended, and to that extent the statute was valid, even if it was unjust and amounted to a violation of the contract. There is a wide distinction between the power to break a contract and the right to do so. The one thing may exist in the absence of the

other. The power to violate a contract exists when the circumstances are such that courts will not decree specific performance; but the right to do so depends upon some justification recognized in the law. The present case is only affected by the State's exercise of its power to treat the contract with appellant as broken; and we are not called upon now to determine the question of its justification in doing so, for the power to violate a contract does not necessarily involve the impairment of the obligation. The obligation remains after the contract has been broken.

The General Assembly controls the economic and administrative policies of the State, and if the statutes in question wrongfully violated the contract with appellants, the obligation of that contract remains unimpaired; but the power of the Legislature to violate the contract can not be questioned any more than the exercise of the like power by an individual.

The doctrine applicable to this case is very clearly stated by the New York Court of Appeals in the case of *Lord* v. *Thomas,* 64 N. Y. 107. The State of New York had contracted for the erection of a certain building, but before the completion of the building, discharged the contractors and appointed commissioners with directions to construct the building upon another plan. An injunction was sought in that case by the contractors, and the court said:

"The State can not be compelled to proceed with the erection of a public building, or the prosecution of a public work at the instance of a contractor with whom the State has entered into a contract for the erection of a building or the performance of the work. The State stands, in this respect, in the same position as an individual, and may at any time abandon an enterprise which it has undertaken, and refuse to allow the contractor to proceed, or it may assume the control and do the work embraced in the contract by its own immediate servants and agents, or enter into a new contract for the performance by other persons, without reference to

the contract previously made, and although there has been no default on the part of the contractor. The State in the case supposed would violate the contract, but the obligation of the contract would not be impaired by the refusal of the State to perform it. The original party would have a just claim against the State for any damages sustained by him from the breach of the contract, and although the claim could not be enforced through an action at law, the remedy by appeal to the Legislature is open to him, which can, and it must be presumed will, do whatever justice may require in the premises. This remedy is the only one provided in such a case, and this is known to the party contracting with the State, and the courts can not say that it is not certain, reasonable and adequate."

In a later case involving the same contract, where the contractors had sued the State for recovery of damages, the court again said:

"Where a valid contract has been entered into, on behalf of the State by its duly authorized agents, for the construction of a public work, it can not, in the absence of any stipulation authorizing it so to do, destroy or avoid the obligation of the contract. While it may refuse to perform and arrest performance on the part of the contractor, it is liable for the breach of the contract the same as an individual and the contractor is entitled to claim prospective profits." *Donolds* v. *State,* 89 N. Y. 45.

In *Brown* v. *Colorado,* 106 U. S. 96, there was a controversy between the State of Colorado and an individual who had conveyed certain lands to the Territory before admission to Statehood for the purpose of erecting a capitol. He refused to surrender possession and the State brought ejectment and recovered possession of the land. The Supreme Court of the United States, speaking through the then Chief Justice, said:

"The most that can be said * * * is, that in this way the contract was violated by the State. * * * All the obligations of the original contract remain, and the State

has not attempted to impair them. If the contract is all that he claims it to be, and the Constitution and statutes are just what he says they are, the most that can be contended for is that the State has refused to do what the Territory agreed should be done. This may violate the contract, but it does not in any way impair its obligation."

The same thought is announced by the following authorities: 15 Am. & Eng. Enc. of Law, p. 1041; *Clark* v. *Marsiglia,* 1 Denio, 317; *McMaster* v. *State,* 108 N. Y. 542; 15 N. E. 422; *Sanilac County* v. *Alpine,* 68 Mich. 659; 36 N. W. 794, 797.

In the recent case of *Falls City Construction Co.* v. *City of Fort Smith,* 107 Ark. 148, 154 S. W. 496, which involved a controversy concerning the construction of a county courthouse, we said that a contractor could not compel the county to construct a building, whatever might be the rights under the contract to recover damages for nonperformance. That principle has its force in this controversy, for any other view would permit the contractor to compel the State to proceed with the construction of the building against the express will and determination of the lawmakers.

The fact that the State can not be sued upon its obligation has no bearing upon the question. If the contract was one which appellants could require the State to specifically perform, then there might be some plausibility in the claim that the commissioners subsequently appointed had no right to interfere with the performance of the contract by appellants. But the contract, even if made with an individual, was not one which a court of equity would require to be specifically performed. *Leonard* v. *Board of Directors of Plum Bayou Levee District,* 79 Ark. 42, and cases therein cited.

Moreover, any action for the purpose of compelling the State, either directly or indirectly, to perform the contract, would be a suit against the State and could not be maintained. *Pitcock* v. *State,* 91 Ark. 527.

The decisions of the Supreme Court of the United

States cited by appellants on the brief announce principles which have no application here. Those cases involve statutes which attempted to take away the rights of parties and impair the obligation of contracts, whereas in the present case the acts of the Legislature, as we have already shown, to the extent that they discharged appellants and withheld permission to proceed further in the construction of the building, did not impair the obligation of the contract.

After the State had, through the enactment of the statute known as the Patterson Act, elected not to proceed with the construction of the building under the contract with appellants, another statute, the Oldham Act, provided for the creation of a new commission, and appellees, as such commissioners, were clearly within their legal rights in proceeding with the construction of the building, pursuant to the mandate of the last-mentioned statute. They were not trespassers but were acting in the line of their duty and are not liable to appellants in any sum. The judgment of the circuit court is therefore affirmed.

CONCURRING OPINION.

WOOD, J. The Patterson and Oldham Acts in so far as they "annul, cancel and set aside" the contract of the State with Caldwell & Drake are unconstitutional and void. For to cancel a contract destroys its obligations. No rights can be set up under a contract after same has been "cancelled, annulled and set aside." But even though the facts mentioned be void in this particular, they may stand in other respects. For it is obvious when the whole acts are considered together, that the Legislature could and would have passed them with this unconstitutional feature eliminated; and it may be left out, leaving the acts complete. It was within the power of the General Assembly to discharge Caldwell & Drake. They had no possessory or property rights in the Capitol building. Therefore the Legislature could provide for their discharge and for the completion of the Capitol in the manner it has done without impairing the obli-

gations of the contract of the State with Caldwell & Drake, as I endeavored to show in my dissenting opinion in *Caldwell & Drake* v. *Jobe,* 93 Ark. 503.

The Legislature did not discharge them without making an appropriation for paying what was already due them under their contract, and thus recognized the binding force of the contract. See case, *supra.* The obligation of the State to pay them for any profits they would have earned under the contract, is not germane to the issue here presented, which is simply that of trespass upon alleged possessory or property rights in the Capitol building itself.

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## BELDING *v.* VAUGHAN.

Opinion delivered April 28, 1913.

1. CONTRACTS—CONSTRUCTION.—Defendant was one of a number of subscribers to stock in a corporation about to be formed, the subscription to be binding if $20,000 was subscribed. Defendant entered into a contract with plaintiffs for the lease of a photographing device, which recited that defendant acted as agent for the corporation to be formed, and the contract was signed by plaintiff individually. The $20,000 stock was not subscribed; *held,* the subscription list and contract being regarded as executed simultaneously, must be considered together in interpreting the meaning of the contract with plaintiffs, and the contract of lease is not a personal contract of defendant, but rested upon the condition that the corporation be formed. (Page 74.)
2. PRINCIPAL AND AGENT—LIABILITY OF AGENT.—Where defendant executed a contract as agent to be binding upon a corporation for which he acted, when it came into existence, he is not personally liable on the contract, where the corporation was never organized, and the plaintiffs knew that he was acting as agent for the corporation to be formed. (Page 74.)
3. PROMOTER—PERSONAL LIABILITY ON CONTRACT.—Where defendant entered into a contract with plaintiffs as agent for a corporation about to be formed, when both parties are interested in the formation of the corporation, but it is in fact never formed, the defendant will not be held to be a promoter of the proposed corporation, nor personally liable as such to the plaintiffs for failure to perform the contract. (Page 75.)

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

*J. W. Blackwood, John W. Newman* and *H. H. Myers,* for appellants.

1. As the contract stands it is appellee's personal note. There is no ambiguity nor doubtful meaning in it, and the court will construe it as made, without supplying or rearranging its words. 150 S. W. (Ark.) 858. If there is any doubt as to its meaning or if it is susceptible of two constructions, it should be construed most strongly against appellee, a practicing lawyer, who wrote it. 153 S. W. (Ark.), 101, 103.

2. One who describes himself and deals as agent of a corporation not in existence is personally liable. 1 Thompson on Corporations (2 ed.), § 83; *Id.* § § 416, 424; 2 Cook on Stocks, etc., § 705; Alger, "The Law of Promoters and the Promotion of Corporations," § 199; 39 S. W. 966; 60 Mich. 26; 26 N. W. 801; 35 Ark. 144; 168 Fed. 187; 22 L. R. A. (N. S.), 1153; 108 S. W. 948; 23 Am. & Eng. Enc. of L. 237.

Had the Title Guaranty Company been at the time a going concern and appellee its duly authorized agent, he would still be personally liable for the reason that apt words were not used to bind the principal.

Persons who sign their individual names to promissory notes are *prima facie* liable thereon, though they are described therein as trustees or other officers of corporations. 21 L. R. A. (N. S.), 1058, 1059, note, and cases there cited; see also 21 Cyc. 1414; *Id.* 1554; 12 L. R. A. (N. S.), 1190; 10 Ark. 446; 41 Ark. 399, 400; 5 Pet. 349.

3. The promise to pay on "May 1, 1907, or earlier upon the organization of the company," made the payment due at all events on that day, the only condition affecting the time of payment being that it would become due earlier if the company was organized earlier. 4 Am. & Eng. Enc. of L. 92, 93; 4 Heisk. (Tenn.), 668; 3 Hawks (N. C.), 458; 103 Ala. 479; 85 Ill. 523; 61 Ia. 166; 47 Am.

Rep. 808; 54 Ind. 164; 23 Am. Rep. 639; 74 Pa. St. 13, 7 Cyc. 857.

*Vaughan & Akers, Ratcliffe & Fletcher, Hal L. Norwood* and *W. H. Rector*, for appellee.

1. The words used in the agreement sued on and the facts attending its execution show that the personal liability of appellee was not intended. Parol testimony was admissible to show the circumstances leading up to and following the execution of the writing in order to throw light upon the intention of the parties. 53 Ark. 58, 66; 70 Ark. 232, 238; 96 Ark. 320, 324; 97 Ark. 532; 80 Ark. 363, 369; 99 Ark. 115; 94 N. W. 1044; 50 N. W. 925; 23 Ark. 585-6; 28 Ark. 282; 52 Ark. 73-5; 94 Ark. 419; 2 Devlin on Deeds, § 840; *Id.*, § 843.

2. The conduct of the parties subsequent to the signing of the agreement show that appellee acted as a representative and not in a personal capacity. If in drawing the agreement personal liability had been intended, it could easily have been expressed in plain terms, and certainly the words "as trustee and agent" would have been omitted. 44 Pac. 854; 46 Ark. 129; 55 Ark. 414-417; 88 Ark. 363, 369; 95 Ark. 499; 98 Ark. 421, 425.

3. After April 2, 1907, appellants were equally interested with appellee in the work of promoting the Title Guaranty Company, and are estopped by their conduct from invoking the rule of the personal liability of the promoters.

The signing of the agreement at Hot Springs and the signing by appellants of the subscription contract were simultaneous acts and so closely interrelated as to constitute one contract. 70 Ark. 232. See also 30 Ark. 186; 64 Ark. 627; 1 Thompson on Corporations, § 85; *Id.* § 83; 62 Minn. 332, 64 N. W. 826.

4. The lease agreement and the subscription agreement together constitute a single executory contract or option. 18 Ark. 65, 76; 52 Ark. 30; 45 Ark. 17; 96 Ark. 320; 19 Ark. 262; 22 Ark. 158; 30 Ark. 187; 90 Ark. 272, 276.

By the agreements the completion of the organization of the corporation was a condition precedent to the going into effect of the lease agreement as well as of the stock subscription. 2 Watts & S. 227, 228; 98 Mass. 131; 13 Atl. 468, 474; 119 Pa. 439; 12 Pac. 665, 667; 14 Ore. 356; 37 Ia. 503, 508.

McCULLOCH, C. J. Appellants sued appellee in the circuit court of Pulaski County to recover, upon written contract, the sum of $3,000 for the lease of a patented machine or device called a "Rectigraph," used in photographing records.

Appellee denied personal liability under the contract, and the case was tried before a jury. Both sides, without asking that the disputed questions of fact be submitted to the jury, requested the court to give a peremptory instruction in their respective favor, and the court gave a peremptory instruction in favor of appellee.

The case stands here, therefore, upon the sole question of the legal sufficiency of the evidence to sustain the verdict in appellee's favor. *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71.

In March, 1907, appellee and certain other persons joined in an effort to organize a corporation, with a capital stock of $25,000, to engage in the business, at Little Rock, of abstracting titles to real estate in Pulaski County. A subscription contract was reduced to writing, dated March 28, 1907, whereby the subscribers agreed to take stock for the organization of the corporation, to be known as the "Title Guaranty Company," and stipulated that the subscriptions were conditioned upon their being *bona fide* subscriptions for at least $20,000 to the capital stock. Several persons, including appellee, signed the contract as subscribers; but the subscriptions did not amount to $20,000, the stipulated sum. Appellants owned or controlled certain territory, including Pulaski County, Arkansas, for the use of the Rectigraph, and on April 2, 1907, appellants and appellee entered into the following written contract:

"This indenture, witnesseth, that George Vaughan,

as agent and trustee for the Title Guaranty Company, a corporation to be organized under the laws of Arkansas, for the purpose of doing an abstract business in Pulaski County, Arkansas, this day agrees to and with George R. Belding and J. A. Stallcup, owners of Lease No. 23 of the Rectigraph Company of Oklahoma City, for the use of the Rectigraph for Pulaski County, Arkansas, to pay to said Belding & Stallcup on May 1, 1907, or earlier upon the organization of said corporation the sum of three thousand dollars, for said lease. And the said Belding & Stallcup, in consideration of the said agreement, have this day subscribed for forty shares of stock in the said corporation. Witness our hands in duplicate this 2d day of April, 1907. (Signed) Geo. Vaughan, Geo. R. Belding, J. A. Stallcup."

Upon the execution of this contract appellants signed the subscription contract, whereby they took forty shares of the capital stock of the proposed corporation.

Efforts were continued to procure subscribers, but there was not enough obtained to raise the requisite amount of $20,000; therefore the plan failed and was finally abandoned. The effort was, however, continued during a considerable period of time, and in the meantime there was much correspondence between the parties hereto concerning the matter. The manufacturers of the machine sent one to Little Rock, where it was set up and demonstrated by their agent, sent for that purpose, and it remained here in possession of appellee. After the abandonment of all effort to organize the new corporation there was an effort made to dispose of the machine, or, rather, the lease thereof, to another corporation engaged in the business of abstracting titles, and considerable correspondence took place between the parties hereto with respect to that, but nothing came of it, and appellants demanded payment of appellee, which being refused this action was instituted.

It is insisted that the written contract amounts to a personal obligation on the part of appellee to pay to appellants the sum of money named on a certain date,

"or earlier upon the organization of said corporation," and that parol evidence is inadmissible to vary or contradict the terms of the written instrument by showing that it was not intended as a personal obligation of appellee.

Our conclusion is that the two instruments hereinbefore referred to, that is to say, the written subscription list and the contract for the lease of the Rectigraph, were executed contemporaneously so far as the parties to this controversy are concerned, and should be considered together in interpreting the meaning of the contract sued on. No rule of evidence is violated in considering the two together in determining the true intention of the parties. *Vaugine* v. *Taylor,* 18 Ark. 65; *Railway Co.* v. *Beidler,* 45 Ark. 17; *Ford Hardwood Lumber Co.* v. *Clement,* 97 Ark. 522. When thus considered, it is manifest that this contract was not intended as a personal obligation, unconditional, of appellee Vaughan, but rested upon the condition that the proposed corporation should be organized.

Appellants invoke the familiar rules that one becomes personally liable who acts as agent for an undisclosed principal, or who assumes to act for a principal who does not exist; but neither of those rules are applicable to the facts of the case, for appellee did not act for an undisclosed principal, nor did he assume to act for a principal who did not exist. His undertaking was to act for the principal (the proposed corporation) when it came into existence, and not before. Therefore, he is not liable personally. *Hersey* v. *Tully,* 8 Colorado Appeals, 110, 44 Pac. 854.

If the corporation had, in fact, been organized pursuant to the terms of the subscription contract, then the obligation of appellee would have been complete, for he undertook to pay as the agent of the corporation when organized, and if, upon the occurrence of that event, authority from the corporation should have been withheld, then his personal obligation and liability would have attached, for his undertaking was, as before stated,

to pay, as agent of the corporation, as soon as it was organized. That would have constituted a case of one who had impliedly contracted that he had authority, in the contingency named, to act for the corporation, and the obligation would have rested on him to make good the contract if the actual authority should be withheld.

It is also argued that appellee is liable as a promoter of the proposed corporation who induced a third party to extend credit, and is personally liable.

The rule upon which liability in that case rests is, however, limited to dealings with strangers who act in expectation of payment from the prospective corporation. 2 Cook on Stock, Stockholders, etc., § 705.

The rule does not apply in this case for the reason that appellants became equally interested with appellee in the promotion of the affairs of the proposed corporation, and there is no reason why either one should be liable to the other except under the strict letter of the contract. If appellee had induced appellants to accept an unconditional obligation of the proposed corporation, then there would be reason for holding him personally liable as a promoter of the corporation; but that is not the case here, for, as before stated, the parties were jointly interested in the enterprise, and by the terms of the contract itself the obligation to pay was based on the condition that the corporation should thereafter be organized. The rule with reference to liability on that score is stated by the author of a recent textbook as follows:

"Promoters are merely persons who, for purposes of their own, bring about the formation of the corporation. In assuming to make contracts in its name or behalf before it comes into existence, they do not stand in the relation of agency, and they represent only themselves, inasmuch as a nonexisting body can not have agents." Alger on the Law of Promoters and Promotion of Corporations, p. 199.

Stress is laid upon the language of the contract stating the promise to pay on a definite date "or upon the

organization of the corporation" as characterizing the obligation as an absolute one to pay on the date named, whether the organization be completed or not. Authorities are cited in suits based upon promissory notes where similar obligations are construed to amount to an absolute one to pay on the date named, or earlier upon the happening of a certain contingency. Ordinarily that is the proper interpretation of a written obligation for the payment of money; but when this contract is read as a whole and in the light of the attending circumstances, it is manifest, as we have already shown, that it was not intended as an absolute and unconditional obligation to pay but was merely an obligation to pay upon the organization of the corporation, which the parties to this contract were jointly interested in organizing. After the abandonment of this project there were further negotiations between the parties looking to a sale to another abstract company, but the evidence does not establish any contract or obligation on the part of appellee except the written contract which we have already quoted.

Upon the whole, we are convinced that the trial court properly interpreted the contract between the parties and that the evidence was legally sufficient to sustain the verdict. The judgment is therefore affirmed.

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## DEMPSEY v. STATE.

Opinion delivered April 28, 1913.

1. HUSBAND AND WIFE—ABANDONMENT—SUFFICIENCY OF EVIDENCE.—The evidence is sufficient under the Act of 1909, page 134, to show that a husband has abandoned his wife where it appears that the husband had left his wife in November, 1912, and had visited her only three times between then and February 11, 1913, and that during that time the husband was guilty of improper relations with another woman. (Page 79.)
2. HUSBAND AND WIFE—WILFUL ABANDONMENT AND FAILURE TO PROVIDE FOR FAMILY.—In order to convict a husband of the crime of abandoning his wife and children and failing to provide for their support, under Act of 1909, p. 134, it must be shown that the hus-

band wilfully or negligently failed to provide adequately for them, and a mere failure on account of inability is insufficient. (Page 79.)

3. HUSBAND AND WIFE—MAINTENANCE OF WIFE AND CHILDREN.—Where a husband has abandoned his wife and minor children, a total provision of $35 made to them for three months, is a failure to provide for the wife and children under Act of 1909, p. 134. (Page 79.)

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

*Geo. M. Chapline,* for appellant.

1. At common law, it is not a criminal offense to leave a wife without the means of support. 15 A. & E. 814; 45 Ark. 158.

2. Under our statute to constitute a criminal offense with desertion or abandonment must be coupled a failure to support. 156 Ill. 241; 80 Ala. 45; Acts 1909, p. 134.

3. There must be abandonment and failure to support. 5 Mich. 80; 21 Cyc. 1611.

4. Infidelity in itself is not sufficient to constitute abandonment. 41 Cyc. 1612. The verdict is contrary to the evidence.

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

The statute is constitutional and the evidence is ample to sustain the verdict. Acts 1909, p. 134; 96 Ark. 134.

McCULLOCH, C. J. The defendant, Will Dempsey, was indicted and convicted under the following statute:

"If any man shall, without good cause, abandon or desert his wife, or abandon his child or children under the age of twelve years, born in or legitimatized by lawful wedlock, and shall fail, neglect or refuse to maintain or provide for such wife, child or children, he shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by a fine not less than fifty nor more than one thousand dollars, or by both such fine and imprisonment." Acts of 1909, page 134.

In the case of *Green* v. *State,* 96 Ark. 175, we held that the statute is a valid one.

It is insisted that the testimony was not sufficient to sustain the verdict. The defendant and his wife lived in Lonoke County, having children under the age named in the statute, and while living there it is claimed the defendant deserted his family and neglected to support them. The principal witness against the defendant was his wife, and in her examination it is clearly manifested that she had, for some reason, concluded to shield him as much as possible, though she had appeared before the grand jury when the indictment was returned.

It appears from the testimony that some time during the summer of the year 1912, defendant began illicit relations with a married woman living in the neighborhood, and that he abandoned his wife on the former's account. The defendant came to Little Rock, and shortly thereafter the woman moved here with her husband, and the improper relations continued between her and the defendant. The indictment was returned by the grand jury on February 11, 1913, and it is proved that from the time defendant left his wife in November up to the date of the indictment, he had returned to his family only three times, two of the visits being each of a few hours' duration. On one of the visits, he had spent the night in Lonoke. They lived in the country prior to the alleged desertion, but about that time a brother of the wife moved the family to the town of Lonoke. Defendant's wife stated that on one of the occasions of his visit in November he came back to stay, but that she told him that he couldn't remain there. She said that she was mad at him at the time, and it is evident from her testimony that what she said to him was provoked by his conduct with the other woman.

Defendant does not deny improper conduct with the other woman, and it is very evident from the testimony that he deserted his wife and was maintaining improper relations with that woman.

The testimony is therefore clearly sufficient to sus-

tain the charge against defendant of deserting his wife and children. This, however, does not constitute an offense under the statute. In order to make out the offense, there must also be failure and neglect or refusal to maintain and provide for the wife and children. This means, of course, a wilful or negligent failure to provide, and not mere failure on account of inability. It does not necessarily mean, however, that there must be a complete failure in that respect, for an abandonment by a man of his wife and children, coupled with a wilful failure or neglect to adequately provide for their wants, would be sufficient to complete the offense. The undisputed testimony in the case shows that the defendant did make some provision for his wife and children, but the jury was warranted in finding that the provision was not adequate for their comfort. The wife testified that from November, 1912, up to the date of this trial, the defendant had provided about $35 for herself and children, and that he gave the children some clothes. Her brother furnished them wood for fuel during the winter.

Where the husband has wilfully deserted his wife and children, it does not satisfy the law merely that he furnished slight and inadequate provision for their welfare and comfort. As before stated, it is incumbent upon him, to the best of his ability, to furnish adequate support for his wife and children, and the failure to do this is what the law seeks to punish.

While the testimony is meager, on account of the evident desire on the part of the wife to shield her erring husband, we are of the opinion that it is sufficient to sustain the charge that the defendant, not only wilfully deserted his wife and children, on account of his *liaison* with another woman, but that he wilfully neglected to provide for their support. The judgment is, therefore, affirmed.

RHODES v. DRIVER.

Opinion delivered April 28, 1913.

ADMINISTRATION—PAYMENT OF CLAIM BARRED BY STATUTE OF NONCLAIM. —Where an administrator pays a note due by the deceased to one D., which is barred by the statute of nonclaim, and the debt is a just one, and the administrator's act was approved by the probate court, the administrator and heirs of the deceased can not recover the amount paid in an action against D. *Semble*, the widow and heirs can not recover the amount from the administrator so paid to D. when the settlement of the administrator has been approved by the probate court.

Appeal from Mississippi Chancery Court, Osceola District; *Chas. D. Frierson*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellant, J. W. Rhodes, the administrator of the estate of J. P. Keiser, deceased, and his widow, and minor heirs by their guardian brought this suit against the executor of the estate of J. D. Driver, deceased, and his heirs for the recovery of money alleged to have been wrongfully paid by the administrator of the estate of Keiser to the executor of the estate of Driver.

The complaint alleges that John P. Keiser died intestate on the 17th day of October, 1907; that J. W. Rhodes was duly appointed his administrator in October that year; that on the 22d day of February, 1906, his intestate, Keiser, executed and delivered to J. D. Driver his promissory note for nine thousand dollars, due five years from date with interest, and secured same by his trust deed on certain lands; that the executors and devisees of Driver's estate failed to authenticate and properly present said note as a claim against the estate of Keiser to Rhodes, his administrator, and that said note was "never duly verified and established according to law" by said defendant and presented to said administrator within one year from the date of granting of letters of administration to him, but that said defendants did, on the 4th day of March, 1911, duly present a copy of said note duly verified as required by law to him as said administrator, and that the said J. W. Rhodes, as

such administrator, on the said 4th day of March, 1911, duly allowed said note.

It is alleged further, that the administrator of the Keiser estate and the defendants in this suit both believed that as Keiser's note was not due at the time of Keiser's death, that it was not necessary to present the same as a claim against the estate within the one year's time allowed by statute; and that the appellant, J. W. Rhodes, as administrator of the estate, deeming it his duty to pay said note, did pay it out of the funds of the estate on hand upon the following dates, and in the following amounts, towit:

| | |
|---|---|
| Jan. 8, 1909, one year's interest | $ 630.00 |
| May 24, 1909, one year's interest | 630.00 |
| Jan. 1, 1910, interest | 540.75 |
| Jan. 20, 1911, one year's interest | 630.00 |
| Jan. 20, 1911, principal | 2,000.00 |
| May 22, 1911, principal | 2,000.00 |
| July 13, 1911, principal | 2,000.00 |
| Nov. 13, 1911, principal | 3,000.00 |
| Nov. 13, 1911, interest | 330.77 |
| Total | $11,761.52 |

as principal and interest due upon said note. They allege that Rhodes, as administrator, had no authority under law to pay the said sum or any part of it out of the funds belonging to the estate; that the said fund in his hands was a trust fund; that all the debts probated against the estate had been paid and the balance of the estate, including said sum so paid to the executors of the Driver estate, was the property of the other plaintiffs, Susie C. Keiser, the widow, and Elizabeth Keiser and John P. Keiser, Jr., the minor children and only heirs, and, that they are entitled to recover said sum. It is further alleged that at a regular day of the probate court for the years 1910, 1911 and 1912, and, at the January term thereof, during each of said years, the said Rhodes, administrator, filed his annual settlement, in which he showed and alleged the payment of the sums as above

set out to the executors of the estate of J. D. Driver, and that each of the accounts were "by the probate court approved and became judgments of said court." "That the payment of said claims by the administrator," and including same in his settlement to the court was a violation of the rights of these plaintiffs, and in fraud thereof and in approving said accounts so filed, which were illegally paid; the probate court was either ignorant of the facts or the law, and that said judgments were procured by fraud and were in violation of or in fraud of the rights of these plaintiffs, who were not parties to said proceedings; and that said claims were not lawful debts. The said claims which could be paid by the administrator and the approval of said claims by the court was fraudulent, and in fraud of the rights of the plaintiffs who were not parties to the proceeding.

The prayer was, that the orders of the probate court approving and confirming the settlements of the administrator showing the said payments of the amount to the executors of the Driver estate be cancelled and set aside as in fraud of the rights of plaintiffs, and that they have judgment against the executors of J. D. Driver for the entire sum paid out on said note as principal and interest; and also asked a restraining order preventing the distribution of the fund by the Driver executors pending the suit. A general demurrer was interposed to the complaint, and by the court sustained; and the decree recited that the payments made by the administrator of the Keiser estate to the executor of the Driver estate was in satisfaction of a just debt which was secured by a trust deed executed by the said John P. Keiser, deceased, but which debt was barred by the statute of nonclaims. Upon due consideration of the demurrer, the court found that the complaint of the plaintiff was without equity and dismissed it. From this judgment the appeal is prosecuted.

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

1. Claims against an estate not presented to the administrator, properly verified, within one year from the

grant of letters, are barred; and this is true even though there is a will in which the executor is directed to pay all just debts. Acts 1907, p. 1170; 97 Ark. 546-549. It is true of all debts capable of being asserted in a court of justice, whether matured or not at the time of the death of the testator or intestate. 14 Ark. 253; 18 Ark. 334; 45 Ark. 299; 23 Ark. 604.

2. Under the law, the administrator was bound to plead the statute of nonclaim. 23 Ark. 291-302; 40 Ark. 75; 45 Ark. 495. Payment of a claim by an administrator after it was barred by the statute of nonclaims, is a conversion of a trust fund, and can be followed and recovered. 39 Ark. 577, 579.

Here the fund was a simple trust fund in his hands. One-third of the fund belonged to the widow under her right of dower. Kirby's Dig., § 2708; 5 Ark. 608, 614; 52 Ark. 1.

3. The beneficiaries of the trust fund are entitled to their day in court. 95 Ark. 180; 89 Ark. 553; 68 Ark. 494.

Payments made by the administrator under a mistake of fact superinduced by a mistake of law can be recovered. 13 Ark. 133-135; *Id.* 142; 49 Ark. 24, 34; 24 Ark. 366, 370; 1 Beach, Modern Equity, § § 35, 37, 38, 39, 40, 41, 42; 2 Pomeroy, Eq. Jur., § 841; *Id.* § § 849, 850; 55 Am. St. Rep. (Miss.) 488, and note at p. 503; 10 Am. Dec. 325, note; 23 Am. Dec. 155; Eaton, Eq. 259, 263; Lawson on Contracts, § 210; Clark on Contracts (2 ed.), 206; 50 Am. Dec. (Ga.) 375; 30 Cyc. 1315, 1316; 3 Pomeroy, Eq. Jur., § 1047, § 1048, and note "C;" 83 Ark. 275; 73 Ark. 324; 99 Ark. 553; 45 Ark. 549; 2 How. 619.

4. The showing made is sufficient to authorize relief in equity. 36 Ark. 383, 390, 391; 45 Ark. 505, 518; 34 Ark. 117; 60 S. C. 322; 95 S. W. 679; 28 Tex. 733; 18 Tex. 75; 33 Ark. 575, 581; 2 Pomeroy, Equitable Remedies (6 Eq. Jur.), § § 847-850; *Id.* § 843; *Id.* § § 872, 873, 880, and note; *Id.* § § 885, 887, and note, 889, 892.

*J. T. Coston*, for appellees.

1. Since 1911, it is no longer necessary to probate a claim secured by mortgage. Castle's Supp., § 5399A.

2. The maxim, "He who seeks equity must do equity," presents an impassable barrier to the relief sought in this case. 1 Pomeroy, § § 385, 391; 17 Pac. 227; 126 Fed. 51; 23 S. W. 464; 43 N. E. 599; 10 Peters 613; 13 S. W. 298; 26 Atl. 104; 55 N. W. 1067, 1068; 86 Fed. 998; 26 Pa. 205.

3. The widow and heirs had a complete remedy at law, and a resort to equity was unnecessary. 55 Ark. 55; 27 Ark. 97; *Id.* 157; 48 Ark. 331; 26 Ark. 649; 13 Ark. 630; 7 Ark. 520. In the absence of appeal, the judgment of approval is conclusive.

4. A court of equity will not vacate an administrator's settlement on account of the allowance of claims barred by the statute of limitations or the statute of nonclaim, but, in order to overturn such a judgment in chancery it must be shown that there was fraud, not only in the original cause of action upon which the probate court judgment was based, but, also, that its judgment allowing the claim was obtained by fraud. 104 S. W. 548; 51 Ark. 409; 50 Ark. 228; 48 Ark. 390; 112 S. W. 380.

A court of chancery will not overhaul a judgment at law for errors. Van Vleet's Collateral Attack, § 724; 2 Black on Judgments, § 514.

KIRBY, J., (after stating the facts). It is insisted for appellants that since the administrator of the Keiser estate paid a note to the executor of the Driver estate, which had not been presented for allowance and classification against the Keiser estate within the one year allowed by statute to present such claims, that its payment was wrongful and a diversion of the trust fund in the hands of said administrator, and on that account that appellants were entitled to recover the sum so wrongfully paid from the executors and distributees of the Driver estate. The statute provides, "that all demands not exhibited to the executor or administrator" of an estate, as required by its provision, "before the end of one year from the granting of letters shall be forever barred." Act 438, approved May 28, 1907. This act only changed the law relative to the time when claims should

be presented against estates, shortening it, and did not dispense with the necessity for proper authentication of claims. *Kaufman Bros.* v. *Redwine,* 134 S. W. (Ark.), p. 1193.

The allegations of the complaint are sufficient to show that the note of Keiser made to Driver was not authenticated and presented to the administrator of Keiser's estate for allowance and classification within the one year allowed by statute from the granting of the letters of administration. And, it further alleged that on the 4th day of March, 1911, that the claim was duly presented and allowed as of that date. The allegations show that the interest was paid upon the note beginning January 8, 1909, and that besides other payments of interest, two thousand dollars of the principal was paid thereon on January 20, 1911, before the date of the allowance of the claim as alleged. These payments of interest and principal before the allowance of said claim at the date alleged as well as all those thereafter made were duly reported to the probate court by the administrator, and credit claimed therefor in his settlements, and all of said settlements were by said court duly approved and confirmed.

The administrator is chargeable with and liable to the payment of all assets coming into his hands, and he is the proper party to represent the estate in the matter of demands against it and to contest them if they are not proper claims, and should not be allowed. *Hall* v. *Rutherford,* 89 Ark. 553.

In the authentication of claims for presentation and allowance by an administrator of an estate, the law requires an affidavit of the justness of the demand in which it must be stated that nothing has been paid or delivered toward the satisfaction of the demand, except what is credited thereon, and that the sum demanded, naming it, is justly due; and if the executor or administrator shall be satisfied that the claim exhibited against the estate is just, he shall endorse thereon his approval of and allowance of same and the time it was exhibited. He is also

required to keep a list of such demands and class the same and make return thereof to the probate court. Kirby's Digest, § § 114, 121 and 122.

Our court, although it has said that an administrator should plead the statute of limitations in bar of a claim presented against the estate for allowance, it has nevertheless held that an administrator's settlement, claiming credit for payment of such a claim which could have been defeated by a plea of the statute of limitation, after its confirmation, will not be set aside by a court of chancery for fraud on that account. *Williams* v. *Risor,* 104 S. W. (Ark.) 548; *Dyer* v. *Jacoway,* 50 Ark. 228; *Conway* v. *Reyburn,* 22 Ark. 290. The administrator, of course, pays such a claim at his peril, for, if he be not allowed credit therefor by the probate court upon his settlement, he necessarily stands charged with the amount so paid, and he and his sureties remain liable therefor to those interested in the distribution of the estate.

It is doubtless also true that he should plead the statute of nonclaim against the allowance of all claims not presented within the time required under its provision, since it is the policy of the law to close up the administration of estates without too long delay, still, such statute does not militate against the justness of the demand.

In the instant case, it is not claimed that the note paid by the administrator to the executor of Driver's estate was not a just debt of the deceased, Keiser, nor that any part thereof had been paid; nor that the whole amount was not justly due; nor was any reason alleged for the recovery of the amount so paid but the technical one, that the administrator could have defeated its payment by a plea of the statute of nonclaim, and having failed to do so, that the executors and legatees of the estate of Driver became liable for the repayment of the money so alleged wrongfully to have been paid. It can not be said that Driver's executor received payment of a claim that was not a just one, and upon the principle that he who seeks equity must do equity, it would be in-

equitable and unjust to permit appellants to recover the money so paid to the executor of the Driver estate.

If the widow and heirs are entitled to recover the money at all, they must look to the administrator, whose duty it was to protect the estate against unjust and illegal claims, and the sureties upon his bond, for any moneys wrongfully paid out by him. And upon a proceeding against the administrator and his sureties, they will necessarily be confronted with his settlements, claiming credit for the money so paid, duly confirmed and approved by the probate court which thereby became binding upon all persons interested in the estate, and are judgments, and as such conclusive of all matters embraced in the settlements, and of all matters belonging to and within the scope of such proceedings. *Beckett* v. *Whittington,* 92 Ark. 235, 122 S. W. (Ark.) 534. Such judgments can not be set aside for fraud even if this were a proper proceeding for that purpose, the allegations of the complaint being insufficient under the authority of the following cases. *Floyd* v. *Newton,* 97 Ark. 464; *Bell* v. *Altheimer,* 99 Ark. 537; *McLeod* v. *Griffis,* 51 Ark. 1; *Mock* v. *Pleasants,* 34 Ark. 72; *Williams* v. *Risor,* 104 S. W. (Ark.) 548; *Dyer* v. *Jacoway,* 50 Ark. 228; *Conway* v. *Reyburn,* 22 Ark. 290.

It follows that the decree is right, and it is affirmed.

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## RICHARDS v. STATE.

Opinion delivered April 28, 1913.

1. CRIMINAL LAW—DELIBERATIONS OF GRAND JURY—STENOGRAPHER PRESENT.—It is not error for the trial judge to refuse to quash an indictment under section 2211 of Kirby's Digest, on the ground that the stenographer of the prosecuting attorney was in the room while the grand jury was examining witnesses, when it appears that the stenographer mereely took notes in shorthand for the prosecuting attorney, and was not in the room when the grand jury was either deliberating or voting on the charge. (Page 89.)

2. FORMER CONVICTION—BURDEN OF PROOF.—Where a defendant interposes a plea of former conviction as a bar to a prosecution, the burden is upon him to show that the offense charged in the indictment was the same as that for which he was previously convicted. (Page 90.)

3. FORMER CONVICTION—WHEN NO DEFENSE.—A plea of former conviction to an indictment will not be held good when the circumstances attending the former conviction, which was before a justice of the peace, show collusion and an intent to elude prosecution by the State. (Page 91.)

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

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

1. The motion to quash the indictment should have been sustained. The law does not authorize the presence of any person in the grand jury room besides the jurors themselves, the prosecuting attorney and the witness. Kirby's Dig., § 2211.

2. The plea of former conviction should have been sustained. Instruction 4 was erroneous, because there was no evidence of collusion, and it is elementary that one has the right to plead guilty to an offense to avoid prosecution. 43 Ark. 68; 72 Ark. 419.

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

1. Under the evidence adduced, the motion to quash was properly overruled. 62 Ark. 516, 535. The presumption of regularity of proceedings of the grand jury will stand until overcome by proof, the burden of which is on the defendant. 96 Ark. 628.

2. The plea of former conviction is not sustained by the evidence. Instruction 4 is correct. 96 Ark. 203, 205; 32 Ark. 726; 70 Ark. 74.

KIRBY, J. This appeal comes from a judgment of conviction upon an indictment for gaming. Appellant moved to quash the indictment because of the presence of a stranger in the grand jury room during the examination of the charge against him and plead former conviction on the trial. The testimony shows that Arthur Dun-

naway was employed by the prosecuting attorney of the district as a stenographer, and was present to take down the testimony of the witnesses before the grand jury, and report it to him, and instructed that he should not be present while the grand jury was deliberating or voting upon any charge. The statute provides that no person except the prosecuting attorney and the witnesses under examination are permitted to be present while the grand jury are examining a charge and no person whatever shall be present while the grand jury are deliberating or voting upon a change. Section 2211, Kirby's Digest.

The testimony shows that Dunnaway was present in the grand jury room in the employ and under the direction of the prosecuting attorney, and took in shorthand, the testimony of the prosecuting witness, who stated that he saw the young man in the grand jury room, but that he did not hear him say anything or see him do anything but make notes of the testimony as a stenographer would do. He was not the deputy of the prosecuting attorney, but was present under his direction and acting for him, taking the entire testimony of the witnesses that the prosecuting attorney might be fully advised of the proof upon the charge. It is not contended that he was present when the grand jury were deliberating or voting on the charge, nor does it appear that anything was said or done by him calculated to in any way influence the grand jury.

If it is desirable that the testimony of witnesses before the grand jury be taken in shorthand and reported in full to the prosecuting attorney in order to further the ends of justice, it would be better be done by a stenographer authorized by law to take such testimony and acting under the sanctity of an oath not to disclose any of the secrets thereof, still, we do not think, under the circumstances of this case, that the court erred in overruling the motion to quash the indictment because of his presence in the grand jury room during the examination of witnesses in the capacity in which he was acting, it not appearing that he was present while the grand jury was

deliberating or voting on the charge. *Bennett* v. *State,* 62 Ark. 535; *Wilfong* v. *State,* 96 Ark. 628.

It is next contended that the plea of former conviction should have been sustained. The indictment was returned on the 23d day of January, 1913, and charged the appellant with the offense committed as of about June 1, 1912. The plea of former conviction states that he was on the 15th day of December, 1912, convicted of the same offense before a justice of the peace, who had jurisdiction, and fined the sum of $10; a certified copy of the judgment of conviction being attached to the plea which further recited, "that on the same day he entered pleas of guilty for gaming eleven other times before said justice of the peace, and that the cases thereby made are now pending before him." The testimony shows that appellant went to the justice of the peace and plead guilty, and paid the constable a fine of $10, that he was under the impression that he plead guilty for gaming twelve times, and said to the justice, "You fine us in the case in which you think we are guilty; we are not guilty in all of these, but will leave it up to you." He stated further that he had understood that a certain man in the town was not friendly to him and would report him to the grand jury, and he went to the gentlemen that were implicated with him and said to them, the best thing for us to do is to plead guilty and settle this, and went to Mr. Gilbert, the justice, and told him he wanted to plead guilty to gaming.

The justice testified that the defendant entered a plea of gaming more than one game, and he told him he would let him off for one fine this time, but if he was before him again he would fine him for every offense, and would make it stick, too; that he had just been appointed justice of the peace, and did not have books for records, and did not enter the other pleas of guilty on the docket because he did not think there was room for them; that he had other cases pending and needed the space to enter up the judgments therein. No session of the court was held, no affidavits were filed, neither the appellant nor

his witnesses were sworn. The justice said further that the appellant entered the pleas of guilty to escape the grand jury indictment. There is only shown to have been one plea of guilty and conviction thereon, and it was evidently made with the intention of avoiding or escaping indictment by the grand jury for a similar charge, and it does not appear that this conviction was even regular. *Bradley* v. *State,* 32 Ark. 726.

The jury could well have found that the prosecution before the justice of the peace, if it can be called such, was under circumstances showing collusion and an intent to elude a prosecution by the State, and such a prosecution would be no bar to an indictment for the same offense, neither did the court err in giving instruction No. 4, relative thereto, said instruction being a copy of one approved in *State* v. *Caldwell,* 70 Ark. 74. The facts in this case are unlike the cases of *State* v. *Nunnelly,* 43 Ark. 68, and *Bryant* v. *State,* 72 Ark. 419, relied upon by appellant. In each of those cases, the defendant was charged with but one offense, and evidence relating to several different acts of like kind during the time for which he could have been convicted of such offense was introduced and no election made by the prosecuting attorney, and all the offenses having been before the jury, he could have been convicted of either upon the testimony, and a former conviction is a bar to all subsequent indictments for an offense of which the defendant might have been convicted under the charge and testimony in the first case.

Having interposed a plea of former conviction as a bar to the prosecution, the burden of proof was upon appellant to show that the offense charged in the indictment was the same as that for which he had been previously convicted, and this the jury found he failed to do. *Jacobs* v. *State,* 100 Ark. 595.

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

## WESTERN UNION TELEGRAPH COMPANY v. TURLEY.

Opinion delivered May 5, 1913.

1. TELEGRAPH COMPANIES—RIGHT TO ADOPT RULES.—A telegraph company has a right to prescribe reasonable hours for receiving, sending and delivering messages, and when the company has a rule that messages will be received and delivered only between 8 a. m. and 6 p. m., the telegraph company will not be liable for failure to deliver to plaintiff that night a message received at 6:30 p. m. (Page 94.)

2. TELEGRAPH COMPANIES—CONFLICT OF LAWS—NEGLIGENCE—RIGHT OF ACTION.—When A in Mississippi contracted with defendant telegraph company to deliver a death message to B in Arkansas, and brought an action against the company in Arkansas for failure of its agent in Mississippi to notify A that the message would not be delivered to B until next morning on account of the office being closed, and no recovery is allowed in Mississippi for damages for mental anguish, there can be no recovery for the same in Arkansas. (Page 95.)

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

*Geo. H. Fearons, W. J. Lanier* and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. The company had the right to prescribe reasonable hours for receiving, sending and delivering messages. The message was received after hours, but was delivered early next morning. 32 S. E. 1026; 66 S. W. 592; 62 *Id.* 136; 47 Atl. 881; 51 S. E. 119; 91 Ark. 604; 47 Atl. 881.

2. Damages for mental anguish are not recoverable under the laws of Mississippi. 69 Miss. 248; 82 *Id.* 101; 93 *Id.* 500; 94 Ark. 86; 93 *Id.* 415; 92 *Id.* 219.

3. No notice was given the company of special circumstances, or special affection between the parties. 34 S. W. 649; 79 S. C. 259; 97 Tex. 22; 30 S. W. 298; 80 Ark. 554; 92 *Id.* 219.

*John Gatling, S. H. Mann* and *J. W. Morrow,* for appellee.

1. The negligence complained of occurred in Arkansas. The message gave notice of the relationship of

parties, and that mental anguish would result from failure to deliver. 80 Ark. 554; 87 *Id.* 303; 99 *Id.* 117; 94 *Id.* 86; 93 *Id.* 415; 92 *Id.* 219; 77 *Id.* 531; 99 *Id.* 117; 87 *Id.* 303.

2. Upon proof that the telegram had been received for transmission, charges being paid, and the telegram was not delivered within a reasonable time, a *prima facie* case was established and the burden was on appellant to exonerate itself. 100 Ark. 296.

3. Defendant was guilty of negligence. 92 Ark. 230; 77 *Id.* 531; 99 *Id.* 117; 100 *Id.* 296; 102 Ark. 607. No effort was made to deliver the message. 91 Ark. 602; 37 Cyc. 1713-14.

McCULLOCH, C. J. Separate actions were instituted in the circuit court of St. Francis County against appellant, Western Union Telegraph Company, by the sender and the addressee, respectively, of a message, to recover damages for mental anguish sustained by reason of negligence of the company in failing to transmit and deliver the message with diligence. The message was sent from Byhalia, Mississippi, to Forrest City, Arkansas, by one of the appellees, acquainting the other, who was his brother, of the death of their mother at Byhalia. The message was sent promptly from Byhalia, and was received at 6:30 o'clock P. M. at Forrest City, but was not delivered to the addressee until 8:15 o'clock the next morning. According to the undisputed testimony, the office hours of appellant for the receipt and delivery of messages were from 8 A. M. to 6 P. M. The telegraph office was kept open at night for railroad business, and what is termed commercial telegrams were sometimes received during the night for convenience, but were held for delivery until the office was opened the next morning. No messenger for the delivery of telegrams was kept in attendance during the night. The addressee lived in the town of Forrest City, and had a telephone in his residence.

The cases were tried separately and resulted in separate verdicts for the appellees.

Both cases are controlled by the same questions of law and will be disposed of in one opinion.

The court correctly instructed the jury that the company had the right to prescribe reasonable hours for receiving, sending and delivering messages, and that there could be no recovery for delay in delivering messages during the night. All question of negligence after the message was received at Forrest City was properly eliminated from the case. *Western Union Telegraph Co.* v. *Harris,* 91 Ark. 602.

The night operator at Forrest City, whose duty it was to receive messages, could have delivered the message to the addressee by telephone, and if there was any legal duty devolving upon him to make delivery during the night, the jury would have been warranted in finding that there was negligence. But the company had the right to prescribe rules for office hours, and to withhold the imposition of any duty upon the part of its employees to deliver messages during the hours of the night, and under those circumstances the company can not be held liable for failure of the night operator to deliver the message during the hours prescribed for closing the office. The failure of the operator to deliver the death message, which he could have conveniently done by telephone, was, under the circumstances, inexcusable, viewing his acts from the standpoint of moral duty to his fellow man; but the delivery of the message during the hours of the night did not fall within the line of his duty prescribed by his employer, and as the latter had the right to prescribe reasonable hours, it is not responsible for the failure of its servant to make the delivery. Any other conclusion on that point would nullify the right of the company to prescribe the hours for receiving and delivering messages.

There is some testimony tending to show that the sender of the message was misled by the operator at Byhalia into believing that the message had been promptly sent and would be delivered immediately to the addressee at Forrest City; and it is suggested that this

brings the case within the rule announced in *Western Union Telegraph Co.* v. *Harris, supra,* where we held that a telegraph company was liable for negligent failure of the sending operator to inform the sender of necessary delay on account of the delivering office being closed, thus preventing the sender from adopting other means of communication with the addressee. If there was any negligence in that respect it occurred in the State of Mississippi, where the contract was entered into, and in that State, mental anguish on account of nondelivery of a telegram is not an element of recoverable damages. *Western Union Telegraph Co.* v. *Griffin,* 92 Ark. 219; *Western Union Telegraph Co.* v. *Crenshaw,* 93 Ark. 415; *Western Union Telegraph Co.* v. *See,* 94 Ark. 86.

The rule established by those cases is, that damages may be recovered on account of mental anguish where the contract for transmission of an interstate message was made in this State, or where the act of negligence occurred in this State, even though there could be no recovery in the State to or from which the message was sent. But, conversely, there can be no recovery on account of negligence in the transmission of such a message unless the contract was made in this State, or the act of negligence occurred here.

There are other questions urged affecting the liability of the company in each of these cases, but as the questions already discussed are controlling, it is unnecessary to discuss them. According to the undisputed facts in each case, the appellees are not entitled to recover damages. The judgment in each case is therefore reversed and the cause dismissed.

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## LITTLE ROCK RAILWAY & ELECTRIC COMPANY *v.* SLEDGE.

Opinion delivered April 21, 1913.

1. STREET RAILROADS—RIGHT-OF-WAY IN STREETS—STREET CROSSINGS.—A street railway has a right-of-way over public streets traversed by its tracks superior to the rights of the general public to pass along or across such streets, and the relative rights of street railway

companies and pedestrians with reference to the use of that particular portion of the public street covered by the street railway tracks are precisely the same at street crossings as elsewhere. *Hot Springs Street Railway Co.* v. *Johnson,* 64 Ark. 420, approved. (Page 103.)

2. STREET RAILROADS—RIGHTS OF STREET RAILROAD AND PEDESTRIAN AT PUBLIC STREET CROSSING.—It is error to instruct the jury that a pedestrian and a street car have equal rights on the tracks of the latter at a public street crossing, and that whichever reached the crossing first had the superior right to the use of that particular portion of the street. (Page 104.)

3. STREET RAILROADS—DUTY OF PEDESTRIANS AT CROSSINGS TO LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE.—It is the duty of a person about to cross a street railroad track to look and listen for approaching cars, at the time and place that will be reasonably effective to afford him information of the presence of an approaching car, and if he crosses heedlessly and is injured, he is guilty of contributory negligence precluding a recovery, notwithstanding negligence on the part of the company, unless the company wilfully or wantonly inflicts the injury, or fails to exercise ordinary care to avoid injuring him after discovering his peril. (Page 108.)

4. STREET RAILROADS—DUTY OF PEDESTRIAN TO STOP, LOOK AND LISTEN AT CROSSING.—A pedestrian is not required to stop, look and listen at a street railroad crossing except, as where the view is temporarily obstructed, the circumstances are such as to require stopping in order to properly look and listen. (Page 108.)

5. CONTRIBUTORY NEGLIGENCE—DECLARED AS A MATTER OF LAW, WHEN.—In an action for damages against a street railroad company for personal injuries, contributory negligence should be declared as a matter of law, when the evidence is undisputed, and men of ordinary intelligence could draw but one conclusion from it; but if the evidence is conflicting, or if from the undisputed evidence men of ordinary intelligence might reach different conclusions, then the issue of contributory negligence must be submitted to the jury. (Page 110.)

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

STATEMENT BY THE COURT.

On the night of April 12, 1910, appellee was walking along the west side of Center Street, to cross Fifth Street, in the city of Little Rock. After he had crossed the sidewalk and gone a part of the way into the street, he saw a wagon coming from the west. He stopped, and when

he saw that he could go ahead of it, proceeded to cross the north street car track running west on Fifth Street, and the wagon passed to the north of him. Appellee's attention was drawn to the wagon, and before the wagon left him, an automobile with a bright headlight on it, coming toward him from the west, sounded its gong, and he stepped back and stopped still for the automobile to pass. The automobile was running down the south track, and when appellee stepped back out of the way of the automobile, a street car, coming from the east on the north track, struck him, inflicting severe injuries upon his person.

Appellee's attention was directed to the noise of the automobile. He was watching the automobile after the wagon passed him. He didn't see the automobile until the wagon had passed him, and didn't see the street car until the instant he was struck. If he had seen the car he would have got out of the way. He didn't hear the car that struck him; it struck him before he saw it. "As he was going down he looked up and saw that it was a street car that struck him." The car had the usual lights inside and a headlight. The automobile also carried a bright headlight.

Appellee, before starting across the street, had just come from a bar room where he had taken "a sup of beer" with a friend, and was going home. He didn't look for cars, wagons or automobiles before leaving the sidewalk and until he had got into the street. He was proceeding rapidly across the street, and plunged into the dangerous situation, as shown by the approaching vehicles and cars, and from which situation he was unable to extricate himself, and received the injury of which he complains.

He alleged that his injuries were caused through the negligence of appellant's motorman in running its cars "at a high rate of speed without sounding the gong."

The appellant denied the allegations of the complaint, and set up the defense of contributory negligence.

In addition to the above facts, shown by the testi-

mony of the appellee himself, a witness in his behalf testified that he saw the plaintiff as he crossed the street, and that there was a wagon and an automobile moving toward Main Street and a street car going west on Fifth Street. That the plaintiff tried to cross in front of the wagon, and that the automobile made him jump back. At the time plaintiff started to cross the street the street car was east of him a distance of about sixty feet. If the automobile had not stopped plaintiff, and if he had not stepped back, he would have had time to get across the street. Plaintiff was dragged about forty feet after he was struck by the car.

The testimony of the motorman showed that he sounded the gong about fifty or sixty feet from Center Street as his car approached it going west. The motorman "struck his gong a time or two about fifty feet east of Center Street." The only time he rang it "was to kick it about fifty feet east of the east line of Center Street." The headlight on the car was burning all the time. There was no obstruction in the street to prevent him from seeing the man if he had been in the street. He could have seen him approach the track, but didn't see him. "He didn't come out there." The first time he saw the man was just as he ran into the car. The injury occurred about forty feet west of the west line of Center Street, according to the testimony of this witness, and he didn't see any wagon or any automobile coming from the west, going east, at the time or about the place when and where the accident occurred.

The plaintiff introduced an ordinance of the city which provides: "That every street railway company operating its cars in the streets or other public places of the city of Little Rock shall place a suitable bell or gong on each of such cars, and cause the same to be rung or sounded on each car approaching or passing another car or approaching or passing any street crossing or other regular crossing, such ringing or sounding to be commenced at a distance of not less than fifty feet from the

car or crossing approached, and continued until such car or crossing has been passed."

Among other prayers for instructions, granted at the instance of the appellee and over appellant's objections, were the following:

"1. You are instructed that where a street car crosses another street other than that along which it is moving, and a pedestrian is lawfully and in the exercise of due care using such other street for the purpose of crossing the street along which the street car is being operated, the street car and the pedestrian have equal rights to the use of the crossing. That is to say, in this case, if the plaintiff was going south on the west side of Center Street at and on the street crossing, and the street car was going west on Fifth Street, and was crossing Center Street, the one that was on that particular point of Fifth and Center streets which was a part of the street car track, and also that part of Center and Fifth streets, which constituted and was a crossing for a pedestrian travelling south on Center Street on the west side of Center Street, first, had the right to use that particular part of the street for lawful rights and in the exercise of due care to the exclusion of the other."

"3. You are instructed that it is for you to determine whether or not, under the facts and circumstances proved in this case, the plaintiff was, or was not, negligent in not looking to see whether a car was approaching."

The appellant duly excepted to the rulings of the court in granting these prayers.

Appellant, among others, presented the following prayers for instructions, which the court refused:

"1. You are instructed to find for the defendant."

"3. The court instructs you that plaintiff, according to his own testimony, was guilty of contributory negligence in attempting to cross defendant's track in front of an approaching car without looking or listening to see if a car was approaching dangerously near, and because of such negligence he will not be entitled to recover

a judgment in this case, unless you find from the evidence that defendant's motorman discovered his peril, after he got upon the track, in time to have stopped the car and avoided striking him, and yet failed to do so."

"8. The street cars, of necessity, must have, and do have, a right-of-way on their tracks where they alone can travel, and this right is superior to that of pedestrians. This paramount or better right to the use of their tracks does not give them the right to exclude travellers, and these may move along or cross these tracks at any time where such travelling does not interfere with the progress of the cars; where there is conflict, the individual traveller must yield the right-of-way.

"If you find that plaintiff attempted to cross defendant's track without looking or listening, or using other prudent means to protect himself from injury, then he can not recover, unless you further find that defendant discovered plaintiff's peril in time to avoid the accident by the use of ordinary care, yet failed to do so."

The court modified appellant's prayer for instruction No. 8 and gave the same as modified, as follows:

"8. The street cars, of necessity, must have, and do have, a right-of-way on their tracks, where they alone can travel, and this right is superior to that of pedestrians between intersecting streets. This paramount or better right to the use of their tracks between streets does not give them the right to exclude travellers, and these may move along or across their tracks at any time and place where such travelling does not interfere with the progress of the cars; where there is conflict, the individual traveler must yield the right-of-way.

"If you find that plaintiff attempted to cross defendant's tracks between intersecting streets, without looking or listening, or using other prudent means to protect him self from injury, then he can not recover, unless you further find that defendant discovered plaintiff's peril in time to avoid the accident by the use of ordinary care, yet failed to do so."

The appellant duly objected and excepted to the re-

fusal of the court to grant its prayers numbered 1, 3 and 8 as requested, and to the giving of prayer No. 8 as modified.

Other prayers for instructions were given and refused, but the above are sufficient for the purposes of the opinion. The verdict and judgment were in favor of the appellee in the sum of $1,500, and the case is here on appeal.

*Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. The court erred in declaring the law as to the relative rights and duties of the parties upon the highway. The first instruction given did not correctly state the law. 64 Ark. 420; 14 Gray 69; 7 Allen 573; 2 Sh. & Redf. on Negl., § 425a; 2 Nellis on St. Rys., § 387; 33 La. Ann. 154; 42 Atl. 699; 61 Pac. 40; 141 Fed. 599; 133 S. W. 449; 85 N. W. 1036; 42 Pac. 914; 35 *Id.* 920; 98 *Id.* 839; 77 N. W. 238; 65 Pac. 284; 61 S. E. 821; 79 S. W. 243; 63 N. W. 401; 84 S. W. 1154; 95 Pac. 602. The vital question is one of relative negligence, not relative rights. 61 S. E. 822, Syl. 9; 78 Ark. 129.

2. The court erred in its charge with respect to plaintiff's failure to look and listen. 45 N. Y. 191. Failure to look and listen is negligence. 40 So. 829; 42 Pac. 914; 35 *Id.* 920; 53 Atl. 369; 44 N. E. 927; 71 Pac. 265; 39 So. 433; 64 Atl. 254; 70 *Id.* 1050; 63 N. W. 401; 79 S. W. 464; 114 App. Div. 272; 32 Atl. 216; 48 Atl. 470; 58 S. W. 534; 101 N. W. 384; 107 Pac. 966; 52 Atl. 1090; 93 N. W. 489; 61 S. E. 821; 105 Pac. 458.

3. Defendant's peremptory instruction should have been given, as plaintiff was guilty of contributory negligence. 63 N. W. 401; 61 S. E. 821; 26 Atl. 419; 84 N. W. 853; 30 So. 747; 79 S. W. 464; 105 Pac. 460; 79 N. E. 335; 71 N. E. 298; 74 *Id.* 687; 61 N. W. 893; 70 N. E. 1029; 105 Pac. 458; 101 N. W. 384; 61 S. E. 821; 73 N. W. 412, and many others.

*Ben D. Brickhouse* and *Bradshaw, Rhoton & Helm,* for appellee.

1. The court did not err in giving the first instruc-

tion. At crossings, pedestrians and the street car company have equal rights, each using due care. 69 L. R. A. 300; 128 Pac. 460; 60 W. Va. 306; 9 A. & E. Ann. Cases 836; 100 Va. 1; 92 *Id.* 627; 96 N. Y. 487; 89 N. Y. Supp. 99; Thompson on Negl. 1399; Nellis on Street Rys., § 14; 84 S. W. 1154; 95 Pac. 600; 77 N. W. 238; 112 Pac. 90; 7 Thompson, Neg., § 1376; 105 Pac. 458; 78 Ark. 129.

2. It is negligence *per se* for a railway company to violate a valid city ordinance. 9 Am. & E. Ann. Cases 841. As to the exercise of due care and prudence by the company and the pedestrian, and the duty to look and listen, see 84 S. W. 1154; 95 Pac. 600; 85 N. W. 1036; 25 S. E. 273.

3. The motorman's neglect of duty was the proximate cause of the injury. 25 S. E. 273; 63 S. W. 549; 49 N. E. 857; 44 S. W. 1112; 84 *Id.* 170; 84 Fed. 93; 64 Atl. 978; 26 Am. St. 512; 49 S. W. 323.

4. Persons about to cross a street railway track are not required to stop, look and listen, unless there is some circumstance which would make it ordinarily prudent to do so. 147 Ind. 408; 62 Am. St. Rep. 421; 10 Misc. 541; 3 N. Y. Supp. 441; 32 *Id.* 153; 59 Minn. 45; 61 *Id.* 85; 14 Ind. App. 433; 98 Pac. 836; 65 Pac. 284; 97 Cal. 583; 57 Am. St. 726; 32 L. R. A. 276; 3 Elliott on Railroads, § § 1096 ci and cj.

WOOD, J., (after stating the facts). 1. In *Hot Springs St. Ry. Co.* v. *Johnson,* 64 Ark. 420, an instruction was given by the trial court which told the jury that "the rights of persons to pass along, over and across the streets where defendant company's tracks are laid are equal with those of said defendant." This court, passing upon the above declaration of law, said: "The tracks of street railways, including crossings, as well as every other portion of their tracks traversing the public streets of cities and towns, are used by the cars of such companies in common with the traveling public. No one is a trespasser for going upon their tracks. But, while this is true, the traveling public does not have equal rights with the railway company to the use of the tracks

for passing along or crossing over same. 'Equal' is not the word. The street cars, *ex necessitate,* must have, and do have, a right-of-way on their tracks, where they alone can travel, and this right is superior to that of ordinary vehicles and travellers. This paramount or better right to the use of their tracks does not give them the right to exclude travellers, and these may move along or across these tracks at any time and place where such travelling does not interfere with the progress of the cars. Where there is a conflict, the individual traveller must yield the right-of-way. This requirement of the law is to subserve the public convenience and accommodation. As was said by the Supreme Court of Pennsylvania, it would be unreasonable that a car load of passengers should be delayed by the unnecessary obstruction of the street railway track by every passing vehicle, horseman or footman. It is true that the travelling public and the street railway company has equal rights in using the public street. * * * But it is not correct to say that the right of the general public to use that particular portion of the public street covered by the street railway track is equal with that of the street railway company."

The opinion in the above case does not disclose whether the injury to Johnson occurred at a street crossing, but this was wholly immaterial. The relative rights of street railway companies and pedestrians with reference to the use of that particular portion of the public street covered by the street railway tracks are precisely the same at crossings as elswhere.

The doctrine announced in *Railway* v. *Johnson,* above, is the outgrowth of a usage so universal and long continued as to ripen into law. Its object, as stated, is to subserve the public convenience. The reasons for the rule are: First, that street cars can only proceed along their tracks, whereas pedestrians, equestrians and travellers by vehicle may easily use other portions of the street, and may readily stop or change their course. Second, the street cars, on account of their weight, momentum and motive power, can not be so easily stopped or

controlled as travellers by other methods. Third, they are operated to afford the general public rapid transit, which would be greatly impeded unless, in cases of conflict, they have the right-of-way in the use of their tracks.

It is obvious, from all these considerations, that there can be no well grounded distinction between the relative rights of street railway companies and pedestrians and other travellers at crossings and between crossings as to the use, in case of conflict, of that portion of the street covered by the car tracks. Since the public convenience is to be subserved, there is all the more cogent reason for applying the rule announced at crossings, in cities like Little Rock, for at crossings the public travel is more likely to be congested unless the rule is rigidly observed.

The authorities almost unanimously hold that street railway companies have the paramount or preferential right-of-way over other travellers in the use of their tracks between street crossings. But there are adjudicated cases, and standard writers upon street railway law, that declare that street railways do not have the superior right-of-way on their tracks over other travellers at street crossings. Such authorities declare that at crossings neither has a superior right-of-way to the other. They say the car has a right to cross and must cross the street, and a vehicle or pedestrian has the right to cross and must cross the railway track; that their rights in this respect are equal, etc. Booth on Street Railways, § 304; Nellis on Street Railways, § 388; *O'Neal* v. *Dry Dock, E. B. & B. R. Co.,* 129 N. Y. 125, 29 N. E. 84, and other cases cited in note; White in Supplement Thompson on Negligence, volume 7, § 1376; 2 Thompson on Negligence, § 1392; Joyce on Electricity, § 589.

But, while it is true that each has the equal right to cross, it by no means follows, and it can not be true, that each has the equal right to pass over the tracks at the same time where there is a conjunction in their line of travel. Necessarily, one or the other would have to yield,

in case of conflict, or the public travel would be completely blocked.

We believe that the authorities which concede that street railway companies have the preferential right-of-way over their tracks between crossings, but which at the same time deny them this right at crossings, and which loosely declare that the rights-of-way over the railway track are equal at crossings, are all illogical and unsound. They ignore, or fail to discriminate between, the equal right to the use of the street as a public highway and the relative rights of each as to the use of that particular portion of the street occupied by the street car tracks. They overlook entirely the object of the rule of law stated in *Railway* v. *Johnson, supra,* as well as the reasons upon which it is based. The reason generally assigned by them why street railway companies have the preferential right-of-way between crossings is because pedestrians and other travellers may easily stop or turn aside from the railway track, whereas the cars can not do so. But this is only one reason for the preferential right between crossings. In assigning this as a reason, the other reasons, viz.: The difference in motive power, weight and momentum of the car, and the greater difficulty on that account in stopping and starting the same, are overlooked.

In the absence of statute or ordinance prohibiting it, travellers may cross the tracks of street railways anywhere between crossings as well as at the crossings, though at the intersection of streets the crossing by travellers is much more frequent. The reasons given for the preferential right-of-way between crossings all exist as well at crossings, and *a fortiori* the rule should apply there in order that the general public may not be discommoded.

Answering the contention that the rule of preferential right-of-way in favor of the street car does not apply at street crossings, the Supreme Court of Wisconsin, in *Stafford* v. *Chippewa, etc.,* 85 N. W. 1036, 1044, said: "That doctrine has been fully considered and rejected by

this and by most courts. If it were to prevail as a measure of relative rights of a person operating a street car and a traveller upon the street, then each might run a race with the other, and the one that arrived at the crossing first demand as a matter of right that his contestant give way for him to pass. Such a system would greatly interfere with the execution of the public purposes for which street railway franchises are granted." The court concludes the discussion with a clear announcement and strong approval of the doctrine we have stated.

The Superior Court of Delaware, in *Price* v. *Charles Warner Co.,* 42 Atl. 699, 703, holding that the doctrine applies to street crossings, says: "It would certainly be contrary to public policy and in violation of the rights of the railroad company to allow its tracks to be blocked at street crossings by the negligence of drivers of vehicles; but a correct understanding of the rights and duties of both parties will avoid any confusion upon the subject."

A careful consideration and analysis of the modern authorities only convices us that the doctrine as announced in *Railway* v. *Johnson, supra,* is an accurate statement of the law. See, *Denver City Tramway Co.* v. *Norton,* 141 Fed. 599, 604; *Austin Electric Ry. Co.* v. *Faust,* 133 S. W. 449; *Tesch* v. *Milwaukee, etc. Ry.,* 84 N. W. (Wis.) 823, 828; *McCarthy* v. *Consolidated Ry.,* 63 Atl. (Conn.) 725; see also *Nappli* v. *Seattle Ry.,* 112 Pac. 89; *Helber* v. *Spokane St. Ry.,* 61 Pac. 40, 41.

The first paragraph of instruction No. 1, given at appellee's request, was the converse of the doctrine announced in *Railway* v. *Johnson, supra.* And the second paragraph, in which the court undertook to explain the doctrine announced in the first, told the jury that if appellee *reached the crossing first,* he had the right to use that particular part of the street, in the exercise of due care, to the exclusion of the street railway company. Under the instruction, as thus explained, the jury were warranted in finding that if appellee reached the particular

point where the street car crossed the street in the line of his travel *first* he had the right to be there and to use that particular part of the street, if he was careful thereafter, regardless of whether or not he exercised ordinary care in arriving at that point. The law required appellee to exercise ordinary care in approaching the street crossing traversed by the street railway to ascertain whether or not a car was approaching with which he might come in collision if he proceeded in his regular course to cross the street car tracks. He could not cross the street car track at a crossing in front of a car that was approaching in its regular course without keeping his senses open to determine whether he would reach the track in front of the approaching car at the same time that the car would reach it. In other words, he had no right negligently to approach the street railway tracks at a public crossing, and by thus *getting there first,* claim that he had a preferential right-of-way. This follows as a necessary corollary to the doctrine above announced, declaring the superior right-of-way in the street railway company.

If a traveller, approaching a crossing, in the exercise of ordinary care, could see that a collision with an approaching car was inevitable or highly probable unless the motorman stopped the car, then it would be the duty of the traveller, under the above rule, to stop and let the car pass before endeavoring to cross, so as not to delay or impede its passage.

The instruction was misleading and highly prejudicial. Under it, no matter what may have been the negligence of the appellee in arriving at the particular spot where he was injured, if he got there first and exercised due care thereafter to avoid injury, he was entitled to recover, although if he had exercised ordinary care before arriving at the spot the injury would have been avoided.

The first paragraph of the instruction, as explained by the court in the second paragraph, was "in the teeth" of the law giving street railway companies where there is conflict the preferential right-of-way over their tracks at crossings and requiring pedestrians to exercise ordinary care in approaching crossings so as not to place them-

selves upon the street car tracks at the same time that the car moving along the tracks in the regular course would pass.

2. There is quite a contrariety of view among the authorities as to whether a failure to look and listen should be declared contributory negligence in any case as a matter of law, or whether it should be left in all cases as an evidentiary fact to be considered by the jury in passing upon the issue of contributory negligence. The authorities on the subject are collated in volume 3, pages 334-5-6, Am. & Eng. Ann. Cases, in a note to *Birmingham Railway, Light & Power Co.* v. *John S. Oldham* (141 Ala. 195); *Orlando S. Wood* v. *Omaha & Council Bluffs St. Ry. Co.* 22 L. R. A. (N. S.) 228. See also cases in briefs of counsel.

It would be of no practical value to review the cases, and would unnecessarily lengthen this opinion to do so.

The law is correctly stated in 36 Cyc. page 1537, as follows: "As a general rule it is the duty of a person about to cross a street railroad track to look and listen for approaching cars in time to avoid an accident, and, if he sees an approaching car in close proximity, to stop until it passes, although he need not exercise the same high degree of care in this respect as is required in crossing a steam railroad. He must look and listen at the time and place which will be reasonably effective to afford him information of the presence of an approaching car, and ordinarily must look and listen in both directions, and must continue to look and listen until he is safely across, and if he goes along heedlessly * * * and allows his attention to become so absorbed that he gives no heed to his danger by reason whereof he is injured, he is guilty of contributory negligence precluding a recovery, notwithstanding negligence on the part of the company, unless the company wilfully or wantonly inflicts the injury, or fails to exercise ordinary care to avoid injuring him after discovering his peril. But ordinarily a person is not required to stop to look and listen before crossing, except where the circumstances, as where the view is temporarily obstructed, are such as to require

stopping in order to properly look or listen. As a general rule, however, the duty to look and listen is not an absolute duty, and it is not negligence *per se* to fail to look and listen for approaching cars before crossing, but such failure is negligence only when the situation and surrounding circumstances are such that a person of ordinary prudence would have looked and listened."

Joyce, in his work on Electric Law, in section 650, after reviewing many cases on the subject of the duty of travellers crossing electric railway tracks to look and listen, has this to say: "At the beginning of this chapter, we have stated that the courts have not inclined to make the crossing of electric street railways subject to the same strict rules as are applied to crossing railroad tracks. In only two States are decisions to be found which favor a strict application of such rule, and in both of these States these decisions appear to be modified by later ones. In the majority of the States the rule seems to be, that it is the duty of a person about to cross tracks to look and listen and that a failure to do so is contributory negligence."

And he concludes as follows: "Ordinary care would generally require, it would seem, that a person should look both ways, or look and listen before crossing tracks, since we can conceive of but few cases where a reasonably prudent man would not exercise his powers of vision and of hearing before attempting to cross electric railway tracks; and in our opinion the degree of care defined in the different cases as necessary to be exercised varies but little, whether it be ordinary care, reasonable care, such care as a reasonably prudent man would exercise, or the requirement to look both ways, or to look and listen. So we think we are justified in stating the rule that it is the duty of the person about to cross the tracks of an electric street railway to look and listen for approaching cars, and that failure to do so is *prima facie* contributory negligence, not necessarily precluding recovery, but dependent as to its effect upon the circumstances of each

particular case." See also Booth, Street Railways, 311-12.

In determining whether, under the evidence, contributory negligence should be declared as a matter of law, the same rule obtains in cases of this kind, as in all other cases. If the evidence is undisputed, and men of ordinary intelligence could draw but one conclusion from it, then contributory negligence should be declared as a matter of law. But, if there is a conflict in the evidence, or if from the undisputed evidence men of ordinary intelligence might reach different conclusions, then the isue of contributory negligence must be submitted to the jury.

Applying these familiar principles to the facts of this record, a majority of the court are of the opinion that the court properly submitted the issue of contributory negligence to the jury upon instructions free from prejudicial error. The failure upon the part of appellant's motorman to sound his gong, as the ordinance required, in the opinion of the majority was sufficient, in connection with the other facts and circumstances in evidence to send the issue of contributory negligence to the jury, under proper instructions.

While prayer No. 3, granted at the instance of appellee, is not happily framed and can not be approved as a precedent, yet no specific objection was made to it, and in the opinion of the majority, when the prayer is taken in connection with prayers *4 and †7, given at the instance of appellant, there was no prejudicial error in granting it. (The writer, however, is of the opinion that

*4. If you find that plaintiff was guilty of contributory negligence in attempting to cross the track in front of an approaching car, without looking or listening for the car, or using such other means to protect himself from injury, as an ordinarily prudent man would have used under like circumstances, then he can not recover, unless you further find that the motorman became aware of his peril in time to have avoided injuring him by the use of ordinary care, yet failed to use such care.

†7. If you find from the evidence that the plaintiff was guilty of any negligence, which directly contributed to cause his injury, if any, then he can not recover in this action, unless you further find that the defendant became aware of his peril in time to have prevented his accident and failed to do so.

the third instruction furnished no correct guide on contributory negligence, and that appellee was guilty of contributory negligence as a matter of law in not looking and listening for approaching cars before attempting to cross the railway tracks.)

For the error in granting appellee's prayer for instruction No. 1 the judgment is reversed and the cause remanded for a new trial.

McCULLOCH, C. J., (dissenting). I agree, entirely, with the majority in holding that the court did not err in refusing to instruct the jury that the failure on the part of appellee to look and listen before he attempted to cross the street constituted negligence *per se* which barred his right to recover damages, and that the issue of contributory negligence was properly submitted to the jury upon instruction No. 3, which told the jury that it was a question to be determined from all the facts and circumstances proved in the case whether or not appellee was negligent in not looking to see whether a car was approaching.

I think, however, that the opinion, while clearly expressing what the court means to decide on this subject, is unfortunate in containing quotations from authorities which make somewhat ambiguous statements of the law. This is true as to the quotation from the Cyclopedia of Law, and also from Mr. Joyce. The last paragraph of the quotation from the Cyclopedia gives a clear statement of what I understand this court holds to be the law, and it should not be obscured by the other part of the quotation. That statement reads as follows:

"As a general rule, however, the duty to look and listen is not an absolute duty, and it is not negligence *per se* to fail to look and listen for approaching cars before crossing, but such failure is negligence only when the situation and surrounding circumstances are such that a person of ordinary prudence would have looked and listened."

The quotation from Mr. Joyce is in conflict with this and does not state the rule correctly, for a failure to look

and listen does not necessarily make a *prima facie* case of negligence. It is a question for the jury to determine, from all the facts and circumstances in the case, whether the traveller was exercising ordinary care for his safety when he attempted to cross the street.

I think this view is supported by the great weight of authority, and, to my mind, is consonant with sound reason and natural justice. The authorities cited in the briefs of counsel fully sustain this view. A few quotations from the decisions demonstrate the correctness of this rule.

The Supreme Court of Minnesota, in the case of *Shea* v. *Ry. Co.,* 50 Minn. 395, 52 N. W. 902, said:

"The degree of care required at the crossing of a highway and an ordinary steam railroad is not the test of care required in crossing the track of a street railroad on a public street. Hence the rule in the former case, that one approaching the crossing must look up and down the track before attempting to cross, is not necessarily applicable to the latter. The failure to do so, is not, as a matter of law, negligence."

The Connecticut court had this to say on the subject of the traveller's duty:

"If other vehicles threaten his safety, or if his attention is engrossed or distracted by the apparent imminence of danger from other sources, he must act with ordinary prudence with reference * * * to the group of circumstances that makes up the situation by which he is confronted. How a prudent man would act in the face of concurrent and distracting dangers must, in the nature of things, be a question of fact to be passed upon by the jury, and not a question of law upon which the court may order a nonsuit or direct a verdict." *Laufer* v. *Traction Co.,* 68 Conn. 475, 37 Atl. 379.

The Supreme Court of Maine, in the case of *Marden* v. *P. K. & Y. Street Railway,* 69 L. R. A. 300, said:

"While it may be found, as a matter of fact, in any case involving an accident by crossing in front of an electric car, that it was the duty of the person undertak-

ing to so cross to look and listen, it can not be laid down as a rule of law that a failure to do this does *per se* constitute negligence. That is, whether the failure of the party injured to look and listen, before undertaking to pass in front of an electric car, constitutes negligence, is a question of fact, while the failure to do so in attempting to pass in front of a steam car is a matter of law."

Many other apt quotations could be made from the cases cited in the briefs which clearly state the same rule.

The difference between steam railroads and electric street railroads is so wide in manner of operation and the circumstances under which travellers cross the tracks, that it would be unjust to subject the traveller to the same test. We have laid down the rule in many cases, that, in crossing steam railroads, it is only in exceptional cases that travellers are not held to the absolute duty of looking and listening up and down the track for the approach of trains. The exceptional cases are illustrated in some of our decisions. *Tiffin* v. *St. Louis, Iron Mountain & Southern Ry. Co.,* 78 Ark. 55; *Scott* v. *St. Louis, Iron Mountain & Southern Ry. Co.,* 79 Ark. 137.

Exactly the reverse of that rule is true as to measuring the duty of travellers about to cross street railroads, and the rule is ordinarily that it is a question to be determined from the situation presented in each instance where the traveller was guilty of negligence in failing to look and listen, and it is only in exceptional cases, where the situation is shown to have been such that there was no excuse for failing to look, and where different minds could not reach different conclusions as to the conduct of the traveller, that it can be said as a matter of law that he was guilty of contributory negligence.

We have held that, in cases of injuries by automobiles and other vehicles, there was no absolute duty on the part of the pedestrian to look and listen before attempting to cross the street. *Millsaps* v. *Brogdon,* 97 Ark. 469; *Minor* v. *Mapes,* 102 Ark. 351, 144 S. W. 219.

Why is it not just to declare the same rule in cases against street railway companies? They occupy the pub-

lic streets in common with other vehicles and pedestrians without any superior rights except that others must get out of the way to let the cars pass. But when it comes to test the duty of a pedestrian with respect to danger from passing cars, the rule ought to be and is, I think, precisely the same as it is with respect to other dangers which infest the path of the traveller in crossing a crowded street.

I dissent from the conclusion reached by the majority that any of the instructions given by the court constituted prejudicial error which calls for a reversal. I think the case was fairly tried and the judgment ought to be affirmed.

I do not mean to say that the case of *Hot Springs Street Railway Co.* v. *Johnson,* 64 Ark. 420, is wrong or ought to be overruled, for the doctrine is correctly stated in that case that the rights of a traveller on the streets are not precisely equal with those of the street railway company. Their rights are equal and their duties reciprocal in many respects. They both use the street in common with others and have the right to do so. The duty rests upon each to exercise ordinary care to prevent a collision. It is only when their rights conflict, that is to say, when the pedestrian or other traveller is about to come in collision with the street car, that the traveller must turn aside and yield the right-of-way to the street car, for the latter can only pursue its way along the track. The instructions of the court on this subject are, therefore, not technically correct, but I do not think that the error had any bearing upon the verdict of the jury and did not constitute prejudicial error. There was no question involved in this case, from a practical standpoint, of conflicting rights between appellee and the street car. The question of the duty of one to turn aside and let the other pass did not arise. The questions in the case were, first, whether the motorman, on the one side, was guilty of negligence in failing to keep his car under control and give the signals and to prevent injuring appellee after discovering his perilous situation, and,

next, whether appellee himself failed to exercise ordinary care for his own safety. Appellee was not attempting to cross the street in spite of the presence of the car. He stepped upon the track without seeing the car, and the question is whether in doing so he was guilty of negligence. He had already crossed the track, and, in order to get out of the way of an approaching automobile, he stepped back on the car track. The jury might have found from the evidence that he was guilty of negligence in failing to look for the approaching street car and in stepping on the track, but it can not be said as a matter of law that under those circumstances he was guilty of negligence in doing so, and the evidence was sufficient to warrant the finding of the jury that he was not guilty of negligence. At any rate, there was no question in the case of the enforcement of equal rights, technically speaking, and the jury could not have been misled by the expression in the instructions telling the jury that their rights were equal.

We are here for the purpose of reviewing cases to discover prejudicial error, and a case should not be reversed for a technical error which did not result in any prejudice.

It is my opinion, as before stated, that this case was fairly tried and that the verdict of the jury being supported by sufficient evidence ought to stand.

Mr. Justice KIRBY concurs in these views.

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## UNITED STATES EXPRESS COMPANY v. COHN.

Opinion delivered April 21, 1913.

1. CARRIERS—NEGLIGENCE—EXEMPTION FROM LIABILITY.—While an express company can not exempt itself from liability because of its negligence, it may, by a fair, open and reasonable agreement, limit the amount recoverable by a shipper, in case of loss or damage, to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk, and such limitation of liability is not in violation of the Carmack amendment to the act of 1906; 34 Stat. at Large, 584; *Adams*

*Express Co.* v. *Croninger*, 226 U. S. 491; *Kansas City So. Ry. Co.* v. *Mixon-McClintock Co.*, 107 Ark. 48. (Page 120.)

2. CARRIERS—COSTS—JUDGMENT FOR.—When an express company tenders to plaintiff the amount of damages due plaintiff for loss of property shipped, the express company will be liable to plaintiff for the amount due and interest thereon until the tender was made, and all costs accruing subsequent thereto will be assessed against the plaintiff. (Page 124.)

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

*Thos. S. Buzbee*, for appellant.

The shipment involved in this case was an interstate shipment, moving under the provisions of the act of Congress. The validity of the provisions in the receipt or bill of lading declaring the value of the shipment to be not exceeding $50 and limiting the liability of the express company to that amount, "unless a greater value is declared at the time of shipment," is settled by the decisions of the United States Supreme Court. 226 U. S. 491; *Id.* 513. Former opinions of this court in conflict with the act of Congress and the above decisions must give way.

*J. W. Blackwood* and *John W. Newman*, for appellee.

The evidence fails to show any special contract of shipment or any declaration by the shipper that the goods were worth only fifty dollars. It fails to show that appellee, the consignee and owner, was bound in any way.

The Croninger case, 226 U. S. 491, and similar cases, merely apply the doctrine of estoppel to facts showing an intentionally false statement by the shipper, and a *bona fide* reliance thereon, and giving of low rates by the carrier; but in this case, *the shipper, or consignor, is not the plaintiff, or a party to the action.*

Appellee bought the goods and ordered them delivered to the express company. She became the owner

upon delivery and liable for the transportation charges. It will not do to say because a servant of the shipper has orders to deliver goods to an express company for another person, that he has authority to assess or misstate the value and estop the owner from asserting the true value. 95 N. E. 1089; 112 Mass. 524, 529; 36 L. R. A. (N. S.) 68; 13 Barb. 57. See also Barnes on Interstate Trans., § 393; 158 U. S. 98; 202 U. S. 242.

SMITH, J. Appellee, who was the plaintiff below, was engaged in the retail millinery business in the city of Little Rock, Ark., and purchased certain merchandise in the city of Chicago, Ill., which was received by appellant as a common carrier on October 30, 1911, for shipment and delivery to appellee in Little Rock, Ark. The goods cost and were of the value of $251.50 and were destroyed while in transit at a point near Hulbert, Ark., by train robbers on the 1st day of November, 1911, and none of the goods were ever delivered to appellee.

The defendant answered and admitted the loss of the goods, but alleged that its contract of carriage, which was evidenced by the receipt executed by it at the time of the delivery to it of the goods, contained the following provisions:

"Nor in any case shall this company be held liable or responsible, nor shall any demand be made upon them beyond the sum of fifty dollars on a shipment of 100 pounds or less, and not exceeding fifty cents per pound on a shipment weighing more than 100 pounds, and said property is hereby valued at and the liability of the express company is limited to the value above stated, unless a greater value is declared at the time of shipment."

And it also further provided:

"The company's charge is based on a value of not exceeding $50 on a shipment of 100 pounds or less, and not exceeding fifty cents per pound on a shipment weighing more than 100 pounds, and the liability of the express company is limited to the value above stated, unless a greater value is declared and paid for or agreed to be paid for at the time of shipment."

And in addition, the answer contained the following allegations:

"Defendant states that at the time of shipment the owner did not declare a greater value than $50 per 100 pounds, but declared that said shipment did not exceed in value $50 per 100 pounds, and the shipper did not pay or agree to pay the charges on a greater value."

It alleged that said shipment did not weigh exceeding 100 pounds, and that by the terms of said receipt, it is not liable to the plaintiff for any amount greater than $50.

It further alleged that its charges for transporting property are based on the value of the property to be transported. That these charges are shown by its tariff on file with the Interstate Commerce Commission; and that the rate of charge paid by the said Gage Brothers & Company on the shipment herein referred to was based on the rate for shipments not exceeding in value $50 per 100 pounds, and that this defendant can not lawfully pay any greater value for said shipment."

The appellant on the 4th day of January, 1912, tendered to the plaintiff in full settlement of the claim sued on, the sum of $50 with interest at 6 per cent per annum from October 30, 1911, which tender was refused by appellee.

The material questions of fact were covered by an agreed statement of facts, which contained the following recitals:

"The plaintiff is engaged in the retail millinery business in Little Rock, Arkansas. The defendant is an association engaged in business as a common carrier by express between Chicago, Illinois, and Little Rock, Arkansas.

"Prior to October 30, 1911, the plaintiff ordered a number of hats from Gage Brothers & Company to be shipped to her by express from Chicago, Illinois. The plaintiff was to become the owner of said hats on delivery to the express company and was to pay all express charges and assume all risks incident to the transporta-

tion as far as Gage Brothers & Company might be concerned. On said date the defendant received from Gage Brothers & Company two paper boxes and one paper case containing said hats which were of the value of $251.50, and the weight of seventy pounds, and properly addressed to the plaintiff. At the time the defendant received said hats for transportation, nothing was said about their value. It is true that the defendant had in force and effect a schedule of charges based upon the value of goods shipped. The defendant said nothing to the shipper concerning said schedule or the value of the goods and said shipper did not inform defendant as to the value thereof. The defendant gave the shipper a receipt for said shipment as appears in the deposition of George C. Woelfel, which deposition is taken as true throughout. The said shipment of hats was not delivered to the plaintiff nor was any part of said shipment delivered to her, although she has often demanded same from the defendant."

Appellee contends that while her vendor, which was the consignor, was instructed to deliver the goods to the express company, it was not authorized to make any contract with the express company other than that implied under the common law from the mere delivery for carriage and that the consignor had not signed the receipt containing the stipulations limiting liability above quoted, and had not knowingly assented to any limitation of liability whatever.

The cause was by consent of the parties submitted to the court sitting as a jury and there was a finding for appellee for the full value of the shipment and judgment accordingly, and this appeal is prosecuted from that judgment.

The judgment of the court below was fully warranted by the previous decisions of this court. *St. Louis, I. M. & S. Ry. Co.* v. *Pape,* 100 Ark. 269; *Southern Exp. Co.* v. *Meyer,* 94 Ark. 103; *St. Louis, I. M. & S. Ry. Co.* v. *Dunn,* 94 Ark. 407; *Kansas City So. Ry. Co.* v. *Carl,* 91 Ark. 97; *St. Louis S. W. Ry. Co.* v. *Grayson,* 89 Ark. 154.

But since the decision of the above cited cases, several cases involving the questions here considered have been decided by the Supreme Court of the United States which overrule our cases on the subject.

In the case of *Adams Express Co.* v. *E. H. Croninger,* 226 U. S. 491, decided January 6, 1913, judgment was asked for the full market value of a small package containing a diamond ring which was delivered to the express company in Cincinnati, Ohio, for shipment to Augusta, Georgia. The package was never delivered and judgment was prayed for the full market value.

The express company made defense by answer, the substance of which was as follows:

"That the defendant was an express company engaged in interstate commerce within the provisions of the act of Congress of June 29, 1906 (34 Stat. at L. 584, chapter 3591, U. S. Comp. Stat. Supp. 1911, page 1288), that in obedience to that act it had duly filed with the Interstate Commerce Commission schedules showing its rate and charges from Cincinnati to Augusta, Georgia, which schedules showed that its rates and charges, when the value of the property to be carried was in excess of $50, were graduated reasonably, according to the value, and that the lawful rate upon the package of the plaintiff from Cincinnati to Augusta was twenty-five cents if the value was $50 or less, and was fifty-five cents if its value was $125.

"It was averred that the plaintiff knew that the charges upon the package shipped were based upon the value of the shipment, and that it (the defendant) required that the value should be declared by the shipper, and that if he did not disclose and declare the value when he delivered the shipment to it at Cincinnati for transportation to Augusta, the rate charged would be based upon a valuation of $50. It was alleged that the package so delivered was sealed, and that defendant did not know the contents or value, and that if it had, it would not have received it for carriage for less than the lawful published

rate of fifty-five cents. The receipt or bill of lading issued shows no value, but contains a stipulation in these words:

" 'In consideration of the rate charged for carrying said property, which is regulated by the value thereof, and is based upon a valuation of not exceeding $50 unless a greater value is declared, the shipper agrees that the value of said property is not more than $50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated nor for more than $50 if no value is stated herein.' "

A demurrer to this answer was filed and sustained and the express company declining to plead further, judgment was rendered against it for the full market value of the package.

It will be observed that the provision limiting liability to $50 was substantially the same in that case as in this, and Mr. Justice Lurton, who delivered the opinion of the court, said:

"The original interstate commerce act of February 4, 1887, was extensively amended by the act of June 29, 1906 (34 Stat. at L. 584, chapter 3591, U. S. Comp. Stat. Supp. 1911, page 1288). We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in the twentieth section—an amendment bearing directly upon the carrier's liability or obligation under the interstate contracts of shipment, and generally referred to as the Carmack amendment," which amendment is as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, re-

ceipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; *provided,* that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

"Prior to that amendment, the rule of carrier's liability, for an interstate shipment of property, as enforced in both Federal and State courts, was either that of the general common law, as declared by this court and enforced in the Federal courts through the United States (*Hart* v. *Pennsylvania R. Co.,* 112 U. S. 331, 12 L. Ed. 717, 5 Sup. Ct. Rep. 151), or that determined by the supposed public policy of a particular State (*Pennsylvania R. Co.* v. *Hughes,* 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. Rep. 132), or that prescribed by statute law of a particular State (*Chicago, M. & St. P. R. Co.* v. *Solan,* 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. Rep. 289).

"Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject."

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulations or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all State regulation with reference to it. Only the silence of Congress

authorized the exercise of the police power of the State upon the subject of such contract. But when Congress acted in such a way to manifest a purpose to execute or concede authority, the regulating power of the State ceased to exist."

And he concludes a discussion of the question of the right of the carrier to limit its liability in consideration of a reduced rate by holding that it can be done, that while a carrier can not exempt himself from liability from his own negligence or that of his servants, he may, by a fair, open, and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of the two or more rates of charges, proportioned to the amount of the risk. The court concluded that the provisions of the contract, limiting liability was not in violation of the provisions of the Carmack amendment, quoted, and reversed the judgment of the State court and remanded the cause with directions to overrule the demurrer.

To the same effect are the case of *Chicago, St. Paul, M. & Omaha Ry. Co.* v. *Latta,* 226 U. S. 519; *Chicago, B. & Q. R. Co.* v. *Miller,* 226 U. S. 513; *Wells Fargo & Co.* v. *Neiman-Marcus Co.,* 227 U. S. 469; *Kansas City So. Ry. Co.* v. *Carl,* 227 U. S. 639.

In the case of *Wells Fargo & Co.* v. *Neiman-Marcus Co., supra,* involving the construction of the same receipt which contained the clause limiting liability, Mr. Justice Lurton, for the court, said:

"But the shipper, in accepting the receipt reciting that the company "is not to be held liable beyond the sum of $50, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated," did declare and represent that the value did not exceed that sum, and did obtain a rate which he is to be assumed to have known was based upon that as the actual value. There is no substantial distinction between value stated upon inquiry, and one agreed upon or declared voluntarily. The rate of freight was based upon the val-

uation thus fixed, and the liability should not exceed the amount so made the rate basis. *Hart* v. *Pennsylvania R. Co.*, 112 U. S. 331, 338, 28 L. Ed. 717, 720, 5 Sup. Ct. Rep. 151.

Under the authority of these cases, the appellant was liable for only the amount of its tender, $50, and interest from the date of the loss of goods to the date of the tender, and judgment against it will be rendered here for that amount, and all costs of this cause subsequent to the date of the tender will be assessed against appellee. *Mixon-McClintock Co.* v. *Kansas City So. Ry. Co.*, 107 Ark. 48.

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## CARTER v. STATE.

Opinion delivered April 28, 1913.

1. HOMICIDE—INDICTMENT—SUFFICIENCY.—An indictment for murder in the first degree which charges that defendant "did unlawfully, feloniously and with malice aforethought and after premeditation and deliberation kill and murder," etc., is sufficient. (Page 128.)
2. HOMICIDE—EVIDENCE—THREATS BY THIRD PERSON.—Under a plea of self-defense to an indictment for murder, evidence of threats made by a third person against defendant, is incompetent, when the same has no bearing upon the question whether or not the deceased was the aggressor. (Page 128.)
3. HOMICIDE—EVIDENCE—ACTIONS AND REPUTATION OF DECEASED.—In a trial of defendant under an indictment for murder, evidence of uncommunicated threats by deceased against defendant, and of the character of deceased for turbulence or violence is admissible. (Page 129.)
4. APPEAL AND ERROR—HOMICIDE—ERROR CURED HOW—SENTENCE FOR LESSER CRIME.—When defendant is convicted of murder in the first degree, and the evidence is sufficient to sustain the conviction, where the trial court committed error in excluding certain testimony offered by defendant and in refusing to give an instruction asked by him, where, under the testimony of defendant, the jury could have found him guilty of voluntary manslaughter, all prejudice from the errors of the court may be removed by sentencing defendant for voluntary manslaughter. (Page 130.)

Appeal from Garland Circuit Court; *C. T. Cotham*, Judge; reversed.

STATEMENT BY THE COURT.

The indictment charged that "J. R. Carter, on the 29th day of July, 1912, in the county of Garland aforesaid, did unlawfully, feloniously, and with malice aforethought and after premeditation, and deliberation kill and murder one Bud Woodfork with a certain pistol which the said J. R. Carter then and there had and held in his hand, the said pistol being then and there loaded with gunpowder and bullets, against the peace and dignity of the State of Arkansas."

The facts are substantially as follows: The appellant and deceased had an altercation in a restaurant, in the city of Hot Springs, during which the deceased slapped the appellant twice on the jaw with sufficient force to knock off his hat. There is some conflict as to whether or not he struck him with his closed fist or slapped him, but the proof shows that the appellant was not knocked down by reason of the blow. Carter had been practically an invalid for a year or two preceding this difficulty, and deceased was a strong, husky man, being a laborer and a ball player. They were separated by the person in charge of the restaurant, and the deceased was pushed out at the front door, and told to go home. Deceased grabbed up some rocks and came to the front door for the purpose of throwing at appellant, but was prevented by the manager of the restaurant. He went around to the side door, but was stopped there by other persons from throwing in. He went on down the street, and was gone twenty or twenty-five minutes, later coming back to the restaurant. Then appellant went out the side door, and was told to go home. The proof shows that he went on up to the saloon, where he had been employed, put on his coat and put a pistol in his pocket. He stood around perhaps twenty or twenty-five minutes at the saloon, and then started out, as he says, to get something to eat. The proof shows that he passed by the restaurant at which he had been in the custom of obtaining his meals, and went directly to the restaurant where he had had the difficulty with deceased. After

walking about midways of the room, he raised his gun and fired one shot, which struck deceased in the breast. Deceased hallooed, "I am shot," and ran out at the side door and across the street, about a hundred feet, where he fell dead; that deceased had a rock, about the size of his fist, in his vest pocket, and appellant testified that the deceased was reaching into his left pocket at the time he shot; that at the time of the killing there was no renewal of the quarrel, and nothing was said by either party at the time the shooting actually occurred.

When the first altercation took place at the restaurant a man by the name of Blue Jackson was with the deceased, Woodfork. He called appellant a vile name and urged the deceased to jump on appellant, and encouraged deceased by telling him he was his friend and would be with him.

Appellant offered to introduce testimony of what Blue Jackson did and said in a saloon when the appellant was not present. The court refused to allow this testimony, but ruled that he would permit testimony as to what all the parties said and did who participated in the second difficulty, some twenty or thirty minutes before the killing, while the appellant and the deceased were present, but would not permit the introduction of declarations and acts of third parties which were said and done outside of the presence of both appellant and the deceased.

The appellant was asked if anything happened that caused him to believe that he was being followed by Blue Jackson and Woodfork, and the court refused to permit the witness to answer, and the appellant saved his exceptions.

Appellant offered to prove that the deceased, within a few minutes after the attempted assault of appellant with rocks, was at a place near the scene of the difficulty and made a statement to the effect that he intended to get the appellant or kill him before the night was over. This threat was not communicated to the appellant and the court excluded it, to which ruling appellant duly ex-

cepted. The court also excluded offered testimony of the general reputation of the deceased in the community where he resided for violence and turbulence.

Among others, the court gave the following instruction, towit:

"If you believe from the evidence that threats were made in this case, it is proper for you to consider such evidence for the purpose of shedding light upon the state of mind existing between the defendant and the deceased at the time of the difficulty, and immdiately thereafter."

The court refused appellant's prayer for instruction No. 12, as follows: "It is competent to prove threats by either party, against the other, if such have been made, for the purpose of shedding light upon the state of mind existing between the parties at the time of the difficulty, and also for the purpose of shedding light upon which of the two was the aggressor in the combat. Threats on both sides, either those against the defendant, or those made by him are to be considered by you, if any were made, for the purpose of shedding light as to the condition of mind between the two parties at the time of the difficulty, and as I said before, as tending to shed light upon which was the aggressor in the difficulty."

The appellant duly excepted to the ruling of the court. Appellant was convicted of murder in the second degree and sentenced to twenty-one years in the State penitentiary, and appeals to this court.

*Appellant, pro se.*

1. The demurrer to the indictment should have been sustained. 26 Ark. 323; 27 Ark. 493; 71 Ark. 150.

2. All facts concerning the assault of deceased upon appellant shortly before the killing are part of the *res gestae,* and are admissible in evidence, if sufficiently connected with the main transaction to throw some light upon it, and to show the motives of the parties to the killing. 34 Cyc. 1642; 21 Cyc. 927; 43 Ark. 103; 44 S. E. 985; 114 Am. St. Rep. 92; 61 N. E. 337; Jones on Evidence 429; 6 Enc. of Ev. 610; *Id.* 634; *Id.* 613.

3. The offered evidence of threats was competent testimony to show who was the probable aggressor. 6 Enc. of Ev. 767; 55 Ark. 593. And without question the court erred in refusing to give instruction 12, requested by appellant. 84 Ark. 121; 69 Ark. 148; 29 Ark. 248; 85 Ark. 381.

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

1. The indictment is good and the demurrer was properly overruled. Kirby's Dig., § 2229; 61 Ark. 88; *Id.* 358; 64 Ark. 144; 94 Ark. 65.

2. Testimony as to Blue Jackson's conduct in the saloon was properly excluded. Acts and declarations of third parties done and said out of the presence of both the appellant and deceased, were not admissible.

Even communicated threats by a third party would not justify one in arming himself and killing another by mistake. 145 S. W. 559, 562; 100 Ark. 301, 312.

"Uncommunicated threats are never admissible except for the purpose of showing who was the aggressor if there is any conflict of the evidence on that point."

3. The instruction given by the court was correct; but if, as appellant complains, it was ambiguous, because of the use of certain words, a general objection to it was not sufficient. 105 Ark. 37; 93 Ark. 605.

WOOD, J., (after stating the facts). The indictment was sufficient. *Jones* v. *State,* 61 Ark. 88; *Turner* v. *State,* 61 Ark. 359; *LaRue* v. *State,* 64 Ark. 144; *Green* v. *State,* 71 Ark. 150; *Harding* v. *State,* 94 Ark. 65.

The court did not err in excluding the offered testimony of the conduct of Blue Jackson not in the presence of the appellant. It is neither alleged nor proved that Blue Jackson and deceased Woodfork were in a conspiracy to assault the appellant, and the testimony is not shown to have been connected in point of time so as to constitute a part of the *res gestae. McElroy* v. *State,* 100 Ark. 301-12. Any threats or other conduct of Blue Jackson towards appellant could not have been competent un-

der appellant's plea of self-defense, for it could have had no bearing on the question of whether or not the deceased was the aggressor. *Jackson* v. *State,* 103 Ark. 21, 145 S. W. 559.

Moreover, the appellant, after the court had announced that it would exclude the offered testimony, did not offer to show what Jackson did or said concerning him.

The testimony of the appellant to the effect that when he returned to the restaurant, Woodfork "kinder put his hands around here and turned," in connection with the other testimony, in which the position of the deceased was demonstrated before the jury, was sufficient to call for a submission of the question to the jury as to who was the aggressor immediately before the fatal shot was fired. This testimony of appellant tended to show that the deceased, Woodfork, was the aggressor, and the offered testimony of the uncommunicated threats of Woodfork against appellant just prior to the fatal rencounter, and also the offered testimony as to the character of Woodfork for turbulence and violence, was competent as tending to corroborate the testimony of the appellant on this point.

In *Palmore* v. *State,* 29 Ark. 248, we said: "Threats, as well as the character and conduct of the deceased, are admissible when these circumstances tend to explain or palliate the conduct of the accused. These are circumstantial facts which are a part of the *res gestae* whenever they are sufficiently connected with the acts and conduct of the parties, so as to cast light on that darkest of all subjects, the motives of the human heart." See also, *Jackson* v. *State, supra; Long* v. *State,* 76 Ark. 493.

It follows that the court erred in excluding the offered testimony as to the uncommunicated threats of Woodfork against the appellant, and also the offered testimony of witnesses as to the character of the deceased for turbulence or violence.

The court also erred in not giving appellant's prayer for instruction No. 12. The uncontroverted evidence,

however, of the appellant himself shows that he was at least guilty of voluntary manslaughter. He armed himself and returned to the scene of the previous altercation when there was no necessity for doing so, and the conduct of the deceased, as shown by the appellant's own testimony was not sufficient to justify or excuse the homicide. Even according to his own testimony, he acted without due care and circumspection, and that is no testimony to warrant a finding that the killing was done in self-defense. The proof was ample to have sustained a verdict of murder in the first degree, but under the testimony of appellant, the jury could have found him guilty of voluntary manslaughter.

Therefore, appellant was prejudiced in the refusal of the court to allow the offered testimony, and in refusing to give prayer No. 12 of appellant. All possible prejudice, however, from these errors, in our opinion, may be removed by sentencing appellant for voluntary manslaughter, and if the Attorney General so elects within fifteen days a judgment will be entered remanding the cause with directions to that effect, otherwise the judgment will be reversed and the cause remanded for a new trial.

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## COMMERCIAL UNION FIRE INSURANCE COMPANY v. KING.

Opinion delivered April 28, 1913.

1. INSURANCE—WAIVER OF PROOF OF LOSS.—Where an insurance company denies any liability under a policy, the company waives the defense of failure to make proof of loss. (Page 133.)
2. APPEAL AND ERROR—DIRECTED VERDICT.—When the trial court directs a verdict for the plaintiff, in determining the correctness of that action the Supreme Court will take that view of the evidence which is most favorable to the defendant. (Page 133.)
3. INSURANCE—CANCELLED POLICY—NOTICE.—In an action against an insurance company, in order to sustain the defense that the policy was cancelled, the burden is upon the insurance company to show delivery to plaintiff of the letter cancelling his policy. (Page 135.)

4. INSURANCE—CANCELLATION—QUESTION FOR JURY.—The receipt of a letter from an insurance company cancelling a fire insurance policy, held under the evidence, a question for the jury. (Page 135.)

5. INSURANCE—CANCELLATION OF POLICY—NOTICE OF.—An insurance company wrote to a policy holder, stating that it would cancel "this policy tomorrow, and if you can make other arrangements with some other agency, it will be well for you to do this before noon." *Held*, error for the trial court to hold that the letter was insufficient as a notice of cancellation. (Page 135.)

6. INSURANCE—CANCELLATION OF POLICY—TERMS OF POLICY.—An insurance company can exercise the right to cancel a policy only when such right is reserved in the policy, and can be exercised only as therein provided. (Page 135.)

7. INSURANCE—CANCELLATION OF POLICY—TERMS OF POLICY.—A notice from the general agent of an insurance company directing a local agent to cancel a policy of insurance is not effective to cancel the same when the policy provides for five days' notice to the insured. (Page 136.)

8. INSURANCE—NOTICE OF CANCELLATION—REQUISITES.—The notice from an insurance company to the insured of the cancellation of his policy should state an intent to cancel, an actual notice of cancellation within the meaning of the policy and so unequivocal in its form that the insured may not be left in doubt that his insurance will expire on the time limited by the terms of the policy, and that the company will not be liable for any loss after the expiration of that time. (Page 136.)

9. INSURANCE—NOTICE OF CANCELLATION.—When an insurance policy provides that it may be cancelled on five days' notice, the policy remains in force until the expiration of the five days, even though the company attempts to cancel it in one day by a letter to the insured. (Page 136.)

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

*Moore, Vineyard & Satterfield,* for appellant.

1. The policy was void and was never delivered, nor was the premium paid. 74 Ark. 507; 78 *Id.* 127; 85 *Id.* 337.

2. The policy was properly canceled. 8 Pa. Dist. 261; May on Ins. (4 ed.), § 68; 19 Cyc. 646, par. 2, note 33; 7 R. I. 562.

3. The jury should have been allowed to pass on the question whether the notice of cancellation of the policy was received or not. 105 Ark. 136.

4. Proof of loss was not made as required. 67 Ark. 584; 85 *Id.* 33; 72 *Id.* 484; 84 *Id.* 224; 87 *Id.* 171; 88 *Id.* 120. There was no waiver. 88 Ark. 120.

*Fink & Dinning,* for appellee.

1. The policy became a valid contract from date of issue. 74 Ark. 507; 78 *Id.* 127; 85 *Id.* 337.

2. The policy was not cancelled. The notice did not comply with the terms of the policy. 189 Pa. 255; 19 Cyc. 646; 37 L. R. A. 131, 137; 116 Md. 622; 39 L. R. A. (N. S.) 829; 6 Fed. 143; 45 N. J. L. 453. Five days' notice was a condition precedent. 83 Md. 22; 34 Atl. 373; 3 Cooley's Briefs on Ins. 2794; 72 Hun. 141; 98 Ark. 421-4.

3. Notice of cancellation must be proved. 72 Ark. 305; 100 N. Y. 451; 118 Ill. App. 349; 81 Ill. 88-94; 132 *Id.* 321; 148 *Id.* 304, 309; 121 Mass. 171; 116 Md. 622; 83 *Id.* 22; 37 L. R. A. 131; 16 A. & E. Enc. L. 873. A notice by mail is not sufficient. 83 Cal. 246; 121 Mass. 171; 54 N. Y. Sup. Ct. 276.

4. A denial of liability is a waiver of proof of loss. 94 Ark. 21; 83 *Id.* 126; 100 *Id.* 212.

SMITH, J. The complaint in this cause was filed on August 25, 1911, and it was alleged therein that the appellant insurance company on the 8th day of November, 1910, issued to appellee, who was the plaintiff below, its policy of insurance, covering his household effects; which, on the 11th day of September, 1911, and while said policy was in force, were destroyed by fire, and that the property destroyed was of the value of $567.25. He alleged further that the policy was not in his possession, but was sufficient in amount to cover the loss.

After a demurrer on the part of appellant had been overruled, it filed an answer, denying that it had insured appellee's household effects, as alleged, and further alleged that on the 8th day of November, 1911, its agent at Helena wrote a policy of insurance on the household effects of the plaintiff to the amount of $300; that the Helena agency made a report of the policy to the appellant in its regular daily report, and upon the receipt of such report, the appellant notified said agency that it had

ceased to write farm business, and instructed the Helena agency to cancel said policy and return it to appellant; and that on November 18, the following letter was written appellee:

"Helena, Ark., November 18, 1910.

"Mr. Esley C. King, City.

"Dear Sir: We renewed your policy on the 8th inst. but the company has ordered the same cancelled, in as much as practically all the companies have discontinued the writing of country business, it will be impossible for us to rewrite your policy. We will cancel this policy tomorrow, and if you can make other arrangements, with some other agency, it will be well for you to do this before noon.

"Assuring you that we are sorry that we can not take care of this business for you, we are,

"Yours truly,

"Aaron Meyers & Son."

It was further alleged in the answer that the said policy was never delivered to King, and that the premium had not been paid at the time it was cancelled, and that appellee had made no inquiry about the insurance until after the destruction of the property by fire, which occurred on the 11th day of September, 1911. That said policy contained the following provision in regard to its cancellation: "This policy shall be cancelled at any time at the request of the insured or by the company giving five days' notice of such cancellation."

The answer further alleged that appellee had failed to make the proof of loss required by the policy, but as there was a denial of any liability under the policy, that question passes out of the case. *Woodmen of the World* v. *Hall,* 104 Ark. 538; *Dodge* v. *Thompson,* 94 Ark. 21.

The cause was tried before a jury and under the directions of the court, a verdict was returned for the plaintiff for $300, and this appeal is prosecuted from the judgment pronounced thereon. In determining the correctness of the trial court's action in thus directing the verdict, we are required to take that view of the evidence

which is most favorable to the appellant. *Farmers Bank* v. *Johnson,* 105 Ark. 136.

There is but little conflict in the evidence, however, and such conflict as is material, is pointed out. Appellee testified that Meyers & Son, appellant's local agents, had written his insurance for several years past, and that it was understood that they would keep his property insured, and they would notify him if any new insurance had been written, and that his custom was to pay the premiums when called upon to do so. That he would have paid for this last policy, but was never asked to do so, and that while this policy had never been delivered to him, none of the policies had ever been delivered. That he called upon Meyers the next morning after the fire and demanded payment of his loss, but was informed that the policy had been cancelled eleven days after it had been written; and on his cross examination, he testified that Meyers had been writing him annual policies for the past four years and that his postoffice address was Helena and he came to town nearly every day for his mail, but had received no notification of the cancellation of the policy. The evidence on the part of appellant was to the effect that the policy was issued on November 8, 1910; and while this agency had been writing insurance for appellant for a few years prior to this loss, none of the policies had been written for appellant company. That when the local agents reported the policy in question, a letter was written by the general agent to the local agents, directing the cancellation of this policy and the letter dated the 18th, set out above, was written and properly addressed and posted in the United States mails in an envelope with a return card printed thereon. The above mentioned letter was taken from the carbon copy kept by the local agent. This agent testified that appellee had never paid, nor had he been asked to pay for this insurance for the reason that the policy had been cancelled, pursuant to the notice given appellee to that effect. That their custom was to charge themselves with the premiums and to send out monthly statements of the amounts due,

but no statement was sent appellee and the subject was never mentioned between them for the reasons stated, and the policy was never delivered, but was returned to the company when it was cancelled.

Appellant offered to introduce the letter cancelling the policy, but the court refused to permit its introduction and made the following ruling with reference thereto:

By the Court: "Let your exception go into the record. Your own witness stated that the letter or notice was given one day and the policy cancelled the next. The policy states the notice shall be given five days before the cancellation shall occur."

In making this ruling, the court evidently assumed that notice of cancellation had been received by appellee, but was insufficient for the reason given. As the case will be remanded, we take occasion to say that receipt of the letter by appellee is an essential fact to be affirmatively shown and the burden of proving its delivery is upon the appellant, and if its receipt is not established by the proof, then the jury should be instructed to return a verdict for the appellee. *Runkel* v. *Citizens Ins. Co.,* 6 Fed. 143; *Farnum* v. *Phenix Ins. Co.,* 23 Pac. 872; 19 Cyc. 646.

But this evidence, viewed as we must view it, presents the question of the receipt of the notice for the determination of the jury.

We think, however, that the court erred in holding that the letter was insufficient as a notice of cancellation. The policy in question is what is known as a standard policy and the provision with reference to cancellation upon five days' notice has been passed upon by many courts and uniformly held valid. But this right of cancellation, where a policy has been fairly entered into and has taken effect, can be exercised only because it is reserved in the policy, and can only be exercised as it is there provided. *Davis Lbr. Co.* v. *Hartford Ins. Co.,* 70 N. W. 88; *American Fire Ins. Co.* v. *Brooks,* 34 Atl. 376. The notice from the general agent to the local agent, di-

recting the cancellation of the policy did not accomplish that result. *Farnum* v. *Phenix Ins. Co.,* 23 Pac. 872.

The notice must be given to the insured, and it should state not merely an intent to cancel, if some condition be not complied with, but it must be an actual notice of cancellation within the meaning of the policy and so unequivocal in its form, that the insured may not be left in doubt that his insurance will expire on the time limited by the terms of the notice, and that the company will not be liable for any loss after the expiration of that time. *Southern Ins. Co.* v. *Williams,* 62 Ark. 386; *German Fire Ins. Co.* v. *Clarke,* 39 L. R. A. (N. S.) 829; *Lattan* v. *Royal Ins. Co.,* 45 N. J. L. 453. Of course, this policy remained in force for five full days after the receipt of this notice, if it was received, for it was a condition precedent to the right to cancel that this time be given in order that other insurance might be procured if desired before the cancellation became final. *American Ins. Co.* v. *Brooks,* 34 Atl. 376.

There was nothing uncertain about the notice set out above. If it was in fact received, appellee was advised in terms, which he could not fail to understand, that appellant had exercised its right to cancel the policy and had cancelled it. It is true, this notice stated the policy would be continued in force for only one day, but that statement did not affect liability for the five days following its receipt, and the fire did not occur until long after the five days had expired.

The question which is usually found in similar cases about the return, or the offer to return, the premium does not arise here for the premium had not been paid.

We conclude, therefore, that the notice claimed to have been given cancelling the policy was sufficient to accomplish that purpose, if it was in fact delivered, and the judgment is therefore reversed and the cause remanded with directions to submit that issue to the jury under appropriate instructions.

# HELENA SPECIAL SCHOOL DISTRICT NO. 1 *v.* KITCHENS.

Opinion delivered April 28, 1913.

1. SCHOOL DISTRICTS—"COMMON SCHOOL FUND"—COMMISSIONS OF COUNTY TREASURER.—Under Art. 7, § 46, of the Constitution, which provides for the election of a county treasurer who shall be ex-officio treasurer of the common school fund, and Kirby's Digest, § 3509, allowing the treasurer commissions on the aggregate amount of all school funds coming into his hands in any one year, the term "common school fund" means funds raised by the annual levy and collection of the taxes for school purposes and other sources as prescribed by Kirby's Digest, § 7486, and special funds obtained by mortgaging the property of a special school district under Kirby's Digest, § 7696, are not a part of the common school fund; and the treasurer being entitled to commissions on funds raised by taxation to pay the interest on the mortgage, is not entitled to a commission, on the principal of the mortgage debt. (Page 139.)
2. OFFICER—FEES.—A public officer is entitled to commissions or fees only when there is some specific statutory authority for the allowance of the same. (Page 140.)

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

STATEMENT BY THE COURT.

The appellant borrowed $100,000 and mortgaged its property for the purpose of paying for a high school building. The trustee for the mortgagees placed the money with the Guarantee Loan & Trust Company of Helena to be paid out by it for the construction of the high school building and its equipment. Drafts on the Guaranty Loan & Trust Company were signed by the president and secretary of the school board, accompanied by a progressive estimate of the architect. The president and secretary of the school board signed the deed of trust and the bond and coupons. They had no further connection with the receiving or paying out of the money than as stated. The semi-annual interest was paid by segregating it from the general revenues of the school district, received from the State aid and taxes raised by the levy of five mills. This was done throughout the life of the bonds and was kept in the treasury to be known as the "building fund." All the money to pay

interest was to be raised by taxing the property in the Helena Special School District No. 1. The Guaranty Loan & Trust Company held the money, $100,000, as the property of the Helena Special School District and paid it out on the order of the board of directors, signed by the president and secretary. The fund of $100,000 was exclusively the result of the mortgage or deed of trust made on the school property, and not received from any other source. It was acquired by the appellant under the authority of the general law of the State, pertaining to special school districts, authorizing them to borrow money and mortgage their property for the purpose of securing funds to build and equip school buildings.

The appellee as treasurer had paid out of the school funds of the Helena Special School District $2,750 as semi-annual interest on the $100,000, on warrants of the secretary of the district, drawn on him as county treasurer out of the funds in his hands as treasurer of the Special School District No. 1. He got the commission on the money paid out as interest and on all moneys of the Helena Special School District No. 1 that had come into his hands.

Appellee demanded of the directors of the special district that the sum of $100,000, borrowed, pass through his hands, but the directors refused and the appellee brought this suit to recover the commission on said sum of money. The court, upon the above facts, directed a verdict in favor of the appellee and appellant duly prosecuted this appeal.

*Fink & Dinning* and *Moore, Vineyard & Satterfield,* for appellant.

A sum of money acquired by a special school district through the sale of bonds for the purpose of acquiring a fund to erect a high school building is a special fund which is no part of the common school fund within the meaning and contemplation of the law, and the county treasurer is not entitled to commission thereon. Art. 7, § 46, Constitution; Kirby's Dig., § 7486; Webster's

Dict., "Revenue;" Worcester's Dict., "Revenue;" 47 Ark. 448; 29 Ark. Law Rep. 298; 80 Ark. 62.

*P. R. Andrews,* for appellee.

The county treasurer is entitled to a commission of not more than two per cent "on the aggregate amount of all school funds * * * coming into his hands in any one year." Kirby's Dig., § 3509. Conceding that the fund in question is a special fund, it is nevertheless a part of "all the school funds of the county," and the county treasurer, the banker for the various school districts thereof, is entitled to have custody of the fund and to have his commission thereon. 80 Ark. 62. The above statute provides against double commissions.

SMITH, J., (after stating the facts). Article 7, § 46, of the Constitution provides: "That the qualified electors of each county shall elect one treasurer, who shall be *ex-officio* treasurer of the common school funds of the county." Section 3509 of Kirby's Digest provides: "He (the treasurer) shall be allowed as commissions on the aggregate amount of all school funds of the county that come into his hands in any one year, the rate of two per cent and no more, provided that if any county treasurer shall have taken commissions from any part of the school funds, the same shall not be subject to the commission in the hands of his successors in office." Appellee contends that he is entitled to the commission sued for under the Constitution and statute above quoted. "The common school fund of each county" and "all school funds of the county" as used in the Constitution and statute quoted mean funds raised by the annual levy and collection of the taxes for school purposes and other sources such as that prescribed by section 7486 of Kirby's Digest. The Constitution and laws provide for State taxes which shall not exceed three mills on the dollar and for a *per capita* tax of one dollar, and also for school district taxes not to exceed seven mills on the dollar. Section 7486 of Kirby's Digest provides for common school funds derived from certain other sources. These funds together with the funds raised by annual

taxation under the Constitution and laws, constitute the "common school funds of each county," referred to under the constitutional provision and statute, *supra,* under which appellee claims. But the special funds obtained by mortgaging the property of the special free school district for the purpose of erecting and equipping a school building under the authority of section 7696 of Kirby's Digest are not a part of the common school fund or the school funds of each county, in the sense that these terms are used in the Constitution and statute, under which appellee claims. The funds obtained for the special purpose named and in the manner named in the statute are not realized from the taxes or from the other sources by which the common school funds of the county are raised. They are not, as stated, a part of the "common school funds," or "the school funds" of each county, but belong to the special school district raising them in a special manner for the special purposes designated. See *Honey* v. *Greene County,* 102 Ark. 106. There must be some specific statutory authority for the allowance of the commission or fee to an officer. See *Honey* v. *Greene County, supra.*

The appellee admits that he had received his commission on all moneys paid out as interest and all moneys of the Helena Special School District No. 1, which had come into his hands. The treasurer being entitled to and allowed commissions on the funds raised by taxation, set apart for the purpose of paying the interest and principal of the bonds as this sum passed through his hands, can not be allowed, in addition to this, a commission on the principal of $100,000, obtained by mortgaging property. To allow a commission on the latter sum would be to give him double commissions. This is not contemplated. The judgment, therefore, is reversed and the cause dismissed.

## SMITH v. IMPROVEMENT DISTRICT NO. 14 OF TEXARKANA.

Opinion delivered April 28, 1913.

1. MUNICIPAL CORPORATIONS — IMPROVEMENT DISTRICT — BOUNDARIES— JURISDICTION OF CITY COUNCIL.—A city council has jurisdiction to lay off a street improvement district only as designated by the property owners in the first petition, and the council must conform strictly to the authority conferred upon it. (Page 144.)
2. IMPROVEMENT DISTRICT—BOUNDARIES—RIGHT OF CHANCERY COURT TO ALTER.—The chancery court has no power to change or alter the boundaries of a street improvement district, from those described in the first petition. (Page 144.)
3. LEASE—LESSEE NOT OWNER IN FORMATION OF IMPROVEMENT DISTRICT.—Where F holds a lease for ninety-nine years on certain property included within a street improvement district, he holds only a chattel interest in the same, and is not the owner of the property within the meaning of art. 19, § 27, of the Constitution of 1874, which provides that the General Assembly may authorize assessments on real property for local improvement in cities, based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. (Page 146.)
4. DEFINITIONS—OWNER.—The word "owner" as used in art. 19, § 27, of the Constitution in regard to local improvement means the absolute owner or the owner of the fee. (Page 146.)

Appeal from Miller Chancery Court; *James D. Shaver,* Chancellor; reversed.

*James D. Head,* for appellant.

1. The petition was not signed by a majority in value of the *owners* of real property in the district.

2. The council erred in including lot 1 and lots 11 and 12, block 73. These lots received no benefit and Frost's signature was obtained by fraud. 98 Ark. 543; 98 *Id.* 113; 94 *Id.* 563; 68 *Id.* 381; 89 *Id.* 561; 81 *Id.* 562; 83 *Id.* 54; 86 *Id.* 1; Welty on Assessments, § 292; 81 Ark. 219; 80 *Id.* 467; Hamilton on Assessments, § § 340, 443; 117 Fed. 925; 28 Cyc. 1130.

3. The assessment was illegal. 86 Ark. 1; Welty on Assessments, 311.

4. The word "owner" means the owner in fee. 148 S. W. 1042; 98 Ark. 553; 75 *Id.* 19; 58 Pac. 509; 93 N. W. 231; 20 Atl. 1028; 28 N. W. 555; 83 *Id.* 85; 21 Ore. 339;

181 Mo. 463; 30 N. Y. Supp. 1040; 15 L. R. A. 262; 64 N. E. 1056; 24 Pac. 1076; 86 N. W. 1093; 1 Abb. Mun. Corp., § 360; 8 Gill (Md.), 150; 11 Md. 186; 20 Atl. 1028; 38 Fed. 69-73.

*Simms & Cella,* for appellee.

1. The action of the council is conclusive except for fraud or mistake. 98 Ark. 543.

2. The assessment is not illegal. 41 N. E. 877; Welty on Assessments, 311; 11 Mo. App. 116; 57 Barb. 411; 63 Tex. 533; 141 Mich. 467; 104 N. W. 730.

3. The assessment does not exceed 20 per cent, but if it did, only the excess is void. 95 Ark. 575; 86 *Id.* 20; 97 *Id.* 334; 133 S. W. 1126.

4. The Huckins property was properly signed for. Washb. Real Prop. (6 ed.), 1454; *Ib.* 1681; Perry on Trusts (3 ed.), 400; 69 Ark. 68; 40 Cyc. 1474.

5. Frost was the "owner" of lots 11 and 12. 64 N. E. 1056; 220 U. S. 472; 20 Atl. 1028; 45 L. R. A. 662; 64 Ark. 136; 67 Cal. 110; 51 Conn. 259.

HART, J. Improvement District No. 14 of the city of Texarkana, Arkansas, was organized for the purpose of grading and paving with creosote blocks or asphalt some fifteen blocks of streets composed for the most part of State Line Avenue and Front Street. C. A. Smith and R. H. T. Mann, who are owners of real estate within the proposed district, instituted this action in the chancery court against the members of the board of improvement district to enjoin the collection of assessments against their lands and to vacate and annul the improvement district. Among other grounds, they allege that the second petition provided by the statute asking that the improvement be made was not signed by a majority in value of the owners of real property within the district. The chancellor found in favor of the defendants and the complaint was dismissed for want of equity. The plaintiffs have appealed.

The facts are undisputed, and so far as are necessary for a determination of the issues involved are as follows: The total assessed valuation of all the prop-

erty in the district for the year 1911, that being the last assessment on file at the time of the organization of said district, was $357,000. Signatures to the petition to property amounting to $205,200, as shown by the county assessment, were obtained. But plaintiffs contend that the signers to some of this property were not the owners within the meaning of the Constitution and that when their names are taken off the petition it will be found that a majority in value of owners of property within the district have not signed the petition. The State National Bank building, a brick and steel structure, is situated on lots 11, 12, 13 and 14. E. W. Frost signed the petition for this property. He was the owner in fee simple of lots 13 and 14 and had a lease on lots 11 and 12 for the period of ninety-nine years, commencing July 1, 1904. By the terms of the lease he was to pay all taxes and assessments against the property and had the right to make any changes or substitution of improvements on it. At the end of the term the real estate together with improvements upon the same were to revert to the owners of the lots. These four lots with the improvements on them were assessed at $80,000 for the year 1911. It was agreed that the assessed valuation of lots 11 and 12 for 1911 was $40,000. It will be noticed that the assessed value of all the property in the district not including lots 11 and 12 is $357,000, and that the assessed valuation of all the property signed for asking that the improvement be made amounts to $205,200. If it should be determined that lots 11 and 12 should be included in fixing the assessed value of all the property in the district and should not be included in the list of property signed for asking that the improvement be made, it is manifest that a majority in value of the owners of real property within the district have not signed the petition asking that the improvement be made and the improvement district, under the former decisions of this court, is void.

It is admitted that lots 11 and 12 are situated within the boundaries of the district. About ten years before

the present district was organized the street in front of these lots was paved with brick and the proof shows that the pavement is now in a good state of preservation. For this reason it is claimed that lots 11 and 12 are not benefited and should not be included in making up the valuation of all the property in the district. In the case of *Kraft* v. *Smothers,* 146 S. W. (Ark.), 505, 103 Ark., the court said:

"Our Legislature has prescribed the manner in which improvement districts may be organized; and, pursuant to the power delegated to it, the city council passed the ordinance in question, for the purpose of creating the sewer district. The foundation of the improvement was the petition of the owners of real property situated in the proposed district. Under the statute, the extent and character of the improvements, as expressed in the ordinance, must substantially comply with the terms of the petition upon which it is based."

It will be seen our statutes require as a prerequisite to the exercise of authority conferred upon the city council that a petition be first filed designating the boundaries of the district so that it may be easily distinguished. This is for the benefit of the property owners. A property owner might be willing to sign for an improvement district as designated in the first petition and might be unwilling to sign if a part of the property included within the boundaries of the district should be omitted; for this might have the effect of imposing upon the property owners additional and enlarged burdens which they did not contemplate when they signed the petition. A special limited jurisdiction is conferred upon the city council to lay off the district as designated by the property owners in the first petition and the council must conform strictly to the authority conferred upon it. For the same reason the chancery court had no power to change or alter the boundaries of the district, and it follows that in making up the valuation of the property of the district all the property situated in the district as it was created must be considered.

It is insisted that the lessees are not owners within the meaning of section 27, article 19, of our Constitution, and in this respect we think counsel are correct. Section 27, article 19, of the Constitution reads as follows:

"Nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected; but such assessments shall be *ad valorem* and uniform."

In *Lenow* v. *Fones,* 48 Ark. 557, it was held that a lease of whatever duration is but a chattel interest and, therefore, upon the death of the lessee's intestate his widow will take dower in it absolutely as in personal property and not for life as in real estate. In this case the court quoted with approval the following: "No proposition has been better settled from the earliest days of the common law than that a lease of whatever duration is but a chattel. Hence the lessee could not be an owner of real property within the district in contemplation of the action of the Constitution above quoted. This holding is in accord with the rule laid down in *Ahern* v. *Board of Improvement District No. 3, Texarkana,* 69 Ark. 86, where the court held that a tenant for life is not an owner who may sign a petition for the formation of an improvement district. In the case of *Rector* v. *Board of Improvement,* 50 Ark. 116, the court said:

"The statute authorizing administrators to sign for estates can not, so far as the heirs are concerned, give their signatures any efficacy in the face of the Constitution requiring the consent of the owners."

Counsel for the defendants rely upon the case of *Village of St. Bernard* v. *Kempner,* 45 L. R. A. 662, where the Supreme Court of Ohio held that the holder of a ninety-nine-year lease, renewable forever, was the owner of the property within the meaning of an improvement

law requiring the signatures of owners. The theory upon which cases like this proceed is that a lease for a long term and renewable forever is a lease in perpetuity and creates in the lessee a qualified base or determinable fee, because it is said they have a possibility of enduring forever. 37 Cyc. 791; *Conn. Spiritualist Camp-Meeting Association* v. *Town of East Lyme* (Conn.), 5 Atl. 849. See also 4 Kent Com. (5 ed.), page 9. The lease in the present case was for a term of ninety-nine years merely and does not even come within the rule laid down in those cases. The general rule regarding lands held under a lease for years giving the right to hold the land for usufructory purposes only, is, in the absence of a statute to the contrary, that there is to be but one assessment of the entire estate in the land and that this assessment should include the value of both the estate for years and the land or reversion. 27 A. & E. Enc. of Law, page 678. The owner of the fee may fairly be deemed to be the owner of the whole estate for the purpose of taxation and this, so far as we are advised, has been the uniform practice in this State. There is a good reason for the rule. The owner of the land annually receives a sum as rent which he deems the equivalent of the value of the use of the land to him and he, therefore, enjoys the entire beneficial interest in the premises, including the value of the leasehold as well as the fee. Besides, as we have already seen, the trend of our decisions is to hold that the word "owner" as used in the section of the Constitution in regard to local improvement means the absolute owner or the owner of the fee.

It follows that the decree must be reversed and the cause remanded with directions to the chancellor to grant the relief prayed for in plaintiffs' complaint.

## LOCKRIDGE *v.* JOHNSON.

Opinion delivered May 5, 1913.

1. TRIAL—TRANSFER FROM LAW TO EQUITY.—In an action of ejectment the right of possession is a question triable at law, and it is error to transfer to equity when the defendant could have secured at law all the relief to which he is entitled under the allegations of his answer. (Page 150.)
2. TRIAL—TRANSFER FROM LAW TO EQUITY.—In an action of ejectment, when defendant pleads title by adverse possession, and prays that his title be quieted and that a plat under which plaintiff claims title, be reformed; *held*, defendant could not secure complete relief at law, and a transfer of the cause to equity is proper. (Page 150.)
3. REMOVAL OF CLOUD—JURISDICTION OF EQUITY.—When, on motion of defendant, an ejectment suit was properly transferred to equity, and defendant asked that a plat under which plaintiff claims title, be reformed; while the plat can not be reformed in its entirety because certain other owners were not before the court. *Held*, defendant was entitled to relief against the one who is before the court, and whose claim casts a cloud upon defendant's title. (Page 150.)

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

*J. M. Brice* and *Sam Frauenthal*, for appellant.

It was error to transfer the cause to equity and for the chancery court to retain jurisdiction thereof after the transfer. The issues involved, the title to the land, the questions whether or not the defendant was in possession of the land described in the complaint and whether the plaintiff was entitled to such possession, were cognizable solely at law. If, under the prayer in defendant's answer, that the title to the lots be quieted in her, the chancery court had any kind of concurrent jurisdiction, that was excluded by reason of the fact that the circuit court had first obtained jurisdiction. 2 Pomery, Eq., § 735; 1 *Id.*, § 177; 65 Ark. 503; 44 Ark. 436; 24 Ark. 431; 19 How. 271; 93 Ark. 376; 87 Ark. 206; 75 Ark. 115; 73 Ark. 462; 67 Ark. 441.

*John L. Ingram* and *Manning & Emerson,* for appellee.

Under the pleadings and the relief asked for in the answer, the chancery court had jurisdiction, and it would have been error under the circumstances to refuse to transfer the cause to equity. 70 Ark. 157; 36 Ark. 228; 29 Ark. Law Rep. 286; 100 Ark. 28-34; 48 Ark. 312-16; 46 Ark. 96-102; 77 Ark. 570-76; 100 Ark. 163-66. Appellee alleged title, and had a right to have it quieted in her. 80 Ark. 43-48.

If there had been no prayer in the cross complaint for equitable relief, the allegations therein were sufficient to state a cause of action in equity in behalf of appellee, and she had the right to have the cause transferred. 78 Ark. 65-69, and authorities cited.

When the chancery court obtained jurisdiction it had it for all purposes, hence it was the duty of the court to decide not only the questions in equity presented, but all questions between the parties, and thereby prevent further litigation. 92 Ark. 15-28; 37 Ark. 286-93; 87 Ark. 206-10; 23 Ark. 746; 24 Ark. 431; 29 Ark. 612; 37 Ark. 643; 43 Ark. 28; 44 Ark. 236; 56 Ark. 391; 57 Ark. 97; 74 Ark. 484; 77 Ark. 338; 99 Ark. 438-46.

SMITH, J. This was an ejectment suit instituted by the appellant against the appellee, in the circuit court of Arkansas County, to recover certain lots situated in the town of Stuttgart. The action involved the title to a parcel of ground, 140 by 50 feet, in the southwest corner of block 11 of Improvement Company's Addition to the town of Stuttgart. Appellant contends that the above parcel of land is the west 140 feet of lot No. 9, while appellee contends that it is the west portion of lot No. 10. Appellant has a deed to lot No. 9, and if that lot is located at the southwest corner of block No. 11, he had the title to the property in question, unless appellee had the title by virtue of the seven-year statute of limitations and if lot No. 9 is not located in the southwest corner of block No. 11, then appellant has no title whatever to the lot in controversy. The complaint

alleged that the defendant was in the unlawful possession of the said lot No. 9, and had been for some time prior to the institution of this suit, but the defendant answered and disclaimed any right, title or interest in the lands described in the complaint and denied that she was or had been in possession of any part thereof. This litigation involves the question as to which of two plats of said block No. 11, in which the property is situated, is correct. It appears that this block was surveyed and platted by one H. J. Campbell, and there was offered in evidence two plats, each of which was said to be the correct and original plat, made at the time of the survey. Defendant claims under a plat which is designated as plat No. 1, and according to it lot No. 10 was situated in the southwest corner of the block. And appellee alleged in her answer that an untrue and incomplete and imperfect copy of the plat was made or drawn, and without authority of the city of Stuttgart or of the improvement company, which company owned the land, a plat was filed for record in the office of the clerk of Arkansas County, and now appears of record in that office, and according to that plat, designated as plat No. 2, lot No. 9 was the southwest corner lot. In addition to her disclaimer, that she was in possession of the land described in the complaint, appellee further alleged, that she and her grantors had been in the open, notorious, continuous, actual and adverse possession of the land occupied by her for a period of more than seven years, and she claimed title under this possession. She asked that the cause be transferred to equity and that said plat No. 2 be cancelled and that her title to said premises be quieted as against plaintiff, or any one claiming under him. The title of the respective litigants is set out by them in the complaint and answer and exhibits thereto, but it will be unnecessary to abstract them here, for the reason that appellee does not deny appellant's title to the lots described in the complaint, and denied she had possession thereof. Appellant's right of possession depends upon the establishment of the correctness of plat No. 2, under

which he claims and upon the determination of the question of appellee's adverse possession.

The right of possession was of course triable at law, and if that was the only question involved it would have been error calling for the reversal of the case to transfer the cause to equity. *Cole* v. *Mette,* 65 Ark. 503. Or if the defendant could have secured all the relief to which she was entitled, under the allegations of her answer, in a court of law, it was error to transfer the cause. The cause was transferred to equity over appellant's objection and his motion to remand was overruled and his exceptions were saved to that action of the court.

Under the allegations of the answer, was appellee entitled to any relief which she could not have secured in a court of law? We think she was. True, in a trial at law she might have had the fact determined that her adverse possession had ripened into title, and a recovery defeated on that account; or by determining that plat No. 2 and not plat No. 1 was the correct plat, a recovery of the possession of the lot might have been defeated. But though appellee might have defeated appellant's recovery of the lot, this is not all the relief to which she was entitled, and which she prayed might be granted her, upon the transfer of the cause. She prayed that her title might be quieted, and this was relief which she might affirmatively have had in a suit brought by her for that purpose in equity. Plat No. 2, which had been filed for record, showed that she was in possession of land she did not own if this was the genuine plat, and by it appellee could not have shown a good paper title to her lot and a suit to quiet her title by cancelling that plat could only have been brought in equity.

Appellant insists that the plat could not be reformed in its entirety, because there were owners who were not before the court. This is true, but that fact is no reason why she should not have had that relief against one who was before the court, and whose claim cast the cloud upon the title.

No question is made about the correctness of the

chancellor's finding, and it appears to us to be authorized by the evidence; but appellant says the questions involved should have been determined in the circuit court. But for the reasons stated, we think the cause should have been transferred and the decree of the chancellor is affirmed. *Ashley* v. *Little Rock,* 56 Ark. 391; *Cook* v. *Jones,* 80 Ark. 48.

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## McCARTHY *v.* PEOPLES SAVINGS BANK.

Opinion delivered May 5, 1913.

1. HUSBAND AND WIFE—NOTE EXECUTED BY WIFE—CONTRACT OF WIFE.—Where a married woman signed a note with her husband to enable him to borrow money to meet the pay roll of his business, the wife is not bound, because a married woman can not bind herself by a contract not made for her personal benefit, or that of her separate property, nor can a married woman make a valid contract of suretyship for a third person. (Page 152.)
2. HUSBAND AND WIFE—CONTRACT OF WIFE—LIABILITY.—Where an action against a husband and wife on a note, not binding on the wife, and another action against the husband and a third party, were settled by the execution of a new note executed by the husband and wife for the amount of both the old notes, the new note will not be held to be binding on the wife, being merely a note substituted for the old notes, and the same failure of consideration attaches to the new note as to the old. (Page 153.)

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

*James A. Comer,* for appellant.

A married woman's note given as security for the debt of another does not bind her, and can not be enforced against her property. 64 Ark. 385.

The promissory note of a married woman not given for her personal benefit or that of her separate property is void. 35 Ark. 365; 58 Ark. 486. See also 66 Ark. 117; 32 Ark. 776.

*Bradshaw, Rhoton & Helm,* for appellee.

The real question presented is whether or not a suit against a married woman and the taking up of a former

note signed by a married woman is sufficient consideration to bind her on a note signed by her, even though the note is signed by her husband also. A compromise of litigation is a good consideration for an express promise. 29 Ark. 131; 31 Ark. 222; 23 Ark. 557. Compromise of a disputed claim, however baseless, is a good consideration. 43 Ark. 177.

Hart, J. This is an action by the Peoples Savings Bank upon a promissory note signed by P. H. McCarthy and Mary H. McCarthy, who are husband and wife. There was a trial before a jury and a verdict in favor of the plaintiff. From the judgment rendered the defendant, Mary H. McCarthy, has duly prosecuted an appeal to this court.

The circumstances under which the note was given are as follows: The husband, who ran a rock crusher, needed money with which to meet his weekly pay roll. He borrowed money from the bank for this purpose and executed a note for $75, signed by himself and his wife. Subsequently he executed two other notes to the bank for the same purpose for $150 each, signed by himself and E. G. Hale. When these notes became due the bank brought separate suits on them. One suit was brought against P. H. McCarthy and E. G. Hale on the two notes executed by them and a separate suit was brought against McCarthy and his wife on the $75 note executed by them. It was agreed between the parties that both suits should be dismissed upon a new note for the amount of all three of the notes and the costs of both suits being executed by McCarthy and his wife. Thereupon, they executed a new note as agreed upon and the present suit was instituted on that note.

The undisputed evidence shows that the original notes and the note in suit were given for the debt of the husband and were not given for the benefit of the wife or for her separate estate. The suit on the original note against the defendant, Mary H. McCarthy, was founded on an obligation which, as to her, the law holds to be void for the reason that being a married woman she

could not bind herself by a contract not made for "her personal benefit or that of her separate property." *Richardson* v. *Matthews,* 58 Ark. 484.

It is equally well settled that at common law a married woman can make no valid contract of suretyship for a third person. *Hyner* v. *Dickinson,* 32 Ark. 776. See also 21 Cyc. 1321.

Counsel for appellee seek to uphold the judgment on the theory that the note sued on was executed as a compromise of litigation, but we do not think that the execution of the note was in compromise of litigation. As we have already stated, there were two separate suits, one against McCarthy and Hale on notes to the amount of $300, and the other against McCarthy and his wife for $75. Both these suits were dismissed upon the agreement that McCarthy and his wife should execute a new note for the amount of all the notes sued on and the costs of both suits. This was not a compromise of litigation; it was merely a renewal of the notes and an extension of time of payment after the notes had become due. That is to say, the note in suit was given in substitution of the notes signed by McCarthy and Hale and by McCarthy and his wife. The original notes not being for the personal benefit of Mrs. McCarthy or that of her separate property were without consideration as to her, and the original want or failure of consideration follows and attaches to the note sued on, which was given in exchange or substitution of the original notes. *McDaniel* v. *Grace,* 15 Ark. 465.

There is nothing to indicate that there was anything of benefit to Mrs. Mary H. McCarthy in the transaction, nor does it appear that the bank gave up anything of value as a consideration for the note sued on. It is plain that the note in suit was given as security for a pre-existing debt of the husband, and there was no consideration for it. It was merely a renewal of the original obligation of the husband with the added signature of the wife. The wife obtained nothing and the hus-

band's creditors gave up nothing, and there was no consideration moving from either party to the other.

It follows that the judgment must be reversed, and, it appearing from the record that the case has been fully developed, the cause of action of the plaintiff against the defendant, Mary H. McCarthy, will be dismissed.

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## STORTHZ v. SANGER.

Opinion delivered May 5, 1913.

1. INSANE PERSON—JURISDICTION OF PROBATE COURT.—The jurisdiction of the probate court, with respect to control of the property of an insane person, is confined to limits prescribed by the statute. (Page 159.)
2. INSANE PERSON—CONTRACT FOR SALE OF INSANE PERSON'S LAND.—There is no statutory authority giving the guardian of an insane person power to enter into an executory contract giving a person an option to purchase property of the insane person, and such a contract, although authorized by the probate court is void. (Page 160.)
3. ESTOPPEL—CONDUCT OF PARTIES.—When a lease of the property of an insane person made by the guardian with an option to purchase, is not voidable but void, the heirs of the insane person are not estopped to plead the invalidity of the lease, although they have received rent for a long period of years under the said lease. (Page 160.)
4. CONTRACTS—CONTRACT INVALID IN PART.—When the guardian of an insane person gave a lease on the latter's property with an option to the lessee to purchase at the end of the term, the entire contract is not rendered void by reason of a portion thereof being void, and the parties are entitled to the benefits under the valid portion of the contract. (Page 160.)
5. PARTITION—SALE OF PROPERTY—DISTRIBUTION OF PROCEEDS.—When the assignee of a lease acquired a three-fifths interest in certain land, and failed to exercise an option in the lease to purchase the entire interest, and upon such failure the owner of the remaining two-fifths interest did not elect to pay the value of the building which had been erected by the lessee, but insisted upon his ownership of the building and a two-fifths interest in the land brought partition, the building may be ordered sold as a part of the realty, and the proceeds distributed according to the rights of the parties. (Page 161.)

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

*Dan W. Jones,* for appellant.

1. The order and judgment of the probate court authorizing and approving the lease made by George E. Dodge as guardian of Julia Robbins to Isaac and Joseph Wolf, which provides that at the end of said lease the lessees should have the option to purchase the lot at the appraised value of same, was not void, but merely voidable when directly attacked. It is not subject to collateral attack. 1 Herman on Estoppel, § 351; Const. Ark. 1874, art. 7, § 34; 44 Ark. 270; 47 Ark. 419; 41 Ark. 426; 29 Ark. 526; 31 Ark. 183; 33 Ark. 298; 11 Ark. 31; 13 Ark. 35; *Id.* 505; 14 Ark. 568; 18 Ark. 63; *Id.* 295; 19 Ark. 485; 20 Ark. 78; 21 Ark. 364; 23 Ark. 129; 11 Ark. 552, 531, 532, *et seq.;* 52 Ark. 7; *Id.* 341-2-3; 66 Ark. 416; 73 Ark. 612; 70 Ark. 88.

2. Plaintiffs by their acquiescence for fifteen years are, under the provisions of the lease, estopped from denying the validity thereof. 5 Ark. 424, 429; 73 Ark. 614-616; 55 Ark. 85; 64 Ark. 345.

3. The court erred in ordering a sale of the lot, *including the brick building thereon,* by a commissioner appointed by the court, contrary to the provisions of the lease. The lease is a contract in entirety, and its provisions can not be changed nor part of them accepted and others rejected.

*Ratcliffe & Ratcliffe* and *Bradshaw, Rhoton & Helm,* for appellees.

1. It is not contended that the lease is void, but only that clause which provides that "lessees shall have the option at the expiration of this lease to purchase said lot at its appraised cash value," the same being an attempt to authorize the sale of lands belonging to a *non compos mentis* in a manner not authorized by law. It is void in this respect. 40 Cyc. 214-16-17; 67 Ark. 325-29; 108 U. S. 143, 2 Addison, Contracts, 814, and note; 21

Cyc. 120, subdiv. 6; 53 Ark. 37; 45 Ark. 41; 33 Ark. 425; 98 Ark. 63-67.

Where a probate court acts beyond its jurisdictional limits, such acts or orders and judgments are void. In this case the probate court in approving and authorizing the clause in question acted beyond its jurisdictional limits and its act is void and subject to collateral attack. 32 Ark. 97; 33 Ark. 490; 47 Ark. 460; Kirby's Dig., § 3793; 23 Cyc. 1070, "E;" 74 Ark. 81, 87; 48 Ark. 151, 156; 90 Ark. 195. See also 32 Ark. 97; 47 Ark. 460; 95 Ark. 164; 54 Ark. 480; 69 Ark. 539; 74 Ark. 149; 99 Ark. 339.

2. The doctrine of estoppel has no application here. Appellees received the rent as they had the right to do, but did nothing more. The provision insisted upon by appellant was void upon its face and appellees had the right to so regard it, and no action was necessary on their part to raise any question as to its validity. There is no duty or necessity for resorting to legal or equitable remedies to establish a right until some one threatens to destroy or impair it, or asserts an adverse right. 88 Ark. 395-404; 70 Ark. 256; 88 Ark. 478-481; 82 Ark. 367; 145 U. S. 368; 99 Ark. 260-3; 2 Pomeroy, Eq. Jur., § 804; 97 Ark. 43, 49.

Storthz is a cotenant of appellees, and as such, limitation and estoppel do not apply. 61 Ark. 527; 42 Ark. 289.

The order authorizing a lessee to become a purchaser could only be an executory contract to convey, and the probate court had no jurisdiction to authorize any such contract. 38 Ark. 31; Kirby's Dig., § 5209; *Id.*, § 4024-4028; 66 Ark. 437; 33 Ark. 425; 98 Ark. 63.

3. Under the circumstances the chancery court had jurisdiction to order the sale of the lot, including the building thereon, and, having found that there could be no partition in kind and that it was to the best interest of all the parties to sell the whole property, was warranted in so decreeing. 33 Ark. 376, 386; 77 Ark. 317, 319; 98 Ark. 151.

McCULLOCH, C. J. The subject-matter of this litigation is a lot, forty-two feet in width, fronting on Main street in the city of Little Rock, on which is situated a brick store building. Appellees owned an undivided two-fifths of the ground by inheritance from Julia Robbins, the former owner, who died intestate in the year 1897. Appellant owns the other undivided three-fifths interest by purchase from the other heirs of Julia Robbins, and he is also the owner of the building on the lot, which was constructed under a lease contract whereby the ownership of the building was reserved in the lessee who constructed it.

Julia Robbins was adjudged by the probate court of Pulaski County to be a person of unsound mind, and George E. Dodge was duly appointed guardian of her person and estate. Dodge, as such guardian, entered into a contract with Isaac and Joseph Wolf, whereby he leased said lot to them for the term of twenty years from September 1, 1892, the lessees to pay a rental price of $1,200 per annum and pay all taxes assessed during the term. The contract contained the following stipulation:

"Said lessees shall have the option at the expiration of this lease to purchase said lot at its appraised cash value, said value to be determined by appraisement to be made by two competent disinterested persons, one of which shall be selected by each of the parties hereto, and in case these two can not agree, they shall select a third disinterested person to decide, and such decision shall be final and binding on all parties, and upon payment of the price of said lot so ascertained, a good and sufficient deed shall be executed to said lessees by said lessor, or his successors in office, conveying absolutely in fee simple the said lot to the said lessees. At the expiration of this lease, if the lessees do not exercise their right to purchase the ground, the lessor shall pay to the lessees in cash the then value of the building and the improvements on said ground, such values to be ascertained in the same manner as is hereinbefore provided for ascertaining the value of the ground, and thereupon said

buildings and improvements shall become the property of the lessor."

This contract appears to have been executed as a renewal of a former contract between the same parties under which the building on the lot had been constructed by the lessees.

An order of the probate court was duly made and entered authorizing said guardian to execute said contract.

The lessees named in the contract assigned the lease to Bertha Ottenheimer, who, on July 31, 1911, assigned the same to appellant, who had theretofore become the owner of an undivided three-fifths interest in the land by purchase from the heirs of Julia Robbins.

Prior to the expiration of the lease appellant notified appellees of his intention to exercise the option to purchase said property under the terms of the contract, and appellees, in response, notified him of their refusal to sell and convey their interest in the property.

After the expiration of the lease appellees instituted this action against appellant in the chancery court of Pulaski County praying that "on the adjustment of the amounts to be paid by plaintiffs for said building and the title vested in them, respectively, that the said lot and premises be partitioned among the several owners as their interest may appear, and if an equitable partition can not be made in kind, that the said property be sold free of all claims, present, future and contingent, and the proceeds equitably distributed."

Appellant demurred to the complaint, but the demurrer was overruled, and he then answered. Among other things he alleged that appellees inherited their interest in the property on the death of Julia Robbins, which was about fifteen years before the expiration of the lease, and thereafter accepted their part of the rental price of the building, thus ratifying the terms of the contract, and that they are estopped to question the power of the guardian to enter into the contract giving an option to the lessees to purchase.

The cause was tried upon an agreed statement of facts, and the court rendered a decree in accordance with the prayer of the complaint, ordering the property sold, including the building, so that the proceeds could be distributed according to the rights of the parties.

The court declared that part of the contract giving the lessees the option to purchase the lot at the expiration of the specified term to be void and unenforceable; and the principal question presented to us for decision is whether it was within the jurisdiction of the probate court to authorize or approve such a contract.

It is very clear that this was not within the jurisdiction of the probate court, which is confined, with respect to control of the property of infants and insane persons, to such limits as are prescribed by the statute. In other words, the court possesses only such powers in that respect as the statute confers. This rule is stated by Judge EAKIN, in the case of *Myrick* v. *Jacks,* 33 Ark. 425, as follows:

"Courts of probate have, by the statute, been entrusted with some limited powers over the estates of minors in the hands of administrators and guardians, and within the scope of those statutory powers they are certainly entitled to all presumptions according to superior courts of record. But they had no such jurisdiction by common law, and beyond the limits given they have none now. When they proceed to do a thing which, by proper proceedings and upon a proper case made, they are authorized to do, it will be presumed they have acted correctly; or if the proceedings have been irregular or the conditions of jurisdiction not strictly fulfilled, it is error to be corrected on appeal or *certiorari.* But if they undertake to make an order not authorized under any circumstances, although they may have jurisdiction over the same property for other purposes, it is void."

Applying that rule, this court held, in the case of *Meyer* v. *Rousseau,* 47 Ark. 460, that the power to exchange the lands of an infant for other lands was not included within the power to sell such lands and that it

was not within the jurisdiction of the probate court to authorize an exchange.

The doctrine of that case was reaffirmed in *McKinney* v. *McCullar,* 95 Ark. 164.

This rule applies, of course, to orders with respect to the property of persons of unsound mind as it does to the property of the estates of decedents and of infants.

Now, the contract, so far as it related to the sale of the real estate, was entirely executory and amounted only to an option to the lessees to purchase at the expiration of the term. There appears nowhere in the statutes of this State any authority in the probate court to authorize the execution of such a contract. The statute authorizes the probate court to make an order directing the guardian to mortgage or lease the property of his ward or to sell the same at public vendue to the highest bidder and report his proceedings in that regard back to the court for approval. But this does not include the power to enter into a contract for a private sale of property, much less to enter into an executory contract giving a person an option to purchase. *Meyer* v. *Rousseau, supra.*

It is next insisted that appellees, on account of having received their part of the rents under the contract for many years, are estopped to plead the invalidity of the contract. But we are of the opinion that this contention is unsound. The contract was not merely voidable; it was absolutely void, because the probate court possessed no power to direct the guardian to execute it. Being void in the beginning, it gained no vitality by the succession of the heirs.

The invalidity of that part of the contract did not, however, deprive the lessor of the other benefits arising under it, and the heirs of the lessor were not put to an election either to ratify the contract as a whole, including the option to purchase, or to let the lessee occupy the premises for the balance of the term free of rent. In other words, the lessees had rights under the contract notwithstanding the invalidity of one feature, and it was

not within the power of the heirs of the lessor to repudiate the contract; therefore, they were not put to an election, either to affirm or repudiate it as a whole.

Another objection to the decree is that it ordered the sale of the building as a part of the realty. Appellees concede, in their complaint, appellant's ownership of the building, and the sale is only for the purpose of converting the whole property into money so that it can be distributed between the parties according to their rights. Appellees had the right, under the contract, to take over the building at a price to be settled by appraisers, but they were not bound to do so. Their failure to take advantage of that privilege doubtless gave appellant, under a fair interpretation of the contract, the right to remove the building; but he has not elected to do so or asked to be given the privilege to do so. His attitude here is merely that of insisting upon his ownership in the building without conceding to appellees the right to enjoy their interest in the property since the expiration of the lease. In this state of the case the only thing that a court of equity can do is to sell the whole property, ascertain the value of the building, and distribute the proceeds of the sale in accordance with the rights of the parties. *Stirman* v. *Cravens,* 33 Ark. 376. In this instance the court reserved for further consideration the ascertainment of the rights of the parties in the property, including the value to be placed upon the building owned by appellant. It would perhaps have been better for the court, before ordering the sale, to determine the question of value; but no objection seems to be urged against the decree on that score.

With appellant's rights protected in his ownership of the building, we can discover no valid objection to the chancellor's decree ordering a sale of the property for distribution of the proceeds. The decree is therefore affirmed.

## SMITH v. McCOY-KESSINGER LUMBER COMPANY.

Opinion delivered May 26, 1913.

1. CHATTEL MORTGAGE—PROPERTY TO BE MANUFACTURED IN THE FUTURE.—A chattel mortgage on lumber to be manufactured in the future is a valid mortgage. (Page 163.)
2. CHATTEL MORTGAGE—DESCRIPTION OF PROPERTY—INVALIDITY.—In a chattel mortgage on lumber when the lumber is described as 50,000 feet "of the last sawing," the description is ambulatory and the mortgage void. (Page 164.)

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

*E. L. Matlock,* for appellant.

The mortgage description is good. "A description which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient." Jones on Chattel Mortgages, § 54; 39 Ark. 394.

The words "of the last sawing," used in describing the lumber, was no more than an ambiguity which could be explained by parol testimony. 28 Ark. 282.

*J. E. London* and *C. A. Starbird,* for appellee.

A description in a chattel mortgage which furnishes no mode of separation of the property sought to be conveyed is void for uncertainty. 41 Ark. 70; 4 Ark. 495; 43 Ark. 850; 35 Ark. 169.

SMITH, J. The Dyer Trading Company brought suit by attachment against the McCoy-Kessinger Lumber Company, in the circuit court of Sebastian County for the Fort Smith District. On that day, and thereafter, a number of suits were filed in the justice courts against the lumber company, which suits were removed to the circuit court and consolidated with the case of the trading company, and tried as one case.

Appellant, J. W. Smith, filed an interplea in the circuit court, claiming the lumber attached under a chattel mortgage given to him by the McCoy-Kessinger Lumber Company, prior to the commencement of any of the suits. Judgment was rendered against appellant, dis-

missing his interplea, and he brings this appeal. The property mortgaged to Smith was described as follows:

"Fifty thousand feet of cottonwood lumber of the last sawing to include the following grades: First and second narrows; first and second wide; narrow box, No. 1 common, and No. 2 common. To be kept on the Frank Wright farm at the site of the sawmill on Arbuckle Island in Sebastian County, Arkansas."

This mortgage was dated the 6th day of July, 1912, and was executed to secure a note of that date for $500, and the attachments were levied upon the mill on July 27, 1912. The trial below was before the court, sitting as a jury, and about twenty consolidated cases were tried as one, and while the court made no special finding of fact, it did find against appellant's interplea and dismissed it, and this appeal is prosecuted from that judgment.

Some questions of pleading are raised, which need not be considered under the view we have of this mortgage. The proof shows that there was lumber upon the yards on the day the mortgage was given, and that the mortgagors continued to operate the mill from that date until it was closed down by the attachment, during all of which time the lumber was shipped away as it became dry enough to ship. There were on the yard on July 22, about 99,000 feet of lumber and between 50,000 and 60,000 on the day of the attachment. Appellant says this is not the case of a mortgagor, left in possession of merchandise, which he had mortgaged and was selling in the regular course of business, but the contention is that the mortgage conveyed only a particular 50,000 feet and that to be of the last sawing, and that this was such a description as would enable third persons, aided by inquiries, which the instrument itself suggests, to identify the property. If this was true, the description would have been sufficient and the mortgage valid. *Gurley* v. *Davis,* 39 Ark. 394; *Johnson* v. *Grissard,* 51 Ark. 410.

But this was not such a description. The fact that the lumber had not been sawed when the mortgage was

executed is not controlling. For in the case of *Morton* v. *Williamson,* 72 Ark. 390, a mortgage was held valid where the property conveyed was described as follows: "All the lumber and logs now on the ground, and all that may be put on the grounds and sawed by us, until final settlement of our account with Williamson Bros." And the court there said: "The lumber though not in existence, when the mortgage was executed, was clearly in contemplation of the parties to the mortgage. *Wright* v. *Bircher,* 72 Mo. 188. There is no reason for any distinction between a mortgage of future crops to be grown by the mortgagor, and a mortgage of lumber to be manufactured in the future." This was said notwithstanding the fact that a special statute gives validity to mortgages on future crops. Kirby's Digest, § 5405.

But this mortgage was unlike the one in that case. There the mortgage covered all the lumber sawed up to a certain time; here the mortgage was "of the last sawing." On the 22d of July, there were 99,000 feet of lumber on the yard, which would otherwise fill the description of this lumber mortgaged, had the mill suspended operation that day, yet none of it would have been conveyed had as much as 50,000 feet been sawed thereafter before the mill was closed down by the attachments, as may indeed have been the case.

Such mortgages are void because the description is ambulatory and the judgment of the circuit court is accordingly affirmed. *Gauss Sons et al.* v. *Doyle & Co.,* 46 Ark. 122; *Dodds* v. *Neil,* 41 Ark. 70; *Krone & Co.* v. *Phelps,* 43 Ark. 350; *Person* v. *Wright & Montgomery,* 35 Ark. 169.

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## SIMON v. REYNOLDS-DAVIS GROCERY CO.

Opinion delivered May 5, 1913.

1. FRAUDULENT CONVEYANCES—CONVEYANCE FROM PARENT TO CHILD.—Where an insolvent debtor sold all of his land except his homestead to his children for from $300 to $650 less than its value, while actions were pending against him, on which judgments

were later rendered, it is proper to find that such conveyances were made with an intent to defraud creditors. (Page 169.)

2. FRAUDULENT CONVEYANCES—PRESUMPTION.—A conveyance to near relatives and members of the household of an embarrassed debtor is looked upon with suspicion and scrutinized with care; and when voluntary is *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, it is presumed conclusively to be fraudulent as to existing creditors. (Page 169.)

3. FRAUDULENT CONVEYANCES—BURDEN OF PROOF.—The burden of proof is upon the party suing to set aside a fraudulent conveyance, but the burden is discharged when he shows that an embarrassed debtor, pending a suit against him by his creditors, made a conveyance of all his land except his homestead, to his sons, for a consideration which appears grossly inadequate upon its face; and the burden is then upon the one holding under the deed to show a consideration. (Page 169.)

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

STATEMENT BY THE COURT.

The appellant, Phil Simon, and one Charles J. Smets, during the year 1910 and prior thereto, had been doing business in Crawford County, under the firm name of Simon Grocery Company, and had become indebted to appellees, on their various separate claims, in the aggregate sum of eleven hundred dollars ($1,100). The appellees had recovered judgments on their separate claims, making up the above aggregate. These judgments had not been paid.

While suits were pending against Simon and Smets, and before judgment was rendered against them, the appellant, Phil Simon, on the 24th day of August, 1910, conveyed to his sons, William Simon and Patrick Simon, coappellants herein, certain tracts of land consisting of the northeast quarter of the southwest quarter of section 11, township 9 north, range 32 west, and known and described in the testimony, as the "Lees Creek Tract," and the fractional southwest quarter of the northwest quarter of section 5, township 9 north, range 31 west, described as the "Watkins Tract," and the southeast quarter of the southwest quarter of section

35, township 10 north, range 31 west, described as the "Rowe Tract," and in addition to the latter forty-six (46) acres in the southwest corner of the southwest quarter of the southeast quarter of section 31, township 10 north, range 31 west.

Two of the tracts at the time, were mortgaged to the Citizens National Bank, to secure a note for fifteen hundred dollars ($1,500).

The appellees in their complaint, set up the above facts and alleged that the lands were conveyed by Phil Simon to his sons, for a pretended consideration of one hundred dollars ($100), and that the lands were worth the sum of two thousand dollars ($2,000), and that said conveyance was made with the intent to defraud the creditors of Phil Simon.

The prayer was that the conveyance be set aside and that the land be subjected to the payment of the debts of the appellant, Phil Simon, to the appellees.

The answer of the appellants denied that the conveyance was fraudulent and alleged that it was for an express consideration of one hundred dollars ($100) and the assumption on the part of the grantees, of the payment to the Citizens Bank of the mortgage for $1,500, with interest from the 18th day of August, 1909, and that the sum of one hundred dollars ($100) and the amount of this mortgage, with the interest, was an adequate consideration for the conveyance.

The chancellor found that the deed of Phil Simon and wife, to William and Patrick Simon, was made with the intent to defraud the creditors of Phil Simon and entered a decree cancelling the same and ordering the same sold to satisfy the judgments of the appellees herein.

The appellants have duly prosecuted this appeal.

*Sam R. Chew,* for appellants.

1. There is no proof of fraud. Fraud must be proved. Mere inadequacy of price is not sufficient. 9 Ark. 91; 11 *Id.* 378; 38 *Id.* 419; 17 *Id.* 151; 66 *Id.* 16; 63 *Id.* 412.

2. If there was fraud there was no proof that appellants knew of it, or participated in it. 30 Ark. 417; 31 *Id.* 554; 41 *Id.* 316; 23 *Id.* 258. They bought in good faith without notice of the insolvency of Phil Simon.

*L. H. Southmayd* and *Read & McDonough,* for appellees.

1. When an embarrassed debtor conveys his property to his son, the circumstance is such as to raise a suspicion of fraud and casts the burden on him of showing a consideration. 68 Ark. 162. Such conveyances are *prima facie* fraudulent. 73 Ark. 174; 86 *Id.* 225; 91 *Id.* 394, 399; 38 Ill. App. 180.

2. A conveyance of all his property is a strong presumption of fraudulent intent. Wait on Fraud. Conv., § 231. Such a conveyance is void as to creditors. 20 Cyc. 407-8. Relationship in connection with inadequacy of consideration places the burden on defendant to show good faith. 20 Cyc. 754, 1.

3. The chancellor found the transaction fraudulent. The findings are not clearly against the evidence. 101 Ark. 522; 73 *Id.* 489; 97 *Id.* 568.

WOOD, J., (after stating the facts). The testimony on behalf of the appellees, tended to show that the land in controversy, was worth from twenty-one hundred and fifty dollars ($2,150) to twenty-five hundred dollars ($2,500). The court might have found from the testimony of the witnesses for the appellees, that the land was worth as much as twenty-five hundred dollars ($2,500), at the time the deed in controversy was executed. From the testimony of about the same number of disinterested witnesses on behalf of the appellants, the court might have found that the land in controversy, was worth a great deal less than the value placed upon it by the witnesses for the appellees.

The question of the value of the land at the time of the execution of the deed in controversy, was one of fact, and the finding of the chancellor in this respect, in our opinion, is not clearly against the preponderance of the evidence.

Assuming that the land was worth as much as twenty-five hundred dollars ($2,500), and the grantees would have paid for it as much as eighteen hundred and fifty dollars ($1,850), the highest price shown by testimony of any of the witnesses on behalf of appellants, then there would have been a difference of six hundred and fifty dollars ($650) that the creditors of Phil Simon would have been entitled to, out of his landed estate.

If the value of the land was but twenty-one hundred and fifty dollars ($2,150), there would have been a difference of but three hundred dollars ($300) between the price paid and the actual value of the land, to which the creditors would have been entitled.

The mere difference between the actual value of the land, according to the testimony of the appellees, and the price paid for same, would not alone be sufficient to show that there was any intent to defraud the creditors of Phil Simon in the conveyance made by him to his sons. But when this is considered in connection with the other facts in evidence it can not be said that the chancellor erred in finding that the conveyance was made with the intent to defraud creditors. For the undisputed evidence shows, and it is admitted, that the appellant, Phil Simon, at the time the conveyance was made, owed the appellees the amounts claimed by them respectively, and that suits were pending against him on these claims at the time he made the conveyance, and that judgments were thereafter obtained for the several amounts claimed.

For the appellant, Phil Simon, under these circumstances, to sell all the land he owned, except his homestead, to his sons, for an amount considerably less than the value of the land, was a strong badge of fraud. It matters not that Phil Simon used the whole or a part of the proceeds of the sale, in payment on his debts, for he was unable to pay his debts and was insolvent, and the fact that the conveyance was made to his sons under such circumstances, would warrant the conclusion that

he was making the conveyance in order to put the property in the hands of his children, and to give them the benefit of the difference between the price paid by them and the real value of the land.

This court has often held that "conveyances made to members of the household and near relatives of any embarrassed debtor, are looked upon with suspicion and scrutinized with care, and when they are voluntary, they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors." (*Wilkes* v. *Vaugh,* 73 Ark. 174; *McConnell* v. *Hopkins,* 86 Ark. 225; *Morgan* v. *Kendrick,* 91 Ark. 394-399.)

To the extent that the price paid was less than the value of the land, the conveyance, so far as creditors are concerned, must be held to be voluntary and without consideration.

As was said in *George E. Priest against Abraham W. Conklin* and *Hunter C. Conklin, Administrators,* 38 Ill. App. 180, where an embarrassed debtor conveyed a farm that was under mortgage, to his son: "If the farm was worth no more than the incumbrances, he (the son) could abandon the title and suffer no loss. If it should be of greater value, then such excess would be a gift from his father."

In *Leonard* v. *Flood,* 68 Ark. 162, we said: "Where an embarrassed debtor conveys his property to his son, the circumstance is such as to raise a suspicion of fraud, in a suit by his creditors attacking the conveyance as fraudulent, and to cast upon him the burden of showing a consideration."

While the burden of proof is upon the plaintiff who alleges fraud, to show it, yet that burden has been discharged, where, as in this case, he shows that an embarrassed debtor, pending a suit against him by his creditors, has made conveyance of all the land he owned, except his homestead, to his sons, for a consideration which upon the face of the conveyance appears to be a

grossly inadequate one. Such circumstances are sufficient to raise a suspicion of fraud and to cast a doubt upon the legality of the transaction, and the burden is then on the one holding under the deed to show a consideration. (*Leonard* v. *Flood, supra.*)

The testimony of the appellants is not in entire accord as to the amount of the consideration that was paid for the lands. The testimony further shows, that although the deed was made on the 20th of August, 1910, it was withheld from the record until the 17th day of November, 1910, and then entered upon the records, just before judgments were rendered in favor of the appellees against appellant, Phil Simon.

The testimony also showed, that although the lands had been conveyed from Phil Simon to his sons on August 20, 1910, he continued to pay the taxes on them in 1911.

The testimony of Geo. R. Wood on behalf of the appellees, shows that Phil Simon, when he was attempting to borrow fifteen hundred dollars ($1,500) on the property, afterwards conveyed to his sons, represented to the cashier of the Citizens Bank, from whom he obtained the money, that the property was worth from two thousand to twenty-five hundred dollars. In his testimony given in this case, to sustain the conveyance, he states that the property was worth about fourteen hundred dollars ($1,400).

Phil Simon testified, that when he made the application to borrow the fifteen hundred dollars ($1,500) from the Citizens Bank, he might have told the cashier that the land was worth two thousand to twenty-five hundred dollars. He said he did not recollect telling him that, but might have done so, as he was "needing money very bad."

It thus appears that appellant, Phil Simon, is in the unfortunate attitude of being willing to make representations and shape his testimony to suit his own selfish interests, regardless of the real facts. The testimony of such a witness should not be entitled to much

consideration in a case where his own interest is involved.

We are of the opinion, that when the record is considered as a whole, the findings of the chancellor are sustained by the clear preponderance of the evidence and that his decree is in all things correct, and the same is therefore affirmed.

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## JOSEPHS v. BRIANT.

Opinion delivered May 5, 1913.

1. ADMINISTRATION—CLAIMS AGAINST ESTATE.—Under section 113 of Kirby's Digest, which requires that when the claim against an estate is founded upon an account, that the claimant present a copy of the account "setting forth each item distinctly and the credits thereon * * *," where plaintiff's claim recited that it was for "legal services rendered to deceased in the suit for divorce in which he was involved * * * to trip from H to M, J and other places and securing evidence which was used in his suit for divorce, $10,000. The proof will show that S, in his lifetime and not long before the demise employed Mrs. B (claimant) to do certain work, and on his own motion agreed to pay her $10,000," the account will be held sufficient, and it will be held that the executor was informed that the claim was for $10,000, and not $10. (Page 178.)
2. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED—In an action by a claimant to enforce a claim against deceased's estate, evidence that deceased owed claimant $10,000 upon a contract for services, and that no part of the same had been paid, is incompetent under section 2 schedule to the Constitution which prohibits either party in actions by or against executors * * * from testifying against the other "as to any transactions with or statements of the testator * * * " (Page 179.)
3. CONTRACTS—SUPPRESSING EVIDENCE—ILLEGALITY.—A contract to procure evidence to win a divorce suit for the deceased, or to secure the possession of certain letters for the purpose of preventing their use against him as testimony in a divorce case, is illegal and void; but a contract to procure letters for deceased which does not contemplate using them for an illegal purpose, or suppressing them, is valid. (Page 180.)
4. CONTRACTS—SUPPRESSING EVIDENCE—ILLEGALITY.—A contract to secure letters for deceased in order to suppress them as evidence, is void when plaintiff was aware of and participated in that

design, but a contract by plaintiff merely to secure letters for deceased to prevent their being unlawfully mailed to a third person, would be valid. (Page 181.)

5. TRIAL—INSTRUCTIONS—IGNORING TESTIMONY.—In an action by plaintiff against testator's estate for services rendered testator, for procuring certain letters for him, an instruction that if plaintiff and the testator made a contract to procure the letters which had been written by the testator was valid, if the letters were not used as evidence in any suit in which the testator was interested, plaintiff could recover, is erroneous because the instruction ignored other testimony in the record which tended to show that there was an agreement covered by this same consideration to procure other testimony with which testator might win his divorce suit. (Page 182.)

6. CONTRACTS—PROCURING TESTIMONY—VOID WHEN.—A contract is void as against public policy by which one of the parties thereto agrees to secure such testimony as will enable the other to win a contemplated suit. (Page 183.)

7. CONTRACTS—SUPPRESSING TESTIMONY.—A contract to suppress or enable another to suppress or conceal testimony is void as against public policy. (Page 183.)

8. CONTRACTS—LEGALITY—VIOLATION OF FEDERAL LAW.—An agreement whereby plaintiff agreed to procure certain letters and return them to the testator, if otherwise valid, is not invalid or illegal when the parties agreed that the letters should be mailed to the testator, although the letters were nonmailable under the Federal statute. (Page 183.)

Appeal from Lawrence Circuit Court, Eastern District; *R. E. Jeffery,* Judge; reversed.

*H. S. Ponder, Stuckey & Stuckey* and *Campbell & Suits,* for appellant.

1. The alleged contract was contrary to law. 30 Ark. Law Rep. 417; 29 *Id.* 517; 97 Ark. 153; 95 *Id.* 552; 85 *Id.* 106; 81 *Id.* 41; 46 *Id.* 420. It contemplated the violation of the law in the performance thereof. 170 Fed. 409; 160 *Id.* 700; 183 *Id.* 719; 188 *Id.* 450; 200 *Id.* 219.

2. The claim was not duly authenticated, nor presented for allowance. 30 Ark. Law Rep. 474; 45 Ark. 392; 15 *Id.* 345.

3. The affidavit is not such as is required by Kirby's Dig., § 114. Nor was a copy delivered to the executor. *Ib.,* § 113.

4. Incompetent evidence was admitted and the court erred in its charge to the jury. 22 Vt. 433; 54 Am. Dec. 83; 2 Fed. Stat. Ann. 123, § 3563.

5. The contract was immoral and contrary to public policy. Cases *supra.*

*L. C. Going,* for appellee.

1. The contract was not contrary to law, nor did it contemplate a violation of law. It was simply a contract to secure certain letters.

2. The claim was duly authenticated, proven and notice and copy waived.

3. No incompetent evidence was admitted.

4. The account showed on its face a valid claim.

5. The charge of the court was correct; no errors are pointed out. There was no proof that the contract contemplated a performance in a manner prohibited by law.

McCULLOCH, C. J. Appellant's testator, A. W. Shirey, lived at Minturn, Lawrence County, Arkansas, and was assassinated in March, 1910, and appellant qualified as executor of his last will and testament. Appellee, Mai Briant, presented to the executor an authenticated claim against the estate for the sum of $10,000, for services alleged to have been performed by her for decedent under a verbal contract with him. The claim was presented in the following form:

"Mrs. Mai Briant account v. the A. W. Shirey Estate. To legal services rendered to the said A. W. Shirey during his lifetime in the suit for divorce in which he was involved, said services being rendered at his request and solicitations.

ACCOUNT.

"To trip from Hope to Minturn, Jonesboro and other places and securing evidence which was used in his said suit for divorce....$10,000.

"The proof will show that Shirey in his lifetime, and not long before his demise employed Mrs. Briant to do certain work and on his own motion agreed to pay her $10,000."

Then follows an authenticating affidavit duly made before a notary public.

The executor declined to allow the claim, and it was presented to the probate court for allowance.

On appeal to the circuit court from the judgment of the probate court, the case was tried before a jury, and the trial resulted in a verdict in favor of appellee for the full amount of the claim.

The evidence tends to show that A. W. Shirey was an illiterate man of many eccentricities. He belonged to that religious sect or cult commonly known as Spiritualists, and was often made the prey of those who were disposed to take advantage of his credulity by offering aid to him in varied and extensive business transactions and in litigations. He had been married several times, and at the time of the transactions involved in this controversy was living separate and apart from his wife, a young woman whom he had married after he became an old man. A divorce suit had been pending between the two, which had resulted in the court refusing to grant a divorce at the request of either party, and there is evidence tending to show that he contemplated renewing the suit.

The claimant, Mrs. Briant, was Shirey's grandniece, and the testimony which she adduced shows that she was a favorite with him, often visiting his house, accompanied by her daughter, a small child. She formerly resided at Harrisburg, Ark., but at the time of these transactions she was living at Hope.

She introduced in evidence the following letters, which the testimony tends to show were written to her by Mr. Shirey:

"Minturn, Ark.

A. W. Shirey, General Merchandise.

Dear Sweet Niece May:

I send you $20.00 come if you will Try what I wrote you i will pay you $5,000.00 fore your services And if you succees i Will pay you double That. it Is not A big fee fore I have paid that much before. I Hape the dr.

Will not care fore helping Me any Thing you want To write since your Enitils and There will be no Danger I look fore you at Onct Bring Hortence to i love Her like you.

Yours Truly,

A. W. Shirey."

"Minturn, Arkansas, Sept. 15, 1909.

A. W. Shirey, General Merchandise.

Dear May

I Received yours of the 8. I have been out on the Fars, Estimating The crops For About A Week past, Is why I did not Acknowledge Receipt of your letter sooner. If it will not In convenience You will be glad to have you Call Maba Hortence Can Eat out of the Skillet A time or two If she Still likes it I want to settl with you when you can come. We find that the cotton here will average no more than 7L OR800 lb¼. The corne is AN average Crop.

A. W. Shirey."

"Minturn, Arkansas, Dec. 23, 1909.

A. W. Shirey, General Merchandise.

Dear niece

I did want you to com and spend Christmas with me So we could fix up Business but i am afrade it will not be safe For you to come. it greavs my soult That I am fixed as I Am but it Seams to be my Destiny It may End some Time if it dont i Will hope you are always comfortable and hapy If i go first you will not want fore nothing fore you and hortence you Are Like my children you Did what no lawyer could or would doe for Me It is worth more Than I told you i would pay. Mabe you can Meet Me in St. Louis when i go to buy spring Goods and we can settle then, I Will give you $5,000.00 Then any way and mabe can pay you the other $5,000.00 too I mean fore to pay much More than This when my truble Ends The more happiness In the world The Better it is fore the World and all in it.

Yours truly,

A. W. Shirey."

The first of the letters, including the signature, was typewritten, but there was some evidence tending to show that it was written on letter paper commonly used by him and was probably his letter.

Other testimony introduced tends to show that prior to this time Mr. Shirey had consulted a woman who claimed to be an adept in the art of fortune-telling or clairvoyance, and that she had induced him to write some letters, addressed to his wife, which contained profane, abusive and threatening language.

These letters were turned over to the woman for the pretended purpose of showing to Shirey's wife to induce or coerce her into a compromise. The letters remained in the possession of the clairvoyant, who resided at Little Rock, and the theory of appellee is that the service to be performed by her in consideration of payment of $10,000 was the procurement of the letters from the woman and their return to Shirey. She testified that she met the woman in Little Rock by appointment and finally induced her to part with the letters in consideration of the payment of the sum of $50, and that she (appellee) returned the letters to Shirey by mail from Little Rock.

Appellee introduced as a witness her daughter, who was twelve years old at the time of the trial, and about nine years old at the time of the transaction under investigation. The child testified, in substance, that she accompanied her mother to Minturn for the purpose of visiting her uncle in the spring of the year 1909, and that she was present at a conversation between the two in which an agreement was entered into whereby her uncle, Mr. Shirey, was to pay appellee the sum of $10,000 to get the letters back from Madam Rupert and return them to him, and to get other evidence for him to be used in his divorce case. She testified that the letters were to be used as evidence in the divorce case and that the agreement was that her mother was to procure the evidence to win the divorce case. She also testified that she accompanied her mother on a trip to Jonesboro

and heard her and Shirey talk about getting evidence to win his case. The testimony of the child is copied voluminously in the record and is to some extent contradictory, but she distinctly stated that the letters to be procured were to be used as evidence in the divorce case and that according to the conversation she heard between them her mother was to procure for her uncle evidence to win his divorce case.

Another witness introduced by appellee testified that he had a conversation with Mr. Shirey, in which the latter told him that he would employ appellee to get the letters back from Madam Rupert, and that he later told witness that appellee had gotten the letters and returned them to him; that the letters, if used against him in the divorce case, would prevent him from getting a divorce, and that he wanted to get the letters back in his possession.

Still another witness introduced by appellee testified to conversations with Shirey, in which the latter told him that he had employed appellee to get the letters back from Madam Rupert and was going to "pay her well;" that if she didn't accomplish the things he had asked her to do that he (Shirey) would be ruined; and afterwards Shirey stated to him that he had gotten the letters, and he was going to pay appellee well for the work.

The court permitted appellee to testify, over appellant's objection, as follows:

"Q. How much, if anything, does the estate of A. W. Shirey owe you? A. Ten thousand dollars. Q. Has any portion of it been paid? A. None whatever; no, sir."

After the case had been closed by both sides, appellee was recalled to the witness stand and, over appellant's objection, permitted to testify as follows:

"Q. Did you procure any evidence to be used in any contemplated suit? A. I never procured any evidence to be used in any suit whatever, pending or to be brought."

It is insisted, in the first place, that the account presented to the executor was not sufficiently specific and that the evidence does not bring the claim within the terms named therein. It is also argued that on account of the punctuation, the amount is stated in the claim as $10, instead of $10,000, as now contended, and that there could be no recovery beyond the former amount.

The statute concerning the presentation of claims against the estates of deceased persons only requires the claimant, where the claim is founded on an account, to present a copy of the account "setting forth each item distinctly and the credits thereon, if any." Kirby's Digest, § 113. Written pleadings, in the strict sense of the word, are not required, and it is sufficient if the items of the account be stated in general terms.

There is no controversy that the executor was informed at the time of the presentation of the claim that the sum of $10,000 was demanded, and there is no indication that the executor was misled either at that time or at the trial to the prejudice of the case; in other words, there was sufficient to apprise the executor and his counsel of the nature of the claim presented against the estate, and our conclusion is that the account as presented was sufficient to let in proof of services of the nature indicated by the testimony of the witnesses who were introduced in the case.

The rulings of the court in permitting appellee to testify as above indicated were clearly erroneous and call for a reversal of the case. Appellee based her claim upon an oral contract, which she undertook to establish by certain letters alleged to have been written by Mr. Shirey, by the testimony of her daughter concerning a conversation between appellee and Shirey, and by the testimony of other witnesses concerning statements alleged to have been made to them by Shirey, in which he stated that he had engaged appellee to do certain things and agreed to pay her well for the service, or would do so.

Appellee sued upon the alleged contract for the specific amount which she claimed that Shirey had agreed to pay her. The issue in the case was whether or not such an agreement had been entered into, and the only force which her testimony could have had before the jury would have been to establish the fact that Shirey owed her the sum of $10,000 upon contract for the services which she alleged that she had performed for him. Her testimony was of a negative character, but its direct tendency was to establish the fact that Shirey had contracted to pay her the sum named for certain services, and that he had failed to do so. This was clearly incompetent under the provision of our Constitution which prohibits either party, in action by or against executors, or administrators, or guardians, from testifying against the other "as to any transactions with or statements of the testator, intestate or ward." Section 2, Schedule to Constitution.

Under the rule announced in the following cases the testimony clearly related to a transaction with the decedent, and appellee was incompetent as a witness to testify concerning the same. *Gist* v. *Gans,* 30 Ark. 285; *Jarvis* v. *Andrews,* 80 Ark. 277; *Williams* v. *Walden,* 82 Ark. 136.

In *Gist* v. *Gans, supra,* it was held that the plaintiff in a suit on a note against the estate of a decedent was incompetent as a witness to prove that at the time the note was executed by deceased it contained certain words found therein when presented at the trial. The court said:

"The execution of the note by the deceased to the plaintiff was a transaction between them, and whether the note did or did not contain the words 'when called on' at the time it was executed was a material element of that transaction, and we think it was incompetent for the plaintiff to testify in effect, as he was permitted to do, that these words were in the note when it was executed."

In *Jarvis* v. *Andrews, supra,* the testimony of one

of the parties was offered to show that he did not execute and deliver the promissory note in controversy, and in disposing of the question of the competency of the witness, the court said:

"Testimony negativing the existence of a transaction in issue is as much within the inhibition as testimony affirming the existence of the transaction. The testimony was properly rejected."

The principles of law which control in this case are clearly set forth in the recent case of *Neece* v. *Joseph,* 95 Ark. 552, which involved a very similar question, and also involved a claim against the estate of Shirey. We held in the case (quoting the syllabus) that "a contract is void as against public policy by which one of the parties agrees to secure such testimony as will enable the other to win an existing or contemplated suit." It was pointed out in that case that it was not unlawful to enter into a contract to obtain evidence in a lawsuit, but the illegality consisted of a provision that the evidence "to be procured should be of a given state of facts, of a tendency to enable defendant to win his suit." In other words, it was held that an undertaking to procure evidence in a case could be the subject-matter of a valid contract but that a contract to procure testimony of a certain nature or to establish a certain issue was contrary to public policy and void.

There are other decisions of this court illustrating the invalidity of contracts for unlawful or immoral purposes. *Mendel & Bro.* v. *Davies,* 46 Ark. 420; *Carey* v. *Watkins,* 97 Ark. 153; *Eager* v. *Jonesboro, Lake City & Eastern Express Co.,* 103 Ark. 288.

In *Mendel & Bro.* v. *Davies, supra,* the court concisely stated the rule:

"Where the ground of a promise on one part, or the thing promised to be done on the other part, is unlawful, the courts will not enforce the contract for either party."

Applying that principle to this case, if, as the testimony shows, the appellee, Mrs. Briant, entered into

a contract with Shirey to procure evidence to win his divorce case, or to secure the possession of the letters for the purpose of preventing their use against him as testimony in the divorce case, the contract was illegal and void and can not be recovered upon. If, on the other hand, the procurement of the letters was the only service to be performed by her, and she was unaware of any unlawful or immoral purpose on the part of Shirey in obtaining possession of the letters, and undertook for a consideration to obtain possession of the letters which he had written and delivered to Madam Rupert, then the contract was not illegal. In other words, if the only purpose was to recover the letters without any design on his part, known to her, to suppress them, and if the agreement did not embrace an undertaking to procure evidence to win the divorce case, then it was a valid contract.

There is some testimony indicating that Shirey feared the letters might be used in a criminal prosecution against him for unlawful use of the mails, and if it was shown that it was his purpose to get possession of the letters to suppress them as evidence, and that appellee was aware of and participated in that design, then the contract would be void. But if Shirey merely endeavored to get the letters back to prevent them being unlawfully mailed to his wife, then it would be an innocent design and would not avoid the contract.

The only witness introduced by appellee to establish her claim, who testified directly concerning the details of the contract, that is to say, her daughter, testified that the agreement was that she was to procure the letters and other evidence that would "win the divorce case." The testimony of other witnesses, which related to conversations with Shirey, was to the effect that he procured the letters in order to prevent them being used against him in the divorce case. In fact, the letters were of no value, intrinsically, and the only reasonable inference from the testimony is that the purpose in procuring them was to suppress them.

In that state of the record we can not permit the verdict to stand.

There are other errors in giving and refusing instructions to which attention should be called. Instruction No. 3, given at the instance of appellee, reads as follows:

"If you find from a preponderance of the evidence that plaintiff and A. W. Shirey entered into a contract by the terms of which plaintiff was employed to procure letters written by the said A. W. Shirey, and you further find from a preponderance of the evidence that said letters were not evidence in any suit or were not to be used as evidence in any suit in which the said A. W. Shirey was interested or was to become interested, and that in pursuance of said contract, plaintiff performed the service for which she was employed and that said Shirey agreed to pay her for such service, then your verdict should be for the plaintiff."

This instruction was erroneous in ignoring the testimony of appellee's child to the effect that the contract included the procurement of other evidence to win the divorce case. She testified that such was the contract and that her mother went to Jonesboro and procured the testimony of certain witnesses which she reported to Shirey, who said it was sufficient to win his case. It is true that another instruction was given at the instance of the plaintiff which was perhaps more liberal towards appellant in stating the law as to void contracts than is justified; but the two instructions were conflicting, and were calculated to mislead the jury. The instruction just quoted directed the attention of the jury to the sole question of the procurement of the letters and, as before stated, entirely ignored other testimony in the record which tended to show that there was an agreement, covered by the consideration involved in this suit, to procure testimony with which the divorce suit was to be won.

The following instructions requested by appellant were concise statements of the law applicable to the case and should have been given:

"7. A contract is void as against public policy by which one of the parties thereto agrees to secure such testimony as will enable the other to win a contemplated suit."

"8. A contract is void as against public policy by which one of the parties agrees to suppress or conceal, or enable another to suppress or conceal, testimony as to the existence of facts or letters, papers, or documents material to a contemplated suit."

There is another feature of the case which learned counsel for appellant insist is fatal to the correctness of the judgment and argue that the cause should be dismissed, because the facts are undisputed as to that feature. Appellee testified that she sent the letters back to Shirey by mail, and that this was done by his direction. The contention of appellant is that her undisputed testimony shows that as a part of the contract she was to make use of the mails for the purpose of delivering the letters to Shirey, when secured from the clairvoyant, and that as the letters constituted nonmailable matter it necessarily rendered the contract void.

In the first place, we are unable to say that the testimony of appellee shows indisputably that this was a part of the contract, nor does it show that the letters were nonmailable. None of the letters were read in evidence, but appellee undertook to state in substance the contents and, in doing so, said that they contained threatening and profane language. The Federal statute which is said to have been violated prescribes a penalty for sending "every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character." An act of Congress of March 4, 1909, 35 St. At. L. 1129, Fed. Stat. Anno. Supplement 1909, p. 462, § 211. It is by no means certain, therefore, that the language

used in the letters rendered them nonmailable. But even if they were nonmailable and it was agreed at the time of making the contract that they should be transmitted through the mails, we do not regard that as an essential part of the contract so as to invalidate it. The essential part of the contract, if any such contract was, in fact, made, was to procure the letters and return them to Shirey, and the method of transmission was a nonessential part of the contract and a mere incident to its performance. If, under the contract, as appellee attempts to establish it, she obtained the letters and returned them in some lawful manner, she would have thereby earned compensation and would have been entitled to recover, even though the letters had been returned in some way other than that specified. Of course, it is possible to make a contract whereby an essential feature of it is the transmission of nonmailable matter through the mails, and that would render the contract void; but we do not think that there is any evidence here to establish that feature as an essential part of the contract, and we are therefore of the opinion that there is no reversible error in the record on that branch of the case.

For the errors indicated the judgment is reversed and the cause remanded for a new trial.

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## HODGES v. KEEL.

Opinion delivered July 14, 1913.

1. LEGISLATURE—SENATE—PRESIDENT TAKES OFFICE WHEN.—Under art. 5, § 18, of the Constitution, which provides that "at the close of any session" the Senate shall elect a president from the members whose terms extend over into the next regular session, the president so elected becomes president of the Senate at the fall of the gavel which marks the end of the session, and the end of the term of the old president. (Page 189.)

2. GOVERNOR—WHEN PRESIDENT OF THE SENATE BECOMES ACTING GOVERNOR.—O was president of the Senate and acting Governor and on March 13, 1913, at 10 A. M. approved a bill passed by the General Assembly. F was elected president of the Senate and

qualified on March 13 at 9:11 A. M., which was before the final adjournment of the Senate. Later F, as Acting Governor withdrew the bill from the Secretary of State and vetoed it. *Held,* F did not become president of the Senate and Acting Governor until the actual adjournment of the Senate for the session, and that the act became a law when it was approved by O, who was Acting Governor until the adjournment. (Page 190.)

3. MANDAMUS—WILL ISSUE WHEN.—Mandamus is the proper remedy whereby one specially interested in the enforcement of a statute, may compel the Secretary of State to publish an act of the General Assembly under his certificate. (Page 191.)

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

*Wm. L. Moose,* Attorney General, and *John W.* and *Jos. M. Stayton,* for appellant.

When the Senate, in compliance with section 18, article 5, of the Constitution, elected Senator Futrell as President of the Senate at the close of the session, and he took the oath of office as such, the term of his predecessor immediately ended. 107 Ark. 386, 155 S. W. (Ark.) 504; *Id.* 507.

The words "at the close of the session" do not mean that the election must take place on the final day thereof. These words were not intended by the framers of the Constitution to be construed literally, for the close of the session does not come until immediately after the *sine die* adjournment.

The constitutional requirement that this election be held during the session is mandatory. *Id.* 505.

Senator Futrell was entitled to take the oath of office immediately after his election, and thereby terminate the incumbency of Senator Oldham, *supra,* p. 507. When he took the oath of office, therefore, at 9:11 A. M. on March 13, 1913, he became President of the Senate for all purposes, at that hour, and the subsequent oath taken by him before the Chief Justice was mere surplusage.

*Morris M.* and *Louis M. Cohn,* for appellees.

1. Governor Futrell's veto of the act in question was ineffective and void, "the executive power over the

bill" having been by Governor Oldham "exercised and exhausted before the attempted veto." 83 Ark. 448, 467.

2. The opinion in *Futrell* v. *Oldham,* 155 S. W. 504, does not sustain appellant's contention, but it fairly warrants the conclusion that Mr. Futrell took the office to which he had been elected "at the close of the session" and not before. Mr. Oldham was in law the President of the Senate and *ex-officio* Governor until the end of the session, and Mr. Futrell became president upon the adjournment of the session.

3. That the petitioners were proper parties to institute proceeding is obvious. 45 Ark. 121; 26 Ark. 100; 30 Ark. 472; 24 Ark. 1; 42 Ark. 152; 83 Ark. 448; 91 U. S. 343, 354, 355; 41 L. R. A. 615; 19 Wash. 518; 53 Pac. 719; 126 Mich. 341; 85 N. W. 114; 115 Ia. 738, 87 N. W. 704. And the Secretary of State was the only necessary defendant. 33 Ark. 450.

Mandamus is the proper remedy. 76 Va. 876; 65 W. Va. 587, 64 S. E. 845, 22 L. R. A. (N. S.), 1089; 79 Va. 269.

McCULLOCH, C. J. The General Assembly of 1913 enacted a special statute creating a levee district in Jackson County, Arkansas, designated as Village Creek & White River Levee District.

The bill was presented to the Acting Governor, for his approval or disapproval, on March 12, 1913, the day before final adjournment, and on March 13, 1913, at 10:10 o'clock A. M., Mr. Oldham, who then occupied the Governor's office and assumed to discharge the duties of Acting Governor, approved and signed the bill, and filed it in the office of the Secretary of State.

That session of the General Assembly came to a close at noon on that day, and Mr. Futrell succeeded to the office of Acting Governor by election to the office of President of the Senate.

The controversy between these two gentlemen over the question of the succession to that office was decided by this court in the reecnt case of *Futrell* v. *Oldham,* 107 Ark. 386, 155 S. W. 502. The details are set

forth in the opinion of the court in that case. The decision was rendered on March 24, 1913, and on that day Mr. Oldham relinquished the Governor's quarters in the State Capitol to Mr. Futrell and no longer assumed to act as Governor.

Thereafter, on March 31, 1913, which was within the twenty days allowed for approval or disapproval of bills by the Governor when the General Assembly by adjournment prevents the return of a bill within five days (Constitution, art. 6, § 15), Mr. Futrell withdrew this bill from the office of the Secretary of State and vetoed it. His proclamation announcing the veto recites that he had qualified as President of the Senate at 9:11 o'clock A. M. on March 13, 1913, and at that moment became Acting Governor, and that the power of his predecessor to act at that time ceased.

The Secretary of State has refused to cause the act to be published as required by statute, and appellees, who are property owners within the boundaries of the levee district, instituted this action in the Pulaski Circuit Court to compel the Secretary of State to perform his duties in that respect. The circuit court awarded the writ of peremptory mandamus as prayed, and the Secretary of State has appealed to this court.

The contention of appellees is that Mr. Oldham, at the time he signed the bill, was, not only *de facto* President of the Senate and Acting Governor, but that his term had not ended and that he was President of the Senate *de jure*.

On the other hand, it is contended by the Attorney General and the counsel associated with him in the case that Mr. Futrell became President of the Senate and Acting Governor before the bill was signed by Mr. Oldham and that the power of the latter to act as Governor had ceased.

We look to the journals of the two houses and the records in the office of the Secretary of State for the purpose of ascertaining the proceedings concerning the

enactment and approval of a statute. *Powell* v. *Hays*, 83 Ark. 448.

The regular session of the General Assembly came to an end, as before stated, on March 13, 1913, at noon.

On Monday, March 10, 1913, the Senate passed a resolution reciting the section of the Constitution 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," and providing that the Senate "proceed to the election of a president from those members who continue over as provided by said Constitution of the State of Arkansas."

Pursuant to said resolution the Senate proceeded to the election, and Mr. Futrell was elected on that day.

The Governor of the State had resigned on March 8, and Mr. Oldham, as President of the Senate, was acting as Governor, and continued to act in that capacity until the close of the session, and he also assumed to act until the controversy was settled by the decision of this court.

Mr. Futrell appeared before one of the Associate Justices of the Supreme Court at chambers on March 13, 1913, at 9:11 o'clock A. M., and took and subscribed the oath of office as President of the Senate. A copy of the oath was filed in the office of the Secretary of State. He did not make known to the Senate or to Mr. Oldham the fact that he had taken the oath as President of the Senate, and did not undertake to discharge the duties of that office until he again took the oath of office before the Chief Justice of the Supreme Court, in the presence of the Senate, at 10:45 o'clock A. M., with the usual ceremonies. He explains in a statement of his which was adduced in evidence in this case that he was ready to take the chair as President of the Senate at any moment, but had business on the floor of the Senate, and for that reason did not do so.

It will be seen from the above recitals that Mr. Old-

ham approved and signed the bill between the time that Mr. Futrell took the oath of office before one of the Associate Justices and the time that he again took the oath administered by the Chief Justice in the presence of the Senate.

The determination of who was President of the Senate *de jure* at the time the bill was signed by Mr. Oldham turns, of course, upon the decision of the question when the term of office of the President of the Senate, elected at the beginning of the session, ends, and when the term of the holdover, elected at the close of the session, begins.

The Constitution provides that the Senate, "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 * * *; 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 term 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."

The President of the Senate is elected at the beginning of the session for a term. That term begins with his election and ends with the close of the session. He may be removed and a vacancy created by a vote of the Senate. The particular method and procedure in that respect need not now be determined.

Conceding that the president may be removed by resolution at any time during the session, and another elected in his stead, it is apparent from the record that it was not intended by the election of Mr. Futrell three days before the close of the session to remove Mr. Oldham from office at that time and to create a vacancy to be filled by the election of another. The resolution itself recites that the election was to be held in performance

of the constitutional function of electing a president to regularly succeed the incumbent.

The election was not held precisely at the close of the session, and that need not have been done. The language of the Constitution is that that shall be done "at the close of any session." Manifestly, the election must be held before the session actually closes, and it need not be the last act of the Senate. The purpose of this provision is that, in contemplation of the close of the session and before the session actually ends, the Senate shall elect a successor to the then incumbent of the office of president, and that he shall qualify as such. In other words, the fall of the gavel at the end of the session marks the end of the term of the old president and the beginning of the term of the new. That is the effect of our decision in *Futrell* v. *Oldham, supra.*

It is unimportant to inquire whether the oath of office taken by Mr. Futrell before one of the Associate Justices in his chambers, or the oath taken later, in the presence of the Senate, before the Chief Justice, was the one upon which he was inducted into office. Both oaths were taken in contemplation of assuming the duties of the office at the moment specified by the Constitution, and was effective for that purpose, but neither of the oaths ushered him into office until the time specified by the Constitution, which was the close of the session, and until that moment his predecessor, Mr. Oldham, was President of the Senate *de jure.*

Now, there is another reason which could well be brought forward why Mr. Oldham's act in approving and signing the bill was valid. He was Acting Governor *de facto* and in the discharge of the duties as such and no demand had been made upon him at that time for a surrender of the office, and Mr. Futrell had not at that time asserted his right to hold the office. Without attempting to go into any full discussion as to what period of time the validity of Mr. Oldham's acts as *de facto* Governor continued, it seems clear to us that, up to the time that Mr. Futrell demanded the office and

undertook to set up as Acting Governor a separate office in the State Capitol, the acts of Mr. Oldham as *de facto* Acting Governor should be held to be valid. Under any other view of the case interminable confusion might arise.

Appellees adopted the proper remedy in this case. The statutes of the State require the Secretary of State to cause the acts of the General Assembly to be published under his certificate by the public printer, and those specially interested in the enforcement of this statute have the right to insist upon its being published, so as to be given proper public authenticity. Appellees are property owners to be benefited by the improvement specified in the act and are, therefore, interested within the meaning of the law and entitled to ask for mandamus to compel the Secretary of State to discharge his duty in this respect. *Maddox* v. *Neal,* 45 Ark. 121. As to remedy by mandamus, see authorities cited in appellee's brief.

The judgment of the circuit court awarding peremptory mandamus was correct, and the same is therefore affirmed.

SMITH, J., concurs.

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## DAVIDSON v. STATE.

Opinion delivered June 9, 1913.

1. INDICTMENT.—CHARGING AN OFFENSE IN DIFFERENT MODES—ELECTION BETWEEN COUNTS.—Where an indictment charges in several counts the same offense committed by defendant in different modes, and does not charge the commission of more than one offense, it is not error to refuse to compel the prosecuting attorney to elect to stand on a single count. (Page 195.)

2. RECORD ENTRY—CONFLICT BETWEEN RECORD ENTRY AND BILL OF EXCEPTIONS.—When there is a conflict between the recitals of the record entry proper and those in the bill of exceptions, the former must prevail (Page 196.)

3. TRIAL—CONSTITUTIONAL GUARANTEE TO ACCUSED.—Under art. 2, § 10, of the Constitution, which provides that in a criminal trial the defendant shall be confronted by witnesses against him, have

process to compel attendance of witnesses in his favor "and to be heard by himself and counsel," it is guaranteed that an accused shall have the privilege of being present in person and by counsel whenever any substantive step is taken by the court in his case. (Page 197.)

4. TRIAL — CRIMINAL PRACTICE — VERDICT — PRESENCE OF ACCUSED — WAIVER.—Under Constitution, art. 2, § 10, and Kirby's Digest, § 2339, in a capital case the defendant may, after the trial has commenced, waive his personal presence at a step in the progress of the trial, such as receiving the verdict, and when his presence has been duly waived, a judgment will not be reversed on account of his absence upon his own consent, unless it appears that he was prejudiced in some way by such absence. (Page 198.)

5. CRIMINAL PRACTICE—VERDICT IN ABSENCE OF DEFENDANT.—Where defendant through his counsel requested the court to permit the removal of defendant from the county for fear of violence from a mob, when the court granted the request, defendant can not complain that the verdict was returned in his absence. (Page 199.)

6. ATTORNEY—WAIVER OF ACCUSED THROUGH ATTORNEY OF PRESENCE WHEN VERDICT RECEIVED—AUTHORITY—PRESUMPTION.—A defendant accused of first degree murder may, through his attorney, waive his presence when the verdict of the jury is received; and in the absence of a showing to the contrary, the authority of the attorney will be presumed. (Page 203.)

7. HOMICIDE — CIRCUMSTANTIAL EVIDENCE — SUFFICIENCY. — Evidence, though circumstantial, held sufficient to warrant the finding of the jury that defendant was guilty of murder in the first degree. (Page 208.)

8. EVIDENCE—CONTRADICTORY STATEMENTS—INADMISSIBLE FOR ALL PURPOSES—ERROR NOT PREJUDICIAL WHEN.—In a trial for murder, when a witness testifies to a certain state of facts, and is asked on cross examination if he did not make contradictory statements before the grand jury, and he admits that he did, the testimony is admissible only for the purpose of contradicting the witness, and not as substantive evidence of the facts related in the contradictory statement; but where the court admits the testimony for all purposes, the defendant is not prejudiced where the facts stated on the contradicting testimony are proved by other witnesses. (Page 208.)

9. APPEAL AND ERROR — EVIDENCE—ADMISSIBILITY—ERROR NOT PREJUDICIAL WHEN.—Where defendant is being tried for murder it is competent for counsel for defendant to interrogate a witness offered by the State, in order to determine his credibility, but where the court refused to permit such questions, defendant is

not prejudiced, when the facts stated by the witness were thoroughly established by the testimony of several other witnesses which are uncontradicted. (Page 209.)

10. EVIDENCE—CIRCUMSTANTIAL EVIDENCE—COMPETENCY.—In a trial for murder, evidence of the finding of defendant's pistol near the scene is competent, being a fact to go to the jury as a circumstance indicating defendant's presence there on the occasion of the killing. (Page 210.)

11. EVIDENCE—CIRCUMSTANTIAL EVIDENCE — COMPETENCY.—Evidence of the finding of an axe two days after the killing, and testimony that blood on the same was human blood, *held* competent. (Page 210.)

12. EVIDENCE—STATEMENTS OF DEFENDANT.—Where a witness stated that upon one occasion defendant had used language about deceased which she did not care to repeat, *held*, it was not error to permit witness to state why she did not care to repeat it; witness not being asked what the language was. (Page 210.)

13. TRIAL—ARGUMENT OF COUNSEL.—Where in a trial for murder, the prosecuting attorney used this language in his argument to the jury: "You have a right to consider this conversation with Miss Barham in presence of her sister, gentlemen of the jury, so unexplained by any one and unexplained and undenied by any one, and I call on them now to explain this conversation, if true," is not improper as a comment on the failure of defendant to testify. (Page 211.)

Appeal from Boone Circuit Court; *George W. Reed,* Judge; affirmed.

*E. G. Mitchell* and *Guy L. Trimble,* for appellant; *W. P. Smith,* of counsel.

1. The right of a defendant to be present in a felony case is both statutory and constitutional. Kirby's Dig., § 2339; Const., art. 2, § 10; 5 Ark. 431; 10 *Id.* 325; 58 *Id.* 239; 30 *Id.* 328; 62 *Id.* 537; 44 *Id.* 331; 100 *Id.* 334; 146 U. S. 374; 4 Sup. Court Reporter, 204; 28 Am. Dec. 629, and notes; 110 U. S. 524; 40 Ala. 325; 49 Cal. 41; 8 Col. 457; 37 Fla. 162; 55 Ga. 521; 14 Bush, 769; 30 La. 367; 53 Miss. 363; 84 N. C. 412; 4 Ore. 198; 99 Va. 816; 85 Wis. 400; 90 Mo. 37; 20 S. W. 758. All the courts hold that receiving the verdict in defendant's absence is error.

2. The waiver of counsel could not bind defendant. The right to be present can not be waived. 28 Am. Dec.

630, and notes; 12 Fla. 562; 97 N. C. 404; 24 Ark. 634; 20 L. R. A. (N. S.), 510; 110 U. S. 524; 146 *Id.* 374; 4 S. C. Rep. 204, and cases *supra.*

3. The receiving of a void verdict acts as an acquittal. Cases *supra;* 53 Miss. 363; 83 Ind. 331; 19 Kan. 445; 60 Minn. 90; 29 Tex. App. 62; 6 S. W. 646; 43 Ark. 271; 48 *Id.* 38; 31 Am. Rep. 31; 19 *Id.* 719; 24 Ark. 629.

4. The admission of the testimony of Alex Davidson as to what he swore before the coroner's jury and the grand jury and the remarks of counsel thereon were erroneous and prejudicial. 72 Ark. 584; 100 *Id.* 344; 51 *Id.* 115; 93 *Id.* 324; 52 Am. St. Rep. 717.

5. It was error not to sustain the motion to elect on which count the State would prosecute. 69 Ark. 184; 60 *Id.* 554; 48 *Id.* 94; Kirby's Dig., § 2230.

6. The instructions are erroneous (136 Mo. 41-45), especially as to reasonable doubt and as to crimes committed by means of poison, lying in wait, burglary, arson, robbery, etc. Defendant was only charged with murder. 69 Ark. 184.

*Wm. L. Moose,* Attorney General, and *John P. Streepey,* Assistant, for appellee; *Gus Seawel,* of counsel.

1. The evidence sustains the conviction. The motive was shown.

2. Appellant was present when the verdict was rendered as the *record* recites. While the bill of exceptions seems to indicate his absence and that he had by counsel waived his right to be present, the *record* is supreme and must prevail. 97 Ala. 49, 51; 165 *Id.* 18; 3 Col. 396; 3 Cyc. 153; 42 So. 380; 107 S. W. 420, 135 *Id.* 28; 17 Ark. 532; 24 *Id.* 499, 505; 23 *Id.* 131; 22 *Id.* 365; 72 *Id.* 320; 87 *Id.* 50; 10 L. R. A. 933-6; 144 S. W. 208.

3. The right to be present when the verdict is rendered is not a constitutional right, and may be waived. Const., art. 2, § 10; 43 Ark. 391; 46 *Id.* 141, 147; 20 L. R. A. (N. S.), 511.

4. He was not prejudiced by the verdict being rendered in his absence. 104 Ark. 629; 50 Ark. 492, 499.

5. There was no error in admitting the testimony of Alex Davidson as to his former testimony. 76 Ark. 276. But if error, no objection was made. 92 *Id.* 237, 239; 80 *Id.* 364.

6. The remarks of the court were neither erroneous nor prejudicial. 2 Ark. 512, 574; 83 *Id.* 379.

7. The appellant was only charged with *one* crime in different counts. 50 Ark. 305, 313; 71 *Id.* 574.

8. There is no error in the instructions. They are well sustained. 105 Ark. 37; 106 Ark. 362; Kirby's Dig., § 1766; 29 Ark. 248, 268; 37 *Id.* 238, 254.

McCULLOCH, C. J. The defendant, Odus Davidson, was convicted of the crime of murder in the first degree. He is accused in the indictment of murdering Ella Barham, a young woman about eighteen years of age, who lived in Boone County, Arkansas, in the same neighborhood where defendant resided and where he had been reared.

There are several counts in the indictment, each charging the defendant with the crime of murder in the first degree, committed in different modes by killing Ella Barham. Each count of the indictment is legally sufficient as a charge of the crime of murder in the first degree, and the indictment concludes with the following clause, namely: "It being intended throughout each count in this indictment to charge the offense herein set out as having been committed in different manners and by different means, but all referring to one and the same transaction."

The defendant moved the court to require the prosecuting attorney to elect upon which count of the indictment he would proceed. The court overruled the motion, and that ruling is assigned as error.

The indictment presents a clear instance of charging the same offense committed in different modes. It does not charge the commission of more than one offense and it is, therefore, not open to the objection that different offenses are named therein. *Corley* v. *State,* 50 Ark. 305.

The next assignment of error is that the trial was vitiated on account of the verdict of the jury being received by the court in the absence of the defendant.

The record entry of the trial and judgment recites the presence of defendant in person and by his attorneys, but the circuit judge has certified in the bill of exceptions that the defendant was not present in person when the verdict was returned and that his attorneys were present and entered into a written stipulation for him consenting that the verdict might be returned in his absence. The recital on this subject in the bill of exceptions reads as follows:

"Two or three hours after the jury had retired in the charge of the officers, under the instructions of the court to consider their verdict, and on the same day, there was a consultation between the attorneys for the defendant and the court in the absence of both the defendant and the prosecuting attorney, and upon the request of the attorneys for the defendant, and upon the specific understanding that the agreement be reduced to writing, waiving the presence of the defendant, if a verdict was returned in his absence, the court and the attorneys for the defendant believing there was danger of a mob, and such action being in the interest of the defendant, the court ordered the sheriff, without the agreement of the prosecuting attorney, and over his objections, to convey the defendant to the jail at Berryville, Carroll County, Arkansas. The defendant was present at all times, either in person or by attorney. Such agreement and waiver was prepared by defendant's counsel, and signed by the said E. G. Mitchell and B. B. Hudgins and other counsel in the case, which written waiver was in words as follows." (Here follows copy of the written stipulation.)

Where there is a conflict between the recitals of the record entry proper and those in the bill of exceptions, the former must prevail; but inasmuch as the circuit judge has certified the facts in the bill of exceptions and defendant's counsel have asked for a postponement of

the case here until the circuit court convenes again and an opportunity can be given for an amendment of the record, we would not dispose of the question adversely to defendant's contention without giving him an opportunity to have the record amended if an amendment in accordance with his contention would bring about a different result in the disposition of the case. We will, therefore, treat the record as amended so as to show his absence by consent as recited in the bill of exceptions, and will test his right to a reversal of the judgment on that state of the record.

The Constitution (art. 2, § 10) provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *; and to be informed of the nature and cause of the accusation against him, and to have a copy thereof; and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to be heard by himself and his counsel.*"

A section of the Code of Criminal Procedure reads as follows:

"If the indictment be for a felony the defendant must be present during the trial. If he escapes from custody after the trial has commenced, or, if on bail, shall absent himself during the trial, the trial may either be stopped or progress to a verdict, at the discretion of the prosecuting attorney, but judgment shall not be rendered until the presence of the defendant is obtained." Kirby's Digest, § 2339.

It is insisted on behalf of the State that the constitutional provision quoted above does not guarantee the right of an accused person to be present when the verdict is returned, and that the judgment should not be reversed on account of the absence of the defendant when the verdict was rendered unless it appears that his absence operated to his prejudice.

We do not think, however, that that contention is sustained by the decisions of this court.

The language of the Constitution, "to be heard by

himself and his counsel," is a guarantee that an accused shall have the privilege of being present in person and by counsel whenever any substantive step is taken by the court in his case. *Bearden* v. *State,* 44 Ark. 331. Chief Justice COCKRILL, speaking for the court in the case just cited, said:

"Under this rule it is not necessary that the accused shall show that he was actually prejudiced by the proceeding had in his absence. It is sufficient to annul the verdict against him if it appears that he may have lost an advantage or been prejudiced by reason of a step taken in his absence. The reason of the rule is to secure to the accused full facilities for defense. However, while he can not be deprived of his right to be present at all stages of his trial, it does not follow that he must be. The statute provides that certain proceedings may be had in the absence of a defendant who absconds, or is on bail and absents himself. Where, also, no prejudice could by any possibility result from the action of the court, there is no reason for requiring the presence of the defendant."

The Constitution does not provide that the defendant *must* be present, but that he may be present. It is a privilege which is conferred and does not relate to the power of the court to conduct the successive steps in the trial.

The statute referred to reads that the defendant "*must* be present during the trial."

The statutory provision is, however, not for the benefit of the accused, but for the State. *Martin* v. *State,* 40 Ark. 364.

The list of authorities cited by counsel for appellant discloses decisions to the effect that in capital cases the accused can not waive his presence when the verdict is received or at any other substantive step in his trial; and there are a few decisions to the effect that, even in felony cases other than capital, the accused can not waive his presence at any step in the progress of the trial.

It may be said here, however, without further dis-

cussion, that according to the great weight of authority, in felony cases other than capital, the accused may waive his presence. 12 Cyc. 527.

In a recent decision of the Supreme Court of Mississippi, the court held that, where the defendant was charged with a capital offense (murder in the first degree), but was convicted of the lower offense of manslaughter, the trial was vitiated by the fact that the accused was absent. *Sherrod* v. *State,* 93 Miss. 774, 47 So. 554, 20 L. R. A. (N. S.), 509. The recital of facts in that case shows that the defendant was on bond and voluntarily absented himself at the time it was announced that the verdict of the jury would be received; but the court held that he could not waive his presence when that important step in his trial was taken.

The Supreme Court of the United States also held that a person accused of a capital offense can not waive his presence at a substantive step in the proceeding. *Hopt* v. *People,* 110 U. S. 574. The grounds of the decision were stated for the court by Mr. Justice Harlan as follows:

"We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the grounds that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public as of the end of human punishment. * * * The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty can not be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of

future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him."

It will be thus seen that that court based its conclusions on the ground that the accused could not waive his presence for two reasons; one, that the power of the court to act depended upon the presence of the accused; and, next, that the public interest in the result of the trial deprived him of the power to give his consent to his absence.

These grounds are, we think, far from tenable, and neither of the cases quoted from above appeals to us as stating sound conclusions; nor are the conclusions reached there in accordance with the decisions of this court.

The power of the court to proceed does not depend upon the personal presence of the accused. Only his right to be present is guaranteed by the Constitution and laws of this State. Any other construction of the constitutional provision would render invalid the statute which provides that if the accused escape from custody after the trial has commenced, or, if on bail, the accused shall absent himself, the trial may progress to a verdict notwithstanding his absence.

This court has declared that statute to be a valid one. *Gore* v. *State,* 52 Ark. 285.

The fact that the statute permits the accused, by his voluntary absence, to waive his presence at the trial, demonstrates that the power of the court to act does not depend upon the presence of the accused, and that it is only where steps are taken in the absence of the latter without his consent, that his rights are violated.

The converse necessarily is true that, where he vol-

untarily absents himself, the court may proceed with the trial in his absence.

Other constitutional guaranties of equal importance and dignity may, according to our decisions, be waived by an accused person.

The Constitution guarantees to the accused the right to have a copy of the indictment; but that may be waived. *McCoy* v. *State,* 46 Ark. 141; *Powell* v. *State,* 74 Ark. 355; *Hobbs* v. *State,* 86 Ark. 360.

It provides that the accused shall be "informed of the nature and cause of the accusation against him;" that is to say, he shall be arraigned. The statute also provides that he shall be arraigned before trial. But this court held that it is a right which can be waived. *Ransom* v. *State,* 49 Ark. 176; *Moore* v. *State,* 51 Ark. 130; *Hayden* v. *State,* 55 Ark. 342.

In *Hobbs* v. *State, supra,* the court held that, even without a formal waiver of arraignment, a judgment would not be reversed "if the record shows that the defendant received every right which he would have received had he been duly arraigned."

The Constitution also provides that the accused has the right "to be confronted with the witnesses against him," but who can doubt for a moment that the accused, even in a capital case, may waive the production of a witness and agree what his testimony will be and consent that it shall go to the jury. The following decisions by other courts settle that question: *Rosenbaum* v. *State,* 33 Ala. 354; *Butler* v. *State,* 97 Ind. 378; *State* v. *Palson,* 29 Iowa, 133; *State* v. *Fouks,* 65 Iowa, 452; *State* v. *Harnsby,* (La.) 41 Am. Dec. 305; *People* v. *Ulunay,* 52 Mich. 288;; *State* v. *Wagner* (Mo.), 47 Am. Rep. 131; *Williams* v. *State,* 61 Wis. 281; *Hancock* v. *State,* 14 Tex. App. 392; *Allen* v. *State,* 16 Tex. App. 237. Now, if those privileges, which are equally guaranteed by the Constitution, may be waived, why may not the accused waive his own presence at some step of the trial?

This court in a number of cases has decided that the defendant in a felony case may waive his presence.

In *Polk* v. *State,* 45 Ark. 165, it was held that it was not error for the trial court to make an order in the absence of the defendant for a change of venue. The court said, in disposing of the question, that the trial court did nothing in the premises except to grant the request of the defendants, and that they could not possibly have been prejudiced by their absence.

In *Bond* v. *State,* 63 Ark. 504, the court held, as in the Polk case, *supra,* that it was not reversible error to make an order for a change of venue in the absence of the defendant.

In *Baker* v. *State,* 58 Ark. 513, it was held that the defendant could in person waive the presence of his counsel when the verdict was returned.

In *Darden* v. *State,* 73 Ark. 315, we held that the defendant, if on bail, could not complain of the examination of witnesses during his voluntary absence.

It is true that none of these was a capital case; but we do not perceive any difference when it comes to the question of the power of the accused to waive some of the privileges that are guaranteed to him by the Constitution and laws. It is the duty of trial courts, in that class of cases, to guard more carefully the rights of accused persons and to see that their rights are not prejudiced; but, after all, the test of the power of the court in a capital case with respect to the presence of the accused is the same as in any other felony cases. Our laws make no distinction. This court has held that one accused of the crime of murder may enter a plea of guilty, but that, on account of the statutory limitation upon the powers of the court, a jury must be empaneled to pass upon the degree of the offense. *Lancaster* v. *State,* 71 Ark. 100.

In *McVay* v. *State,* 104 Ark. 629, where the defendant was convicted of murder in the first degree, we held that he had the power to waive the presence of the trial judge during the progress of the argument of the case and to consent to the argument being proceeded with in the absence of the judge.

*Powell* v. *State, supra,* is a case where the defendant was convicted of murder in the first degree, and we held that the defendant could waive his right to service of a copy of the indictment.

Our conclusion is that the accused may, even in a capital case, after the trial has commenced, waive his personal presence at a step in the progress of the trial such as receiving the verdict, and that where his presence has been duly waived, this court should not reverse a judgment on account of his absence upon his own consent, unless it appears that he was prejudiced in some way by such absence.

In this case the court did no more than grant the request, conveyed to the court through defendant's counsel, that he be removed from the court and from the county for his own safety from threatened mob violence. If he and his counsel conceived it to be necessary for his own safety that he should be absent from the county during the further progress of the trial, he can not now complain that the verdict was returned in his absence.

It is next contended that the defendant himself did not waive his presence at the trial and that his counsel could not waive it for him.

It may be conceded that counsel, in the absence of the defendant and without authority from him, can not waive a personal privilege guaranteed to him by the Constitution.

That, however, is not the case before us. The record shows that his counsel acted for him and in his name consenting to the verdict being returned in his absence. The presumption must be indulged, in the absence of a showing to the contrary, that the attorneys had authority from him to enter into the stipulation waiving his presence. *Martin* v. *State, supra.*

"The general presumption," says Judge Elliott in his work on Appellate Procedure, section 718, "is that the judgment of a judicial tribunal is supported by whatever is essential to its validity and effectiveness."

Such is the view of this court expressed in the case of *Bond* v. *State, supra.*

It is not essential to a valid waiver that the defendant should make the agreement in his own person. He may do so through his counsel, and, as before stated, in the absence of a showing to the contrary, authority to perform an act in the progress of the trial, which counsel assume to do, will be presumed.

Counsel for defendant rely upon the case of *Osborn* v. *State,* 24 Ark. 629, as sustaining their contention that the defendant can not waive his presence, if he can do so at all, except by his own act, and can not do so through his counsel.

The case does sustain that contention. It appears from the opinion that the court reversed the judgment simply because the transcript failed to show that the defendant was present when the time for service of a copy of the indictment was waived.

We think that decision is in conflict with subsequent decisions of this court, just cited, and that it has, in effect, been overruled.

The defendant filed with the motion for new trial his affidavit, in which he stated that he did not authorize his counsel to enter a waiver of his presence and that he did not know that it had been done until after the verdict was rendered, and did not know that the verdict was to be rendered in his absence. The affidavit did not however, establish conclusively the truth of the statement that he did not consent to the waiver. Under all the circumstances the court was justified in finding that, notwithstanding the defendant's affidavit to the contrary, he did authorize his attorneys to take this step.

Many questions are raised as to the admissibility of testimony, and it is necessary to refer to the facts of the case, which we will do as briefly as possible.

Defendant and deceased lived in the same neighborhood in Boone County, where the crime is alleged to have been committed. Defendant lived with his father, who was a farmer in that locality. Deceased lived with her

parents a few miles distant. Deceased met her death on Thursday, November 21, 1912, while she was returning from the home of a neighbor. She left home about 9 o'clock in the morning, and went over to the home of a Mrs. Briant, for the purpose of procuring the services of the latter in making a hat. She rode horseback, and in making the trip it was necessary for her to pass the house of defendant's parents. She stopped there on her trip over to Mrs. Briant, and conversed with defendant's mother. The evidence tends to show that she reached Mrs. Briant's home between 9 and 10 o'clock in the morning, and after remaining there for a while she started on her return home about 11 o'clock. She was never seen again after she passed the Davidson's home on her return from Mrs. Briant's house. The members of her family became alarmed late in the afternoon at her failure to return, and they, together with other neighbors, instituted a search for the body. They first found the horse which she had ridden, and later found her dismembered body in the woods a few hundred yards distant from the defendant's home. The body was horribly mutilated. The face was mashed and bruised, the nose being mashed in, the skull fractured in several places and the flesh mashed away from the teeth. The head was completely severed from the neck, having the appearance of being cut off with a sharp instrument; the body was cut in two completely at the waist line; the bowels were gone, and both legs were severed about the middle of the thighs. There was a cut in the left hand and the wrist of that hand was fractured. There was also a cut in the left thigh which apparently was inflicted with the blade of a sharp axe. The dismembered parts were found under a bluff, scattered about over a space of twenty feet square or more. A witness who testified as an expert, examined the remains and, according to his testimony, deceased was a virgin, in good health, and the hymen had been ruptured not more than a few hours before death and too short a time for repair to begin; that semen was found in the culdesac at the mouth of the

womb, showing sexual intercourse shortly before or after the murder was committed. Between 11 and 12 o'clock on the day of the murder an elderly lady, partially deaf, who was at work at a spring a few hundred yards from the place where the first blood was found, heard a single scream of distress in that direction.

The theory of the State is that the defendant dragged the deceased from her horse, or compelled her to dismount, and after perpetrating the crime of rape, murdered her.

The body was found about 9 o'clock on the night of the same day that the young lady disappeared. The next day a search of the locality was made, and the first evidences of blood were discovered 683 yards from deceased's home. At that place there was a tree-top which had been cut down in the road and the trunk of the tree removed; there was found among the leaves in this tree-top impressions as if a body had lain, and blood was scattered in two directions. The trail of the blood led from there a short distance to a point where a rock, weighing a hundred pounds, or more, was found, on which there appeared blood, and also a smaller rock on which there was blood and also hair which corresponded in color and otherwise with the hair of the dead girl. Near that spot the shoes and stockings of deceased were found secreted, and also a back comb used by deceased. From there the searchers traced the course of the murderer across Crooked Creek, a very small stream, where they detected tracks made by bare feet in the water and sand, and across this creek a short distance in the direction of an abandoned mine shaft they found the body as before described.

This was all within a few hundred yards of the home of deceased, in a sparsely settled locality.

Three days later there was found, among the leaves near the fallen tree top, a loaded revolver, which was identified as one owned by the defendant.

Defendant was arrested on Friday night, at the home of his father, after the murder was committed on

Thursday. The sheriff carried to the place a posse, which was assembled around the house when the officer went in to make the arrest. When the sheriff informed defendant's father that he had a warrant, the latter called to defendant, who, it appears, was in an upstairs room. About the time that his father's voice called to defendant, those on the outside heard a window raised in the room above and a hand protruded and dropped something, which was found to be a pair of men's socks, containing some sand and red pepper, a pod or pods of red pepper having been crushed up and placed in one of the socks. The sheriff had stated publicly that he was going to get bloodhounds, and it is the theory of the State that the defendant placed the pepper inside of his socks believing that it would prevent the hounds from following his track.

On Saturday morning those who were searching for evidences of the crime, found an axe near the woodpile at defendant's home, and blood was discovered in and about the eye of the axe. An expert chemist who analyzed the blood, declared it to be human blood. There also appeared on the handle, about the eye of the axe, a sliver upon which had caught what appeared to be a small thread or piece of cloth.

The testimony shows that the defendant was absent from home during the middle of the day; in fact, it is undisputed that he admitted to the sheriff of Carroll County, where he was confined in jail, that he left the house about 12 o'clock and went down on the creek. His brother testified that he saw him during the morning take this axe and go to the barn for the purpose of doing some work, and that he left home about 4 o'clock in the afternoon to go down to look after his fish traps on the creek.

There is also testimony to the effect that defendant had attempted to pay social attentions to deceased, but that his attentions had been rejected, and that he had expressed irritation and animosity towards the deceased on account of her conduct in rejecting his attentions.

The case against appellant is built up on circumstances, but we are of the opinion that the circumstances were sufficient to warrant the jury in finding that the defendant committed the crime. Learned counsel for defendant insist very earnestly that the evidence is not sufficient to sustain the conviction; but a careful consideration of all the circumstances compels the conclusion that the jury were correct in deciding that the defendant committed the crime.

The first assignment urged upon our attention as an error of the court in ruling upon the admissibility of testimony is that concerning the testimony of Alexander Davidson, the brother of defendant. He was called as a witness by the prosecuting attorney, and testified that he saw the deceased pass by his father's house on her return from Mrs. Briant's about 11 o'clock in the morning, and that some time during the morning he saw the defendant go towards the barn with an axe, and that he saw the defendant leave home to go down to the creek to set his traps about 4 o'clock in the afternoon. He was asked if he had not testified, before the grand jury and the coroner's jury, that he saw his brother, the defendant, go up towards the barn with the axe about half-past 12 o'clock; and he admitted that he had made that statement, but said that he was mistaken about it, and that his brother went up towards the barn with the axe earlier in the morning.

The defendant asked the court to let this statement only go to the jury for the purpose of contradicting the witness, and not as substantive evidence of the facts related in the contradictory statement.

The court overruled this request, and told the jury that they might consider the testimony for all purposes, for what it was worth.

Now, the ruling of the court was undoubtedly incorrect, for the testimony was not admissible for any other purpose than that of contradicting the witness; but we are of the opinion, considering the other testimony in the case, that the error was not prejudicial. This witness

testified that the defendant went towards the barn with his axe some time in the morning, and that he left home about 4 o'clock in the afternoon for the purpose of going down to the creek to set his traps. In his contradictory statement he said that his brother went towards the barn with the axe about half-past 12 o'clock. The fact which the State sought to establish was the time that defendant went off, and, according to the undisputed evidence, he left there about 1 o'clock. The sheriff of Carroll County testified that the defendant admitted to him that he left home about 1 o'clock and went down to the creek. Other witnesses corroborated this, and showed that the defendant was not at home in the middle of the day. Now, these are undisputed facts, and the contradictory statement of the witness, Alexander Davidson, was not important in fixing the time that defendant went away. It was testified by the witness that he went away and that he had an axe with him when he went off towards the barn, and the only question is as to the time that this occurred. The time is fixed by the testimony of the sheriff, and it is undisputed; so it is impossible to discover any prejudicial effect from the admission of the contradictory statements of this witness.

The next assignment relates to the refusal of the court to allow defendant's counsel to interrogate a witness introduced by the State, one Matlock, concerning his prejudice against the defendant.

It was, of course, competent for the defendant to show that fact in order to affect the credibility of the witness, and the court ought to have allowed the questions to be asked. *McIlroy* v. *State,* 100 Ark. 344.

The testimony of this witness related, however, to facts and circumstances which were thoroughly established by the testimony of several other witnesses and which are uncontradicted. All of the witnesses introduced on that subject, including Matlock, testified to discovering the evidences of the crime and the situation of different objects in the locality, and also to the fact of defendant dropping his socks out of the window. These facts were, as before stated, established beyond dispute

by testimony of other witnesses who were not impeached, and, therefore, must be taken as undisputed facts. It would not have aided defendant's case in the slightest for him to have broken down the testimony of Matlock by the method of impeachment which he attempted. No prejudice, therefore, resulted from this erroneous ruling of the court, and it does not call for a reversal of the case.

Objection is made to the introduction of testimony concerning the finding of the pistol, which was found near the scene of the killing on Sunday after the killing.

We think this testimony was competent, as the evidence tended to show that the pistol was owned by the defendant and that it was secreted under the leaves and brush near the scene of the killing. The State was entitled to have this fact go to the jury as a circumstance indicating defendant's presence there on that occasion.

A similar objection was made to the introduction of testimony concerning the finding of the axe two days after the killing, and the testimony as to the chemical analysis of the blood on the axe.

The State proved by the testimony of an expert that it was human blood on the axe, and, considering defendant's opportunities for having the axe in his possession and the fact that he was the last person seen with it, and, in fact, the only person who was seen with it in his possession on the day of the killing, it was competent for this testimony to go to the jury. The State adduced proof tending to show that the axe, from the time it was found at the woodpile on Saturday, was carefully preserved by the sheriff in the condition in which it was when found until delivered to the chemist.

Another objection was to the testimony of Miss Gertrude Barham, a sister of deceased, to the effect that defendant offered to escort her sister home from a party, but that after she refused to accept his attentions he used some language about her which the witness expressed a desire not to repeat. After relating the incident, she was asked to repeat the language which defend-

ant used, and her reply was, "I rather not." Counsel for the State then asked why, and an objection was interposed, which was overruled, and she gave as a reason that the language was of such a nature that she (witness) did not want to repeat it.

Now, it would have been improper for the court to refuse to require the witness to state what the language was, but counsel for the defendant did not ask the court to require the witness to state what the language was. The manner in which the exception appears in the record shows that they were objecting to any statement on the subject at all. Doubtless, if it had been suggested to the court, the witness would have been required to state what the language was.

We think that under those circumstances the defendant is not in any position to ask for a reversal because the witness was allowed to state that she preferred not to repeat the language.

There are two or three other exceptions to the rulings of the court in regard to admissibility of testimony; but we do not find them to be of sufficient importance to call for discussion.

Our conclusion is, that the court committed no prejudicial error in that regard.

The record shows that during the argument, the prosecuting attorney referred to the testimony of Miss Barham and used this language:

"You have a right to consider this conversation with Miss Barham in presence of her sister, gentlemen of the jury, so unexplained by any one and unexplained and undenied by any one, and I call on them now to explain this conversation, if untrue."

It is urged that this amounted to a comment on the failure of the defendant to testify.

We do not think that that is the proper construction to place on the language of the prosecuting attorney. It is not a comment or criticism on the defendant's failure to testify in his own behalf, but was the expression of the opinion of counsel that the testimony had not been re-

butted and it should be accepted as true. *Davis* v. *State,* 96 Ark. 7; *Culbreath* v. *State,* 96 Ark. 177.

The objections pointed out by counsel to the instructions of the court are not of sufficient importance to discuss.

Upon an examination of the whole record, we are convinced that the case was fairly tried below and that the evidence was sufficient to sustain the conviction. The judgment is, therefore, affirmed.

WOOD and SMITH, JJ., dissent.

SMITH, J., (dissenting). At the common law the presence of the defendant was required at every substantial step during the progress of the trial, and the right to be present is still as universally recognized, as the necessity for the defendant's personal presence formerly was. But in the development of our criminal procedure this rule has been much relaxed until now in this State, and in many others, the defendant's presence may be waived throughout the entire trial of a charge not a felony. But we have not heretofore gone that far in the trial of felonies, although such must be the effect of the opinion of the majority of the court in this case. If the defendant's presence may be waived during the receipt of the verdict, why may it not be waived during the progress of any other part of the trial, and if during a portion of the trial, why not during all of it? Trials by proxies may result, and who can tell the possibilities of that situation?

It was once unquestionably the law of this State that a defendant's presence was required during the progress of his trial upon a felony charge, and that a verdict could not be received in his absence. That very point had been so decided.

In the case of *Sneed* v. *State,* 5 Ark. 431, the defendant was on bail when the verdict was received. At the next term of the court the attorney for the State ordered the defendant into custody and moved that the court proceed to render judgment on the verdict returned at the previous term of the court. It was there said: "The

offense with which the prisoner stood charged was larceny; and this is felony by the common law. In such cases, by our revised statutes, page 307, section 154, no indictment for a felony shall be tried, unless the defendant be personally present during the trial. This was only declaratory, and an affirmance of the common law, which would not allow any proceeding affecting life or liberty, to be had in the absence of the prisoner, and when any step was to be taken in the cause, the prisoner was to be present personally, lest in so important a matter he should be prejudiced. This care of the law for his safety was extended through the whole trial, from his arraignment to his final conviction or acquittal. No verdict, therefore, could be properly rendered in court in the prisoner's absence, because he was not there to make objection to, or avail himself of them.

The authorities are express upon this point. 1 Chit. Cr. Law, ...; 1 Tenn. Rep. 434; 1 Breese Rep. 109; 1 Wend. 91, and where the defendant is out on bail, the principle is the same; the law not regarding the cause of his absence, as whether he is away voluntarily or against his will. *State* v. *Hurlburt,* 1 Root, Conn. Rep., 90. "The verdict being taken in his absence, was void, consequently the court erred in entering judgment of conviction upon the finding, but should have ordered a new trial to be had. Judgment reversed and new trial ordered."

The Constitution of 1836 was in force at the time of that trial and it contained practically the same provision as our present Constitution in regard to the right of a defendant to be present at his trial. "That in all criminal prosecutions the accused hath a right to be heard by himself and counsel." Section 11, article 2, Constitution, 1836. And the statute then in force and referred to in the opinion is the statute we now have except that it has been amended to permit a trial to continue, after it has commenced, where the defendant escapes, or, if on bail, absents himself; in either of which cases the trial may be stopped, or may progress to a verdict at the discretion of the prosecuting attorney.

Kirby's Digest, § 2339. Neither of these two exceptions, excusing the necessity for the defendant's presence, need be considered here for they do not apply to the facts of this case. The constitutionality of this section was attacked upon the ground that under no circumstances could a trial for felony progress in the absence of the defendant. And several courts of the highest authority have so declared the law to be.

But this court upheld the act in an opinion by Justice SANDELS in the case of *Gore* v. *State,* 52 Ark. 285, and among other things it was there said: "It has been uniformly held by this court that a defendant charged with felony has a right to be present at every stage of his trial. Sections 8 and 10 of article 2 of the Constitution have been construed to guarantee him that right. And it has been often held that a defendant can not waive his constitutional rights by agreement. It is now to be determined whether the constitutional guaranty that the defendant shall be confronted with the witnesses against him remains where he, pending a trial, absconds and refuses to be confronted. Neither direct authority nor analogy are lacking in the construction of this guaranty." And the statute was upheld and the discussion of the constitutionality concluded with the statement that while the Constitution guarantees the defendant the right to be present, this guaranty is not intended to include the right to abscond and then complain of his own absence. But before this statute and before the decision in the Gore case, *supra,* Justice SCOTT, speaking for this court in *Cole* v. *State,* 10 Ark. 318, said: "And the authorities are equally numerous, pointed and respectable, that in all cases of treason and felony, the verdict, whatever may be its effect, must be delivered in the presence of the defendant in open court, and can not be either privily given, or promulgated, while he is absent, and if he does not appear the jury may be discharged without rendering it (1 Ch. Cr. Law, 636; 1 Breese, 109; Overton's Tenn. Rep. 435; *The People* v. *Perkins,* 1 Wend. 91), and the defendant being out on bail does not alter the case. *State* v. *Hulbert,* 1 Root, 91; *Sneed* v. *State,* 5 Ark. 432."

"Although many of the ancient forms on trials have fallen into disuse in modern times, those touching the presence of the defendant, both at the time of the rendering of the verdict and judgment in treason and felonies, including, as they do, substantial rights—that of the right to poll the jury, the making of any proper objection to the recording of the verdict, and of answering further why judgment and sentence should not be pronounced—and designed, as they are, to throw additional safeguards around the proper administration of criminal justice, in having the defendant and those who are to pass upon his case and pronounce the sentence of the law face to face, are not to be dispensed with."

The same subject, that of the necessity of the defendant's presence throughout his trial, was again discussed in the case of *Sweeden* v. *State,* 19 Ark. 205, and it was there said: "We have said that it was absolutely necessary that the appellant should have been present 'during the trial' in the court below. The phrase 'during the trial' used in the section of law we have quoted, means that it is necessary that the defendant should be present in court at each and every time, and on all occasions, at which, and when any substantial step is taken by the court, in his cause, after the indictment is presented by the grand jury to the court, up to, and until final judgment (including that also) is pronounced in his cause, by the court, and even afterwards, if any subsequent step should be taken by his counsel. But this particularity in reference to the presence of the defendant, only relates to the trial of felonies, and not to offenses less than felonies, as the act itself expressly declares. And this seems to be consistent with the law as it existed before the act in question was passed as abundantly appears by the authorities and principles collated and stated in *Cole* v. *The State,* 5 Eng. Rep. 318, and *Sneed* v. *The State,* 5 Ark. 431." The statute referred to reads as follows: "No indictment for a felony shall be tried, unless the defendant be personally present during the trial; nor shall any person indicted for an

offense less than felony be tried, unless he be present at the trial, either personally or by his counsel."

In the case of *Bond* v. *State,* 63 Ark. 504, a reversal was sought upon the ground that the defendant was absent when the verdict was returned, and while that case was disposed of upon the presumption of the defendant's presence, yet the opinion of the court and the dissenting opinion of Chief Justice BUNN leave no doubt the case would have been reversed but for this presumption, for the opinion of the majority concludes with this statement: "It would have been an easy matter, if the defendant was prevented from being present, by confinement in jail or otherwise, at the time the verdict was returned into court, for him to have shown the fact, and embodied the evidence in his bill of exceptions. This he did not do, and we must presume that he was voluntarily absent, or that he was present when the verdict was returned." And the dissenting opinion concludes with the statement that "He was presumptively present; and if he was not actually present, he should affirmatively show he was absent, and not voluntarily absent." To substantially the same effect are the cases of *Osborn* v. *State,* 24 Ark. 629; *Bearden* v. *State,* 44 Ark. 332; *Benton* v. *State,* 30 Ark. 328; *Owens* v. *State,* 38 Ark. 512; *Bennett* v. *State,* 62 Ark. 516; *Warren* v. *State,* 19 Ark. 214; *Brown* v. *State,* 24 Ark. 620, and an indefinite number of cases to the same effect are to be found in the reports of other States.

But it is said that this right can be waived and was waived by defendant's counsel and that the presumption is that his counsel were authorized so to do. An examination of many cases leads us to the conclusion that the great weight of authority is that the defendant himself can not waive his presence during a trial upon a felony charge.

The case of *Warren* v. *State,* 19 Ark. 214, is reported in 68 Am. Dec. 214, and there is an extensive note with many cases cited which we think fully sustain our position.

The case of *Fight* v. *State,* 7 Ohio, 180, was an Ohio case, and is reported and annotated in 28 Am. Dec. 629, and many cases are cited to support the editor's note that "the accused must be present during the entire trial, or at least up to and including the rendition of the verdict, and no valid judgment can be predicated upon a verdict received in his absence, and that any waiver of this right must be the act of the accused himself and not that of his counsel." Other cases to the same effect are collected in the note to *State* v. *Keeley,* 97 N. C. 404; 2 Am. St. Rep. 299; *Hill* v. *State,* 86 Am. Dec. 736.

In Bishop's New Criminal Procedure, § 273, the rule is announced that "except as already appearing, the doctrine is that in felony or treason the accused must be present at every material stage in the trial, at the swearing of the witnesses, and the giving in of the evidence, the charge to the jury, special instructions during its deliberations, the rendition of the verdict—else there can be no valid judgment against him. It is not sufficient that his counsel are present and not objecting." And he cites many cases to support the text.

Among other courts which hold that not even the defendant himself can waive his presence at a trial upon a felony charge is the Supreme Court of the United States. *Hopt* v. *People,* 110 U. S. 574; *Lewis* v. *United States,* 146 U. S. 370; *Schwab* v. *Berggren,* 143 U. S. 442.

The law of this subject is fully reviewed in a recent opinion of the Supreme Court of Mississippi in the case of *Sherrod* v. *State of Mississippi,* 47 So. 554, 20 L. R. A. (N. S.), 509, and the following conclusions were announced by Whitfield, C. J.

First. In the trial of all felonies, not capital, where the defendant is on bond, and has been present throughout the delivery of the testimony, up to the rendition of the verdict, but is absent at the rendition of the verdict, voluntarily, he will not be permitted to avail himself of his own wrong in being thus voluntarily absent, but the verdict may be properly received in his absence. In other words, he may waive the right to be present when

the verdict is received, which is not, as seems popularly supposed, a constitutional right, though a very sacred right secured by the common law as well as by statute.

Second. Whenever the charge is a capital one, the courts have held uniformly, *in favorem vitae,* that the defendant can not waive his right to be present, and that whether he be in jail, subject to the power of the court to produce him, or on bond, it is fatal error to receive the verdict in his absence.

Third. Even in felonies, not capital, if the defendant be in jail when the verdict is received, it is fatal error.

Fourth. In cases not capital, the right of the defendant, where he is on bond, to waive his own presence when the verdict is received, is strictly his personal right, and no such waiver can be exercised for him by his own counsel.

No distinction can be made under the Constitution and laws of this State between a capital and other felonies. But an examination of many cases construing the constitutions and laws of other States leads to the conclusion that a proper interpretation of the Constitution and laws of this State would not permit even the defendant himself to waive his presence upon a trial for a felony charge. And we have found no case which permits this right to be waived, where it can be waived at all, by any one except the defendant himself. To hold that it could be would make our Constitution read that the defendant has the right "to be heard by himself *or* his counsel," when in fact it reads that his right is "to be heard by himself *and* his counsel." Art. 2, § 10, Constitution.

The statute is, "If the indictment be for a felony the defendant must be present during the trial. If he escapes from custody after the trial has commenced, or, if on bail, shall absent himself during the trial, the trial may be either stopped, or progress to a verdict at the discretion of the prosecuting attorney, but judgment shall not be rendered until the presence of the defendant

is obtained." It is thus seen that the presence of the defendant upon trial for a felony is mandatory, except that the Legislature has provided that if the defendant escapes, or, while upon bail, absents himself, the trial may proceed. These exceptions are both acts wholly within the control of the defendant, and are the only exceptions made, and the court should not add another.

It is not required of the defendant that he show he was prejudiced by any substantial step taken in his trial during his absence, for the probability that he might have been prejudiced by any step taken, or any order made, is all that need be shown to reverse a judgment of conviction, where no affirmative showing is made that no prejudice did result or could have resulted from his absence. *Mabry* v. *State,* 50 Ark. 492; *Bearden* v. *State,* 44 Ark. 331; *Polk* v. *State,* 45 Ark. 165.

Yet in this case a verdict was returned which did not fix the degree of the homicide and this court has several times decided that a verdict upon an indictment for murder which does not find the degree of murder is so defective that no judgment can be entered upon it. *Lancaster* v. *State,* 71 Ark. 100; *Porter* v. *State,* 57 Ark. 267. And when this void verdict was received the defendant was being spirited away to another county. With this significant fact before them, the probabilities were not lessened, when the jury retired to prepare a valid verdict, that the verdict thereafter returned would authorize the imposition of the death sentence.

For the error indicated a new trial should be granted.

Justice WOOD concurs.

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

Opinion delivered May 12, 1913.

1. STATUTES—REPEAL.—The married daughter and minor children of deceased brought suit against defendant railway company on June 3, 1912, for the killing of their father, which occurred in Septem-

ber, 1909. *Held*, Kirby's Digest, § 5075, providing that persons under disability may bring suit on a cause of action within three years after the disability is removed, does not repeal Kirby's Digest, § 6290, which provides that in actions for wrongful death, such action shall be commenced within two years after the death of such person, since the two statutes relate to different subjects, and there is no necessary repugnance between their provisions. (Page 222.)

2. LIMITATIONS OF ACTIONS—DEMURRER.—In an action against a railway company for damages for the wrongful killing of plaintiffs' father, when the complaint shows on its face that the action was not brought within the two years required by the statute (Kirby's Digest, § 6290), the defendant may avail himself of the objection by demurrer. (Page 223.)

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

STATEMENT BY THE COURT.

On June 3, 1912, Mrs. Irma Anthony, in her own name, and as next friend to Victor Peterson and Roscoe Peterson, minors, instituted this action in the circuit court against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for injuries received by their father, which resulted in his death. They allege that the plaintiff, Mrs. Irma Peterson, is only twenty-one years of age, and that Victor Peterson and Roscoe Peterson are minors. That their father, Andrew Peterson, in September, 1909, while in the employ of the defendant railway company, was run over and killed by one of its trains, and that said injury and death was caused by the negligence of the defendant's employees in the operation of said train.

The defendant demurred to the compalint, which demurrer was sustained by the court, and from the judgment rendered, the plaintiffs have duly prosecuted an appeal to this court.

*Oscar H. Winn*, for appellant.

The complaint alleges a cause of action *ex contractu* as well as *ex delicto*, and the cause of action is not barred. 35 Ark. 622; 50 Ark. 250; 62 Ark. 360; 67 Ark. 189; 68 Ark. 433; 63 Ark. 563; 71 Ark. 71.

*E. B. Kinsworthy* and *T. D. Crawford,* for appellee.

1. The cause of action is barred. Kirby's Dig., § 6290.

2. The question whether plaintiff failed to sue within the time prescribed by the statute, could be raised by demurrer. 25 Cyc. 1398; 13 Cyc. 340; 72 Miss. 886; 94 N. C. 525; 70 S. C. 254; 51 Wis. 603; 42 W. Va. 813; 154 Fed. 121; 119 U. S. 214; Tiffany, Death by Wrongful Act, § 121, and cases cited in note 3.

3. The general statute saving the rights of infants, Kirby's Dig., § 5075, is inapplicable in this case. 50 Ark. 132.

HART, J., (after stating the facts). In the case of *Earnest* v. *St. Louis, Memphis & Southeastern Railway Co.,* 87 Ark. 65, we held that by the common law, the death of a human being could not be made the subject of a civil action, and that where a stautory right of action is given, which did not exist at common law, and the statute giving the right also fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition upon the right of action, and will control. Mr. Tiffany says that, inasmuch as the act which creates the limitation also creates the action to which it applies, the limitation is not merely of the remedy, but is of the right of action itself. Tiffany on Death by Wrongful Act, (2 ed.), section 121.

Section 6290 of Kirby's Digest, commonly known as Lord Campbell's Act, upon which the claim of the plaintiffs is based, contains the proviso, "that every such action shall be commenced within two years after the death of such person." Inasmuch as the statute creates no saving clause for the benefit of persons under disability, the infancy of the plaintiffs at the time the cause of action accrued, does not postpone the running of the statute. 13 Cyc. 340; Tiffany on Death by Wrongful Act, (2 ed.), sections 121, 122. It follows that the bringing of the suit within two years from the death of the person whose death has been caused by the wrongful act is made an essential element of the right to sue. As said in the

case of *The Harrisburg,* 119 U. S. 199, "The time within which a suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition to sue at all." But counsel for plaintiffs claim that the proviso of section 6290, above quoted, is repealed 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 can not agree with his contention. Section 5075 of Kirby's Digest, was passed April 17, 1899, and was entitled, "An Act to amend section 4833 of Sandels & Hill's Digest," and is also a part of the chapter relating to the statute of limitations. In the case of *Sims* v. *Cumby,* 53 Ark. 418, it was held that the general saving clause in the act of December 14, 1844, in favor of infants and persons under disability was limited in terms to laws then in force, and was inapplicable to statutes of limitations subsequently enacted. The act of April 17, 1899 (section 5075), was passed to remedy this defect, and it also extended the time for bringing actions of persons under disabilities mentioned in the section to a period of three years after their disabilities were removed. Section 5075 is a part of our general statutes of limitation, and does not refer to section 6290, and does not expressly repeal it. In *Coats* v. *Hill,* 41 Ark. 149, the court said:

"Repeals by implication are not favored. To produce this result, the two acts must be upon the same subject, and there must be a plain repugnancy between their provisions; in which case, the later act, without the repealing clause, operates, to the extent of repugnancy, as a repeal of the first. Or, if the two acts are not in express terms repugnant, then the later act must cover the whole subject of the first and embrace new provisions, plainly showing that it was intended as a substitute for the first." See also, *C., R. I. & P. Ry. Co.* v. *McElroy,*

92 Ark. 600; *Welch Stave & Mercantile Co.* v. *Stevenson,* 92 Ark. 266; *State* v. *Southwestern Land & Timber Co.,* 93 Ark. 621.

In the application of this rule, we do not think that section 5075 repeals the proviso contained in section 6290. As we have already seen, the limitation contained in the proviso of section 6290 is not merely of the remedy, but is of the right of the action itself. We can not find that the Legislature, by the passage of section 5075, intended to repeal the proviso contained in section 6290. The two statutes relate to different subjects, and there is no necessary repugnancy between their provisions. It follows that this action is barred under section 6290, of Kirby's Digest.

The complaint shows on its face that the action was not brought within the two years required by the statute and in the case of *Earnest* v. *St. Louis, Memphis & Southeastern Ry. Co.* 87 Ark. 65, we held that the defendant may avail himself of the objection by demurrer. The reason for this is well stated in *Hanna* v. *The Jeffersonville Railroad Co.,* 32 Ind. 113. The court said:

"It only remains to ascertain whether the point can be raised in this case by demurrer to the complaint. Ordinarily, statutes of limitations must be pleaded though the facts appear by the averments of the complaint. The reason for this is, that usually there are exceptions to statutes of limitations, and the plaintiff should therefore have the opportunity of replying to the plea, so that he may show that the case is within any of the exceptions. To compel him to make these averments in the complaint, would tend to inconvenient and needless prolixity. But in the case before us there are no exceptions, and consequently there is no reason why the defendant should plead the fact. There could be no reply avoiding the plea. The complaint brings upon the record all the facts concerning the matter that could be of service to either party, and the answer would be but a repetition of them, accomplishing no useful end. We think, therefore, that the question was properly

raised by the demurrer, and that it was correctly sustained."

The judgment will be affirmed.

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## HALLEY v. STATE.

Opinion delivered May 12, 1913.

1. ASSAULT WITH INTENT TO KILL—INDICTMENT—SUFFICIENCY.—An indictment for assault with intent to kill, which alleges that the assault was made unlawfully and feloniously, with malice aforethought, and after premeditation and deliberation, is sufficient. (Page 226.)
2. TRIAL—EVIDENCE—WAIVER OF OBJECTIONS.—Where defendant fails to object to the introduction of testimony, or except to the action of the court in admitting it over his objection, the question of the inadmissibility of the testimony can not be considered on appeal. (Page 226.)
3. CRIMINAL LAW—TRIAL OF TWO DEFENDANTS ON SEPARATE INDICTMENTS.—Two defendants, indicted for separate offenses, were tried together. *Held*, where one defendant expressly consented that this be done, when the facts in both cases were the same, and he was not prejudiced thereby, he can not, after verdict, complain of the action of the court in permitting the cases to be tried together. (Page 227.)
4. CRIMINAL LAW—HUSBAND AND WIFE MAY TESTIFY WHEN.—Under Kirby's Digest, § 3092, the wife may testify against her husband in a criminal prosecution, in which an injury has been done to the person of the wife by the husband. (Page 228.)

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

STATEMENT BY THE COURT.

The defendant, Jim Halley, was indicted for the crime of assault with intent to kill, alleged to have been committed by cutting his wife with a razor. The defendant and his wife are colored people. The alleged assault occurred at the home of the defendant. The defendant and a companion named Arthur Hill came to the defendant's house one night after his wife had gone to bed. She got up and let them in and got back in bed. Her husband complained about her being so long in opening the door and then asked her if she had any-

thing cooked. She replied that she had not and was not going to cook for him any more. The defendant and his companion soon left the house and in a few minutes Arthur Hill returned. The defendant's wife got up out of bed and it was discovered she had been cut. She dressed herself and, in company with Arthur Hill, went out on the streets in search of a physician. They met a policeman and the defendant's wife told him her husband had beaten her up and cut her with a razor. The policeman found that a place right over her spine was swollen as large as his wrist and that there was a cut in her shoulder from about four to six inches long. He went home with her and examined the condition of the bed she was in when she was cut. He found a cut place through three quilts and the sheets and pillows were bloody. The defendant was arrested and carried before the police judge of Fort Smith. The police judge testified that it was his recollection that the defendant admitted to him that he had cut his wife with a razor. The defendant's wife testified that she first believed her husband had cut her and so stated to the policeman. That on the next day Arthur Hill told her that he had done the cutting and she believed him. She said that no one was in the room at the time she was cut except Arthur Hill, her husband and herself, but that she had her head covered up with the bed quilts and did not see who cut her, and does not now think that it was her husband who did it.

The defendant testified that he did not cut his wife, but made no other statement about it at all. The defendant and his wife were both placed in jail. Other witnesses for the defendant testified that before they were admitted to bail they examined the quilts on the bed in which the defendant's wife was lying at the time she was cut and could not discover any cut places on the quilts. They exhibited to the jury the quilts which they said were on the bed and there were no cut places on them.

In rebuttal, the State introduced the policeman who had examined the quilts and he stated that they were

not the quilts which were on the bed, and which he examined almost immediately after the crime was committed.

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

*Jo. Johnson,* for appellant.

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

1. The demurrer was properly overruled. Kirby's Dig., § 1588; 65 Ark. 404.

2. The law only requires the presence of defendant in the examining court so that he may exercise the privilege of cross examination. 99 Ark. 507.

3. The wife was a competent witness. Kirby's Dig., § 3092.

4. No objections or exceptions were saved to the instructions. 95 Ark. 325.

HART, J., (after stating the facts). The indictment alleges that the assault was made unlawfully and feloniously, with malice aforethought, and after premeditation and deliberation. This was sufficient, and the court did not err in refusing to sustain the demurrer to the indictment. Section 1588 of Kirby's Digest; *Dillard* v. *State,* 65 Ark. 404.

The defendant in his motion for a new trial assigns as error the action of the court in admitting certain evidence. We do not deem it necessary to set out the testimony or more particularly refer to it. It is sufficient to say that we have examined the transcript and it does not appear that the defendant excepted to the ruling of the court in admitting it. Under our rules of practice, the defendant must first object to the introduction of evidence and, if the court admits the evidence over his objection, he must except to the ruling of the court. This the defendant did not do and we can not consider his objection. *Walker* v. *State,* 39 Ark. 221; *Burris* v. *State,* 38 Ark. 221; *Green* v. *State,* 38 Ark. 304; *Meisenheimer* v. *State,* 73 Ark. 407.

The record shows that the defendant's wife first claimed that her husband cut her with a razor and afterwards testified in the examining court that he did not cut her and that she did not know who did cut her. Because of her change in testimony, she was indicted for perjury. At the beginning of the trial the defendant agreed to try this case at the same time and together with the perjury case against his wife. He now contends that, although he consented to do this, the action of the court in permitting it was error. The precise question has never been determined by this court and, so far as our examination discloses, by any other court. In the case of *McClellan* v. *State,* 32 Ark. 609, two separate indictments were returned against the same defendant, and, by his consent, he was tried upon both indictments at the same time. The case was reversed for other reasons and the court said that the trial of the defendant upon both indictments at the same time was an irregularity, to say the least of it, and that such practice would certainly produce great confusion and uncertainty and should be condemned. It must be conceded that irregularities come at first by degrees and are tolerable because no perceptible injury has followed the first step, and such practice should not be allowed by the trial court. It does not follow, however, that the judgment below should be reversed alone on the ground of the irregularity here mentioned. The court had jurisdiction to try the charges made by the indictments against both parties, and had obtained jurisdiction over the persons of both of them. *McDonald* v. *State* (Ark.), 149 S. W. 95. Although they were indicted separately, the same facts were involved in the trial of both cases. While the court would have no authority against the objection of the defendant to try the cases together, yet as the record affirmatively shows the defendant expressly consented to it, and inasmuch as the record does not show he was prejudiced thereby, he can not now be heard to complain of the action of the court which was superinduced by him. *Lucas* v. *State* (Ala.), 3 L. R. A.

(N. S.) 412. In discussing a somewhat similar question, in the case of *Parker* v. *The People,* 4 L. R. A. 803, the court said:

"While this order is not very happily expressed, it shows that the cases were consolidated for trial upon motion of the defendants. Why the consolidation was asked, we are not advised. It may have been for the purpose of saving expense to the defendants, or for some expected benefit to arise to them from having all the cases submitted to a particular jury; it is sufficient for the purposes of the case for us to know that the consolidation was ordered to accommodate the defendants; and they can not be heard to complain of this action of the court induced by their request."

The defendant also assigns as error the action of the court in admitting the testimony of his wife. Her testimony was admissible under section 3092 of Kirby's Digest, which is as follows:

"In any criminal prosecution a husband and wife may testify against each other in all cases in which an injury has been done by either against the person or property of either."

The testimony on the part of the State was sufficient to show malice on the part of the defendant and would have warranted a conviction of the defendant of murder if the death of his wife had ensued from the assault. Therefore, there was sufficient evidence to warrant a conviction of assault with intent to kill. *Young* v. *State,* 99 Ark. 407. The instructions given by the court were fair to the defendant and fully covered every phase of the charge embraced in the indictment.

The judgment will be affirmed.

ON RE-HEARING.

HART, J. Counsel in his brief on rehearing again insist that the court erred in not sustaining his demurrer to the indictment. As we pointed out in our opinion, the indictment charges the assault to have been made "unlawfully and feloniously, with malice aforethought, and after premediation and deliberation," and

in the case of *Harding* v. *State,* 94 Ark. 65, the court held that the use of these words mean that the act charged was wilful. Therefore, the court did not err in refusing to sustain the demurrer to the indictment.

Counsel has also presented to the court an amendment to the record so as to show that it was agreed that his exceptions to evidence might be preserved. In the case of *Harding* v. *State, supra,* the court held that objections to evidence must be made to the circuit court before it can err in its admissibility. We have carefully examined the record and where it appears that objections were made by the defendant, to the evidence the court sustained them and, under the ruling in the Harding case, he could save no exceptions by agreement with the court or otherwise, unless he made an objection to the evidence. Therefore, his amendment to the record avails him nothing, because the court sustained all the objections he made to the evidence. We have carefully considered the instructions given by the court and think they fully and fairly cover every phase of the case, and do not deem it necessary to comment upon them and review them at length.

The motion for a rehearing will be denied.

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## PINE BLUFF NATURAL GAS COMPANY *v.* SENYARD.

Opinion delivered May 12, 1913.

NEGLIGENCE—INDEPENDENT CONTRACTOR—GAS COMPANY—INJURY TO PERSON ON STREET.—Defendant, a gas company, under its franchise from a city, possessed the right to lay its pipes in the city streets, but was required not to unnecessarily obstruct the streets. After laying its pipes, defendant contracted with one H to relay the street paving. H, preparatory to relaying the pavement, piled materials in the street to be used in the work. Plaintiff, at night, drove her buggy into a pile of gravel, and was thrown out and injured. *Held,* in an action against defendant for damages, plaintiff was entitled to recover, although the injury was due to the act of a contractor, on the ground that defendant owed a duty to the public to keep the street in a safe condition, and that the negligence causing the injury was a probable consequence of the work contracted for.

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

STATEMENT BY THE COURT.

Mildred Senyard brought this action against the Pine Bluff Natural Gas Company to recover damages for personal injuries received by her while driving along Walnut Street in the city of Pine Bluff at about 8:30 o'clock P. M., and which she alleged were caused by her buggy being overturned by running upon a pile of gravel placed by the defendant in the street. The circumstances attending the injury are as follows:

The city of Pine Bluff granted to the defendant a franchise allowing it the privilege of laying pipes, mains and other appliances in the streets of the city for the purpose of conveying and supplying natural gas to consumers thereof. The sections of the ordinance granting the franchise which are relevant to the present case are as follows:

"Section 1. That H. S. Grayson, hereinafter designated as the grantee, be and is hereby granted the privilege and vested with the right to use the streets, lanes, avenues, alleys, commons, bridges and other public grounds and places within the corporate limits of the city of Pine Bluff, Arkansas, for the period of thirty (30) years from the date of passage of this ordinance, for the purpose of laying, maintaining, repairing, reclaiming and removing pipes, mains and other necessary appliances to be used for carrying and conveying natural gas for public and private use in buildings, manufacturing establishments and otherwise within the said city of Pine Bluff, Arkansas, together with the right to dig and excavate in all or any of the said streets, lanes, avenues, alleys and other public grounds and places for the purpose of laying and constructing such mains, pipes and other appliances, and removing the same, required to convey and conduct said gas to consumers upon the following conditions:

"Section 3. In the work of laying, repairing, reclaiming and removing said pipes and appliances, the

said grantee shall not unnecessarily obstruct or interfere with the use and occupancy of any streets, lanes, avenues, commons, public grounds or places, and in no wise injure, interfere with or change any existing arrangements for gas, water pipes, drains, sewers, ditches or other public or private works of said town.

"Section 4. Said grantee shall relay and replace with due diligence any and all pavements, curbs, gutters, streets, avenues, alleys and other public grounds and places disturbed by him in the same manner and like conditions as the same may have been before excavating, leaving the surface of all unpaved streets smooth and level; provided, that nothing contained in this section shall authorize any act in violation of any ordinance now in effect or to be hereafter passed by the council of the said city of Pine Bluff, nor prevent said city from replacing any such pavements by its agents, at the expense of said grantee. Nor shall anything contained in this section be construed on behalf of said city of Pine Bluff as waiving any right now possessed or hereafter to be possessed by said city to exercise full control over all streets, avenues, alleys or other public grounds.

"Section 5. The said grantee shall preserve and keep the city of Pine Bluff, Arkansas, safe, free and harmless from any damage, costs or expenses that may be incurred or happen to persons or property by reason or on account of anything done by said grantee under the provisions of this ordinance, and shall defend, at his own proper costs, any suits brought against the city of Pine Bluff, Arkansas, by persons or corporations claiming damages or injury on account of the creation and maintenance of the natural gas plant of said grantee."

The street on which the injury occurred was paved with wooden blocks. For the purpose of laying its mains, the gas company tore up the street, and dug a trench running north and south on Walnut Street. The trench was dug about ten feet from the east curb and was about four feet deep and ten inches wide. The

street was forty feet wide from curb to curb. The blocks taken up were piled between the trench and the east curb of the street. After the gas company had laid its mains, it replaced in the trench or ditch the dirt it had excavated and firmly tamped it. The gas company had entered into a contract with Elson Hale to replace the pavement. This work was accomplished by first spreading a concrete foundation several inches thick over the refilled trench, and then laying the blocks on the concrete foundation. The concrete foundation was made of gravel mixed with cement. To successfully do this, it was necessary to bring the gravel and cement to that part of the street that was being repaired so that they might be mixed as they were spread upon the surface of the street. Preparatory to doing this work, Hale hauled about a wagon load of gravel and deposited it on the west side of the street next to the curb. He placed some wheelbarrows, which were to be used in the work, on top of the pile of gravel. The pile of gravel was allowed to remain over night without any light or other precaution taken to warn the travelling public that it was there. The gas company placed lights about forty or fifty feet apart along the line of the refilled trench. The gravel was placed in the street about 4 o'clock P. M., on Saturday, the 11th day of February, 1912. About 8:30 o'clock in the evening Mrs. Senyard, the plaintiff, was driving along Walnut Street in a buggy, and when she was between Third and Fourth streets she drove into the pile of gravel and was thrown from her buggy and severely injured.

The evidence for the plaintiff tends to show that it was too dark to see the obstruction, and one of her witnesses stated that upon examination made afterwards, he found that the gravel extended about five feet into the street and that there was hardly room for a vehicle to pass between it and the ditch on the other side. The street in question had a great deal of traffic over it.

There was a verdict and judgment for the plaintiff and the defendant has appealed.

*Coleman & Gantt* and *Moore, Smith & Moore,* for appellant.

Hale was an independent contractor for whose acts appellant was not liable. 32 Ark. L. Rep. 771; 77 Ark. 551; 54 *Id.* 427; 53 *Id.* 503; 26 Cyc. 1553; 88 N. W. 741; 49 N. W. 822; 78 Pac. 337; 39 La. Ann. 551; 49 Am. Rep. 113; 98 N. W. 573; 43 S. E. 562; Dillon on Mun. Corp. (5 ed.), § 1723.

*A. H. Rowell,* for appellee.

A corporation owing a public duty can not delegate its duties to another and escape liability for negligence. 39 So. 142; 49 N. W. 822; 78 Pac. 337; 16 Wall. 576; 88 N. W. 741; 71 Am. Dec. 285; 63 S. E. 367; 72 Atl. 1069; 20 N. E. 33; 14 L. R. A. 398; 34 S. W. 590; 83 U. S. 566; 27 L. R. A. 590; 51 Am. Rep. 269; 45 N. E. 668; 153 S. W. 838; 87 S. W. 297; 53 Atl. 807; 150 S. W. 77; 108 Pac. 509; 48 N. E. 66; 87 Ill. App. 40; 26 Cyc. 1562; 140 S. W. 1197; 55 N. E. 618; 56 *Id.* 797; 81 Ark. 199; 77 *Id.* 553; 54 *Id.* 131; 152 S. W. 148.

HART, J., (after stating the facts). To reverse the judgment, counsel for the defendant invoke the general rule that the employer is not responsible for the negligence of an independent contractor. They concede that there are exceptions to the general rule, and that one of them is that where a person causing something to be done, the doing of which casts on him a public duty, he can not escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. They do contend, however, that the piling of the gravel in the street without a light was purely collateral to the work contracted to be done, and was entirely the result of the wrongful acts of the contractor, Hale, and therefore he alone is liable. We can not agree with their contention. The city council has entire control of the streets of the city and it was its duty to the public to keep them unobstructed and safe for passage in the ordinary modes of travel.

In recognition of its duty to the public, the city council provided in the ordinance that the defendant, in the work of laying and repairing its pipes and appliances, should not unnecessarily obstruct or interfere with the use of the streets of the city. The defendant when it began the work of tearing up the streets of the city for the purpose of laying its gas mains assumed all the obligations of the city to the public, and it became its duty to exercise ordinary or reasonable care in the laying and repairing of its mains so as to prevent such work from obstructing the street or endangering those using it. In *Chicago City* v. *Robbins,* 2 Black (U. S.) 418, and again reported under the style of *Robbins* v. *City of Chicago,* 4 Wall. (U. S.) 657, Robbins was held liable for damages by a pedestrian upon the streets of Chicago falling into an area which his contractor had made before a building he was erecting in that city. In the first opinion, the court said: "Robbins' duty was absolute to see that the area dug under his direction and for his benefit should be safely and securely guarded and, failing to do so, his liability attached and the jury should have been told so."

In the opinion on the second appeal, it is said: "The import of the decision of this court in reversing the former judgment of the circuit court, and remanding the cause for a new trial, was that the party contracting for the work was liable in a case like the present, where the work to be done necessarily constituted an obstruction or defect in the street or highway which rendered it dangerous as a way for travel and transportation, unless properly guarded or shut out from public use; that in such cases the principal for whom the work was done could not defeat the just claim of the corporation or of the injured party by proving that the work which constituted the obstruction or defect was done by an independent contractor."

In the case of *Hawver* v. *Whalen,* 49 Ohio St. 69, 14 L. R. A. 828, it was held that the owner of a city lot, who made an excavation in the sidewalk for coal cellars, to

be used in connection with the building, was bound to guard it with ordinary care, and that this duty could not be delegated to an independent contractor employed to construct the cellar. The court said:

"There is much innate justice in a rule of law that declines to permit one who causes work to be done, the performance of which though not necessarily injurious to the persons or property of others, yet necessarily creates conditions inimical to their safety, to exonerate himself from all duty towards those whom he had thus exposed to danger."

In the case of *Woodman* v. *Metropolitan R. R. Co.* 149 Mass. 335, 14 Am. St. Rep. 427, the court held:

"Where a city railroad company is engaged in laying a track in a public street, and negligently leaves rails projecting beyond a temporary barrier inclosing the place where the track is being laid, it is liable in damages to one, who, travelling at night, and exercising due care, is injured by coming in contact with such projecting rails, notwithstanding the fact that the injury was sustained at other than a regular street crossing, and that the work was being done by an independent contractor."

In the case of *Village of Jefferson* v. *Chapman,* 11 Am. St. Rep. 139, the Supreme Court of Illinois said:

"Another exception to the general rule relieving an employer from liability for an injury occasioned by an independent contractor is where the party causing the work to be done is under a primary obligation imposed by law to keep the subject-matter of the work in a safe condition. The principle upon which this exception is predicated is, that where a duty is so imposed, the responsibility for its faithful performance can not be avoided, and that the party under such obligation can not be relieved therefrom by a contract made with another for the performance of such duty."

The facts of the present case, we think, bring it within the exceptions we have noted. Walnut Street was paved with wooden blocks and was a public street over

which there was much travel. The defendant, with its own servants, tore up the street for the purpose of laying its mains, and piled the blocks with which it was paved next to the east curb of the street. After it had laid its mains, and refilled the trench, Hale, under his contract with the defendant, began the work of repaving the street. Before the paving blocks could be replaced in the street it was necessary to prepare and lay a concrete foundation for them to rest upon. The concrete foundation was made by placing a mixture of gravel and cement upon the dirt, and it was necessary that the gravel and cement should be mixed near the place where it was to be spread upon the surface of the street. To do this, it was also necessary to pile the gravel in the street preparatory to mixing it with the cement for the purpose of constructing the concrete foundation. The piling of the gravel in the street for this purpose necessarily rendered the street unsafe for night travel. This was a condition which did not depend upon the care or negligence of the contractor, but the danger arose from the very nature of the work contracted for and could only be averted by placing lights or danger signals to warn those travelling the street at night that the obstruction was there. That is to say, the performance of the work in the usual and only practical way it could be performed, necessarily created a condition which would bring wrongful consequences unless guarded against, and inasmuch as the contract could not have been performed by Hale except under the right of the defendant, the defendant was under a primary obligation imposed by law to keep in safe condition the subject-matter of the work, which in this instance was the street. The injury sustained was caused by the gravel, which had been left in the street, and which came within the duty of the defendant to persons travelling on the streets to see that they were kept safe.

In such a case, the responsibility for the faithful performance of the work can not be avoided, and the defendant being under such obligation can not be re-

lieved therefrom by a contract made with another for the performance of that duty. In cases like the present, where the employer owes a public duty to keep the subject-matter of the work in safe condition, it is only where the negligence complained of is entirely collateral to and not a probable consequence of the work contracted for that the employer can escape liability; and we hold that the negligence complained of was not collateral. The question of negligence was submitted to the jury under proper instructions and the judgment will be affirmed.

McCULLOCH, C. J. and WOOD, J. dissent.

McCULLOCH, C. J., (dissenting). It is undisputed that the work of restoring the pavement over the refilled trench was, at the time of plaintiff's injury, being done for the defendant by an independent contractor.

Ordinarily, liability for injury on account of the negligent act of an independent contractor does not fall upon the person who has employed the contractor to do the work; but there is a well recognized exception to that rule, which is to the effect that, where the work to be performed is necessarily dangerous or creates a nuisance, then it can not be delegated so as to shift liability for any injury that results therefrom.

The majority finds this case to fall within the exception, and in this I think they are clearly in error.

The exception has been recognized by this court in numerous decisions, beginning with the case of *St. Louis, I. M. & S. Ry. Co.* v. *Yonley,* 53 Ark. 503, where it was said:

"If one employs another to perform a work which from its nature is necessarily dangerous to the property of a third person, the employer can not escape liability for the injury thereby done. In such cases the injury flows from the doing of the act as its natural consequence, and not from the manner in which the act is done."

Another way of stating the exception is that, where one owes a public duty, responsibility can not be shifted by delegating it to another.

Judge Dillon, in the last edition of his work on Municipal Corporations (5 ed., vol. 4, § 1723) states the rule with respect to work done in public streets as follows:

"Where the work contracted for necessarily constitutes an obstruction or defect in the street, of such a nature as to render it unsafe or dangerous for the purpose of public travel, unless properly guarded or protected, the employer * * * where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor, subcontractor, or his servants. In such a case the immediate author of the injury is alone liable."

Another clear statement of the rule is found in the opinion of the Supreme Court of the United States delivered by Mr. Justice Clifford in the case of *Water Company* v. *Ware,* 16 Wall. 566, as follows:

"Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do those acts is *equally liable* to the injured party * * * Common justice requires the enforcement of that rule, as if the contractor does the thing which he is employed to do the employer is as responsible for the thing as if he had done it himself, but if the act which is the subject of complaint is purely collateral to the matter contracted to be done, and arises indirectly in the course of the performance of the work, the employer is not liable, because he never authorized the work to be done."

Now, when the duty which defendant, in temporarily occupying the street, owed to the public and the particular work which it delegated to the contractor is analyzed, it seems clear to me that the alleged act of negligence was in the performance of a collateral act for which the defendant is not responsible. It occupied the street for the purpose of laying its gas mains, and the trench was dug for that purpose. It owed the public the duty of refilling the trench and restoring the pavement to its original condition, and was responsible for any injury that resulted either from the exposed condition of the trench or any obstacle that necessarily resulted from the work in restoring the pavement. This duty could not be delegated to another, but its responsibility must, under the law, be confined to an injury which resulted from necessary obstructions, and not merely from collateral acts. If the contractor had been guilty of negligence in failing to properly restore the pavement or in failing to properly guard the open ditch before the work of restoration was complete, then defendant would be liable, because that was a duty which it owed to those who use the streets. But under the contract the defendant exercised no control whatever over the contractor in the particular manner in which the work was to be done. Though it was contemplated that sand and gravel should be used, it was not a part of the contract that it should be placed in the street, nor was it necessary that it should be placed there. The question of placing the sand and gravel in the street was purely collateral. It was merely one of the methods whereby the preparation was made for doing the work. It certainly was not necessary to place the gravel in a place where it would obstruct the street. It might have been placed between the trench and the east curb; or it might have been placed upon the curb and the sidewalk, or upon some abutting lot. It might have been hauled and unloaded as it was needed without being piled in the street at all. Those were matters which were, under the contract, left to the free and unrestrained action of the contractor himself and concerning which the defend-

ant had no control over him. All that the contract required was that the contractor should restore the pavement, and he was permitted to go about assembling the material in any way that he saw fit.

The case of *Sanford* v. *Pawtucket Street Railway Co.,* 19 R. I. 537, is directly in point. There an independent contractor was employed to construct a street railroad, and in doing so the contractor negligently stretched a rope or wire across a street in the city of Pawtucket, which rendered the highway dangerous to travellers and caused an injury. The court, after discussing the rule as to liability for the act of independent contractors, said:

"The defendant made no agreement with the contractor as to the particular manner in which the road should be constructed or the trolley wire erected. That is to say, the defendant did not authorize the contractor to place, stretch or maintain a wire or rope across the street, in the manner complained of. He was simply authorized to construct the road, thus leaving the manner of doing the same to his skill and judgment. Moreover, the work authorized to be done was not in itself a nuisance, nor was it necessarily dangerous or injurious. It was authorized by law. The manner in which it was done was the sole cause of the injury complained of. Hence, the obstruction or defect created in the street was purely collateral to the work contracted to be done, and was entirely the result of the wrongful or careless acts of the contractor or his workmen; and in such case it is well settled that the employer is not liable."

Another case directly in point is that of *Hackett* v. *Western Union Telegraph Company,* 80 Wis. 187, where an independent contractor dug a hole in a street which caused the injury complained of, and the court, in holding that the employer was not responsible, said:

"Nor does the case come within the well recognized exception to such general rule, to the effect that where the performance of such contract, in the ordinary mode of doing the work, necessarily or naturally results in

producing the defect or nuisance which caused the injury, then the employer is subject to the same liability to the injured party as the contractor. * * * In the case at bar the railroad company was not required by the contract to dig any hole in a travelled public street, much less to leave the same open and unguarded at night."

Many other cases cited in appellant's brief illustrate what should be termed collateral acts for which the employer of an independent contractor is not responsible.

I think, according to the undisputed testimony, the alleged act of negligence was committed in the performance of a purely collateral act for which the defendant was not responsible and that the judgment should be reversed and the cause dismissed.

But even if it can not be said that the evidence is undisputed on this point, there was, to say the least of it, abundant testimony which warranted the jury in finding that the placing of the obstruction in the street was a collateral act for which the defendant was not responsible, and the court erred in refusing to submit that question to the jury and in telling the jury broadly in its instructions that "if the defendant or any contractor employed by it did place obstructions of building or paving materials in said streets and failed to use reasonable caution to light the same at night, * * * and that the failure to provide such lights was the proximate cause of the injury and was due to the negligence of defendant or its servants or employees," that the defendant was liable.

Mr. Justice WOOD concurs in the views here expressed.

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## WILLIAMS v. UZZELL.

Opinion delivered May 5, 1913.

1. ACCORD AND SATISFACTION—HOW PLEADED.—A plea of accord and satisfaction sets up an affirmative defense, and it is a defense that is required to be specifically pleaded. (Page 246.)

2. PLEADING—VARIANCE BETWEEN PLEA AND PROOF—SURPRISE—RIGHT TO CONTINUANCE.—W sued U for the balance on a promissory note. U answered, pleading payment, but offered proof of an agreement between the payee of the note and U's husband that a sum of money which the payee owed U's husband be applied on the note, which, if done, the note would be paid. W objected to the introduction of evidence of this agreement, alleging surprise, and moved for a continuance. *Held*, W was entitled to a continuance. (Page 247.)

Appeal from Mississippi Circuit Court, Osceola District; *D. F. Taylor,* Special Judge; reversed.

STATEMENT BY THE COURT.

This suit was brought by Percy H. Williams against Eula Sloan Uzzell and Homer F. Sloan, principal and surety, on a note to recover a balance of $500 alleged to be due thereon. The note was payable to Nina W. Carleton, for the sum of $4,000 and endorsed by H. F. Sloan. Four credits, with the dates thereof, were entered upon it, reducing it to $430, the amount claimed to be due at the time Nina W. Carleton sold it to her son-in-law, appellant, for $250.

There is no contention about the correctness of the credits shown on the note and the appellee pleaded payment.

It appears that Mrs. Carleton, the payee of the note, resides in Memphis, and is the owner of certain interests in Mississippi, of which her brother, the husband of Eula Uzzell, was for a time manager. In November, 1906, Mrs. Carleton wrote to appellee, Eula Sloan Uzzell, the maker of the note, saying she wanted a statement from George as to what she owed him, and for him to go down to the mill and her manager would do what he could to help him get what she owed him unless he could wait until she could come and, "When I left I told Blanton (her then manager) if George came to try to straighten it and give him what I owed him." George Uzzell testified that he went down to Mississippi to see Blanton Peete, the manager of her affairs referred to in the letter, to collect what Mrs. Carleton owed him, and discovered on arrival that Peete was not prepared

to pay him, but advised him "to take credit on the note for the balance would be the best way out of it." To have Mrs. Carleton give his wife credit on the note for the amount due him. He stated on cross examination:

Q. And Mrs. Carleton sent you down there to collect what was due you?

A. Well, he was then working for her. He was her manager at that time.

Q. And when you got there he told you he wasn't able to pay it?

A. Yes, sir.

Q. And advised you to go to Memphis and get credit?

A. He said he would advise it himself.

Q. And that was all there was to it?

A. Yes, sir.

The evidence does not disclose whether he mentioned the matter to Mrs. Carleton, after talking with her manager, and on January 4, 1907, his wife, appellee, Eula Sloan Uzzell, went to the bank, which held the note for collection, and paid $930.64, all that was due on the note, if credit was allowed for the $430, her husband claimed was due him from Mrs. Carleton, and paid in the way already indicated, by agreement with her manager to take credit on the note therefor.

Appellee testified that her husband was working for Mrs. Carleton managing her business in Mississippi, while appellee was living in Memphis, and that Mrs. Carleton wrote her she did not have any money down there in Mississippi to pay him, but to credit herself with $100 on the note which she did. That later she paid $1,000 and then $1,700 on the note, and when her husband stopped working for Mrs. Carleton, he went down to the mill to get the balance due him, $430, upon the receipt by her of the following letter, of date November 26, 1906, from Mrs. Carleton:

"Now, I will want a statement from George of what I owe him—I think he and I know better than any one else about what it is. I want him to go down to the mill

and Blanton will do what he can to help him get what I owe him—if he wants to wait till I go that is all right. The reason I say go to Blanton is because I am sick and I can't tell when I will go down. When I left, I told Blanton if George came to straighten it and give him what I owed him." After the settlement when Mrs. Carleton called on her for the balance due, she went to the bank and paid the balance of $930.54, and the $430 she owed to Mr. Uzzell made it even. That it was considered paid, and there was never any question made about it and her brother who was surety was never notified of the note not being satisfied. From 1907 to 1909, it was considered settled. This testimony was all objected to.

Mrs. Carleton testified that after appellee married her brother, she loaned her $4,000, took her note and that she sold the note later to Percy H. Williams, for $250. She denied that she was ever paid at any time the sum of $430 on the note. Admitted the credit of $930.64 on January 4, 1907, which she said was left at the bank to her credit. That the note remained there until it was sold to Mr. Williams. That she never heard of appellee claiming to have paid $430 on the note in December, 1906, until after this suit was filed.

The endorser testified that he did not know the note had been transferred to Williams until September, 1909; had never received any notice of when the note was due or that it had not been paid until about three and a half years after it was due when he was notified it had not been paid.

At the conclusion of the testimony, the plaintiff filed a motion asking that the submission of the case be withdrawn and that it be continued until the next term of court, on the ground of surprise from the testimony relative to the payment and in order that he might produce Mrs. Carleton and her manager, both of whom it was alleged would deny that either of them ever agreed to give credit upon the note for the $430 claimed to have been paid by way of a credit for services rendered by

George Uzzell to Mrs. Carleton. A motion for a new trial was filed, supported by the affidavits of Nina W. Carleton and her manager, Blanton Peete, in which it is stated that she never agreed, promised nor consented to give credit on the note in suit for the sum of $430 or any other sum that she owed to George Uzzell; that she never directed or requested him to go to her manager to ascertain the amount of indebtedness to him for the purpose of giving credit on the note and that her manager had no authority, whatever, to credit the note or agree that it should be credited with her indebtedness to George Uzzell; that she had never at any time agreed to any credit on said note of any of her indebtedness to George Uzzell, except the first $100, credited thereon. That she had attended several terms of court at Osceola to testify in the case, which had been continued at the instance of the defendant and that finally her deposition was taken and that she was surprised at the testimony of Uzzell and his wife, relative to the credit of the $430 upon the note. The manager swore that he had no authority, whatever, to apply or agree to apply the amount of the indebtedness claimed due him from Mrs. Carleton as a credit upon the note of his wife; that he did not consent, promise, or agree to any such credit and that he had no authority to do so.

The jury returned a verdict in favor of the defendant and from the judgment this appeal is prosecuted.

*J. T. Coston,* for appellant.

1. George Uzzell was not acting as the agent of his wife, not acting at her request nor on her behalf. He was incompetent to testify in her behalf. Kirby's Dig., § 3095.

2. Under the defendant's plea of *payment,* plaintiff did not expect, and was not prepared to meet, evidence tending to show an accord and satisfaction in the nature of an agreement to give credit upon the note sued on of an alleged indebtedness due from Mrs. Carleton to George Uzzell. The introduction of such testimony was a surprise, and the court's refusal to withdraw the sub-

mission and grant a continuance was an abuse of its discretion. 6 Words and Phrases, "Payment," 5249; 66 Ark. 620.

3. If Blanton Peete agreed to give Mrs. Uzzell's note credit with the $430 alleged indebtedness due from Mrs. Carleton to George Uzzell, such agreement was not within the scope of his authority, either real or apparent, and was not binding upon Mrs. Carleton. Mechem on Agency, 391; 52 Ark. 254; 53 Ark. 136-137.

4. The evidence that Peete, the plantation manager, agreed, or suggested, that Uzzell take credit on the note which his wife owed Mrs. Carleton, raised an issue not presented by the answer and was clearly incompetent. Hunt on Accord and Satisfaction, 231, 232; 16 Ark. 657; 57 Pac. 758; 117 S. W. 102.

*Appellee, pro se.*

1. The defendant, Homer F. Sloan, was entitled to have the testimony of George Uzzell, and, since the jury were instructed to regard his testimony only so far as it pertained to the interest of Sloan in the action, or acts done as agent of his wife, the admission of his testimony was not prejudicial.

2. There is no showing of diligence on the part of appellant in preparation for the trial, to justify the claim of surprise. Motions for continuances and new trial on the ground of surprise are addressed to the sound discretion of the court. 76 Ark. 515; 26 Ark. 496; 34 Ark. 659; 26 Cyc. 852.

KIRBY, J., (after stating the facts). It is contended that the court erred in admitting the testimony relative to the accord and satisfaction under the general plea of payment of the note and that it should have granted the continuance upon the ground of surprise.

A plea of accord and satisfaction, like one of payment, sets up an affirmative defense and it is one that is required to be specifically pleaded. 1 Cyc. 371; 1 Enc. Plead. & Prac. 74. Hunt on Accord and Satisfaction, § 106. *Owens* v. *Chandler*, 16 Ark. 651.

It is the purpose of the pleadings to advise the

parties of the facts that will be relied upon in the suit for a recovery or defense, that they may with proper proof meet the issues made. Under a plea of payment it can, of course, be shown that the debt or obligation was discharged in the usual manner, by the delivery of money in satisfaction or by the delivery of property of any kind in lieu of money, agreed to be accepted in discharge thereof. Payment may be made in anything that the creditor will receive in payment. *Bush* v. *Sproat,* 43 Ark. 416. Appellant claims that the variance between the allegations of the plea of payment and the proof relating to the manner of the satisfaction of the claim of the husband of appellee by an agreement on the part of the agent of the payee that it might be credited upon his wife's note misled him to his prejudice as he was not required to expect that any such defense would be relied upon thereunder, nor given any information thereof that would enable him to prepare to meet it. We agree with this contention. He objected to the introduction of said testimony under said plea at the time and after the testimony was introduced alleged he was surprised on account of it, moved the court to withdraw the submission of the case and grant him a continuance in order that he might have time to meet the new issue injected into the case.

The affidavits in support of the motion for a new trial show that both the payee of the note and her agent, by whom it was claimed the credit was agreed to be allowed, deny any such agreement or statement, or any authority to allow the credit and it is evident that appellant was deprived of material testimony that he could and doubtless would have been able to produce upon the trial if he had been advised of the nature of the defense by the pleadings, and not being so advised was surprised upon its introduction. The payee of the note was not a party to the suit, did not live within the jurisdiction of the court, her deposition was properly taken and, of course, she was not required to attend the trial in person and appellant can not be regarded at fault in not having her present. The testimony of ap-

pellee and her husband, relating to the allowance of a credit upon the note by the manager of the payee was objected to and the objection not having been sustained appellant was left without any testimony in relation thereto, much to his prejudice. The court should have granted his motion for a continuance under the circumstances.

The court is of the opinion that the testimony is insufficient to show that the manager of Mrs. Carleton's to whom the husband of appellee was sent for an adjustment of the amount due him from her, agreed that he should have credit upon the note of his wife due Mrs. Carleton, the testimony tending only to show that he had no money with which to pay the claim and suggested that the debtor see Mrs. Carleton and get credit upon the note of his wife, indicating, at most, that it was the intention that the matter should not be closed up until she was consulted about it.

For the errors indicated, the judgment is reversed and the cause remanded for a new trial.

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## ANDERS v. ROARK.

Opinion delivered May 12, 1913.

1. LIMITATIONS—MARRIED WOMAN.—Title by adverse possession for seven years can not be built up against a married woman. (Page 252.)
2. LACHES—WHEN NO DEFENSE.—The doctrine of laches has no application to a case where plaintiff is not seeking equitable relief, when plaintiff, a married woman, sues defendant in ejectment, to enforce a legal title, and her action is not barred by the statute of limitations. (Page 252.)
3. ACTIONS—TRANSFER FROM LAW TO EQUITY.—Where a cause of action is purely one at law, it is error to transfer to equity, when no ground for equitable relief is alleged in the answer, save the plea of laches, which could not be availed of. (Page 252.)
4. APPEAL AND ERROR—ERRONEOUS TRANSFER TO EQUITY CAN NOT BE TAKEN ADVANTAGE OF, WHEN.—Where a cause of action has been erroneously transferred to equity upon motion of defendant, defendant can not take advantage of the error, and plaintiff, being entitled to judgment, the cause will be remanded with directions to enter judgment in favor of the plaintiff. (Page 253.)

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

STATEMENT BY THE COURT.

Appellants brought suit in ejectment for the possession of an undivided interest in certain lands, alleged to be unlawfully held by appellees and for damages for timber taken therefrom.

The complaint alleges that E. R. Anders is a married woman and the wife of her co-plaintiff, to whom she was married in 1867; that she is the daughter of Jesse and Nancy Goodman, all of whose children died in infancy, except appellant and her brother, Jesse Goodman, Jr., and that her father became the owner of the lands under the homestead laws and patent issued in the year 1852. That he built a dwelling house upon the land and cleared and cultivated the same until his death in 1855; that his widow continued her residence upon the land with her children until her marriage to Bennett Cooper in the year 1858, and with him continued to live thereon until her death in the year 1876. That her husband Bennett Cooper, was left in the possession of the lands until 1889, when he attempted to convey them by warranty deed to W. H. Wheeler on December 26, 1888. That Wheeler conveyed the lands to Culbreath in March, 1891, who conveyed them to the defendants on May 10, 1907. That the plaintiffs are the sole surviving heirs of Jesse Goodman, Sr., and entitled to one-half interest in the lands and homestead, J. Goodman, Jr., being barred by laches and limitations and that the coverture of E. R. Anders prevented the running of the statute of limitations against her, and she received no gifts or advances from her father's estate, which could be charged to her as her interest therein.

The answer admits the allegations of the complaint, except it denies that the appellants are the owners of the lands and alleges that E. R. Anders married in the year 1867, "and that she has lived without asserting any claims to the lands in suit for 43 years since that date and to the institution of the suit and has knowingly per-

mitted divers and various persons to purchase, hold, improve, cultivate and pay taxes on the land and that each holder has asserted hostile claims to the plaintiff; that defendants and their grantors have for more than forty years had the exclusive possession of the premises, holding the same peaceably, continuously and openly, claiming to be the owners of the fee; that defendants' claim and hold the said lands as innocent purchasers, and by adverse possession. That plaintiffs are guilty of such laches as ought to estop them from a recovery of the premises."

The plaintiff filed a demurrer to the answer, which was overruled and the cause transferred to equity over their objections.

The testimony shows the facts to be as alleged in the complaint and E. R. Anders in explanation of her long acquiescence in the possession of the lands by others said it was because she had no knowledge that she was entitled to them until she raised a boy large enough to look into the matter. She lived near the lands in controversy and knew the improvements were being made upon them and made no objections thereto.

The testimony does not disclose any conduct upon her part calculated to induce the appellees or those under whom they claim, to purchase the land, although T. D. Roark stated that during the time he was engaged in making the improvements thereon that he heard Mrs. Anders say her father died and she never got anything out of the estate, but she never seemed to have any claim, saw them making the improvements, but did not forbid it being done. It was also shown that appellees had made about $1,500 worth of improvements since their purchase of the lands in 1891.

The court found that the plaintiffs, by neglect to assert their rights for a period of forty years and their failure to pay taxes on the lands abandoned all rights thereto and are estopped by laches and their conduct from asserting title to the land and confirmed defendant's title and dismissed the complaint at plaintiff's cost.

From this judgment this appeal comes.

*B. L. Herring,* for appellants.

1. The coverture of Mrs. Anders exempted her from the operation of the statute of limitations and from the effects of adverse possession. 73 Ark. 221, 226.

2. Appellants are not chargeable with laches, because of mere delay. Moreover, laches could not properly be pleaded in this case, beng an ejectment suit wherein the relief sought by appellant is strictly cognizable at law and not in equity. The doctrine of laches has no application. 100 Ark. 399, 403; 140 S. W. 278-9; 94 Ark. 122; 62 Ark. 316.

*Poole & Speer, John E. Bradley* and *R. W. Baxter,* for appellees.

1. The evidence shows a clear case of laches and appellants are estopped. 55 Ark. 92, 95; 81 Ark. 352; *Id.* 432; 90 Ark. 430; 93 Ark. 298; 83 Ark. 385; 101 Ark. 234; Bisp. Prin. Eq. (4 ed.), § 287; 12 Am. & Eng. Enc. of L. (1 ed.), 533, 534; 1 Johns. Cas. (N. Y.) 436. See also, 42 Ark. 300; 39 Ark. 131; 33 Ark. 468; 87 Ark. 232; 24 Ark. 399; 64 Ark. 345; 78 N. Y. 159; 2 Pomeroy, Eq. Jur. (2 ed.), § 779; 96 U. S. 855.

2. When a defendant is sued at law, he must present all his defenses, both legal and equitable, and if any of them are exclusively cognizable in a court of chancery, it is his right to have the case transferred to the chancery court. Sandels & Hill's Dig., § 5619; Kirby's Dig., § § 6098, 5995; 76 S. W. 1063; 70 Ark. 505; 71 Ark. 484; 57 Ark. 500; 85 Ark. 25.

WOOD, J., (after stating the facts). There is no dispute, whatever, as to the facts in this case, except relative to the conduct of appellant, Mrs. Anders, during the time of the making of the improvements upon the land in controversy by appellees, and there is no testimony tending to show any conduct upon her part that would have induced appellees or their grantors to purchase said lands, or mislead them to think that she had no claim thereto, except the fact that she lived long in the locality near them without asserting any title thereto or paying taxes thereon.

Her father died in 1855, leaving her mother, herself and the other children in possession of the lands, his homestead; she thereafter married in 1867, and has ever since been a married woman, and her mother and the other children resided upon the lands until the death of the mother in 1876, and certainly no claim adverse to her interest arose or could have arisen before that time, because the homestead could not be partitioned, and under the law the mother had the prior right thereto. *Johnson* v. *Turner,* 29 Ark. 280; *Lindsey* v. *Norrill,* 36 Ark. 545. And she was a married woman and under disabilities from 1867, long before the death of her mother, and exempt on that account from the operation of the statute of limitations and a title under adverse possession could not be built up against her.

In the case of *Harvey* v. *Douglass,* 73 Ark. 221, this court said: "The seven-year statute could not apply because the agreed statement of facts was that Mrs. Douglass has been a married woman ever since a date prior to this sale and the possession of defendants. Title by adverse possession for seven years can not be built up against a married woman." (Citing cases.)

The court erred in transferring the cause of action, which was purely one at law, to the court of equity, no equitable relief being alleged in the answer, except the plea of laches, which could not be availed of at law.

In *Davis* v. *Neal, et al,* 100 Ark. 399, 140 S. W. 278, the court said:

"In the case of *McFarland* v. *Grober,* 70 Ark. 371, the court held: 'The doctrine of laches has no application to a case where the plaintiff is not seking equitable relief, but to enforce a legal title, and where her action is not barred by the statute of limitations in reference thereto.' "

And in *Taylor* v. *Leonard,* 94 Ark. 122, "The doctrine of laches does not apply to a case where one is seeking to enforce a legal right, and where the right to assert that title is not barred by the statute of limitations. In the case of *Roland* v. *McGuire,* 67 Ark. 320, it is said: 'The right to plead such fact (laches) as a defense is sub-

ject to the important limitation that it is confined to claims for purely equitable remedies, to which the party seeking to enforce them has no strict legal right.' In the case of *McFarland* v. *Grober,* 70 Ark. 371, it is said: 'The doctrine of laches, invoked by the defendant, does not apply to a case where the plaintiff is not asking any equitable relief, but seeks only to enforce a plain legal title in a court of law, and where her action is not barred by the statute of limitations in reference thereto.' And this principle is equally applicable in a case where a defendant interposes his legal title in a court of equity as a defense against one seeking to establish title to the land.''

''It is true a married woman may be estopped to claim real estate, but mere silence or inertness will not suffice to work an estoppel.'' *Fox* v. *Drewry,* 62 Ark. 316.

It follows that the court erred, both in the transfer of the case and the rendition of the decree. The appellees, however, are not in a position to complain of the transfer of the case to equity, made upon their motion, and the decree is reversed and the cause remanded with directions to enter a decree for appellants for possession of the lands.

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## MILLER *v.* WHITE.

Opinion delivered May 26, 1913.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—TIME OF APPEAL.—The provisions of Kirby's Digest, § 5706, that the transcript on appeal from a decree for street improvement asessments shall be filed within twenty days after the rendition of the decree appealed from, and § 5709, that no appeal shall be prosecuted after the expiration of the twenty days, are mandatory, and when a transcript has not been filed on time the appeal must be dismissed.

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

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

*Terry, Downie & Streepey,* for appellees.

KIRBY, J. This suit was brought by the improvement district to enforce the collection of assessments on the property of Mrs. Susie Miller, for grading and improving the streets of the town of Pulaski Heights.

It will not be necessary to discuss any of the questions raised by appellant, since her appeal must be dismissed upon appellees' motion.

It appears that the decree from which the appeal was taken was rendered on February 5, 1913, and that the transcript of the record was not filed in the office of the clerk of this court until April 8, 1913, more than thirty days thereafter. It is the purpose of the law to avoid delay, and it provides for great dispatch in the enforcement of the collection of assessments for improvements. It requires that when an appeal is taken from a decree in favor of the board for the condemnation and sale of the land to pay the assessments that the transcript shall be filed in the office of the clerk of the Supreme Court within twenty days after the rendition of the decree appealed from. (Sec. 5706, Kirby's Digest.) And, "No appeal shall be prosecuted from any decree after the expiration of the twenty days herein granted for filing the transcript in the clerk's office of the Supreme Court." (Sec. 5709, Kirby's Digest.)

These provisions of the statute are plain and mandatory, and, not having been complied with, and the transcript of the record lodged with the clerk of the Supreme Court within the time required, the appeal must be dismissed. *Crandall* v. *Harrison,* 105 Ark. 110.

It is so ordered.

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MIDDLETOWN MACHINE COMPANY *v.* CHAFFIN.

Opinion delivered May 12, 1913.

1. EVIDENCE—CONTRADICTING WRITTEN WARRANTY BY PAROL.—When a contract of sale contains a warranty in writing that the engine shall develop a certain horsepower, and be constructed of good material, parol evidence is inadmissible to establish a verbal warranty in addition to that in the written instrument. (Page 260.)

2 EVIDENCE—CONTRACT IN WRITING—EVIDENCE OF VERBAL WARRANTY—ADMISSIBILITY.—Where defendant purchased an engine from plaintiff under a written warranty as to quality, in an action for the purchase price he can not prove an oral warranty that the engine would run his machinery. Such a warranty must be embodied in the written instrument. (Page 261.)

3. SALE OF CHATTEL—WARRANTY OF QUALITY.—Upon the sale of chattels the law implies no warranty of quality; that is left as a matter of contract between the parties to the sale. (Page 261.)

Appeal from Columbia Circuit Court; *George W. Hays,* Judge; reversed.

STATEMENT BY THE COURT.

The appellant sued the appellee on a promissory note for three hundred dollars ($300), executed for the balance of the purchase price of a gasoline engine, bought by the appellee from appellant, under a contract, which provides in part, as follows:

"10-25-1909.

"Mr. T. H. Chaffin, of Emerson:

"The Middletown Machine Company, hereby propose to furnish and deliver f. o. b. cars, Middletown, Ohio.

| State Quantity Here. | State H.-P. Here. | Type |
|---|---|---|
| 1 | 15 | K |

Skids, Gravity and Tank Cooled Gasoline Miami Engine. Goods ordered on this contract to be shipped to T. H. Chaffin, at Emerson, via freight, about what date, at once. * * *

"Guarantee.

"The above engine will have been tested before shipment and shall develop its rated brake horsepower. We will furnish upon application a record test. We will replace or repair, free of charge, f. o. b. factory, any faulty material or faulty workmanship within one year from date of invoice, provided faulty parts in question are sent for our inspection with express or freight charges prepaid. This guarantee does not cover any time or material expended by customer unless authorized in writing by the home office, Middletown, Ohio, nor does it

cover electric supplies which carry their own guarantee from the respective manufacturers thereof."

* * * * * * * * * * * *

"Prices and Terms.

"We propose to furnish the above engine and material for the sum of ($550.00) five hundred and fifty dollars, to be paid as follows: $250 upon shipment, $300 twelve months after shipment, with 7 per cent interest.

"All deferred payments to bear interest at the rate of 7 per cent per annum from date, and to be evidenced by note or acceptance.

"The above payments to be secured by note * * *

"Title and Conditions of Sale.

"It is agreed that the title and right of possession of the above described property, shall remain in the Middletown Machine Company until payment of the above amount has been made in full, and that if such payments are not made when due * * * the Middletown Machine Company may take possession of said property and sell it, or give a ten days' notice of such sale by posting notices, and apply the proceeds of the sale to the expense of taking possession. * * *

"This contract is made in duplicate, and it is expressly understood that it is the only one in existence between the said parties, concerning matters herein stated, and there is no verbal understanding whatever changing or modifying it. * * *

"Proposed by W. W. McClellan, Salesman,

"For the Middletown Machine Company.

"Approved by J. W. H. Higbee, Sales Manager.

"Accepted by T. H. Chaffin, Purchaser."

The appellant alleged that the note was due and unpaid, and asked for judgment for the amount thereof and also for the sale of the engine and fixtures to satisfy the same. The defense relied on by the appellee, was set up in his answer, as follows:

"He alleges that at the time that he purchased this engine he was operating a gin and grist mill near Emerson, Arkansas; that he was operating said gin and grist

mill with a steam engine; that the plaintiff manufactured the gasoline engine sold to this defendant, and that the plaintiff is engaged in the manufacture and sale of gasoline engines; that the agent of the said plaintiff, who sold him this engine, examined the machinery that this defendant was operating at the time and warranted to this defendant that this engine sold him would furnish power sufficient to operate said gin, together with the press, elevator and grist mill at the same time; that this defendant had had no experience with gasoline engines and at the time he purchased this engine from the plaintiff that he did not know the size engine to purchase to operate his machinery and that he relied wholly on the judgment of the plaintiff as to the size engine necessary to purchase in order to operate said machinery; that the said plaintiff warranted to this defendant that the engine sold to him would have sufficient power to operate his machinery, together with an additional gin stand. Said plaintiff set up said engine and placed it in operation according to the contract, but said engine does not furnish sufficient power to operate his machinery.

"That said engine, on account of some defect in the construction of same, leaks its power; that the engine hasn't sufficient power, and can not furnish sufficient power, even if it were in good condition, with which to operate the defendant's machinery as warranted by said plaintiff; that by reason of the breach of warranty on the part of the plaintiff, this defendant has sustained damages in the sum of five hundred dollars."

Appellee asked damages in the sum of five hundred dollars, for which he prayed judgment. Over the objections of appellant, the court permitted the appellee to testify "that a man by the name of McClellan, representing the appellant, came to the appellee's house and examined his machinery. He took appellee's order for the engine and after examining appellee's gin plant, grist mill, etc., he stated that the engine he was selling appellee, 'would pull the gin stand, elevator, grist mill and the press all at one time and not know that there was ever anything hitched to it.' "

Appellee had had no experience prior to that time with gasoline engines, and told McClellan that he wanted an engine that would operate the machinery which McClellan had examined, and McClellan represented that the engine he was selling would do it. Appellee relied upon this representation in making the purchase, etc.

Appellee further testified over the appellant's objection, that the appellant about the same time sold another engine of the same size and same kind as the one he purchased, to another man that lived at Haynesville; that appellee saw that engine operated and "it pulled a sawmill right straight along, and it did not check it." It took more power to pull sawmills than it took to pull appellee's machinery.

Appellee further testified that the value of the gasoline engine which he bought of appellant, as it now stands, was one hundred and fifty dollars.

The court, over the objection of the appellant, at the request of the appellee, gave the following instructions:

"You are instructed that if you find from a preponderance of the evidence that the plaintiff sold the defendant a gasoline engine, the note in controversy being executed for the purchase money thereof, and that the plaintiff sold said engine to the defendant for the purpose of operating a gin and grist mill, together with their attachments, then owned by the defendant, and that defendant relied upon plaintiff's judgment as to the kind of engine needed to operate this machinery, then the plaintiff impliedly warranted to the defendant that said engine was reasonably fit for the purpose for which it was sold, and if you find from a preponderance of the evidence that said engine was not reasonably fit for the purpose for which it was sold, then the plaintiff fails to comply with its contract of sale with the defendant, and the defendant is entitled to recover such damages as you may find from a preponderance of the evidence he has sustained."

Other evidence was adduced and instructions given over the objection of appellant, but the above show the theory upon which the cause was tried, and it is unneces-

sary for the purpose of the opinion to state more. The jury returned a verdict in favor of the appellee, and from a judgment in appellee's favor, this appeal has been duly prosecuted.

*Stevens & Stevens,* for appellant.

1. The contract was in writing and parol testimony to vary or contradict was not admissible. 65 C. C. A. 224; 141 U. S. 510; 80 Ark. 505; 95 *Id.* 131; 94 *Id.* 130.

2. There was no implied warranty that the article was fit for any specific work. 141 U. S. 510; 6 L. R. A. 392; 71 S. W. 1118; 24 C. C. A. 441.

3. Mere representation is not warranty. 45 Ark. 228; 38 *Id.* 351.

*C. W. McKay,* for appellee.

1. Warranties may be implied when the contract is in writing. 35 Cyc. 390-1, D. 1-3; 48 Ark. 325; 73 *Id.* 472. This is always true where goods are purchased for a specific purpose known to the seller. 35 Cyc. 397-9, 400-2, 408, 459; 77 S. W. 1011.

2. Damages on breach of warranty may be recovered. 95 Ark. 492; 81 *Id.* 549.

WOOD, J., (after stating the facts). The contract for the sale of the engine was in writing and contained an express warranty, as follows:

"The above engine will have been tested before shipment and shall develop its rated brake horsepower. We will furnish upon application a record test. We will replace or repair free of charge, f. o. b. factory, any faulty material or faulty workmanship, within one year from date of invoice."

There is no pretense that the appellant has failed to comply with this warranty; but the evidence which the appellee introduced over the objection of appellant, tended to show an entirely different warranty from that contained in the written contract. The testimony comes within the familiar rule, that "Parol evidence is inadmissible to vary, qualify or contradict, to add to or subtract from, the absolute terms of a valid and unambiguous contract," as held in *Delaney* v. *Jackson,* 95 Ark. 131.

The appellee does not allege in his answer, nor does the evidence adduced, tend to prove that appellant's agent made any intentionally false or misleading representation, by which appellee was induced to enter upon the contract. There is no pretense that the statements of McClellan to appellee were false and fraudulent—that is, made with the wilful intention of misleading appellee, to his prejudice, and the most that could be said of the statements of McClellan, as shown by the testimony, is, that they were expressions of his opinion as to the quality of the engine that appellant was proposing to sell, and that the results of the operation of the engine showed that he was mistaken in his judgment.

The defense of appellee was not based upon any tort of appellant's agent outside of the written contract. The effect of the oral testimony adduced by the appellee was to engraft upon the written contract, a warranty by parol, contradicting the terms of the written warranty. This can not be done. *Lower* v. *Hickman,* 80 Ark. 505. See also, *Bradley Gin Co.* v. *J. L. Means Machinery Co.,* 94 Ark. 130.

The general rule is, that upon the sale of chattels, the law implies no warranty of quality. That is left as a matter of contract between the parties to the sale. But as said in *Curtis & Co. Mfg. Co.* v. *Williams,* 48 Ark. 325: There are exceptions to the rule as well established as the rule itself. One of these exceptions is: "Where a manufacturer undertakes to supply goods manufactured by himself, to be used for a particular purpose, and the vendee has not had the opportunity to inspect the goods. In that case, the vendee necessarily trusts to the judgment and skill of the manufacturer, and it is an implied term in the contract that he shall furnish a merchantable article, reasonably fit for the purpose for which it was intended." See also, *Weed* v. *Dyer,* 53 Ark. 155; *Bunch* v. *Weil,* 72 Ark. 343; *Main* v. *Dearing,* 73 Ark. 470.

Appellee relies upon the doctrine of these cases to sustain the instructions given by the trial court. But, under the facts of this record, the doctrine of the above cases is wholly inapplicable. Here the gasoline engine

was a merchantable article. It was manufactured for the purpose of running machinery, and there is no pretense that it was not fit for that particular purpose. The appellee contends, and his evidence tends to show that it was not sufficient for the particular purpose for which appellee intended it, but there is no implied warranty that it should be adapated to run appellee's machinery in a manner satisfactory to him. This was a matter to be compassed by his contract and comes within the general rule above and not the exception. If appellee desired a warranty that the engine purchased would run his machinery, he should have seen that a provision to this effect was embodied in the written contract before he accepted the same.

The cause was tried upon an erroneous conception of the law and for the errors in admitting the evidence and giving the prayer objected to, the judgment is reversed and the cause is remanded, with direction to enter a judgment in favor of the appellant for three hundred dollars dollars ($300) with interest, and for the sale of the engine, unless the judgment is paid within a time to be fixed by the court.

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## QUEEN OF ARKANSAS INSURANCE COMPANY v. LASTER.

Opinion delivered May 5, 1913.

1. INSURANCE—WARRANTY—KNOWLEDGE OF AGENT—QUESTION FOR JURY.—In an action against an insurance company to recover on a fire insurance policy for loss by fire of certain farm products, testimony *held* sufficient to warrant a submission to the jury of the question of the knowledge of the company's agent, that the property insured was encumbered. (Page 266.)
2. INSURANCE—BREACH OF WARRANTY—WAIVER.—A breach of warranty of no incumbrance is waived where the insurer's agent was notified, when the application for the policy was made, that the property was encumbered. (Page 266.)
3. INSURANCE—INTEREST OF AGENT—COLLUSION.—Where the agent of a fire insurance company is acquainted with the applicant, and has a friendly feeling toward him and his family, and pays the premium for the insured, but has no personal interest in the procure-

ment of the insurance, it will not be held that it is shown that fraud was practiced in procuring the insurance. (Page 267.)

4. INSURANCE—PROOF OF LOSS—FAILURE TO FURNISH—FORFEITURE—DEFENSE.—Failure to furnish proof of loss in accordance with the terms of a contract of fire insurance, constitutes a forfeiture of the policy, and is a complete defense to an action on the same. (Page 267.)

5. INSURANCE—PROOF OF LOSS—WAIVER.—Where, after a fire, the insured called at the office of the insurance company, notified it of the fire, and asked for blanks on which to make proof of loss, and was told that the company had no such blanks, but the adjuster visited the insured's place, and said he had "all the proof he wanted," the conduct of the adjuster will be held to be a waiver of the formal proof of loss specified in the policy. (Page 268.)

6. INSURANCE—PROOF OF LOSS—DENIAL OF LIABILITY—WAIVER.—Denial of liability by the insurer, constitutes a waiver of the provisions of the policy requiring proof of loss to be made, and the insurer will be held to have denied liability when he wrote the insured, "* * * it is our opinion that we are not in any way liable * * *," and to have waived the formal proof of loss. (Page 269.)

7. INSURANCE—WARRANTY.—Where there is no evidence that the insured knew that foreclosure proceedings were pending against the property insured, nor that there was any change of interest, title or possession in the property, before or at the time of loss, it is not error to refuse to submit to the jury the question whether the policy has become void on those grounds. (Page 269.)

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

STATEMENT BY THE COURT.

The appellee sued appellant on a fire insurance policy to recover for a loss by fire of certain farm products and implements, the amount being stated in the policy at $1,100. The plaintiff alleged the loss by fire and compliance with the terms of the policy, and prayed judgment for the sum of $1,100, together with 12 per cent penalty and reasonable attorney's fee.

The defenses relied on by appellant in its brief are:

First. That the appellee violated his contract of warranty by making false statements as to encumbrances on the property, and as to the property being in litigation at the time of its loss, etc.

Second. That he failed to comply with the provisions of the policy as to furnishing proof of loss.

There is a statement in the policy which reads: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein."

There is also a provision in the policy to the effect that if the interest of the insured "be other than unconditional and sole ownership, or if the subject of the insurance be personal property and be and become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed," etc., the policy shall be void, etc.

The policy also contained the following provision: "If fire occur, the insured shall, within sixty days after the fire, unless such time be extended in writing by this company, render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and all others, in the property, the cash value of each item and the amount of loss thereon, all encumbrances thereon; and changes in the title, use and possession."

The application was a part of the contract of insurance and the statements in the application are made warranties. Appellant contends that appellee made false statements as to encumbrances on the property. The substance of the testimony on this issue is stated in opinion.

The appellant complains of the refusal of the court to give its prayer No. 6, which is as follows:

"You are instructed that there is a provision in the policy of insurance that if with the knowledge of the insured foreclosure proceedings be commenced, or if any change take place in the interest, title or possession of the subject of the insurance, whether by legal process or

judgment, or by voluntary act of the insured or otherwise, the entire policy shall be void. You are therefore instructed that if you believe from the evidence that the property insured, or any portion of the same was in litigation at the time of its loss, or if any change had taken place in the possession of said property, or any change in the title or interest of the plaintiff, whether by legal process or otherwise, then your verdict will be for the defendant."

The appellant also complains of the refusal of the court to give the following prayer for instruction:

"You are instructed that it is incumbent upon the plaintiff under the provisions of the policy to furnish the defendant within sixty days after the loss alleged to have been sustained, a complete inventory of the property alleged to have been destroyed, stating the quantity and cost of each article and the amount claimed thereon; that said statement should be signed and sworn to by the insured, stating the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, and if you find from the evidence that the plaintiff failed to do this, then your verdict will be for the defendant, unless you find that the defendant waived same by denying liability or otherwise."

It also excepted to the giving of that part of instruction No. 1, given at appellee's instance, in which the court told the jury "that the denial of liability by the defendant was a waiver of proof of loss and rendered unnecessary any proof of loss."

The court, at the request of appellant, gave instructions in effect telling the jury that if the assured stated that there was no encumbrance against the property, and if they found that there were outstanding ownership notes against the agricultural implements, and an outstanding landlord's lien against a portion of the other property insured, they should find for the defendant, unless defendant's agent was informed of the liens at the time of the application for insurance.

There was a verdict in favor of the appellee for the sum of $900, with 12 per cent penalty. The court allowed an attorney's fee of $225. Judgment was entered in favor of the appellee, and the case is here on appeal.

*A. W. Files* and *W. R. Donham,* for appellant.

1. If the statement in an application for insurance are made express warranties, and the statements made are false, the warranties are broken and the policy of insurance is rendered void. 82 Ark. 400.

If the facts touching the landlord's lien against the property and the outstanding ownership notes against the farming implements were made known to appellant's agent, the evidence, on its face, shows fraudulent collusion between appellee and the agent, and the latter's knowledge as to the facts will not be imputed to appellant. 86 Ark. 538.

2. Instruction 6, requested by appellant, should have been given.

3. No proof of loss was ever furnished to appellant. This is a complete defense. 72 Ark. 484; 84 Ark. 224; 88 Ark. 120; 91 Ark. 43. Under the evidence, it was a question for the jury to say whether there was a denial of liability, and the court erred in its instruction 1, saying that appellant had denied liability. 83 Ark. 126.

*Mehaffy, Reid & Mehaffy,* for appellee.

1. The insurance was written upon a crop described as upon a place which the application plainly states was leased, and the name of the owner of the land, facts sufficient to advise a purchaser of the possible existence of a landlord's lien. 34 Ark. 691. An insurance company issuing a policy upon an application containing such disclosure, ought not to be permitted to claim a forfeiture even if it be shown that a landlord's lien for rent existed at the time the policy was issued. *Id.* See also 82 Ark. 90; 81 Ark. 92; 65 Ark. 581.

2. The course of conduct of the insurance company and its adjuster towards appellee amounts to a waiver of any proof of loss other than that taken by the ad-

juster, and to a denial of liability. 83 Ark. 111; 83 Ark. 126.

WOOD, J., (after stating the facts). 1. The testimony of the appellee tended to show that he informed the agent of the appellant at the time the latter took his application for insurance, that he did not own the land on which the products being insured were grown. He told the agent that the property was leased. He told the agent about the lien. He told him about the plow and about giving notes with security—told him that "he had given these ownership notes."

The testimony of the daughter of appellee tended to show that while she was not present all the time when her father was making the statements in the application, yet the agent of the company knew that the property was encumbered. When asked the question as to whether the parties who took the application knew that the property was encumbered, she answered affirmatively.

Testimony of the appellee himself further tended to show that he did not tell the agent who took the application that there was no encumbrance on the property. He said he did not "remember the question nor answer." Said he thought the question was asked and he told the agent, but did not know whether he "put it down or not."

The above testimony was amply sufficient to warrant the court in submitting to the jury the question as to whether or not, at the time of the application for insurance, the appellant's agent was informed of encumbrances on the property.

This court has often ruled that a warranty of no encumbrance is waived where the insurer's agent was notified when application was made for the policy, that the property was encumbered. (*Capital Fire Ins. Co.* v. *Montgomery,* 81 Ark. 508; *Capital Fire Ins. Co.* v. *Johnson,* 82 Ark. 90.)

In the application, when the appellee was asked in whose name the title to the land was, on which the crops insured were grown, he answered "J. P. Basham owned the land." He also told the agent that the land was

occupied by a tenant. This, in connection with the other testimony above, was sufficient at least to make it a jury question as to whether the appellant's agent had knowledge of the encumbrances existing on the farm products at the time of taking the application for insurance.

The instructions given at the instance of appellant, properly submitted the question as to whether or not a breach of warranty of unconditional ownership and no encumbrances on the property insured had been waived by knowledge of the agent of appellant, of the facts alleged to have constituted such breach of warranty, at the time contract of insurance was entered into.

Appellant contends here, for the first time, that there was a collusion between appellee and the agent of appellant, to procure the insurance, but there is no evidence in the record to warrant the conclusion that appellant's agent was interested in the property insured.

The most that could be said of the testimony is that it showed that the agent of the insurance company, who took the application, was acquainted with appellee, and his daughter, who worked in the same bank with appellant's agent, and that he had a friendly feeling for the appellee and his daughter. He was interested in procuring the insurance—so much so that he agreed to, and did pay the premium for appellee; but this does not even tend to show that the insurance was procured by fraud, so as to bring the case in the rule of *Home Insurance Co.* v *North Little Rock Ice & Electric Co.,* 86 Ark. 538, on which appellant relies.

In that case, the agent had a personal interest in the property insured, affecting the insurance, and to the prejudice of his principal, which might induce him to keep the matter concealed from his principal.

3. This court has often held that failure to furnish proof of loss in accordance with the terms of the contract of insurance constitutes a forfeiture of the policy, and is therefore a complete defense to any suit upon a contract of insurance. (See *Teutonian Ins. Co.* v. *Johnson,* 72 Ark. 484; *Ark. Mutual Fire Ins. Co.* v. *Clark,*

84 Ark. 224; *Commercial Fire Ins. Co.* v. *Waldron,* 88 Ark. 120; *American Ins. Co.* v. *Haynie,* 91 Ark. 43.)

But this defense can not avail appellant, for the reason that the undisputed evidence shows that appellant's adjuster waived the requirements of the policy as to the proof of loss. Just after the fire, appellee called upon the company at its office in Little Rock, notified it of the fire and asked for blank proofs of loss. The appellant's adjuster informed him that he carried no blank proofs of loss. The adjuster a short time afterwards went down to the farm where appellee was to adjust the loss. He questioned appellee in regard to the same and took down his statements. Appellee told the adjuster that he was ready to furnish any information he desired and the adjuster said that he had "all the proof he wanted."

This conduct on the part of the adjuster was a waiver of the formal proof of loss specified in the policy (See *Lord* v. *Des Moines Fire Ins. Co.,* 99 Ark. 476; *Queen of Ark. Ins. Co.* v. *Forlines,* 94 Ark. 227.)

When appellant's adjuster, in response to appellee's inquiry, said that he had "all the proof he wanted," this was a waiver of any further proof of loss on the part of appellant, notwithstanding the nonwaiver agreement. It was equivalent to saying to the appellee that appellant was satisfied as to his loss and had all the information pertaining thereto that appellant desired.

In this view of the case, it was not a prejudicial error for the court to tell the jury that the denial of liability by the appellant was a waiver of proof of loss, conceding that it was a disputed question as to whether appellant denied liability. But we are of the opinion that the letters written by appellant to appellee, before the time for making proof of loss had expired, were in legal effect an absolute denial of liability. True, appellant's agent, who wrote them, says that he did not "deny liability at all," but he does not deny that he wrote the letters and the letters speak for themselves.

The language in the letter of February 3 is as follows:

"Beg to say that basing our opinion on the information that has been furnished us to the present time, it is our opinion that we are not in any way liable to Mr. Laster for any amount on account of his alleged loss by fire on the policy of insurance which he holds."

The only reasonable construction of which this language is susceptible is that appellant did not consider itself liable under the policy, to appellee, for the loss he had sustained.

The court, therefore, did not err in telling the jury that "the denial of liability by the defendant was a waiver of proof of loss" (*Yates* v. *Thomason,* 83 Ark. 126; *Dodge* v. *Thomason,* 94 Ark. 21); nor did the court err in refusing to grant appellant's prayer for an instruction submitting to the jury the question as to whether or not appellee had forfeited his policy by failing to furnish proof of loss.

3. The appellant's prayer for instruction No. 6* was abstract. There was no evidence in the record to warrant such an instruction. The evidence did not show knowledge upon part of appellee of foreclosure proceedings pending at the time of, or before the loss by fire, and it did not show any change of interest, title or possession.

There is no reversible error in the record and the judgment is therefore affirmed.

*6. You are instructed that there is a provision in the policy of insurance that if with the knowledge of the insured foreclosure proceedings be commenced, or if any change take place in the interest, title or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured or otherwise, the entire policy shall be void. You are therefore instructed that if you believe from the evidence that the property insured, or any portion of the same was in litigation at the time of its loss, or if any change had taken place in the possession of said property, or any change in the title or interest of the plaintiff, wnether by legal process or otherwise, then your verdict will be for the defendant.

## ROSS v. HODGES.

Opinion delivered May 12, 1913.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—ASSIGNEE AND CREDITORS AS BONA FIDE PURCHASERS.—Neither the assignee nor the creditors whom he represents are purchasers for a valuable consideration, without notice, as against prior equitable liens, unless some consideration passes at the time of the assignment. (Page 274.)
2. ASSIGNMENT FOR BENEFIT OF CREDITORS—CONSIDERATION.—Where an assignment for the benefit of creditors is made under an agreement with the creditors, that in consideration of the receipt of their *pro rata* parts of the proceeds of the sale of the property assigned, that they would execute a release in full, it is not supported by a new consideration passing at the time of the assignment, because no new responsibility or liability on the faith of the alleged assignment was incurred by the creditors. (Page 274.)
3. VENDOR AND PURCHASER—PRE-EXISTING DEBT—PAYMENT.—The rule of innocent purchaser for value does not apply when property is assigned simply in payment of a pre-existing debt. (Page 274.)
4. ASSIGNMENT FOR BENEFIT OF CREDITORS—INNOCENT PURCHASERS.—An assignment for the benefit of creditors was made, pursuant to a stipulation that the assignment should not become effective until each creditor had agreed to accept the land conveyed in settlement of all amounts due them, and that until it could be determined whether this could be done, that all actions pending in favor of the creditors should be continued. Some of the creditors did not sign the release of their claims. *Held*, the creditors did not acquire any rights under the purported deed, as against one holding prior equity in the land in controversy. (Page 275.)
5. MORTGAGES—PAYMENT.—When a debt which is secured by a mortgage is paid, the mortgage can not then be held as security for another debt, except by a contract in writing, supported by a sufficient consideration. (Page 275.)
6. MORTGAGES—STATUTE OF FRAUDS.—When the debt secured by a mortgage has been paid, a contract that the mortgage shall thereafter serve as security for another debt, must be in writing. (Page 276.)

Appeal from Greene Chancery Court; *C. D. Frierson*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This is a suit by appellees, against appellants, to have a vendor's lien declared and enforced on two hundred (200) acres of land in Greene County, Arkansas.

In March, 1909, E. M. Ross entered into a contract

with the appellees, whereby he was to receive a deed to the lands in controversy, and in part consideration therefor was to transfer to the appellees certain real estate, designated in the briefs as the "Bertig lands." The Bertig lands, at the time of the contract, were encumbered by a mortgage in favor of the Cotton Exchange Bank of Kennett, Missouri, for four hundred and fifty dollars ($450), with interest. At the time the contract was entered into Ross represented to the appellees that the mortgage on the Bertig lands would be released and that the mortgagee would take a new mortgage on the lands in controversy. In pursuance of the contract, D. D. Hodges, one of the appellees, executed to Ross a warranty deed to the lands in controversy. On the 8th of May, 1909, Ross executed a warranty deed to R. P. Taylor, in pursuance of an agreement between them, which provided in part as follows:

"Whereas, said first parties have contracted and agreed, and by these presents do hereby contract and agree, to procure, if possible, from each and every creditor of the said Southern Pole & Piling Company an agreement to accept said lands in full and complete settlement of all sums due to said creditors, and when said land shall have been sold and proceeds converted to money, and when the same shall be divided and paid to said creditors, and receipt in full and release thereupon executed to the said Southern Pole & Piling Company and to the said E. M. Ross, and said deed shall be placed of record the said conveyance shall be treated and considered as completed and final."

The Cotton Exchange Bank refused to satisfy the mortgage on the Bertig lands, and the appellees brought this suit, to have a vendor's lien declared and enforced against the lands in controversy, which had been conveyed to Ross as part consideration for the Bertig lands, and the stock of merchandise purchased by the appellees, of Ross, representing the Southern Pole & Piling Company.

It was shown that before the conveyance was made

by Ross to Taylor, Ross informed him of the claim of four hundred and fifty dollars ($450), for which the land was mortgaged. Ross testified as follows:

"The conveyance to Taylor was on consideration that the creditors for whose benefit the conveyance was made could take their *pro rata* out of the price realized from the sale of the lands, and release all claims against me.

"The plaintiffs at that time held a mortgage on another place of mine (the Crunk place) to secure $272.50 of the indebtedness of four hundred and fifty dollars ($450). I paid off the mortgage of $272.50 on the Crunk place, but after I did so the question of satisfying this four hundred and fifty dollars ($450) mortgage came up, and I told Mr. Grady, one of the plaintiffs, that he could still hold the $272.50 mortgage against my farm. But in the meantime they brought this suit, and I made him give the mortgage to me.

"I have lived on the Crunk place since March, 1909. The place was worth about one thousand dollars ($1,000)."

The appellants, in their answer, after alleging the contract under which the deed to Taylor was executed, alleged as follows:

"Defendant, R. P. Taylor, states for himself and for said creditors, that neither he nor they nor any of them, had any knowledge of any right, claim, interest or lien, running in favor of the plaintiffs, or either of them, in and to the lands conveyed to them, in trust for the said creditors, prior to the institution of this suit. They state that the debts to the creditors, which constitute the consideration for the conveyance to Taylor, greatly exceed the value of the lands on which plaintiffs claim a lien."

On behalf of appellants, there was testimony tending to sustain the allegations of their answer.

The court found that the defendant, R. P. Taylor, "received the conveyance from Ross, with constructive notice of an agreement by E. M. Ross, to convey the Bertig lands to plaintiffs free from encumbrances, and that

no new consideration passed to Ross for said conveyance."

The court divested the title to the Bertig lands out of the defendants, E. M. Ross and the Southern Pole & Piling Company, and decreed that the lands in controversy be sold and that the proceeds of the sale be applied towards the satisfaction of the claim of the Cotton Exchange Bank, and the case is here on appeal.

Other facts stated in opinion.

*Johnson & Burr,* for appellant.

1. Where the facts show that the assignor receives some substantial advantage other than the assurance that the proceeds of the property will be applied to his indebtedness, a sufficient consideration is present to support the *bona fides* of an assignee unaffected with notice of prior liens.

When a creditor, in consideration of the assignment, releases the assignor from personal liability on the debt for the payment of which the assignment is made, the assignee is a purchaser for value and not bound by the undisclosed fraud of the assignor. 59 Miss. 111; 16 L. R. A. 664; Kent's Com. (12 ed.), 464. The chancellor's finding that the defendant Taylor was affected with constructive notice was wrong as a matter of law. Constructive notice could not have resulted except in consequence of want of consideration. 95 Ark. 586.

2. So much of plaintiff's claim as equals the amount due on the mortgage on the Crump place should be disallowed. If there has been no actual satisfaction of record, the mortgage still stands as security to the plaintiffs. 27 Cyc. 1433.

Grady's disregard of the rights of the creditors who accepted the terms of the trust created by the assignment should estop him to claim that which he deprived them of by his own inequitable conduct. 32 Ark. 663; 69 Ark. 224; 89 Ill. 491; 24 Neb. 702, 40 N. W. 132; 128 La. 779; 55 So. 369.

*Block & Kirsch,* for appellees.

1. Appellants' contention that R. P. Taylor purchased for value is mere assumption; there is no proof whatever in the record to that effect. 33 Am. Dec. (Mass.), 733; Burrill on Assignments, § 391; *Id.* § 392.

2. The transaction concerning the Crunk place was between Ross and Grady as individuals; that out of which grew the $450 lien was between Ross and the Southern Pole & Piling Company on the one hand and Hodges, Grady and Cottrell as a firm on the other.

Copartners can be estopped by the acts of a partner only when the matter in which the estoppel is sought to be asserted is within the scope of the partnership business. Bigelow on Estoppel (3 ed.), 469.

None of the elements essential of an estoppel *in pais* exist in this case. Bigelow on Estoppel (3 ed.), 72; Pomeroy, Eq. Jur., § 802.

WOOD, J., (after stating the facts). 1. The prevailing rule is that "Neither the assignee nor the creditors whom he represents are purchasers for a valuable consideration, without notice, as against prior equitable liens. There must be some consideration passing at the time of the assignment, some new responsibility incurred, or some rights given up, to invest an assignee with this character." Burrill on Assignments, page 482 (6 ed.).

The appellees contend that the case at bar is taken out of the operation of this rule, because the purported assignment here was made under an agreement with the creditors, that in consideration of the receipt of their *pro rata* parts of the proceeds of the sale of the land they would execute a release in full to E. M. Ross and the Southern Pole & Piling Company. But there was no new consideration passing at the time of the assignment. No new liability or responsibility, on the faith of the alleged assignment, was incurred by the creditors. It was not shown that the creditors would have refused to accept the assignment if they had known of the mortgage.

The rule of innocent purchasers for value does not apply where property is assigned simply in payment of

pre-existing debts, for in such case it can not be said that the creditors gave any new or additional consideration therefor.

In *Clark* v. *Flint,* 22 Pick. 231 (Mass.), it is held: "That assignees in trust for creditors, are not *bona fide* purchasers for value, who will be protected against an equity of which they had no notice, though the assignment contains a release of claims of creditors, where the assignees have incurred no new liability on the credit of the property." *Clark* v. *Flint,* 33 Am. Dec. 733, note. Such is the case here, conceding that this was an executed assignment. But the contract under which the purported deed of assignment was made shows that there was, in fact, no completed assignment for the benefit of the creditors of the Southern Pole & Piling Company. It is clear from the provisions of this contract that the deed was not to take effect as an assignment until the assignee had procured from "each and every creditor" an agreement to accept said lands in full and complete settlement of all sums due to said creditors. The uncontroverted evidence shows that there were three of the creditors, with claims amounting in the aggregate to $294.81, who had not signed the release of their claims. Furthermore, there was a provision in the contract to the effect "that all lawsuits now pending in the court of R. C. Hays, justice of the peace for Lake Township, in favor of the creditors for said Southern Pole & Piling Company and E. M. Ross, should be continued from time to time, until it can be ascertained whether the said settlement can be perfected, and all further proceedings held in abeyance until said time." These provisions of the contract, in pursuance of which the deed was executed, show that there was to be no completed assignment of the property until all the creditors had released their claims in full, and the assignee, in endeavoring to have this done, was representing primarily the debtor instead of the creditors. It was in evidence that Ross had four hundred (400) acres of land in Missouri. Yet the alleged assignment

was to effect a complete settlement, if possible, out of the proceeds of the sale of the land in controversy before the deed of assignment could take effect. We are of the opinion that the evidence shows that there was no assignment, such as to entitle the creditors of the Southern Pole & Piling Company to claim as innocent purchasers. They had not, in fact, acquired any rights under the purported deed, as against one holding prior equity in the land in controversy.

2. The contention of the appellants that the claim of appellees should be reduced by $272.50, the amount of the mortgage held by E. H. Grady, one of the appellees, against Ross, can not be sustained, for the reason that this alleged agreement between Ross and Grady was a transaction concerning the mortgage of real estate and was void, because it was not in writing. When the debt of Ross to Grady was paid, the mortgage had performed its function and could not thereafter be held as security for another debt. Any promise upon the part of Ross to this effect was wholly without consideration and performance of which could not be demanded by Grady. A contract of this kind to be binding would have to be in writing and based upon consideration. There was no element of estoppel in the transaction.

It follows that the decree of the court was correct, and the same is in all things affirmed.

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## STROUTHERS v. BOGENSHUTZ.

Opinion delivered May 12, 1913.

GIFTS—GIFT OF LAND—DELIVERY OF POSSESSION TO DONEE.—F purchased land taking title in his own name, but the evidence showed a clear intention at the time of the purchase to make J, his brother, a gift of the same; J was put into possession of the land before the death of F. *Held*, F purchased the land intending to make a gift of the same to J, and that the gift was completed when J was invested with the possession of the land.

Appeal from Boone Chancery Court; *T. H. Humphreys*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This is a suit to quiet title to thirty-two (32) acres of land in Boone County, Arkansas.

The original complaint alleges a purchase of the land from one C. M. Davey, and that the draftsman of the deed, through mistake, conveyed the land to Francis X. Bogenshutz, instead of the appellee. The appellants denied the purchase and denied that there was any mistake in the deed, and set up title in themselves, as the heirs of Francis X. Bogenshutz. They also pleaded the statute of frauds.

Charles M. Davey testified that about September, 1909, John B. Bogenshutz, of Keener, Ark., was in correspondence with him, with a view of buying the land in controversy. Later, Francis X. Bogenshutz called on the witness and said he was buying the land for his brother, John B. Bogenshutz. He did buy the land and took the deed to himself. At the time the deed was executed, Francis X. Bogenshutz told witness that he expected soon to go to Arkansas and transfer the land to his brother, John B. Bogenshutz. Witness ordered an abstract made and John B. Bogenshutz paid fifteen dollars ($15) for the abstract, which was supposed to be part of the purchase price of the land.

Witnesses on behalf of the appellee testified that they knew Francis X. Bogenshutz, who lived in Kansas City, Missouri; that they understood that Francis X. and John B. Bogenshutz, brothers, had been separated for about forty-two (42) years. When Francis found his brother John in Arkansas, he invited him to visit him in Kansas City, which he did. Witnesses testified that Francis had great affection for his brother, John B.; that Francis told witnesses that he intended to buy his brother John B. thirty-two (32) acres of land in Arkansas. He told witnesses that he had bought thirty-two (32) acres of land in Arkansas for his brother John to have a home on while he lived; that he would not have bought the land if it had not been for his brother John. He stated to witnesses that his brother John was not very well fixed

in this world's goods. It was shown by these witnesses that Francis was an old bachelor and possessed of considerable means. One of the witnesses stated that Francis told him on one occasion, when he went in to see him about buying land for his brother, John B., that he had bought him thirty-two (32) acres of land. Witness was of the impression that Francis said that he had made his brother a deed to the land. This witness stated that John B. Bogenshutz seemed to be the chief object of affection of his brother, Francis X. Bogenshutz.

The appellee testified, in part, as follows: "He was seventy-eight (78) years old. He bought the land in question in November, 1909, of C. M. Davey, of Kansas City, Missouri. He wrote Davey to get the price of the land. He wanted his brother, Francis X., to close the contract with him, but his brother was not to pay anything, but he did buy. Davey accepted $400 for the land. He wrote witness as follows:

"I wrote Cotton & Rosson to make a bill and send to you. Will you go to them and say for me that you have bought the place and will hold out $15 to pay for it? Let me know immediately, and I will deliver your deed to your brother."

After receiving this letter, witness paid fifteen dollars ($15) for the abstract. A man by the name of Rogers was in possession of the place at the time witness bought it and the grantor gave Rogers the following notice to deliver the place to witness:

"Kansas City, Mo., November 22, 1909.

"S. M. Rogers, Keener, Ark.

"Dear Sir: I have sold the place to Mr. Bogenshutz, and I wish you would relinquish possession to him, as he has paid for it and I have delivered the deed.

"C. M. Davey."

On the 9th of November, 1909, witness received the following letter from Davey:

"Dear Sir: I suppose your brother has notified you that I have contracted the place to him for you. I hope you will do well with it. I have written Mr. Rogers that

you have bought it, and wish you would get me a statement of this year's taxes and mail me at once.

"Yours truly,

"C. M. Davey."

Much of the testimony of this witness, relating to the transaction between himself and his brother, Francis X. Bogenshutz, was incompetent, and was so held to be by the chancellor, and is not set forth here. He shows, however, that his brother purchased the land and had the deed taken in his own name and that his brother sent him the deed, and when he saw that it was not in his name, witness knew that it was a mistake. Witness had the deed recorded and paid for it and sent it back to his brother. He told his brother that he thought the deed had been made in witness's name. He did not receive any other letter from his brother in regard to it. Witness's brother paid for the land, all except fifteen dollars ($15). Witness moved on the land as soon as he got the notice to Rogers to vacate, and had lived on it ever since, and had had the use of it since December, 1909. He fenced the land just before the death of his brother and after he had the deed recorded. He did not make the improvements or spend any money on the place before he had the deed recorded. Witness stated that he had nothing to do with paying money for the land, only as he had stated. His brother paid the money and sent the deed down to him for record. Witness paid out of his own money the following: Abstract, $15; taxes for the years 1909, 1910 and 1911, $12.51; and for improvements, $104.50. Witness introduced the following letter:

"Kansas City, June 23, 1910.

"Brother John: Received both of your letters asking for a loan of fifty dollars. I don't want you to get in the habit of asking loan of money from me. I am getting old and feeble, and have use of my money for myself; thinking of selling out my business and retire, and use my own money if I go broke. I have nobody that I can borrow one dollar.

"Would have answered your letter sooner, but had

another spell of sickness, same as before. Just about getting on my feet again. You have been asking me from time to time to buy that piece of ground, that you would be independent and make money. Now, as you have it, you are not doing or trying to do anything for yourself. If your wife is sick, why not her kinfolks do for her? However, I will make you a present of $20. Hope you are well, getting better. Regards to all.

"Brother Frank."

Another witness, who lived with the appellee, went with plaintiff to Kansas City to meet his brother. Witness testified as follows:

"They had not met in forty-one years, and it was the greatest meeting that ever was, I think. Francis said, 'John, I want you and your wife to come and live with me. I will deed you a piece of property I have here. If you don't want to do that, I will hire a hack and send for you to live with us or I will live with you.' "

Plaintiff and his wife would not go to Kansas City. So when Francis X. Bogenshutz came to visit his brother John, witness heard Francis say to his brother, "John, if there is any place down here that you want, I will let you have the money to pay for the place anywhere you want it. I will have all kinds of money, more than for us both. If you want any money to pay for the place, let me know and I will let you have it."

Witness heard Francis Bogenshutz say that he intended that plaintiff should have all his property at his death. He heard him say that taking the deed to himself instead of to plaintiff was a mistake in getting the deed out; that he intended to send the money to plaintiff; that it was Davey's place to have made the deed to plaintiff. Witness heard Francis Bogenshutz say that he was going back to close out his business and would prepare a deed to the plaintiff. Francis Bogenshutz told witness that he did not want land in Arkansas, that he had all he wanted. Said that he gave plaintiff money to buy the place with and that the deed was made in the name of Francis Bogenshutz by mistake.

On the trial, the appellee's complaint was treated as amended so as to allege that Francis X. Bogenshutz held the land in trust for appellee. The court found: "That Francis X. Bogenshutz purchased the land for his brother, John B. Bogenshutz, the plaintiff, paying therefor $435 out of his own money, as a present to the plaintiff, and that plaintiff paid some part of said purchase price, and that said Francis X. Bogenshutz took the deed in his own name, as trustee to John B. Bogenshutz, and not as owner thereof."

The court decreed that the title of the land be divested out of the appellants and that the same be vested in the appellee, and the case is here on appeal.

*J. W. Story,* for appellant.

1. There was no gift of money or land to the appellee. 3 Pom., Eq. Jur. (3 ed.) § 1149.

2. There was no resulting trust. *Ib.,* § 1037; 41 Ark. 391; 42 *Id.* 503; 50 *Id.* 71. Any oral agreement was within the statute of frauds.

3. A written, absolute fee simple deed can not be overturned by parol evidence, unless clear, full, unequivocal and unmistakable. 3 Pom., Eq. Jur. (3 ed.) § 1040; 71 Ark. 614; 89 *Id.* 182; 79 *Id.* 418; 72 *Id.* 75; 46 *Id.* 176; 44 *Id.* 367; 48 *Id.* 167; 101 *Id.* 451. Appellee has shown no equities and no ground of relief. 63 Ark. 100; 82 *Id.* 33; 44 *Id.* 334; 39 *Id.* 424.

4. Appellee's possession was entirely consistent with the absolute title in his brother. 82 Ark. 33; 63 *Id.* 100.

WOOD, J., (after stating the facts). The only theory upon which the appellee can be allowed the relief prayed for in this case is that his brother made him a gift of the land. We are of the opinion that the testimony showing such a gift is clear, unequivocal and convincing. Without going into detail in discussing the evidence, which is quite fully set forth in the statement, it is sufficient to say that it shows clearly that it was the intention of Francis X. Bogenshutz, who was in prosperous circum-

stances, to buy the land for his brother, John B. Bogenshutz, who was in rather destitute circumstances. The greatest affection existed between the brothers and the letters and oral testimony in the case show unmistakably that Francis Bogenshutz bought the land for his brother, John B. Bogenshutz, and gave the same to him. The notice which C. M. Davey gave to Rogers to vacate the premises and to deliver possession to the appellee must be taken as the act of Francis X. Bogenshutz, who paid to Davey the purchase money, and to whom Davey executed the deed. The land at the time of this notice was not the land of Davey, but the land of Francis X. Bogenshutz, to whom Davey had sold the same. So the investiture of possession in appellee was effected during the life of his brother, Francis X., the donor.

The letter of Francis Bogenshutz, written to his brother on June 23, 1910, in which he says, "You have been asking me from time to time to buy that piece of ground. Now, as you have it, you are not doing or trying to do anything for yourself," shows, when taken in connection with the other evidence, that Francis X. had bought the land for and had delivered same to the appellee.

The question of resulting trust has no place in the record, for the undisputed evidence shows that Francis X. Bogenshutz furnished the money with which to purchase the land, and therefore no resulting trust in favor of appellee could exist. *Hackney* v. *Butts,* 41 Ark. 393; *Gaines* v. *Cannon,* 42 Ark. 503; *Bland* v. *Talley,* 50 Ark. 71.

If these were nothing further shown than that Francis X. furnished the money to buy the land and intended thereafter to convey same to his brother, John B., then appellee's contention could not be sustained, because there would be neither an express nor resulting trust, and the statute of frauds would apply to prevent the relief sought. But, as we have stated, the evidence shows a gift, which was completed by the donor, Francis X., in delivering the possession of the land to his brother, the

appellee, with the intention of making a gift thereof to him. It was not simply a promise to give, but a completed gift. Acting under the belief that his brother had given him the land, appellee took possession thereof, and paid the taxes and made improvements thereon. See *Young* v. *Crawford,* 82 Ark. 33; *Williams* v. *Neighbors,* 155 S. W. 917, and cases there cited.

While there is no evidence to justify the finding of the court "that Francis X. Bogenshutz took the deed in his own name, as trustee of John B. Bogenshutz, and not as the owner thereof," the testimony does clearly prove that Francis X. Bogenshutz bought the land, taking the title in his own name, intending at the time to give the same to his brother, and that he afterwards carried out this intention, by investing his brother with the possession of the land, and, when he did so, he intended that his brother should have full control and dominion over it, as the owner thereof.

Even though the court was mistaken in finding that Francis X. held the land as trustee, the judgment of the court is nevertheless correct in granting the relief prayed for, and it is affirmed.

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## SOUTHERN TELEPHONE COMPANY *v.* BANKS.

Opinion delivered May 12, 1913.

1. APPEAL AND ERROR—DIRECTING VERDICT.—Where, in an action on an account, the defense of set-off is interposed, in testing the correctness of an instruction directing a verdict for the plaintiff, the testimony will be considered in its light most favorable to the defendant. (Page 286.)

2. CONTRIBUTION—EVIDENCE—SUFFICIENCY.—Where A and B were defendants in a former action, and the whole of the attorney's fee was paid by A, in an action by B against A on an account, *held,* evidence sufficient to require a submission of the cause to the jury of a set-off claimed by A by way of contribution. (Page 290.)

3. SET-OFF—WHAT MAY BE SET OFF—CONTRIBUTION.—Kirby's Digest, § 6101, provides that a set-off can only be pleaded in an action upon a contract, and the action must arise upon a contract or be ascertained by the decision of a court; *held,* when A is sued for money

paid by an accommodation indorser of its note, it can set off its right of contribution from the plaintiff, for fees paid by the defendant, A, to attorneys who represented both plaintiff and defendant, where both were defendants in former litigation. (Page 290.)

4. ACTIONS—TRANSFER OF CAUSES.—A court of equity is the proper forum for the adjustment of rights and equities between co-obligors, one of whom has discharged the obligation for the benefit of all, and where defendant, in an action at law, plead set-off for contribution, it is the duty of the law court of its own motion to transfer the cause to equity, and it is a reversible error to permit the cause to go to trial and render final judgment denying equitable relief to the defendant. (Page 291.)

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

*Manning & Emerson,* for appellant.

1. In testing the correctness of an instructed verdict, the evidence in the case will be given its strongest probative force in favor of the party against whom the verdict was directed. 95 Ark. 560.

2. It is well settled that where two persons are liable for the payment of a sum of money, and one of them pays it, the other shall make contribution by paying his proportional part of the amount to the party who paid it. 49 Ark. 105; 73 Ark. 174-8.

Even if the facts failed to show a joint liability in the usual acceptation of the term, still, under the undisputed facts, appellee is liable to appellant as a matter of law. 51 Ark. 232-5; 31 Ark. 559; 40 Ark. 42; 55 Ark. 104; 47 N. E. 242; 9 Cyc. 805; 32 Md. 245-251; 89 Pac. 1123-4.

*Cockrill & Armistead,* for appellee.

Appellant's attempted set-off was not cognizable at law, because contributions can be enforced only in a court of equity. 39 Ark. 238; 15 Ark. 97; 23 Ark. 569. An action for contribution will lie only where two or more persons are jointly, or jointly and severally, bound to pay a sum of money, and one or more of them compelled to pay the whole, or more than his or their share. See 7 Am. & Eng. Enc. of L. (2 ed.) 326, and notes.

Each must be liable to the obligor for the entire debt before contribution will lie between the obligees. 30 Conn. 72.

There can be no contribution where the liability is for separate and distinct portions of the same debt. T. & R. 426; 4 Y. & Cull 424; McMull, Eq., (S. C.) 376; 22 N. C. 372; 55 Col. 106; 82 S. W. 415; 144 S. W. 847; 61 S. E. 797; 6 Pomeroy, Eq. Jur., § 916; 49 Ark. 105; 73 Ark. 174, 178; 60 Ark. 190; 119 Ia. 562; 38 N. H. 90; 22 Am. & Eng. Enc. of L. (2 ed.) 537, and cases in notes 1 and 2; 27 Cyc. 838, 841; 30 Cyc. 1298, 1306.

McCULLOCH, C. J. The plaintiff, A. B. Banks, instituted this action in the circuit court of Pulaski County against the defendant, Southern Telephone Company, a domestic corporation, to recover the sum of $1,006.54, alleged to be due on account for that amount paid out by the plaintiff for defendant as accommodation endorser on a promissory note.

The defendant filed its answer, admitting liability for the amount of plaintiff's demand, but pleading a set-off against the same in the following words:

"That plaintiff and defendant were jointly liable and indebted to McRae & Tompkins, attorneys, in the sum of $1,500.00 as between the said McRae & Tompkins upon the one part, and plaintiff and defendant upon the other, but really in proportions as between plaintiff and defendant that plaintiff owed $1,250.00 of said sum; that said McRae & Tompkins demanded of defendant the entire sum of $1,500.00, and threatened to sue it if said sum was not paid, and also threatened to institute proceedings for the purpose of placing the defendant in the hands of a receiver if said sum was not paid, and to avoid such litigation, defendant paid McRae & Tompkins the said sum of $1,500.00; that on account thereof, plaintiff is indebted to defendant in the sum of $1,250.00, with interest thereon," etc.

Plaintiff filed a reply, denying each of the allegations of defendant's plea of set-off, and the cause was tried by a jury.

Defendant adduced testimony in support of his plea of set-off; but the court gave a peremptory instruction to the jury to return a verdict in favor of plaintiff, and the defendant has appealed to this court.

In testing the correctness of the instruction, we must, of course, consider the testimony in its light most favorable to the defendant.

The strength of defendant's case, if any has been made out at all, depends principally upon the testimony of Mr. David A. Gates, who was vice president of defendant corporation and one of its stockholders.

The defendant, Southern Telephone Company, is a corporation organized under the laws of this State, having its domicile at the city of Little Rock. It seems to have been the successor of several other corporations owning and operating telephone lines in the State, and had, at the time of the occurrences under investigation in this lawsuit, become a prosperous concern with a large surplus almost equal to its capital stock. The fair market value of its capital stock was 60 per cent above par value. The stockholders were divided into two factions, one headed by Mr. Gates and the other by Mr. Banks, and the two factions were antagonistic to each other. Mr. Banks was president of the corporation, and a majority of the directors were of his faction. At a meeting of the directors in the year 1911, it was found by the Banks faction that the other faction owned a majority of the capital stock, and a resolution was adopted, authorizing the issuance of additional stock to the extent of $94,000 par value, and the sale of it to Mr. Banks at par, taking his notes, without interest, payable in six, twelve and eighteen months. The witness, Mr. Gates, computed this as making the sale of the stock to Banks, on a cash basis, at 92 per cent of its par value. The Gates faction protested against this and offered to take the stock at par value. The stock was, however, issued and delivered to Mr. Banks, and Gates instituted an action in the chancery court of Dallas County against the Southern Telephone Company and Banks to enjoin them from putting the stock into circulation and directing its cancellation,

it being charged in the complaint, in substance, that the stock was issued collusively and at less than its actual value. Mr. Gates employed his own attorneys in that case and paid their fees. Defendant company had its regular attorneys, who resided and practiced their profession in the city of Little Rock, but McRae & Tompkins, a firm of attorneys at Prescott, Arkansas, were employed to defend against the said action which Gates had instituted. A joint answer of the Southern Telephone Company and Banks was filed in the action, but the defense was abandoned, and the relief sought by the plaintiff, Gates, was conceded and the stock surrendered by Banks, and cancelled. The action was dismissed, and that litigation thus ended. During the summer of 1911, at another meeting of the stockholders, a board of directors of the Banks faction was again elected, and a resolution was adopted authorizing the issuance of $200,000 additional stock and sale of it to Banks. There is testimony tending to show that at that meeting, the Banks faction voted stock which they had no right to vote, and thereby controlled the action of the corporation at that meeting. A Mr. Howell, who resided in Louisiana, was induced by Mr. Gates and his associates to institute an action in the United States Circuit Court at Little Rock to enjoin the issuance of his stock and to place the affairs of the corporation in the hands of a receiver. The Southern Telephone Company and Banks were the defendants. At that time the stock was of the market value of $1.60, and its assets were of the value of $1,100,000. Shortly thereafter it sold out to the Southwestern Telegraph & Telephone Company for that sum. The regular attorneys for defendant, Southern Telephone Company, entered its appearance, and McRae & Tompkins were also employed and filed a written entry of the appearance of both defendants.

Within a few days thereafter the differences between the two factions were adjusted, and the suit was dismissed, and in a few months the aforementioned sale to the Southwestern Telegraph & Telephone Company

was consummated. In the meantime, the directors of the Banks faction had ceased to act, and the Gates faction, who controlled a majority of the stock, elected directors, Mr. Banks, however, continuing as president, and Gates was elected vice president. After the sale of the assets of the corporation, but before its affairs were adjusted, when it had large amounts of outstanding assets to collect, Mr. McRae, of the firm of McRae & Tompkins, approached Gates and demanded payment by the corporation of fees aggregating $1,500 for services alleged to have been performed in the aforementioned litigation, and for certain other services rendered in an advisory way in getting its records straightened out. Mr. Gates, who was then in control of the affairs of the corporation, declined to pay the account at first, claiming that the services were really performed for Banks individually, but after several conferences, he agreed to go to Fordyce to confer with Mr. Banks, and then take it up with McRae & Tompkins. He did this, but Banks finally refused to pay any of the fee, and Gates asked McRae & Tompkins to draw a draft on the company at Arkansas City, and promised to see that it was paid. The draft was drawn, and a bill for the $1,500 was attached to it, and the draft was promptly paid.

Mr. Gates, in testifying, did not pretend to know that a contract had been entered into with McRae & Tompkins, but stated the fact that McRae & Tompkins had appeared in the action for both the telephone company and for Banks, which is shown by other testimony, and he also testified that when he went to Fordyce to confer with Banks about the bill, the latter admitted that McRae & Tompkins had appeared for him individually in the litigation, and that he owed them for the service, but later in the conversation, after having talked with McRae over the telephone, refused to pay anything on the bill.

Gates testified that defendant company was only a nominal party to the Dallas County litigation and that a fair proportion of the fee to McRae &

Tompkins would be one-sixth of the amount charged, the other amount being chargeable against Banks, who was the real party interested in that litigation. His testimony tended to show that while the defendant company had more than a nominal interest in the Federal Court litigation, Banks and his associates were the cause of the differences which gave rise to that litigation, and that the greater portion of the fee was chargeable against him. In other words, the testimony of Gates tended to show that McRae & Tompkins had appeared in the litigation for both of the defendants, Southern Telephone Company and Banks, and that there was a joint liability to McRae & Tompkins for the fee which the telephone company had paid. The bill attached by McRae & Tompkins to the draft was made out against the telephone company alone, and Gates' testimony is sought to be weakened in his statement that Banks was jointly liable; but this circumstance is explained by Gates, who stated that the bill was forwarded to Arkansas City attached to the draft, and that he did not see it until after it was paid. In fact, he testified that he yielded to the demands of McRae & Tompkins and paid the bill because he was afraid they would institute proceedings for another receivership, and thus tie up the assets of the company, which he sought to avoid.

If there was a joint liability on the part of the defendant, Southern Telephone Company, and plaintiff, Banks, to McRae & Tompkins, as the testimony of Mr. Gates tended to prove, then Banks is legally liable to the telephone company for contribution of his share. If the transactions, which, as between Banks and the telephone company, gave rise to the litigation, were fairly conducted and free from fraud, then the amount of the joint liability should, as between the two parties, have been equitably shared according to their interests in the litigation. If, as charged by Gates and his associates, the attempted issuance of additional stock and the sale thereof at a price less than the market value, was collusive and fraudulent, thus giving the other stockholders

just grounds of complaint, then the corporation would be entitled to recover all of the fee from Banks, who, under those circumstances, would be deemed the wrongdoer, and should be held responsible for the expense of the litigation. In either event, however, there existed a joint liability on the part of both of the defendants in that litigation to McRae & Tompkins, if, as the testimony of Gates tended to show, they were jointly employed to appear for both of the defendants, and Banks would be liable to the telephone company for a part, or all, of the fee, according to the circumstances. There may have been a joint liability on the part of both of the defendants to McRae & Tompkins for the full amount of the fee, though, as between themselves, the expense should, according to the facts, have been borne in unequal shares. If, on the other hand, the two parties employed attorneys separately to represent their respective interests in the litigation, there existed no joint liability and no right to contribution.

We are of the opinion, therefore, that the testimony was sufficient to establish a joint liability and the right of defendant telephone company to demand contribution, and the court erred in giving the peremptory instruction.

The liability for contribution grew out of a contract, and could, therefore, be made the subject-matter of a set-off. Kirby's Digest, § 6101.

Unliquidated damages for breach of contract can not be the subject of a set-off. *B. A. Stevens Co.* v. *Whalen,* 95 Ark. 488.

Appellant's claim is not, however, one for damages, but it is to recover the amount alleged to be due under an implied contract to contribute a proportionate part of the sum paid in discharge of a joint liability. The fact that the amount is in dispute does not prevent it from being offered in set-off.

It is insisted, however, that contribution can only be asserted in a court of equity, and can not be awarded at law. Learned counsel for appellee cite cases in support of that contention.

It is true that a court of equity is the proper forum for the adjustment of rights and equities between co-obligors, one of whom has discharged an obligation for the benefit of all, and that it is impracticable to adjust in a suit at law all of its defenses, both legal and equitable, and he is required to do so. *Moore* v. *McCloy,* 70 Ark. 505. The defendant should have asked the transfer of the cause to the chancery court for a decision upon its equitable defense; but it was, too, the duty of the court, of its own motion, to transfer the cause when the equitable defense was presented, and it constituted error to permit the cause to go to trial and then render final judgment against the defendant denying the equitable relief sought. *Newman* v. *Mountain Park Land Co.,* 85 Ark. 208; *Lawler* v. *Lawler,* 107 Ark. 70.

The judgment is therefore reversed and the cause remanded with directions to transfer the cause to the chancery court for further proceedings not inconsistent with this opinion.

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## WULFF *v.* DAVIS.

Opinion delivered May 19, 1913.

APPEAL FROM COUNTY COURT—AFFIDAVIT.—Where, in an appeal from the county court, the appellee failed to file an affidavit for appeal until four days after the appeal was granted, and the appellant did not raise the question in the circuit court, the filing of the affidavit will be *held* to have been waived by reason of the appellant's appearing and taking substantive steps without moving to dismiss the appeal on that ground.

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

*J. M. Brice,* for appellant.

*W. A. Carpenter,* for appellee.

MCCULLOCH, C. J. This is a companion case to *Wulff* v. *Claibourne,* 107 Ark. 325, 155 S. W. 497, and every point now raised is concluded by the decision in that case, except the one that the appeal from the county court should have been dismissed because the affidavit

for appeal was not filed until four days after the appeal was granted by the county court. That question was not, however, raised in the circuit court, and can not be raised here for the first time. Appellant filed a motion in the circuit court to dismiss the appellee's appeal from the county court, and assigned numerous grounds for dismissal, but did not raise any question as to failure to file an affidavit before the order was made granting the appeal. The first time this was referred to was in the motion for new trial filed several days after the final judgment of the circuit court was rendered upon the merits of the cause.

The filing of an affidavit was a prerequisite (*Walker* v. *Noll,* 92 Ark. 148), but was waived by appellant's appearing and taking substantive steps without moving to dismiss the appeal on that ground. Ex parte *Morton,* 69 Ark. 48; *Stricklin* v. *Galloway,* 99 Ark. 56.

The judgment of the circuit court is therefore affirmed.

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

Opinion delivered May 19, 1913.

1. RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY.—Testimony of plaintiff held sufficient to show negligence on part of trainmen failing to call her station so as to give her time to debark, and advising her to step from a moving train. The question of plaintiff's contributory negligence, *held,* a question for the jury. (Page 294.)

2. RAILROADS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.—Where plaintiff was injured while alighting from a moving train, it would have been error to instruct the jury that she would be barred from recovery only if she were guilty of recklessly jumping off the train, but there is no error when all the instructions, read together, clearly explained to the jury that plaintiff could not recover if her own conduct was wanting in ordinary care for her own safety. (Page 295.)

3. RAILROADS—INJURY TO PASSENGER—DEGREE OF CARE.—Plaintiff was injured while alighting from a moving train. *Held,* an instruction that defendant, as a carrier of passengers, was "required to use

the highest degree of care, consistent with the practical operation of its trains for the safety of the plaintiff while a passenger, on its train and while embarking and debarking from the train," was not erroneous. (Page 296.)

Appeal from Franklin Circuit Court, Ozark District; *Jeptha H. Evans,* Judge; affirmed.

*Thos. B. Pryor,* for appellant.

1. The court should have directed a verdict for the defendant. 99 Ark. 252, and authorities cited; see 85 Ark. 117; 59 Ark. 185.

2. It was error to charge the jury that "if plaintiff recklessly and negligently jumped off the train while in motion, and was injured thereby, plaintiff can not recover," since it places the burden upon the defendant to show that not only the plaintiff was wanting in ordinary care for her own protection, but also that she must have acted in a reckless, as well as a negligent manner.

The error in this instruction is not cured by other instructions. 93 Ark. 151; *Id.* 573. As to the use of the word "recklessly," see 39 Kan. 531; 114 Ala. 492; 94 Fed. 762; 48 Mo. App. 482.

*Sam R. Chew,* for appellee.

1. The injury occurred in Oklahoma. The law of that State makes it the duty of carriers of passengers to use the utmost care and diligence for the safe carriage of persons for hire, and to provide everything necessary for that purpose, and to that end must exercise a reasonable degree of care. Statutes Okla., 1893, p. 143, § 440; 87 Pac. 293; 89 Pac. 207. This rule obtains in all the States. 2 Hutchinson on Carriers (3 ed.) § 1118, and authorities cited.

2. Whether, under the circumstances, there was negligence on the part of appellee, was a question for the jury. 3 Hutchinson on Carriers (3 ed.) § 1177.

It is not negligence *per se* for a passenger to attempt to leave a moving train. When directed to do so by an employee of the company, the passenger may rely upon the superior knowledge of the employee. 37 Ark. 519; 54 Ark. 25; 46 Ark. 423; 49 Ark. 182; 67 Ark. 531.

3. Appellant's objections urged here against instruction 7 are without merit, because it is more favorable to appellant than to appellee.

McCULLOCH, C. J. Appellee was a passenger on appellant's train from Delaware, Oklahoma, to Greenwood Junction, Oklahoma, and was injured while stepping from the train at her destination.

She testified that when the train reached Greenwood Junction, it stopped only a few moments; that the station was not called, and when she looked out of the car window, it appeared to her that it had stopped at a tie yard; that as the train moved off, she started up to the car door and asked the brakeman or porter if that was her station —Greenwood Junction, and that he told her it was, and instructed her to step off the train, assuring her that the train was going very slow, and that she could do so with safety.

Her testimony was sufficient to establish the charge of negligence on the part of the trainmen in failing to call the station so as to give a passenger an opportunity to debark from the train, and in advising her to step from the moving train. Whether or not she was guilty of negligence herself in stepping off the moving train was, under the circumstances, a question for the jury.

She was seriously injured, and the jury awarded damages, the amount of which is not claimed to be excessive.

There are numerous exceptions to rulings of the court in giving and refusing instructions. Only a few of these assignments need be mentioned.

One is that the court erred in instructing the jury that "if plaintiff recklessly and negligently jumped off the train while in motion, and was thereby injured, plaintiff can not recover."

The court gave several other instructions telling the jury that appellee could not recover if she was guilty of negligence which contributed to her injury, and on appellant's request defined contributory negligence as "doing that or omitting to do that which a reasonably

prudent person would do or would not do under the same or similar circumstances." The court did not tell the jury that appellee would be entitled to recover unless she "recklessly and negligently jumped off the train while in motion," and none of the instructions extend her right to recover to that limit. On the contrary, all of the instructions, read together, clearly explained to the jury that she could not recover if her own conduct was wanting in ordinary care for her own safety. The instruction complained of is technically correct in saying that if appellee "recklessly and negligently jumped off the train while in motion," she could not recover, though it would have been incorrect to use language in the instruction which would have placed recklessness as the only limitation upon her right to recover. Recklessness means more than mere carelessness or want of ordinary care, and is too strong a word to use in that connection; but the instruction, considered with the others given, did not convey the impression to the jury that appellee was entitled to recover unless her conduct amounted to recklessness, and, therefore, it was not prejudicial.

Another assignment is that the court erred in its first instruction in telling the jury that defendant, as a carrier of passengers, was "required to use the highest degree of care consistent with the practical operation of its trains for the safety of the plaintiff while a passenger on its train and while embarking and debarking from the train."

That is, under ordinary circumstances, the correct measure of a carrier's duty toward its passengers. 2 Hutchinson on Carriers (3 ed.) § 1118. And that is the law in the State of Oklahoma, where this cause of action accrued. *A. T. & S. F. Ry. Co.* v. *Calhoun* (Okla.), 89 Pac. 207.

Counsel for appellant rely upon a decision of this court holding that such is not the degree of care which a carrier owes to its passengers under all circumstances. *St. Louis, I. M. & S. Ry. Co.* v. *Green,* 85 Ark. 117. That was a case where a passenger, while attempting to board

a train, was assisted by two friends, and we held that under those circumstances, no duty devolved upon the carrier to assist the passenger at all, but if its servants volunteered to do so, they were only bound to use ordinary care in discharging that duty. That rule has no application to the present case, for while the passenger was on the train and about to debark at her destination, it was the duty of the servant, in inviting her to alight from the moving train, to exercise the highest degree of care for her safety, as that was a dangerous situation in which she was placed by the act of the company's servants.

Several of appellant's requests for instructions were denied, but the refused instructions were covered in the following instruction, which the court gave at appellant's request:

"The court instructs you that it is the duty of a passenger when his destination is reached to leave said train, and the law only requires that a reasonable time be allowed a passenger in which to do so; and if you believe from the evidence in this case that the train upon which the plaintiff was a passenger, stopped at Greenwood Junction for a reasonable length of time in which the plaintiff, acting with ordinary care, could have reasonably left the train, and that she failed to leave the train while it was stopped, and voluntarily attempted to, and did jump from the train, while the same was in motion, then your verdict should be for the defendant."

That instruction was in some respects more favorable than appellant was entitled to, for it ignored the testimony tending to show the failure to call the station and the invitation extended to appellee by the company's servant to alight.

Other instructions on the subject of contributory negligence were, as above stated, given at appellant's request.

Upon the whole, we are convinced that the case was submitted to the jury upon instructions which were not prejudicial to appellant's rights.

The judgment is therefore affirmed.

NEWMAN v. JACOBSON.

Opinion delivered May 12, 1913.

HOMESTEAD—ABANDONMENT—MORTGAGE.—L mortgaged his homestead to N, but his wife did not join in the conveyance. *Held*, under section 3901 of Kirby's Digest, which provides that no mortgage affecting the homestead of any married man, shall be valid except for taxes, laborers' and mechanics' liens, and the purchase money, unless the wife joins in the execution of the instrument and acknowledges the same, the mortgage is void, although L subsequently abandoned the property mortgaged as his homestead.

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

*A. J. Newman,* for appellant.

*Charles Jacobson,* for appellee.

1. The property being a homestead, the mortgage is void because of the nonjoinder of the wife in its execution. Kirby's Dig., § 3901; 57 Ark. 242; 86 Ark. 397; 90 Ark. 115; 91 Ark. 110.

2. Appellant obtained no vested rights under the Walker transactions. The purchase price was never paid. No deed was ever delivered.

SMITH, J. Esko Lawhon owned, and with his wife, Fannie, and seven children, occupied as their homestead, the west half of the southeast quarter of section 4, township 2 south, range 12 west, in Saline County, and had owned and occupied it as such for a number of years, and owned no other real estate. He was indicted by the grand jury of that county, and he undertook to employ appellant to defend him at his trial, and he negotiated with him in regard to making a bond for his appearance at his trial, and finally it was agreed that appellant should be paid a fee of $200, and that appellant would sign the appearance bond, and to secure the payemnt of his fee and to indemnify him against loss upon signing this bond, Lawhon executed a mortgage on the property above described on the 31st day of October, 1910. Mrs. Lawhon did not sign this mortgage, and her testimony is that she knew nothing about it until some time after its execution by her husband; she and her husband continued to reside

on the place for some time after the execution of this mortgage, and until Lawhon disappeared just before the time for his trial. Mrs. Lawhon remained on the property after her husband's disappearance until the 2d day of February, 1912, at which time she removed to Little Rock.

After the execution of the mortgage to Newman, Lawhon and his wife executed a mortgage to appellee, and there were other transactions between Lawhon and appellee and other considerations alleged to have been paid by appellee to Lawhon in consideration of which a deed, dated the 10th day of November, 1911, was executed to appellee, and afterwards recorded. This suit was filed by appellee in the chancery court of Saline County to quiet the title in him, alleged to have been conveyed by said deed, and appellant was made defendant, and it was alleged that the mortgage in his favor was void for the reason that the property mortgaged was Lawhon's homestead; and that Lawhon's wife had not joined in its execution. It appears from the evidence that Esko Lawhon had not in fact executed or acknowledged the deed to appellee, but that one W. A. Lawhon, a brother of the said Esko Lawhon, had appeared before the acknowledging officer and impersonated his brother, and had undertaken to acknowledge the deed for him. Appellant filed an answer and cross complaint upon which the cause was finally heard, and in it he alleged that when Esko Lawhon executed said mortgage to him, he was told that the property was not his homestead, and that he owned two other tracts of land, one of which consisted of forty acres near Sweet Home in Pulaski County, which was in fact his homestead; and that he was going to move on it as soon as he had some improvements done on it; and that it thereafter would be his homestead, and he thereupon alleged that the Lawhons were estopped from claiming said property as a homestead to avoid payment of his fee, and the indemnity from liability on the bond which he had signed. It was also alleged in the cross complaint, and proof tended to sustain the allegation, that Newman frequently called upon Lawhon to have his wife join in

the execution of this mortgage, and that at first it was promised that this should be done, but later an agreement was made that Lawhon should sell and convey the land to one J. S. Walker for the consideration of $700 in cash, of which sum $200 should be paid appellant for his services, and the remaining $500 deposited to indemnify him against liability upon the bond. In accordance with this agreement, Lawhon and his wife executed a deed to Walker for the recited consideration of $700, and delivered it to W. D. Brouse, an attorney at Benton, with directions to deliver the deed and collect the money when he had examined and approved the title, but the title was not approved and the money was not collected and the deed was never delivered, but was destroyed. Appellant insists that he has such rights under this agreement to sell to Walker as entitles him to have a lien declared in his favor upon the land for the amount of his fee and his liability on the bond. Without considering other objections that might be made to this statement of the law, it is sufficient to say that the arrangement for the sale of the land to Walker was never consummated.

Nor do we think appellant's contention that Lawhon had either abandoned his homestead, or had estopped himself from denying his abandonment, is sustained by the evidence. It appears from the recitals of the decree that Lawhon was never served with process, yet his wife appeared and answered and alleged the mortgage was invalid because of her nonjoinder in its execution, but the chancellor held that it was not necessary to have Lawhon before the court to dispose of the rights of the parties.

Section 3901, of Kirby's Digest, is as follows: "No conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same."

It has been held that this section does not restrict the right of abandonment, and that where the owner of

the homestead does abandon, it is thereafter subject to sale like other property belonging to the husband. *Stewart* v. *Pritchard,* 101 Ark. 104. And we might add that after its abandonment, it is subject to conveyance like any other property belonging to the husband. In the case of *Farmers Building & Loan Assn.* v. *Jones,* 68 Ark. 79, it was said: "While the act of the Legislature of March 18, 1887, is a limitation upon the right of the husband to convey his homestead, except by the consent of his wife, it does not in any manner affect or restrict his right of abandonment. This right he has by virtue of his marital and parental authority, and when he has chosen to exercise it he renders the property which had formerly been his homestead the proper subject of alienation without his wife's concurrence." But there is no estoppel here for the reason that Lawhon was living on the land with his family at the time of the conveyance to appellant, and appellant had knowledge of that fact, although he says he was expecting Lawhon to move to Pulaski County and occupy a tract of land there as his homestead as soon as he had made certain improvements on it. The proof does not establish that Mrs. Lawhon was a party to this representation or knew anything about it having been made. Nor does the fact that, subsequent to the date of this mortgage, Lawhon abandoned the homestead operate to cure the defective conveyance of it, for in the case of *Pipkin* v. *Williams,* 57 Ark. 242 (quoting the syllabus), it was said: "When a married man conveyed his homestead by a deed which is invalid by reason of the nonjoinder of his wife in its execution, and with his family abandons the lands as a homestead, the invalidity of the conveyance is not cured by the subsequent abandonment * * *."

The chancellor found that appellee was not entitled to have his title quieted for the reason that his deed was a forgery, and he dismissed the complaint and held that appellant's mortgage was void because of nonjoinder of the wife, and he also refused to decree a lien in favor of appellant for the amount of his fee and liability on the bond, and the costs were apportioned in accordance

with that finding, and we think that the law and the testimony warrant his finding, and the decree is accordingly affirmed.

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## LETCHWORTH v. FLINN.

Opinion delivered May 12, 1913.

1. ELECTIONS—CONTESTS—COSTS.—Where a suit was initiated in the county court to contest the election of school director, and the circuit court, on appeal, found only that the election was a tie, and that neither party was entitled to the office; *Held*, costs can not be awarded in favor of the contestant, there being no statutory authority for the same. (Page 305.)
2. ELECTIONS—VOTERS—QUALIFICATIONS—PRESUMPTION.—The contestant in an election contest claimed that a certain voter was not of age, and, therefore, not a legally qualified voter. *Held*, where the voter is registered and his name accepted by the election officers, and the evidence is of equal weight as to the time he became of age, there is a presumption that he is a legally qualified voter, and the burden is upon the contestant to rebut this presumption. (Page 306.)

Appeal from Prairie Circuit Court, Northern District; *Eugene Lankford*, Judge; reversed in part, and affirmed in part.

*W. A. Leach*, for appellant.

1. The right to recover costs did not exist at common law, but rests upon statute only. 86 Ark. 259; 60 *Id.* 194; 12 *Id.* 62. In the absence of a statute allowing costs, none can be recovered. 84 Ark. 187. There is no such statute. Kirby's Dig., § 2850 to 2864; 95 Ark. 81; 86 *Id.* 259. The office of school director is not within our statutes governing the contest of elections. 79 Ark. 213; 43 *Id.* 413. The judgment for costs was void.

2. Even under ch. 155, § § 7987-8, no provision for judgment for costs is provided. 28 Ark. 451.

*J. G. & C. B. Thweatt*, for appellee.

1. The court had jurisdiction under art. 7, § 11, of the Constitution, and Kirby's Dig., ch. 155. Kirby's Dig., § 965, awards power to adjudge costs. 66 Ark. 243.

2. It was error to declare the election a tie. The vote of Jim Gilliam was not legal. Kirby's Dig., § § 75-89, 2767, 2772, 6912. 5 Enc. Ev., p. 116; 27 N. Y. 45; 135 Ill. 591; 206 *Id.* 80.

SMITH, J. This case involves a contest over the office of school director, in Common School District No. 9, in Prairie County. The parties treat the evidence as being undisputed, and the depositions upon which the court made its findings of fact are not copied into the transcript. The judges of the election declared appellant elected, and gave him a certificate, certifying that fact, and upon it he qualified and assumed the duties of the office. Appellee instituted a contest in both the county and circuit courts. Trial was first had in the county court, and judgment there being rendered against appellee, when he appealed to the circuit court, where the cases were consolidated and tried together, as if one, and originating in the circuit court. The court found that the vote was a tie, that each party had reecived ten votes, and that neither the appellant nor appellee had been elected, and rendered judgment against appellant for costs. Appellant appeals from that order. The court found that the election was a tie, after holding that the vote of one Jim Gilliam, who had voted for appellant, should be counted, the court's finding of fact and declaration of law in regard to this vote being as follows: "That the evidence that Jim Gilliam (one of the defendant's votes, being one of the ten above held to be a legal vote), who had not paid his poll tax for the year 1910, became of age since August 31, 1910, and the evidence that he did not become of age since that date are of equal weight and strength, and that because of the presumption that a vote cast is legal, the court holds that the burden of proving said vote illegal was on the plaintiff, and hence the court holds said vote legal."

Appellee complains of this action of the court, and insists that if this vote was excluded, as it should be, that there was no tie, and he would have been entitled, and is

now entitled to a judgment in his favor for the possession of the office.

The court found that neither appellant nor appellee had been elected and assessed all costs against the appellant, who insists that this action was unauthorized, for the reason that costs is a liability created by statute, and in the absence of a statute allowing costs, there can be no judgment against a defendant in favor of a plaintiff for costs. It was so decided in the case of *Wilson* v. *Fussell,* 60 Ark. 194. The case of *Buchanan* v. *Parham,* 95 Ark. 81, was a contest over the office of sheriff of Garland County, which originated in the county court of that county, and upon appeal from the judgment of the county court, it was decided that Buchanan had been elected, and was entitled to the office, and after the rendition of that judgment, Buchanan filed a motion in the circuit court to tax the costs of the contest against Williams, his unsuccessful adversary, who appeared and resisted the motion, on the ground that the court was without jurisdiction to render a judgment in favor of the contestant for costs in an election contest. At the same time, Parham, who was the clerk of the circuit court, during the pendency of the contest, filed a motion, praying that his fee for making the transcript on the appeal to the Supreme Court be taxed, and that judgment be rendered in his favor for the amount of his unpaid costs for making the transcript on the appeal against Buchanan and the sureties on his bond. On the hearing of both motions together, the circuit court rendered a judgment in favor of Buchanan against Williams for the amount of the costs of the contest in the county court, and in the circuit court, and also rendered judgment in favor of Parham against Buchanan, and his sureties, for the amount of his unpaid costs for making this transcript. Both parties appealed, and the court, in disposing of the question there, said: "No express authority is found in the statutes for rendering judgment against an unsuccessful contestant in an election contest, which originated in the county court," and after reviewing the prior decisions upon this ques-

tion, it was there further said: "Taking the language of all these opinions, it can be said to be yet an open question, whether there is any authority for rendering a judgment for costs in favor of a successful contestant for office, the contest of which is by statute originated in the county court. It is plain that the statute does not expressly confer such an authority, and it is significant that the Legislature expressly authorized judgment for costs against an unsuccessful contestant, and also expressly authorized judgment for costs in favor of the successful contestant for an office, the contest of which is by statute originated in the circuit court. We need not seek a reason for the omission to authorize judgment in favor of the successful contestant in the first-named class of contests, as it is within the power of the law-makers, either to give, or withhold, such authority. Probably, the Legislature did not deem it expedient to impose the costs of a contest on a county officer, who defends the title vested in him by the declared result of the election, even though he does not succeed in his defense," and after stating that all the authorities appear to agree that the courts have no authority to give judgment for costs, in contested election cases, unless the statute expressly authorizes it, the court reversed the judgment of the circuit court awarding costs to Buchanan.

Appellant insists that the provisions of the general election law relating to contested elections has no application here, for the reason that the office of school director is not within the provisions of the sections of the election laws governing the contest of elections, and in support of that position, cites the cases of *Brown* v. *Hasselman,* 79 Ark. 213, and *Stout* v. *State,* 43 Ark. 413. But it will be unnecessary to decide that question here, because of the facts of this case as found by the circuit judge. Appellee concedes that the right to recover costs rests upon the statute only, and that the right to contest the election of a school director does not come from sections 2856 to 2864 of Kirby's Digest, said sections being the ones which relate to election contests, but he says the

circuit court had the jurisdiction of the case originally under article 7, section 11, of the Constitution, which makes the circuit court the residuum of all unassigned original jurisdiction, and that the circuit court had jurisdiction under chapter 155 of Kirby's Digest, which is the usurpation of office statute. Chapter 155 does provide for proceedings against one who has usurped an office, and under its provisions, the court may render judgment ousting the usurper, and reinstating the party entitled thereto, and it may enforce its decree by fine and imprisonment, and may render judgment for the fees and emoluments of the office, but nowhere does it provide for a judgment for costs in favor of the prevailing party. And appellee also relies upon section 965 of Kirby's Digest, which provides: "If the plaintiff recover judgment, he shall have judgment for costs against the defendant." But this section did not authorize the judgment here rendered for costs, because plaintiff did not recover judgment, and the section quoted applies only in cases where that occurs. And for the same reason, section 2859 of Kirby's Digest did not authorize a judgment for costs, if it were applicable and authorized the contest. The provisions of that section are as follows:

"If the contestant shall succeed in his action, he shall not only have a judgment of ouster, but for damages, not exceeding the salary and fees of the office during the time he was excluded therefrom, with costs of suit; *provided,* either party shall have the right of appeal, with or without supersedeas, as in other cases at law."

But, as has been stated, appellee does not claim that this section supports his judgment for costs. The judgment of the circuit court, assessing costs against appellant, is therefore reversed.

But upon the question of the cross appeal, appellee insists that the court erred in counting the vote of the said John Gilliam, but we do not think so. We can not know from the transcript in this case what the evidence was in regard to the age of this voter, but we do know that the court found that the evidence was of equal

weight, as to the time when he came of age, and, therefore, indulged the presumption that the voter was qualified. It is conceded that if he became of age since August 31, 1910, he was not required to have a poll tax receipt, and the fact that he did not have a poll tax receipt was not sufficient to make a *prima facie* case that he was not entitled to vote, because he was not required to have a poll tax receipt, if he had come of age since the date of the last personal assessment, which date was the 30th of August, 1910. The question was not whether he had a poll tax receipt, for it was conceded that he did not have, but his right to vote depended upon the time when he came of age, and the court has found that the evidence is of equal weight upon that question, and we can not disturb that finding under this state of the record. "Where it appears that a person was registered, or that his vote was accepted by the election officers, there is the presumption, which, in the absence of proof to the contrary, that such person was a legally qualified voter." Enc. of Evidence, volume 5, page 116. It is not sufficient for a contestant, by merely challenging a voter, to impose upon the voter, or upon the contestee, the burden of proving the voter's qualification. To so hold would deprive the election returns of any presumptive validity, and would result in interminable confusion. The judgment of the court declaring the election a tie, is therefore affirmed.

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## CITY OF BENTONVILLE v. BROWNE.

Opinion delivered May 19, 1913.

1. MUNICIPAL CORPORATIONS — MISMANAGEMENT OF FUNDS — WATERWORKS IMPROVEMENT DISTRICT—REMEDY.—An owner of property within a waterworks improvement district has the right to sue to prevent the city from wasting or mismanaging or improperly diverting the fund of the improvement district. Sec. 13, art. 16, Const.; Kirby's Dig., § 5485. (Page 311.)

2. JUDGMENTS—PARTIES—EFFECT.—When a property owner brought suit to compel the city to lay a water main to his property, where the holders of city warrants are not parties to the proceedings, the chancery court has no authority to make an order affecting the validity of the warrants. (Page 311.)

3. MUNICIPAL CORPORATIONS—WATERWORKS IMPROVEMENT DISTRICT—FUNDS.—The chancery court has authority to order that a city keep separately from the general funds of the city, the funds of a waterworks improvement district, and account for the same. (Page 311.)

4. MUNICIPAL CORPORATIONS — PUBLIC REVENUE — ADMINISTRATION. — Courts can not administer the affairs of a municipality in the disbursement of public revenue. (Page 312.)

Appeal from Benton Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

STATEMENT BY THE COURT.

This appeal is a continuation of the case of *Browne* v. *Bentonville,* reported in the 94 Ark., page 80. The waterworks improvement district was formed coextensive within the corporate limits of the city (then town) of Bentonville, August, 1896. Appellee was then, and since continuously has been, the owner of a tract of land, consisting of about four acres, situated within the said improvement district. The city took over the waterworks plant, and has since continuously operated it under the authority conferred by section 5675 of Kirby's Digest. After the city took over the plant, it kept no separate account of the receipts derived, nor of the expenses incurred, in its operation. All of the city funds, whether derived from the waterworks plant, or from other sources, were placed to the credit of the city's general revenue fund, and warrants were drawn against this fund by the city for all municipal purposes.

Appellee instituted a suit, the purpose of which was to compel the city to lay a four-inch water main to his property in order that he might have fire protection. As an incident to this suit, and for the purpose of showing that the city was able to construct this main, he undertook to show that the plant was being operated with great profit to the city, but that the city was using these profits for general municipal purposes. At the time of the installation of the plant, bonds were sold to pay for the cost of this improvement, which constituted a lien upon all the property within the improvement district, and appellee alleged that, in common with all other property

owners, his property was burdened with this lien, but that he had derived no benefit from the waterworks, and would derive none unless the city was required to keep the accounts of the plant separate from its other funds, and be required to expend the net profits in the extension of the system, until all portions of the district had the benefit of the improvement. During the progress of that trial, much proof was taken upon the question of the cost of the plant, and the expenses of maintenance and operation, and of its receipts, and finally there was filed by the attorneys in the case, a stipulation that the income derived from the waterworks plant for the years 1898 to July 1, 1907, inclusive, exceeded the expenditures for all purposes in the sum of $1,000, and it was further stipulated that the income had equalled the expenditures since the last mentioned date. The court found in the original case that the income of the plant had been placed in the general revenue fund, and had been paid out for ordinary purposes, and that the sum of $1,000 had been received by the city in excess of the expenditures. The court had granted a temporary restraining order, which was made permanent, requiring the city to keep the funds separate, and to draw upon the funds of the waterworks plant by special warrants, showing upon their face for what purpose they were issued; and that only such warrants should be paid out of said fund, as were given for the payment of the expense of this plant. The city was ordered to pay over to the credit of the waterworks fund this sum of $1,000 not later than July 1, 1909, and it was also ordered that the city furnish appellee with a two-inch main to his residence; and that thereafter water be furnished him from this main, upon terms similar to that under which it was furnished other residents of the district. Both parties appealed from this decree, the appellee contending that the court should have ordered appellant to lay a four-inch instead of a two-inch main; and the city contending that it should not have been required to lay any main. Pending the appeal, the city constructed the two-inch main as directed by the decree, but this court held that

the decree was erroneous in requiring the city to do so, but held that inasmuch as the decree had been complied with, it should be affirmed, and such was the order of the court. The purpose of that suit manifestly was to compel the city to lay the four-inch main, and the other questions involved were collateral to that, and no other feature of the case was discussed in the opinion of this court.

On the 8th day of December, 1910, appellee was permitted by the court below to file a complaint and motion in that original cause, and the clerk of the court was ordered to issue a citation against the appellants, returnable on the first day of the January term, 1911, of that court, at which time permission was given appellee to maintain this present proceeding, for the alleged purpose of enforcing the terms of this original decree, which had been entered on the 26th day of August, 1908. In this pleading, which appellee calls a complaint and motion, the mayor, aldermen, recorder and treasurer of the city of Bentonville are made parties defendant, and it was alleged that they and their predecessors in office had failed and refused to perform the terms of this original decree, which was made an exhibit to the complaint and motion. It was alleged that these officers had disregarded the directions of this original decree in the following particulars: That they had been ordered to pay over to the credit of the waterworks fund the sum of $1,000, which should not be used except for the operation of that plant; and that thereafter, no warrants should be drawn against this waterworks fund except for the expenses of that plant, but that notwithstanding this order of the court, that they had issued a number of warrants against this water fund, which should only have been issued against the city's general revenue fund. The evidence appears to establish the fact, as found by the chancellor, that the water plant had earned the sum of $1,000 at the date of the original decree, and had since that time been self-sustaining. But it appears that certain sums of money had been borrowed for the use of the water plant, and that warrants had been issued for the amount of

these loans, before the date of the original decree, and were issued against the city's general revenue fund, which fund, at the time of the issuance of the warrants, comprised all the city's income, whether derived from the waterworks or other sources.

After this original decree had been rendered, an order was made by the council of the city, calling in all outstanding warrants issued by the city, under the authority of section 5508, Kirby's Digest, and at that time certain warrants owned by the First National Bank and the Benton County National Bank, of that city, and one Mrs. Ella Hegley, a resident of that city, were reissued. These warrants had originally been issued against the general revenue fund, but when reissued, the fact was ascertained by the council that they represented a loan that had been made to the water plant, and were accordingly made payable out of the funds of that plant instead of out of the city's general revenue fund. The city complied with the directions of the original decree by transferring from its general revenue fund the sum of $1,000 to the credit of this water fund, and this money was used in cashing a warrant of Mrs. Hegley for that amount. It does not appear how the city raised this $1,000 in cash, for, at that time, and at all times since, the city has been heavily in debt, with no money in its treasury to the credit of the general revenue fund. The city officials contend that they have in good faith obeyed the provisions of this original decree by keeping separate accounts of the waterworks fund, and that they have issued no warrants against that fund except for loans of money actually made for the use and benefit of this plant; and they deny that the indebtedness, which these last mentioned warrants represent, was taken into consideration in the stipulation that the plant had earned the sum of $1,000.

The court found that appellee was entitled to have the original decree enforced, and that all receipts and expenditures had been taken into account in the stipulation; that a net profit of $1,000 had been earned by the waterworks plant, and found that this original decree

had been violated by paying Mrs. Hegley this $1,000, which had been transferred from the general revenue fund to the waterworks fund; and by issuing warrants, payable out of the waterworks fund, for debts contracted prior to the date of the original decree. And the court ordered that the city authorities should repay to this water fund the said $1,000, and that it should relieve the said water fund by depositing to its credit a sum equal to the outstanding warrants so found to have been wrongfully issued, or by calling them in and cancelling them, and the city was given nine months in which to perform the decree. This appeal is from that order of the court.

*E. P. Watson,* for appellant.

*E. B. Wall,* for appellee.

SMITH, J., (after stating the facts). As an owner of property within the improvement district, appellee had the right to sue to prevent the city from wasting, or mismanaging, or improperly diverting, the funds of the improvement district. *Russell* v. *Tate,* 52 Ark. 541; *Jacksonport* v. *Watson,* 33 Ark. 704; section 13, article 16, of the Constitution; section 5485 of Kirby's Digest. But he had no right to demand that the court order the city to construct a water main to his property, and all other questions involved in the original decree were collateral to that one. *Browne* v. *Bentonville,* 94 Ark. 80. As to the court's order, directing the action to be taken with reference to the outstanding warrants, payable out of the water fund, and in regard to their cancellation, it is sufficient to say that their holders are not parties to this proceeding, and the court was therefore without authority to make any order which affects their validity.

We are of the opinion that the court had the authority to direct that these funds be separately kept, and accounted for, and had the authority to make proper orders to enforce that decree, but we think there has been a substantial compliance with its terms, so far as the question could be decided with the parties before the court.

It appears that accounts have been separately kept, and that the $1,000 was actually paid out of the general

revenue fund to the credit of the waterworks fund, although we do not think the court had the authority to administer and direct the expenditures of the city's revenue subsequently collected. The courts can not take upon themselves the burden and responsibility of administering the affairs of the municipalities of the State in the disbursement of their public revenues. The rule in such cases is well stated in the opinion in the former appeal of this case. *Browne* v. *Bentonville,* 94 Ark. 80.

The decree of the court is therefore reversed and this supplemental complaint is dismissed.

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## WELLS v. STATE.

Opinion delivered May 19, 1913.

1. ASSAULT—DEFINITION—WHAT CONSTITUTES.—Under Kirby's Digest, § 1583, defining an assault as "An unlawful attempt, coupled with present ability to commit a violent injury on the person of another," *held,* the intention and ability to commit a battery are necessary to constitute an assault, and an attempted act of violence to come within the definition of an assault, must have been made under such circumstances as made the infliction of an injury a reasonable probability. (Page 314.)
2. ASSAULT—RETREAT BY THREATENED PERSON.—Where defendant drew a knife, and, advancing on the prosecutor, threatened to cut his throat, and the prosecutor ran away, defendant is guilty of an assault, although he did not follow after prosecutor. (Page 315.)
3. ASSAULT—EVIDENCE—SUFFICIENCY.—Evidence held sufficient to warrant a conviction for assault. (Page 315.)

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

*Patrick Henry,* for appellant.

The evidence does not support a conviction for assault. Under the statute, there are three essential elements in the crime of assault, all of which must appear from the evidence before a conviction can be sustained, viz.: (1) an intent; (2) an unlawful attempt, and (3) the present ability to commit a violent injury on the person of another.

The evidence affirmatively shows the absence of the third element of the offense in this case. 61 N. C. 434; 3 Greenleaf on Ev., § 59; Bishop, Crim. Law, § 419; 49 Ark. 179, 182; 77 Ark. 39; 88 Ark. 91; 89 Ark. 213.

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

The evidence supports the verdict.

SMITH, J. The appellant, Dave Wells, was indicted by the grand jury of Drew County for the crime of assault with intent to kill, alleged to have been committed "in and upon one Dallas Calhoun," and upon his trial for that offense, he was convicted of a simple assault, and fined the sum of $50. The appeal questions the sufficiency of the evidence to sustain that verdict. The assault was alleged to have been committed with a knife, and the appellant insists that the proof upon the part of the State shows that he was never at any time nearer than from seven to ten feet of the said Calhoun, and that he did not therefore have the present ability to inflict an injury with the knife.

Section 1583, of Kirby's Digest, defines an assault as follows: "An assault is an unlawful attempt coupled with present ability to commit a violent injury on the person of another." It is settled that both the intention and the ability to commit a battery are necessary to constitute an assault. *Pratt* v. *State,* 49 Ark. 179; *Jones* v. *State,* 89 Ark. 213. An assault is defined in volume 3, section 59, of Greenleaf on Evidence, as follows: "An assault is defined by the writers on criminal law to be an intentional attempt by force to do an injury to the person of another. This allegation, therefore, is proved by evidence of striking at another with or without a weapon, and whether the aim be missed or not; or of drawing a sword upon him; or of throwing any missile at him; or presenting a gun or pistol at him; the person assaulted being within probable reach of the weapon or missile. So, if one rush upon another, or pursues him with the intent to strike, and in a threatening attitude, but is

stopped immediately before he was within reach of the person aimed at, it is an assault."

In Bishop's New Criminal Law, volume 2, section 23, it is said: "An assault is any unlawful physical force, partly or fully, put in motion, creating a reasonable appearance of immediate physical injury to a human being, as raising a cane to strike at him, pointing in a threatening manner a loaded gun at him, and the like." And, dealing with the same subject, he further says: "Words may explain and give character to acts and so combine with them as to make that an assault which, without them, would not have been such. For example * * * the brandishing or pointing of a weapon, when accompanied by threats, may constitute an assault under the circumstances wherein without them it would not."

The language of the section of the statute quoted is plain, and its purpose is apparent. It does not contemplate that any act of violence shall have been actually inflicted, but only that it shall have been attempted under such circumstances as made the infliction of the injury a reasonable probability. In the case of *Keefe* v. *State,* 19 Ark. 190, a conviction was had for an assault, but it was urged that the verdict was contrary to the law and the evidence, because there was no actual attempt to shoot the person alleged to have been assaulted, although the defendant drew a pistol and cocked it, and pointed it toward the breast of the person alleged to have been assaulted, with the remark, "If you do not pay me my money, I will have your life." Chief Justice ENGLISH discussed the purpose of the law, and quoted the following language from the case of *State* v. *Morgan,* 3 Iredell Law 186: "Whenever the act is done in part execution of a purpose of violence, whether that purpose be absolute or provisional makes no difference as respects the question whether the act be an assault. In both cases, the assailant equally violates the public peace. In both he breaks down the barrier which the law has erected for the security of the citizen. In the former, he sets up none in its place. In the latter, he substitutes for it the protection of his grace and favor."

Applying these principles to the facts of this case, we have no difficulty in reaching the conclusion that the evidence sustains the verdict. The prosecuting witness testified that he had been sent by his employer to make a settlement of some accounts with the appellant, and that he went to his house for that purpose. They had some discussion in regard to this settlement, when Calhoun said to appellant, "Mr. Wilson said that if you do not come clean, he will prosecute you for selling or killing some cattle." Appellant became very angry and cursed Calhoun for some time, when Calhoun said he would hear no more of it, and that appellant must "cut it out." Whereupon, appellant ran his hand into his pocket and drew out his knife and remarked that he was going to cut Calhoun's throat. Calhoun began to back away, and backed for ten or fifteen feet, during which time appellant was advancing upon him with a drawn knife, which the witness said appeared to him to be a big dirk. Calhoun called to a Mr. McEllee, who was standing near, and said: "Mr. McEllee, won't you come here; that negro will kill me." But McEllee said: "I can't do nothing for you." Whereupon, Calhoun backed around behind a team that was standing near and ran to a house a quarter of a mile away, and left his own horse and buggy at appellant's house, where it remained until appellant left for Pine Bluff. Appellant did not attempt to follow Calhoun as he ran away. But it was not necessary that he do so to constitute the offense of a simple assault. The law on that subject is designed to preserve the peace, and to prevent acts of violence, and the putting in fear of violence. Calhoun obeyed the law by retreating to a place of safety, but appellant has no right to say that Calhoun should have done so, and because he did do so, it was not possible for appellant to cut him. Had Calhoun been armed, he might not have retreated and a homicide might have been committed; and had he not retreated, violence would have been done, had appellant executed his threats. Appellant will not be permitted to say that Calhoun's observance of the law made it impossible for him to break it. This law should be suffi-

cient to protect one from the humiliation of being compelled to retreat, but, if not, then it punishes that person who forces another to do so, to prevent the infliction of a bodily injury.

Incidentally, it may be said the settlement was not made. The judgment is affirmed.

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## PAXTON v. STATE.

Opinion delivered May 12, 1913.

1. RAPE—ASSAULT WITH INTENT TO COMMIT RAPE.—An assault with intent to rape is included in the charge of rape, and a conviction may be had of the former offense under an indictment for the latter. (Page 319.)
2. RAPE—ASSAULT WITH INTENT TO RAPE.—Defendant may be found guilty of an assault with intent to rape, if he assaults his victim with the intent, forcibly and against her will, although after the assault, she yields and consents to the act. (Page 319.)
3. APPEAL AND ERROR—INSTRUCTIONS—HARMLESS ERROR.—Where the evidence shows the completed act of rape, it is not error to instruct the jury on the offense of assault with intent to rape. (Page 320.)
4. CRIMINAL LAW—PRESUMPTION OF INNOCENCE—INSTRUCTIONS.—In a prosecution for the crime of rape, the court charged the jury that "the defendant starts out in the trial with the presumption of innocence in his favor, and that presumption follows him throughout the trial, or until the evidence convinces you of his guilt, beyond a reasonable doubt." *Held*, nor error. (Page 320.)
5. WITNESS—IMPEACHMENT OF ACCUSED.—Where the accused takes the witness stand in his own behalf, the State may impeach his character for veracity, although his good character may not already have been put in issue, but evidence of his bad character may be introduced only to affect his credibility as a witness. (Page 321.)
6. EVIDENCE—FORMER TESTIMONY OF ABSENT WITNESS.—Where a former witness in a felony case, upon diligent search or inquiry, can not be found, what such witness previously testified upon the examining trial of defendant may be proved at the trial of the case in the circuit court, it appearing that defendant was present at the examining trial. (Page 321.)
7. EVIDENCE—ADMISSIBILITY—HARMLESS ERROR.—There was no prejudicial error committed in the admission of the testimony of the prosecuting witness, that defendant struck his wife, before his assault on witness, when other witnesses and defendant, himself, testified to the same thing without objection. (Page 322.)

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

*Carmichael, Brooks, Powers & Rector,* and *S. A. Jones,* for appellant.

1. The crime made out was rape, or it was nothing. The verdict is a manifest compromise, not responsive either to the law or the facts. It is patent that the jury did not find the prosecuting witness worthy of belief, that they did not find beyond a reasonable doubt that the element of force was present, or their verdict must have been "guilty of rape," because the other element, penetration, was admitted.

2. The testimony as to appellant's beating and maltreating his wife was inadmissible. A party charged with one crime can not be convicted upon evidence of the commission of another crime. 37 Ark. 261; 39 Ark. 278; 73 Ark. 262; 99 Ark. 615.

3. There was no sufficient foundation laid for the introduction of the testimony of Enos Brown, given at the hearing before the justice of the peace, no sufficient showing that he had left the State. 63 Ark. 131; 58 Ark. 371.

4. Appellant's general reputation had not been put in issue, and his objection to such testimony should have been sustained. 91 Ark. 558, 560; 28 Ark. 164; 39 Ark. 337. The court, in its charge, nowhere instructed the jury that the reputation of the defendant should not be considered for any purpose except as affecting his credibility as a witness, and that they could convict him of rape, or of assault to commit rape, upon proof that he was guilty of some other offense.

5. It is prejudicial error to submit to a jury an issue not raised by the evidence. In this case, where the undisputed evidence shows that there was no *attempted* intercourse, but that the intercourse was *complete,* it was error to charge the jury that they might convict of assault with intent to commit rape. Kirby's Dig., § 2382; 30 Ark. 336; 91 Ark. 574; 74 Ark. 444; 50 Ark. 508; 85 Ark. 514; 77 Ark. 464; 95 Ark. 409; 29 S. E. (Ga.) 424; 64 S. E.

(Ga.) 653; 89 S. W. (Tex.) 271; 96 N. E. (Ill.) 1007; 143 S. W. (Ky.) 51; 87 Ga. 579; 141 Cal. 686; 100 Ia. 155; 118 S. W. (Tenn.) 1022; 33 Cyc. 1503-4; 2 Bishop, New Crim. Pros., § 980.

That part of instruction 7, charging the jury: "If he did not consummate that crime (rape), but attempted to do it, he is guilty of assault with intent to rape," is further erroneous in that there must be more than an *attempt*. 99 Ark. 563; 77 Ark. 37.

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

1. There is ample evidence to sustain the verdict.

2. The testimony of the prosecutrix as to appellant's assaulting his wife, was, under the circumstances, admissible, as tending to prove the intent existing in the mind of appellant to have intercourse with prosecutrix. 91 Ark. 555, 559.

3. Sufficient foundation was laid for admitting the testimony of Enos Brown, taken before the justice of the peace, it having been shown that diligent inquiry had been made to locate his whereabouts. 99 Ark. 629, 631; 95 Ark. 172, 177.

4. Testimony touching appellant's reputation for truthfulness and morality was properly admitted, for the purpose of impeaching his testimony. 46 Ark. 141, 151; 100 Ark. 199, 202; *Id.* 321, 324.

5. It was not erroneous for the court to instruct the jury as to the lower grade of the offense charged, as well as the crime charged, and it was within the province of the jury to find from the evidence that appellant was guilty of the crime of assault to commit rape rather than that of rape. Kirby's Dig., § 2413; 51 Ark. 167, 169; 32 Am. St. Rep. 134, 136; 80 Ky. 526; 7 Conn. 54, 56; 41 Minn. 285-7; 1 Bishop, Crim. Law, § 733; *Id.*, § 766; 78 Am. Dec. 609; 91 Ark. 589; *Id.* 562.

KIRBY, J. The appellant was indicted for the crime of rape, and from the judgment of conviction of an assault with intent to rape, brings this appeal.

He admitted having sexual intercourse with the

prosecuting witness at the time and place she claimed to have been raped, and testified that it was with her consent and co-operation. It is conceded, however, that the testimony is amply sufficient to sustain a conviction of rape, if believed.

It is contended for reversal that the court erred in giving certain instructions, in the admission of incompetent testimony, and that the verdict of the jury is contrary to the law and the evidence, counsel for appellant saying:

"Without going into a detailed discussion of the evidence, it is submitted that there is no possible view of the evidence which will support a finding that appellant was guilty of an assault with intent to rape. * * * The crime was made out rape, or it was nothing."

An assault with intent to rape is included in the charge of rape, and a conviction may be had of the former offense under an indictment for the latter, and the appellant will not be heard to complain that because he was not convicted of the offense of rape, that he could not be guilty of an assault to commit the offense, which the testimony was amply sufficient to show he did commit. *Pratt* v. *State,* 51 Ark. 167; Kirby's Dig., § 2413; *Skaggs* v. *State,* 88 Ark. 72; *Green* v. *State,* 91 Ark. 563; *Sexton* v. *State,* 91 Ark. 589; *Hamer* v. *State,* 150 S. W. (Ark.) 142.

He also contends that, having admitted carnal knowledge of the woman, that the court erred in charging the jury relative to an assault with intent to commit rape. A man can be guilty of an assault with intent to rape, if he assaults a woman with the intention of having carnal knowledge of her, forcibly and against her will, even though after the assault is made she finally yields to his embraces and consents to the intercourse. Such subsequent yielding and consent does not mitigate nor justify the assault with the intent to commit the crime. *State* v. *Cross,* 12 Iowa 66; *State* v. *Atherton,* 32 Am. Rep. 134; *State* v. *Shepherd,* 7 Conn. 54; *State* v. *Bagan,* 41 Minn.

285; 1 Bishop Crim. Law, § § 733-736; *State* v. *Hardigan,* 78 Am. Dec. 609.

If the court was not required to submit to the jury the question of an assault with intent to rape in this case, the defendant can not complain of its action in doing so, since, otherwise, it was an instruction more favorable to him than he was entitled to have given.

Neither is the instruction open to the objection that it was incorrect, not specifying that the attempt to have carnal knowledge of the woman must have been forcibly and against her will, since an assault with intent to rape was correctly defined immediately above the expression used which followed the sentence: "If he had carnal knowledge of the woman, as charged in the indictment, forcibly and against her will, he is guilty of rape; if he did not consummate that crime, but attempted to do it, he is guilty of assault with intent to rape." The instructions were given as one, and the jury could not but have understood that before he could be found guilty of an assault with intent to rape, they must find that he attempted to have carnal knowledge of the woman forcibly and against her will. And, besides, if the instruction was erroneous, it was such an error as called for a specific objection, which was not made.

No error was committed in the court's instruction that "the defendant starts out in the trial with the presumption of innocence in his favor, and that presumption follows him throughout the trial, or until the evidence convinces you of his guilt, beyond a reasonable doubt," which meant no more than that, "the presumption prevails until overcome by evidence convincing the jury, beyond a reasonable doubt, of his guilt," as said in *Ross* v. *State,* 92 Ark. 483.

The next assignment is, that the court erred in permitting the introduction of testimony relating to the general reputaion of the defendant, it being claimed that he had not put his character or reputation in issue. He testified in the case, however, and took the witness stand like any other witness, and his character for veracity

could be impeached, though his good character may not have been previously put in issue. *McCoy* v. *State,* 46 Ark. 141; *Turner* v. *State,* 100 Ark. 199; *Skaggs* v. *State,* 88 Ark. 73; *Younger* v. *State,* 100 Ark. 321.

Of course, the testimony relating to the bad character or the general reputation of the accused for truth and morality could only be considered as affecting the question of his credibility as a witness, of which the jury was sufficiently advised by the court saying it was competent to prove such reputation, but "it does not necessarily follow from the fact that a witness has been impeached that he should not be believed. It is intended to shed light upon the credibility of the witness." Appellant asked no instruction upon this point and did not specifically object to the one given.

It is next contended that the court erred in permitting the testimony of Enos Brown, taken before the justice in the examining trial to be read on the trial in the circuit court. It is conceded that appellant was present when said Brown testified in the examining trial and had the right to cross examine him, and it was shown that diligent inquiry had been made as to the whereabouts of this witness, and that he could not be found; the deputy sheriff having the subpoena for service made inquiry from all sources likely to discover information as to his whereabouts and was unable to find him, and other witnesses also testified that he had been gone from his home about a month and that his wife said he was in Mississippi. This was a sufficient foundation for the introduction of the testimony.

"The settled law of this State is that where an adverse witness is dead, beyond the jurisdiction of the court, or, upon diligent inquiry, can not be found, what such witness testified on a former occasion, on the same issues and between the same parties, may be given in evidence, providing the accused was present, having the right to cross examine." *Poe* v. *State,* 95 Ark. 177, and cases cited.

Complaint is made of the introduction of the testi-

mony of the prosecuting witness, relating to the defendant's assaulting and beating his wife on the way home upon the night of the commission of the crime. It is true this statement of hers was introduced over the objection of the appellant, but other witnesses testified to the same effect without objection, and he, himself, admitted, upon cross examination, that he had sworn at and struck his wife and that she was either drunk or unable to continue the journey home and was put to bed in the house of a neighbor, some two and a half miles from home, and immediately before the offense was perpetrated just beyond the house where the wife remained.

It may be that this evidence reflected the intention of appellant to get rid of his wife, in order that he might have the better opportunity to commit the offense, but, in any event, it having been introduced by other witnesses and himself, without objection, if error was committed in its introduction, it can not be held prejudicial.

There are other assignments of error, but we do not regard it necessary to discuss them.

The instructions fairly presented the issues to the jury, which doubtless found appellant guilty of assault with intent to rape, rather than the crime of rape, because of the fact that the prosecuting witness was living at the time of the occurrence in adultery with another man.

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

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## CROUCH & SON v. LEAKE.

Opinion delivered May 19, 1913.

SALE OF CHATTEL—WARRANTY—BREACH.—A sold a stallion to B with certain warranties, the contract of sale providing that if the horse failed to comply with the warranties, that it might be returned to A, and another stallion substituted; *held*, the contract provided the remedy for a breach, and B, not having complied with the conditions, nor shown a waiver thereof by A, will be held to have accepted the stallion as complying in all respects with the warranty, and is liable to A for the purchase price.

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

STATEMENT BY THE COURT.

This suit was brought by appellants against T. B. Leake and others to recover a balance of $614.95, claimed to be due on a note for $1,000, executed to them May 29, 1907. The note was signed by the defendants and credited with six different amounts paid thereon from May 29, 1907, to March 15, 1910, aggregating $534.93.

The defendants admitted the execution of the note and alleged that it and two others for like amount were given for the purchase of a stallion sold them by plaintiffs under a warranty, that he was an imported German coach horse and a satisfactory and sure breeder; alleged a breach of the warranty, that the horse was not a sure breeder, as warranted, and unfit for the purpose for which he was purchased.

He was delivered to the defendants on May 29, 1907, under the following contract of sale and warranty:

"Nashville, Tenn., May 29, 1907.

"GUARANTEE ON THE GERMAN IMPORTED COACH STALLION, METHODIST, No. 2907.

"We have this day sold the imported German coach stallion, named 'Methodist No. 2907,' to the Junction City German Coach Horse Company, Junction City, Ark., and we guarantee the said stallion to be a satisfactory sure breeder, provided the said stallion keeps in as sound and healthy condition as he is now and has proper care and exercise.

"If the said stallion should fail to be a satisfactory sure breeder with the above treatment, then the same shall be returned to us at Lafayette, Ind., in as sound and healthy condition as he now is and in as good flesh by August 1, 1908, and we agree thereupon to take the said stallion back and to give the said company another stallion in his place, of equal value.

"We, J. Crouch & Son, agree not to place an imported German coach stallion within a radius of twenty

miles of Junction City, Ark., within one year from date.

"J. Crouch & Son.

"Junction City German Coach Horse Co.

"Accepted: W. L. Thompson, Secretary."

The testimony tends to show that the horse was not "a satisfactory sure breeder," as warranted, and that only about 10 per cent of the mares he served brought colts.

One of the defendants stated that he made an effort to return the stallion in 1908, but did not remember the date. They had a meeting at which he was appointed on a committee to see T. B. Henderson, the bank cashier, and have him open correspondence with Crouch & Son to dispose of the horse in some way as soon as they found he was not a sure breeder. They wanted to satisfy the company and return the horse and offered to pay the first note, but this offer was not satisfactory. That in the following spring, they had Mr. Henderson write a letter taking the matter up.

Mr. Henderson testified that he took up the matter of the settlement at the defendants' request and made an offer to return the horse and pay the first note in settlement, and could not remember the date the letter was written, but thought it was in the summer of 1908.

The following letter, which appellants stated was the only one they had ever received, relative to the matter, was introduced in evidence:

"Junction City, Ark., 1/16, 1909.

"Messrs. J. Crouch & Son, Lafayette, Ind.

"Gentlemen: The directors of the Junction Coach Horse Company had a meeting this morning and request me to write you for your best settlement on notes and take horse off their hands.

"Yours truly,

"T. B. Henderson, Cashier."

No offer to return the horse before that date, or at all, in accordance with the terms of the warranty, was shown. The court instructed the jury, refusing to direct

a verdict for plaintiffs, and from the judgment on their verdict in defendants' favor this appeal comes.

*Marsh & Fenniken,* for appellants.

Appellants' request for a peremptory instruction in their favor should have been granted. Appellees having by their own contract stipulated what their remedy should be in case the animal did not prove to be a satisfactory sure breeder, they can not ignore that contract and avoid payment of the note, but were bound to exhaust their remedy by returning the animal as stipulated, unless prevented by appellants, before they could be heard to complain. 101 S. W. 1179; 97 S. W. 18, and cases cited.

*R. G. Harper,* for appellees.

There was evidence to show that appellees offered to return the stallion by or before the time provided in the contract, and the jury's verdict is conclusive of that fact and should not be disturbed. 83 Ark. 15, 16.

KIRBY, J., (after stating the facts). Appellants contend that the court erred in not directing a verdict in their favor and are right in so doing.

The undisputed testimony shows that the stallion was not "a satisfactory sure breeder" as warranted, but it also shows that appellees gave no notice to appellants of a breach of the warranty nor did they return or offer to return the horse to the seller and receive another of equal value in his place by August 1, 1908, as they were required to do by the terms of the contract or at all. Neither was there any testimony tending to show a waiver by appellants of this condition. The written contract expressed the terms of the warranty and provided the remedy that should accrue from a breach of it which was exclusive of any other mode of compensation and afforded the only relief to which they were entitled. Not having complied with the said condition on their part, nor shown a waiver thereof on the part of appellants, they will be held to have accepted the stallion as in all respects complying with the warranty and bound to the payment of the balance due on the note for the purchase

money. *Highsmith* v. *Hammonds,* 99 Ark. 400. See also *Walters* v. *Akers,* 101 S. W. (Ky.), 1179; *Wisdom* v. *Nichols & Shepherd Co.,* 97 S. W. 18.

The court erred in not directing a verdict for appellants and its judgment is reversed and judgment will be entered here for them in the sum sued for. It is so ordered.

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## ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* CHAMPION.

Opinion delivered May 19, 1913.

1. RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.—Under the lookout statute (Acts of Ark., 1911, p. 275), if a person is killed while on the tracks of a railway, by the running of a train, and such person would not have been killed had the lookout required been kept, the statute makes such failure to keep a lookout, the proximate cause of the death, no matter by what cause or under what conditions the party killed may have been upon the railway tracks. Deceased's being upon the track, whether by accident, negligence or whatever cause, is but a mere incident to the killing, and not the proximate cause thereof. (Page 331.)
2. APPEAL AND ERROR—INSTRUCTIONS—HARMLESS ERROR.—Where the court erroneously submitted to the jury the question of proximate cause, when that was not an issue in the case, the error was not prejudicial to the defendant. (Page 333.)
3. RAILROADS—INSTRUCTIONS—INJURY TO PERSON ON TRACK—PROXIMATE CAUSE.—Where deceased was killed on a railway track by the operation of a train, it is not error, under Statutes of 1911, p. 275, for the court to refuse to instruct the jury on the point that the proximate cause of the killing was the fact that deceased was knocked down on the track by another boy. (Page 334.)
4. RAILROADS—INJURY TO PERSON ON TRACK—FAILURE TO KEEP LOOKOUT.—When deceased was killed by a train while on the track of the railway company, the issue in the case under the lookout statute, is whether defendant failed to keep the lookout required, and not the contributory negligence of deceased, (Page 334.)
5. RAILROADS—INJURY TO PERSON ON TRACK—NEGLIGENCE—QUESTION FOR JURY.—Where deceased was killed by being struck by freight cars "kicked" down the track, and there was no one on the cars, the question of whether a proper lookout was kept by employees of defendant was properly submitted to the jury, and whether, if a

proper lookout were kept, the perilous position of deceased could have been discovered in time, by the exercise of ordinary care, to have avoided killing him. (Page 334.)

6. RAILROADS—DUTY TO KEEP LOOKOUT.—The act of 1911, p. 275, contemplates the keeping of a lookout commensurate with the danger to be apprehended and avoided. If the engineer and fireman can not keep a proper lookout with reference to moving cars, then there must be other employees so situated that they will be able to make the lookout effective for the purpose of preventing injury to persons and property on the tracks of railways by the running of trains. (Page 335.)

7. RAILROADS—INJURY TO PERSON ON TRACK—LOOKOUT—AVOIDABLE INJURY—QUESTION FOR JURY.—Where deceased was killed by being struck by freight cars "kicked" down the track, it is a question for the jury whether, if the lookout required by act of 1911, p. 275, had been kept, the peril of the deceased could have been disdiscovered in time to have been avoided. (Page 336.)

8. RAILROADS—DEATH—CONSCIOUS SUFFERING—QUESTION FOR JURY.—Where a minor is killed by a railway, on its track, under the evidence, *held*, that the question of conscious suffering was for the jury. (Page 336.)

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

STATEMENT BY THE COURT.

These suits were instituted by the appellee—one in his own right, and the other, as administrator of the estate of Charles Champion—to recover damages for the loss by appellee of the services of his minor child, and for the benefit of the estate of the child. The causes were consolidated and tried by a jury, that returned a verdict in favor of the appellee, in his own right, in the sum of one thousand dollars ($1,000), and for the benefit of the estate, in the sum of two hundred dollars ($200).

The negligence set up in the complaints was the same, and was to the effect that the appellant, while moving its cars and locomotives on a street in Fayetteville, negligently permitted one of its cars to run over Charles Champion, causing his death. The complaint alleged that Charles Champion, at the time, was a pedestrian at the street crossing, and that appellant permitted its cars to approach the public crossing, without having a locomotive attached or coupled to them, so as to govern and

control the momentum of the cars; that it failed to cause a whistle to be sounded or the bell to be rung before the cars reached the crossing; that it neglected to keep a constant lookout for persons on its tracks while the cars were approaching the crossing; that if the lookout had been kept, the peril of Charles Champion would have been discovered in time to have prevented his death, by the exercise of ordinary care on the part of appellant; that after Charles Champion had been knocked down by the car, and before he had been so injured as to cause his death, and while he was under the car, the appellant, knowing that he was under the cars and knowing that he would be killed if the speed of the cars was not stopped or arrested, negligently failed to exercise ordinary care to reduce the speed of the cars or stop the same, thereby causing the death of Charles Champion.

The complaint for the benefit of the estate alleged that Charles Champion, after being run over and injured, suffered greatly for about thirty minutes. The complaint for the benefit of the appellee in his own right, alleged that the services of his child, who was six years of age at the time of his death, were of the value of ten dollars per month to appellee.

The facts are substantially as follows:

The main line track of appellant, in the city of Fayetteville, runs north and south. Dickson street runs east and west. Appellee had his confectionery store close to the appellant's main line track and west of the same, on the north side of Dickson street. Appellant had three or four side tracks east of its main line track and east of the depot. Two of the tracks were laid in West street, that runs north and south and across Dickson street. Dickson street is the main thoroughfare from the depot to the business part of the town. Fayetteville has a population of five or six thousand. The switch tracks crossing Dickson street run parallel to the main line track. The appellee's six-year-old son and companion, a somewhat larger boy, were running across the track, when the larger boy ran against the son of appel-

lee and knocked him down on the track. The two little boys, at the time, were going in opposite directions. Two cars coupled together were going south down West street and were at the time crossing Dickson street. There was no engine attached to the cars. The cars were running with about enough speed to put them over the street. They were almost coming to a stop when they ran over the appellee's son and killed him. The cars were being "kicked" across the street and were only given barely enough force to start them moving. They were moving very slowly—three or four miles an hour. There was no brakeman on the top of the cars. The cars had been separated from the engine. If the engine had been attached, the cars would have stopped in a short distance. They were not making a flying switch, just dropping the cars, which was drawing the pin and letting the cars roll for the purpose of shifting the cars from one track to the other. The car was some three or five feet from the boy when he fell. The first trucks passed over him without killing him. He scrambled to his hands and knees after the first trucks passed over him and the rear trucks struck him and cut him through, about the point of the shoulders. He died instantly. At the time the wheel ran over him, he was about ten feet from the sidewalk, south of it. It was the hind trucks of the first car that passed over his body. The death of appellee's son was caused on the 18th day of May, 1912.

*W. F. Evans* and *B. R. Davidson,* for appellant.

1. Where two boys left the sidewalk of a street and attempted to cross a railroad track by running around in front of a moving car, and, when in the middle of the track and in front of and in immediate proximity to the car, one boy knocks the other down and the latter is run over and killed, the proximate cause of the injury is the one boy's knocking the other down. 9 S. W. 793; 204 Pa. St. 568; 21 S. E. 571; 69 N. E. 653; 75 Fed. 811; 124 Fed. 113; 144 Fed. 605; 94 U. S. 469-475; 86 Ark. 289; 91 Ark. 260.

2. In view of the undisputed evidence that the boys

knew that the car was moving across the street and attempted to run around in front of it, it was error to submit to the jury the question of negligence in failing to give signals for the crossing. 63 Ark. 177; 33 S. W. 396; 56 S. W. 1; 37 S. W. 119; 79 Pa. 873; 110 Am. St. Rep. 29; 56 So. 790; 146 S. W. 790.

3. The failure to keep a lookout was not the proximate cause of the injury. The boys ran so suddenly before the moving car that a lookout could avail nothing, and any failure to keep a lookout could not be the proximate cause of the injury. 84 S. W. 1049; Fed. Cases, No. 13358, 4 Hughes, 157; 50 S. W. 227.

4. Where the facts are undisputed, the question of negligence is for the court. 86 Ark. 289.

5. The testimony did not warrant submitting to the jury the issue of negligence after discovered peril. 77 S. W. 272; 50 S. W. 227; 16 S. W. 125; 52 N. E. 1013.

6. The testimony did not warrant submitting the second cause of action to the jury. The boy was killed instantly. No suffering whatever was shown. The administrator could recover nothing except what the boy himself could have recovered for pain and suffering endured after the injury up to the time of his death, and the pain and suffering, if any, which he endured was contemporaneous with, and inseparable from, the death. 56 Fed. 248; 117 Mich. 332; 145 U. S. 335; 68 Ark. 4; 101 Ark. 327.

*Sam R. Chew,* for appellee.

1. Under the facts developed in evidence, appellant is liable, notwithstanding any negligence on the part of the deceased. Acts 1912, page 275; 78 Ark. 28; 80 Ark. 528.

Had the lookout been kept as the law requires, the car could have been stopped before it struck deceased. A slight effort would have stopped it. The facts bring the case within the principle of discovered peril announced in *Railway* v. *Hill,* 74 Ark. 482.

2. The court's instructions covered the questions of contributory negligence of the child, the negligence

of the father, negligence of the appellant and the proximate cause of the injury, which were all the questions raised by the proof, and the jury's determination of them adverse to appellant, being supported by ample evidence, will not be disturbed.

3. The appellant was under the duty not only to keep a constant lookout for persons upon this street crossing but also to ring a bell or blow a whistle for a distance of eighty rods back and to continue it until the crossing was passed. Injury to the deceased was one of the naturally to be expected consequences that would result from appellant's negligence in failing to keep a lookout for persons and property. 69 Ark. 130. And such negligence was the proximate cause of the injury. 67 Ark. 47; 33 Ark. 350. See also 53 Ark. 201; 75 Ark. 133; 66 Ark. 363; 75 Ill. 96; 27 Fla. 157.

4. The proof shows that the boy lived some appreciable time after being knocked down before he was killed by the rear trucks of the car. The verdict in favor of the administrator is not excessive. 78 Ark. 100; 39 Ark. 491.

WOOD, J. The appellant contends that the proximate cause of the death of Charles Champion was the fact of his being knocked down on the track by his companion running into him, when he was in front of the moving car. On this question, the court instructed the jury, at the instance of appellant, as follows:

"If you find that a child ran into the deceased child and knocked him down on the track, and, without the intervention of this act, that the result would not have followed; and you further find that men of ordinary care and prudence would not, in switching, anticipate such an occurrence, then the act of the boy knocking him down would be the proximate cause."

The instruction, given at the instance of appellant, was certainly as favorable to it as it could expect, and it has no right to complain. For under the lookout statute of May 26, 1911, enacted before the injury herein complained of, no matter what may have caused the

unfortunate predicament of young Champion, if the employees of the appellant in charge of its train, by keeping the lookout, could have discovered his peril in time to have prevented his injury, by the exercise of ordinary care, then appellant is liable. See Acts of Arkansas, 1911, page 275; *Railway* v. *Lindley,* 151 S. W. 246; *St. Louis, I. M. & S. Ry. Co.* v. *Gibson,* 107 Ark. 431, 155 S. W. 510.

The child could not have been in a more perilous position, by reason of having been knocked down on the track, than he would have been had he deliberately placed himself in that position, and yet even though he might have voluntarily assumed the dangerous situation in front of the moving cars, still the railroad company, under the above statute, would be liable for his death, if by keeping the lookout which the statute requires it could have discovered his peril in time to have avoided killing him by the exercise of ordinary care. In other words, under the lookout statute, where the injury complained of could have been avoided by keeping the lookout therein prescribed, then the failure to keep such lookout, resulting in the injury, is the proximate cause of such injury, no matter what may be the causes by which the party injured has been placed upon the track. The intention of the Legislature was to make railway companies absolutely liable for the killing or injuring of persons on their tracks, where such killing or injuring could have been avoided by keeping the constant lookout which the statute requires. The effect of the statute in the case of killing of persons on a railway track by the running of trains is to make the failure to keep the lookout, which the statute prescribes, the proximate cause of such killing, where, if such lookout had been kept, the perilous situation would have been discovered in time to have avoided the killing.

Therefore, under the statute, in suits for damages against railways, for the killing of a person on their tracks by the running of trains, where the negligence alleged is a failure to keep the lookout, the issue is as to whether or not the company was negligent as alleged,

and not whether such negligence was the proximate cause of the death, for, as we have stated, if the person was killed while on the tracks of the railway, by the running of trains, and such person would not have been killed had the lookout required been kept, then the law makes such failure to keep the lookout the proximate cause of the death, no matter by what cause or under what conditions the party killed may have been upon the railway tracks. The being upon the railway tracks, whether by accident, through negligence, or from whatever cause, would be but a mere condition or incident to the killing and not the proximate cause thereof.

The court erred in submitting to the jury the question as to whether or not the alleged negligence of appellant in failing to keep the lookout required by the statute was the proximate cause of the death of Charles Champion. But the error was not prejudicial to appellant.

It follows, therefore, that the court did not err in refusing appellant's prayers for instructions to the effect that the evidence was not sufficient to show that the defendant had been guilty of any negligence, which was the proximate cause of the injury, and that the proximate cause of the injury, under the evidence, was the boys running together and one being knocked down upon the railroad track.

The appellant also contends that the court erred in submitting to the jury the question of the alleged negligence of the company in failing to give signals on approaching the crossing. The court, among other things, told the jury that one of the grounds of negligence alleged was the failure of appellant to ring the bell or sound the whistle, and that if this ground was proved, and was the proximate cause of the death of the child, that they should find for appellee, unless contributory negligence barred recovery. But in another instruction, given at the request of appellant, the court told the jury that if the child knew that the car was moving and went in front of the car, then a failure to ring the bell or

sound the whistle should not be considered, because in such case the failure to ring the bell or sound the whistle would not be the proximate cause of the injury. We are of the opinion that under the undisputed evidence, the failure on the part of the appellant to ring the bell or sound the whistle could not have been the proximate cause of the injury, and the court might have so told the jury in so many words. But when the instructions on this issue are considered together, there was no prejudicial error in the instructions. Indeed, the instructions on this issue are more favorable to appellant than they should have been, because in these instructions the court virtually told the jury that contributory negligence would bar recovery, whereas, such is not the law, if the killing was caused by the failure to keep the lookout required by the statute.

Appellant contends that there was no evidence to warrant the court in submitting to the jury the issue as to whether the death of Charles Champion was caused by the alleged failure on the part of the employees of appellant to keep the constant lookout required. But we are of the opinion that this was a question for the jury under the evidence, and that it was submitted under instructions free from error. Indeed, the instructions in this respect were more favorable to appellant than the law warranted. The testimony shows that the train crew, who were handling appellant's cars at the time, were not in position to see the little boy, after he went in front of the cars. There was a curve which prevented the engineer and fireman from seeing; and the switchman, also, who uncoupled the car, was not in a position to see. The watchman, whose duty it was to guard the crossing and to prevent accidents as far as possible, was too far away to render efficient service in preventing this injury. There was no one on top of the cars to keep a lookout for travellers, who might be in danger of such cars, and to stop them in cases of emergency. These cars, in other words, were uncoupled and left to roll without any one being on them to sound a warning or to

arrest their progress, under exigencies calling for such action on the part of the company. The street upon which young Champion was killed was the main thoroughfare leading from the depot to the principal business part of the city, and was constantly travelled, and it was the duty of the appellant to anticipate the necessity of being able to arrest or stop the progress of its cars, to prevent their coming in contact with any pedestrian using the street at any time. In *Inabnett* v. *St. L., I. M. & S. Ry. Co.,* 69 Ark. 130, we said:

"The duty of railroads is to exercise reasonable and ordinary care to observe travellers about to cross the railroad upon the highway. Here the travellers have the right to be and they must be expected to be constantly passing. They are ever present, so to speak, and the railroad employees must exercise that diligence which the law requires to observe them. The care and skill to be reasonable, must be proportioned to the danger and multiplied chances of injury."

The law embodied in the lookout statute contemplates that an efficient lookout, commensurate with the danger to be apprehended and avoided, shall be kept. *St. L. S. W. Ry. Co.* v. *Russell,* 64 Ark. 239. If this can not be done by the engineer and fireman, then there must be other employees so situated with reference to the moving cars that they will be able to make the lookout effective, for the purpose of preventing injury to persons and property, on the tracks of railways by the running of trains.

Under the evidence adduced, it was for the jury to say whether or not appellant was keeping the lookout required by the statute. It was also a question for the jury as to whether or not, if this lookout had been kept, the perilous position of young Champion could have been discovered in time, by the exercise of ordinary care, to have avoided killing him.

There was testimony tending to prove that the cars were running very slowly. One witness said: "They were running two or three or four miles an hour, at the

time they struck the child." The car must have been "three or four feet from the child at the time he fell on the track." Another witness said: "When the car hit him, it turned him over on his back. It kind o' jogged and almost stopped. If a fellow had been there with a broomstick and presence of mind enough to use it he could have stopped the car. They were not going with any speed at all—just enough to take them across."

There was testimony tending to show that the first pair of trucks passed over the little boy without killing him, and, that after the trucks passed over him, "he tried to get out and the rods under the car hit him and knocked him back down toward the east side of the track."

Now, if there had been some one on top of the cars to have kept a lookout for pedestrians on the street at the crossing, and to have stopped or checked the speed of the cars, in cases of emergency, the deplorable killing of this child might have been avoided. At least, it was a question for the jury.

There was some testimony from which the jury might have found that there was conscious suffering on the part of the child from the time he passed under the car until he was run over by the hind trucks and instantly killed. That also was a jury question.

Upon the whole record, we find no prejudicial error. The judgment is therefore affirmed.

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## BROWN v. STATE.

Opinion delivered May 19, 1913.

1. CRIMINAL LAW—INDICTMENT—SUFFICIENCY—VARIANCE.—Defendant was indicted for grand larceny for stealing property from the "St. Louis Southwestern Railroad Company." *Held.* Where the railroad company is known by a number of names in the locality where the crime was committed, there is no variance between the indictment and proof, where the proof tended to show that the property stolen was the property of the "St. Louis Southwestern Railway Company." (Page 338.)

2. LARCENY—OWNERSHIP OF PROPERTY—CORPORATION—EVIDENCE.—Where defendant is indicted for larceny, if a corporation is alleged as

owner of the property stolen, only its *de facto* existence need be shown in evidence. (Page 339.)

3. LARCENY—ALLEGATION OF OWNERSHIP—PROOF.—Where defendant is indicted for grand larceny for stealing shoes, the allegation that "the shoes were the property of the St. Louis Southwestern Railroad Company" is sufficient to warrant proof that the railroad company had possession of the shoes as bailee. (Page 340.)

4. LARCENY—ALLEGATION OF OWNERSHIP—COMMON CARRIER.—When defendant is charged with larceny, when the property is in the possession of a common carrier, it is proper in the indictment to charge ownership in the common carrier, for its possession as bailee is sufficient to warrant an allegation of ownership in the carrier. (Page 340.)

5. CRIMINAL LAW—JOINDER OF OFFENSES.—Under Kirby's Digest, § 2231 charges against defendant of receiving stolen goods, and grand larceny may be laid in one indictment. (Page 341.)

6. CRIMINAL LAW—ARREST OF JUDGMENT.—A motion to arrest judgment is properly overruled when the indictment in apt language charges a public offense and defendant was convicted of one of the offense charged. (Page 341.)

Appeal from Lafayette Circuit Court; *Charles W. Smith,* Special Judge; affirmed.

*D. L. King,* for appellant.

The indictment is defective. It fails to allege from whom the goods were stolen. There is a variance between the indictment and evidence. Nor does the indictment charge that the railroad company is a corporation. Kirby's Dig., § § 2231-2.

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

1. There is no variance. It is not necessray to prove a charter. 41 Tex. 215.

2. If a corporation is alleged as owner, only its *de facto* existence need be shown. 3 Bishop, New Cr. Pl., § 752 (2); 54 Atl. 683; 19 Cal. 598; 76 Ga. 551; 58 Ark. 19.

3. Proof of possession by the railroad company is sufficient. 25 Cyc. 89, note 94; 64 Vt. 405; 58 Ala. 391; 134 *Id.* 159; 60 Atl. 1117; 73 Ark. 32.

4. The motion to require the State to elect was properly overruled. 71 Ark. 574; 100 *Id.* 196.

WOOD, J. The appellant was convicted of the crime of receiving stolen property, and sentenced to one year in the penitentiary. The indictment (omitting formal parts), is as follows:

The grand jury of Lafayette County, in the name and by the authority of the State of Arkansas, accuse the defendant, Brooks Brown, of the crime of grand larceny, committed as follows, towit: The said defendant, on the 10th day of February, 1913, in Lafayette County, Arkansas, six (6) pairs of men's shoes, of the value of $5 per pair, the property of the St. Louis Southwestern Railroad Company, feloniously did steal, take and carry away, against the peace and dignity of the State of Arkansas.

The grand jury of Lafayette County, in the name and by the authority of the State of Arkansas, accuse the defendant, Brooks Brown, of the further crime of knowingly receiving stolen goods, committed as follows, towit: "The said defendant, on the 10th day of February, 1913, in Lafayette County, Arkansas, six (6) pairs of men's shoes, of the value of $5 per pair, then and there lately before then, unlawfully and feloniously stolen, taken and carried away; did then and there, unlawfully have and receive, with the intent to deprive the true owner thereof, he, the said Brooks Brown, then and there, well knowing that the said six pairs of men's shoes had been so unlawfully and feloniously stolen, taken and carried away, as aforesaid. The crime charged in this count being the same as the crime charged in the first count of this indictment, but charged in a different mode, against the peace and dignity of the State of Arkansas."

The indictment alleges that the shoes were the property of the St. Louis Southwestern Railroad Company. The proof tended to show that the shoes, at the time the same were stolen, were in the possession of the St. Louis Southwestern Railway Company. Appellant contends that proof that the shoes were in the possession of the St. Louis Southwestern Railway Company, was not proof that they were in the possession of the St. Louis Southwestern Railroad Company, and that therefore, there

was a fatal variance between the allegation of ownership and the proof thereof.

The appellant also contends that there was no evidence that the railroad company was a corporation, and that therefore, there was no proof of ownership of the property, as made in the indictment. There was evidence tending to prove that there were only two railroad companies at the town of Stamps, where this offense is shown to have been committed, one being the Louisiana & Arkansas Railroad, and the other, the St. Louis Southwestern Railway Company. It was shown that the St. Louis Southwestern Railway Company was generally known as the "St. Louis & Southwestern," the "St. Louis Southwestern Railway Company," the "St. Louis Southwestern Railroad Company" and the "Cotton Belt;" that if you called it by any one of these names, persons living in the community would understand what railroad was meant.

The statute provides: "That no indictment is insufficient, nor can the trial, judgment or other proceedings thereon, be affected by any defect which does not tend to the prejudice of the substantial right of the defendant on the merits."

The alleged variance here, between "Railway Company" and "Railroad Company," did not prejudice the substantial rights of the defendant on the merits. The allegation was sufficient to advise appellant of the name of the owner of the goods which he is alleged to have received. In *Price* v. *State,* 41 Tex. 215, 216, it was held not to be necessary to "set out the charter in the indictment, or allege it to be a chartered company, otherwise than by naming it." In *Calkins* v. *State,* 18 Ohio St. 366, it was held "That the corporate character of the party injured might be proved by reputation, and that it was only necessary to show a corporation *de facto.*" See also, *Fleener* v. *State,* 58 Ark. 98; *Burke* v. *State,* 34 Ohio St. 81; *State* v. *Savage,* 60 Pac. (Ore.) 610, 616.

It was sufficient to meet the requirements as to ownership to show that the St. Louis Southwestern Railroad Company or Railway Company was doing business

at the town of Stamps, and that it had the possession of the shoes at the time that they were alleged to have been stolen, and it was generally known by that name. "If a corporation is alleged as owner, only its *de facto* existence need be shown in evidence." 3 Bish., New Crim. Proc., section 752 (2).

In *McCowan* v. *State,* 58 Ark. 17, the indictment charged that the allegation of ownership was that the articles stolen were the property of "W. L. C. & Co.," and we held that this was not a sufficient allegation of ownership, because it showed that the goods stolen were owned by a firm or partnership—a joint ownership, and in such cases it is necessary that the names of the several persons who compose the firm, or who constitute the joint owners, should be stated. But that case is different from this, because here the allegation shows that the property was owned by the railroad company, which is a sufficient allegation of the corporate character of the alleged owner, and shows on its face that it was not the property of a partnership or joint owners.

In *State* v. *Rollo,* 54 Atl. 683 (N. J. Law), it was held that, "An indictment alleging a larceny of goods from a designated corporation, need not specifically allege that the owner of the goods was a corporation, it being sufficient to allege the name by which the corporation was generally known."

It is contended by appellant that there was no proof of ownership of the goods alleged to have been stolen, because it was not shown that the railroad company owned the shoes, and there was no allegation that it held the same as bailee. The allegation that, "The shoes were the property of the St. Louis Southwestern Railroad Company," was sufficient to warrant proof that the railroad company had possession of the shoes as bailee.

"The allegation of general ownership is sufficient to allow proof of special ownership." *Merritt* v. *State,* 73 Ark. 32. Where one is in possession of goods as a common carrier, it is proper to charge ownership in the common carrier, for his possession as bailee is sufficient to

warrant an allegation of ownership in him. See 25 Cyc. 89, cases cited in note 94.

The court told the jury that appellant could not be convicted under this indictment for both crimes of grand larceny, and knowingly receiving stolen goods, that there is only one offense charged in the indictment, and that they could only convict him on one offense. The instruction was not technically correct, because the appellant was charged with the offense of grand larceny and also the offense of knowingly receiving stolen property. But there was no prejudicial error in the court's charge to the jury, because, under section 2231 of Kirby's Digest, the separate and distinct offenses of grand larceny and knowingly receiving stolen goods, could be joined in one indictment, and the evidence was amply sufficient to sustain the verdict finding the defendant guilty of the offense of knowingly receiving stolen property, of which the jury convicted him.

The statement in the indictment that only one offense was charged, was surplusage, and the court, in embodying this language in its charge, meant no more than that under the proof in the case, the appellant could be convicted of only one offense—that of either grand larceny, or knowingly receiving stolen goods, but that he could not be convicted of both.

Appellant's motion to require the State's attorney to elect, was properly overruled, as the offenses could be joined in one indictment. Sec. 2231, of Kirby's Digest. The motion to arrest the judgment was also properly overruled, because the indictment, in apt language, did charge a public offense, and the appellant was convicted of one of the offenses with which he was charged. *Jones* v. *State,* 100 Ark. 195.

Finding no error, the judgment is affirmed.

## DILLEY v. SIMMONS NATIONAL BANK.

Opinion delivered May 19, 1913.

1. ELECTION OF REMEDIES—ACTIONS ON CONTRACT AND TORT.—The doctrine of election does not apply to two actions, one upon a contract and the other for fraud in its procurement, since both are an affirmance of the contract; so an action on a note which was procured by fraud, is not such an election of remedies as to preclude an action against defendant later, for fraud in procuring the loan. (Page 344.)
2. BANKRUPTCY—DISCHARGE—DEBTS PROCURED BY FRAUD.—Under the Federal Bankruptcy Act of February 5, 1903, amending the act of July 1, 1898, which provides that a discharge releases a bankrupt from his provable debts "except such as * * * are liabilities for obtaining property by false pretenses or false representations;" *held*, debts procured through fraud are not released whether they are reduced to judgment or not. (Page 346.)
3. LIMITATION OF ACTIONS—DISCOVERY OF FRAUD.—Where plaintiff did not discover defendant's fraudulent act until the spring of 1909, but filed his complaint on April 13, 1911, the action is not barred by the statute of limitations of three years. (Page 349.)

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

STATEMENT BY THE COURT.

The plaintiff, Simmons National Bank, instituted this action in the circuit court against F. L. Dilley to recover damages on account of fraud and deceit. The facts in the case, as developed by the plaintiff, are substantially as follows:

On the 4th day of February, 1907, plaintiff was induced to make a loan of three thousand dollars to the defendant by his statement that he owned fourteen hundred and ninety-six shares of the capital stock of the Dilley Foundry Company, a corporation, and that said stock was unencumbered, which proved to be untrue. The defendant gave plaintiff a note for the three thousand dollars, indorsed by the Dilley Foundry Company. On October 14, 1907, plaintiff loaned to the Leola Lumber Company the sum of ten thousand dollars, and took the note of the lumber company for that amount, indorsed by F. L. Dilley and Lynn Butler. Plaintiff was induced to

make this loan by the statement of the defendant that he owned about half of the stock of the lumber company, and that the lumber company owned thirty-five million feet of timber, which latter statement proved to be untrue. On the 15th day of February, 1908, plaintiff loaned to the Leola Lumber Company the sum of five thousand dollars, evidenced by a note of the same date, indorsed by F. L. Dilley and the Dilley Foundry Company. It was induced to make this loan by the statement of the defendant that he owned fourteen hundred and ninety-six shares of stock in the Dilley Foundry Company, and that the Leola Lumber Company owned thirty-five million feet of timber. Plaintiff learned in March, 1909, that the statement as to the ownership by the defendant of the foundry company's stock unencumbered, was untrue, and in April, 1909, learned that the statement that the lumber company owned the timber was untrue. The notes were renewed from time to time until 1909, when the plaintiff brought suit in the State courts against the defendant and the Dilley Foundry Company upon the three thousand dollar note and against the defendant, the lumber company and the Dilley Foundry Company on the five thousand dollar note, and against the defendant and the lumber company on the ten thousand dollar note.

The defendant was adjudged a bankrupt, and on March 9, 1911, was discharged from all debts and claims made proveable under the Federal Bankruptcy Act. The judgment expressly excepted from the order of the discharge of such debts as are by law excepted from the operation of the discharge in bankruptcy. In the bankruptcy proceedings, the plaintiff proved its debt as evidenced by all of said notes.

The defendant admitted that he told the plaintiff, for the purpose of securing the loan in question, that he owned 1,496 shares of stock in the Dilley Foundry Company, but denied that he told its officers that said stock was unencumbered. He also denied that he told them that the Leola Lumber Company owned thirty-five million feet of timber.

The plaintiff filed objections to the defendant's discharge in bankruptcy on the ground that the loans made by it were procured by the false representations of the defendant, but afterward withdrew its objection.

The case was tried before a jury and there was a verdict and judgment for the plaintiff. The defendant has appealed.

*Bridges & Wooldridge,* for appellant.

1. An election of one remedy with knowledge of the facts is a waiver of another and inconsistent remedy. 52 Ark. 458-467; 78 *Id.* 501-3; 70 *Id.* 319, 323-4; 49 *Id.* 94; 101 *Id.* 95-99; 15 Cyc. 260; 171 Fed. 755; 195 U. S. 176; 205 *Id.* 183; 195 U. S. 606; 201 Fed. 557; 183 N. Y. 271; 76 N. E. 25.

2. The discharge in bankruptcy was a complete defense. 195 U. S. 176; 205 *Id.* 183; 183 N. Y. 267.

*W. F. Coleman* and *W. B. Alexander,* for appellee.

1. The doctrine of election does not apply. 7 Enc. Pl. & Pr. 362; 3 Abb. N. Cas. 92; 118 N. Y. 228; 43 S. E. 482; 95 N. Y. 337; 70 Ark. 319; 49 *Id.* 94; 47 S. E. 711; 75 N. Y. 40; 114 *Id.* 349; 44 C. C. A. 309; 8 Am. B. R. 196; 70 App. Div. 166, 75 N. Y. Supp. 40, 175 N. Y. 501.

2. The action for deceit was not barred by the proceedings in bankruptcy. 79 N. Y. 390; 68 App. Div. 179; 172 Fed. 109; 96 C. C. A. 314; 67 N. E. 1082; 8 Am. Bank. Rep. 501; 92 Fed. 912; 96 *Id.* 597.

3. There is no error in the instructions. 6 L. R. A. 149, and note; 57 L. R. A. 108; 30 Ark. 334; 98 *Id.* 44; 99 *Id.* 438; 100 *Id.* 144.

HART, J., (after stating the facts). Counsel for the defendant invoke the defense of waiver by election. They contend that inasmuch as the plaintiff brought suit in the State courts against the defendant to recover on the note, they are now precluded from suing him in an action for fraud and deceit. We can not agree with their contention. The two remedies are not inconsistent. Plaintiff, in the present suit, admits the contract, and that it is bound by it. Its action is to recover damages on account

of fraud and deceit, and its complaint alleges that it was induced to make the loan by reason of certain alleged false representations made by the defendant. The doctrine of election does not apply to two actions, one upon a contract, and the other for fraud in its procurement, since both are in affirmance of the contract. The doctrine is well stated in 7 Encyc. of Pleading & Practice, page 362, quoted in the case of *Standard Sewing Machine Co.* v. *Owings* (N. C.), 6 A. & E. Ann. Cas. 211, and is as follows:

"As already stated, the principle does not apply to all coexistent remedies. As regards what have been termed consistent remedies, the suitor may, without let or hindrance from any rule of law, use one or all in a given case. He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final, and, if not satisfied with the result of that, he may commence and carry through the prosecution of another. Thus, where a sale of chattels is induced by the fraud of the vendee, the vendor may prosecute the vendee for the price of the articles in one action, and in another for damages on account of the fraud; both proceeding on the theory of ratifying the sale. But he can not maintain either if he has rescinded the sale, or, if, on the theory of rescission, he has resorted to replevin to recover the property. No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress upon one and the same line of facts."

In the case of *Whittier* v. *Collins,* 15 Rhode Island 90, 2 Am. St. Rep. 879, the court held:

"Unsatisfied judgment *in assumpsit* for money loaned is not a bar to an action on the case between the same parties, for deceit on account of false and fraudulent representations made by the defendants in procuring the loan. But the value of the judgment *in assumpsit* should be considered by the jury in assessing the damages in the second action."

In this case, the court said:

"The plaintiff in such case, of course, would not necessarily be entitled to recover the full value of the goods sold, or money lent, but it would be the duty of the jury in assessing the damages, to consider the value of the judgment *in assumpsit,* and if the judgment was thought to have any value, to reduce the assessment accordingly."

As bearing on the question, see also *Hutchinson* v. *Gorman,* 71 Ark. 305, where it is held that a suit for fraud or deceit is in affirmance of the contract.

There were other signers to the note sued on. There was no inconsistency in plaintiff realizing all he could in a suit on the notes and subsequently proceeding against the defendant in an action for fraud and deceit. The unsatisfied judgments against the defendant and the other signers of the note would not bar an action for fraud and deceit against the defendant.

It is next contended by counsel for the defendant that inasmuch as the defendant received his discharge in bankruptcy before this action was commenced, that such discharge is a complete defense. In support of their contention, they cite the cases of *Crawford* v. *Burke,* 195 U. S. 176, and *Tindle* v. *Birkett,* 205 U. S. 183, where the court held that debts, founded upon an express contract, even though they were created through the fraud of the bankrupt, were barred by a discharge in bankruptcy, provided they had not been reduced to judgments. Those decisions were rendered prior to the amendment of the Federal Bankruptcy Act in 1903, and have no application under the facts in the present case. Subdivision 2 of the Bankruptcy Act of 1898 provides that a discharge in bankruptcy which releases the bankrupt from all of his provable debts, except such as "are judgments in actions for fraud, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another." This section, as amended in 1903, provides that "a discharge in bankruptcy releases a bankrupt from all his provable debts, except such as * * * are liabilities

for obtaining property by false pretenses or false representations." In discussing the effect of this amendment in the case of *In re Lawrence,* 163 Federal, 131, the court said:

"Upon comparing the two statutes, it will be noted that the former act excepted from the operation of a discharge 'judgments' for fraud or obtaining money by false pretenses or false representations, whereas, by the amendment of 1903, it is provided that 'liabilities' for obtaining money under false pretenses are excepted from the operation of a discharge. The change in the statute above noted makes the opinion of Mr. Chief Justice Fuller, in the case above cited, inapplicable in this case." The opinion referred to in the quotation is that delivered in the case of *Tindle* v. *Birkett, supra.* The Supreme Court of New Hampshire, in discussing the effect of this amendment in the case of *Lund* v. *Bull,* 23 A. & E. Ann. Cas. 819, said:

"As a consequence of this change in the statute, it is now held that debts procured through fraud, whether reduced to judgments or not, are not barred by a discharge; and that under this act, as well as under the act of 1867, the fraud inducing the contract or debt must be actual, as distinguished from fraud in law (citing cases). This being so, and it appearing that the defendant procured the money in question from the plaintiff by actual fraud, the discharge in bankruptcy is not a bar to the action." See also, *Frey* v. *Torrey,* 175 N. Y. 501; 67 N. E. 1082; see also, Collier on Bankruptcy (9 ed.), pp. 390-91; *Standard Sewing Machine Co.* v. *Kattel,* 22 Am. Bk. Rep. 376, 117 N. Y. S. 32.

In the case of *Strang* v. *Bradner,* 114 U. S. 555, the court held that "a claim against a bankrupt for damages on account of fraud or deceit practiced by him, is not discharged by proceedings in bankruptcy; nor is a debt created by his fraud, discharged, even where it was proved against his estate, and a dividend thereon received on account." The reason given is that the statute expressly declares that a discharge is subject, even in re-

spect of claims provable in bankruptcy, to the limitation that no debt created by the fraud of the bankrupt shall be discharged by the proceedings in bankruptcy. This decision was based upon a construction of the act of 1867. The bankruptcy act of 1898, as amended in 1903, enumerating debts not affected by discharge given thereunder provides that a discharge shall release a bankrupt from all his provable debts, except such as are liabilities for obtaining money by false pretenses or false representations. In this respect, both the act of 1867 and the act of 1898, as amended in 1903, differ from the original act of 1898. That is to say, under the law as amended by the act of 1903, as well as under the act of 1867, the creditor's claim for a liability created by false representations need not have been reduced to judgment in order to be excepted from the operation of the discharge.

In the case of *Talcott* v. *Friend,* 103 C. C. A. 80, the court held that "an action for deceit is not based on a rescission of the contract, but implies an affirmance; and the proving of a claim in bankruptcy for the price of goods sold and delivered on a contract, and the receiving of dividends thereon is not a bar to a subsequent action by the creditor for deceit based on fraudulent representations inducing the sale." The court further held that the action of a creditor in opposing a bankrupt's discharge on the ground that he obtained credit on a materially false statement is not a bar to a subsequent action by the objecting creditor against the bankrupt for deceit based upon the same false statement. Moreover, in the present case, the plaintiff withdrew its objections, and there was no finding of the court thereon. Therefore, we hold that the plaintiff is not barred from maintaining this action.

The term, "fraud," in the clause of the bankruptcy act of 1867, defining the debts from which a bankrupt is not relieved by a discharge under the bankruptcy act, was held to mean positive fraud or fraud in fact involving moral turpitude or intentional wrong; and not implied fraud or fraud in law, which may exist without the impo-

sition of bad faith or immorality. *Neal* v. *Clark,* 95 U. S. 709.

While the later bankrupt act differs in language from the act of 1867, the purposes of the acts are the same, and the term fraud in the later act is to be given the same meaning as in the act of 1867. *Bullis* v. *O'Beirne,* 195 U. S. 606.

In *Forsyth* v. *Vehmeyr,* 177 U. S. 177, the court held that "a representation as to a fact, made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong." See also *Morris* v. *Covey* (Ark.), 148 S. W. 257.

In the case of *Hutchinson* v. *Gorman,* 71 Ark. 305, the court said: "In order to sustain an action for deceit, the plaintiff must not only show that he was misled and damaged by a false representation concerning a material fact, but he must go further, and show that the defendant knew at the time he made it that the representation was false, or that, being ignorant of whether it was true or false, he asserted that it was true, and did so with the intention to deceive the plaintiff."

The court followed the principles of law announced in these decisions, and the instructions were full and complete, covering every phase of the issues involved in the case.

The testimony shows that the plaintiff did not discover the fraud of the defendant until in the spring of 1909. The complaint in the present case was filed on April 13, 1911, and summons was issued on that date. Therefore, the action is not barred by the statute of limitations of three years. See *Conditt* v. *Holden,* 92 Ark. 618, and cases cited; *McKneely* v. *Terry,* 61 Ark. 527.

The judgment will be affirmed.

# JOHNSON & COTNAM v. BAXTER.

Opinion delivered May 19, 1913.

1. FRAUD—FRAUDULENT REPRESENTATIONS.—The general agents of an insurance company are not liable in damages to a policy holder for fraudulent representations that the insurance company was solvent, when it was in fact solvent when the representations were made. (Page 355.)
2. INSURANCE—RECEIVERSHIP.—Where a foreign fire insurance company was embarrassed but not adjudged insolvent, and the chancery court appointed a receiver to wind up its affairs in this State, the holder of an uncanceled policy may recover for a loss occurring after the appointment of the receiver. (Page 355.)
3. INSURANCE—DISALLOWANCE OF CLAIM—DUTY OF INSURED.—Where the affairs of an embarrassed fire insurance company have been placed in the hands of a receiver, and an agent of the company presents to the court for allowance the claim of a policy holder growing out of a fire loss, and the agent notified the insured of the disallowance of the claim, and the court's reason therefor, it is the duty of the insured to prosecute an appeal from the decision of the chancellor, if he desired the enforcement of the claim. (Page 356.)

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

STATEMENT BY THE COURT.

R. M. Baxter instituted this action in the circuit court against Johnson & Cotnam to recover damages suffered on account of certain alleged false representations made by the defendants to the plaintiff. On November 28, 1908, the Southern Insurance Company of New Orleans, through Johnson & Cotnam, its general agents in the State of Arkansas, issued a policy for one thousand dollars in favor of R. M. Baxter on certain lumber situated at Eudora, Ark. Herman Carlton was the local agent of the company and procured the policy. Carlton delivered the policy to a Mr. Stevens who was cashier of the bank at Eudora and the agent for Baxter. In January, 1909, Carlton learned that the affairs of the insurance company were in an insolvent condition, and notified Baxter and asked him to send in his policy so that it might be cancelled and the insurance rewritten in an-

other company. Baxter, through his agent, Stevens, sent the policy to Carlton as requested. Before the policy was cancelled, Johnson & Cotnam wrote to Carleton as follows:

"Little Rock, Ark., January 20, 1909.

"Mr. H. Carlton, Lake Village, Ark.

"Dear Sir: We are in receipt of telegram from Southern, stating that they have decided to cease writing business, and to cancel all policies issued after the 18th of this month; hence, we must request cancellation and return of policy 26673, Sam Epstein. Kindly return Southern supplies.

"Yours truly,

"Johnson & Cotnam,

"General Agents."

On January 24, Herman Carlton wrote to Johnson & Cotnam as follows:

"I notice by the papers that the Southern has gone into the hands of a receiver. Kindly advise me what you know about it, and if you have reinsured the line written from my agency. An immediate reply will greatly oblige.

"Yours truly,

"Herman Carlton."

In reply, Johnson & Cotnam wrote the following:

"Little Rock, Ark., January 25, 1909.

"Mr. Herman Carlton, Lake Village, Ark.

"Dear Sir: In reply to your letter of the 24th, will state the writer has just returned from New Orleans and finds the Southern has ample funds with which to pay all losses, and will close a deal with the Peoples National, a million-dollar company of Philadelphia, for reinsurance today or tomorrow.

"Yours truly,

"Johnson & Cotnam,

"General Agents."

On January 28, Johnson & Cotnam telegraphed to Carlton as follows:

"Do not cancel Southern policies; protection good; see letter."

The letter referred to in the telegram is as follows:

"Little Rock, Ark., January 28, 1909.

"Mr. Herman Carlton, Lake Village, Ark.

"Dear Sir: We confirm our telegram asking you not to cancel Southern policies. We have arranged with the Fidelity & Deposit Company for them to assume payment of any losses that may occur under Southern policies in connection with liabilities that now exist to the extent of $20,000.

"The assets of the Southern are in good condition and ample to meet outstanding claims. We hope to be able to send you policies to be substituted for the policies of the Southern in a short while. In the meantime, you can rest assured your customer is protected by the policy which he has.

"Yours very truly,

"Johnson & Cotnam,

"General Agents."

Upon receipt of this letter, Carlton sent the policy back to Stevens, and notified him that the company was good; that he had had a communication from Johnson & Cotnam to that effect. On February 2, 1909, a fire occurred in the plaintiff's lumber plant at Eudora, and his lumber was damaged to the extent of one thousand dollars. On January 21, 1909, in a suit brought by the State of Louisiana, a receiver was appointed for the Southern Insurance Company. There was an ancillary receiver in this State, and on the 22d day of January, 1909, T. T. Cotnam, one of the defendants, was appointed as such receiver, and served without pay. He took charge of the assets of said insurance company in this State, and its affairs here were wound up and settled in the Pulaski Chancery Court. It had assets in this State to the value of four thousand dollars, which were collected and taken charge of by the receiver. The Fidelity & Deposit Company of Maryland was surety on the company's bond in this State to the amount of twenty thousand dollars. The surety company deposited the full amount of its bond in the hands of the receiver to be used by him in settling

claims against the company. The surety company was made a party to the insolvency proceedings. Johnson & Cotnam wrote Carlton after Baxter had suffered the fire loss that it would be necessary for Baxter to file an intervention in the insolvency proceedings in order to recover the amount of his policy. They sent a form to him, and this was returned after having been filled out and duly signed by Mr. Baxter. Carlton said that he saw the defendant Cotnam with reference to the intervention, and asked him if Baxter should employ a lawyer, or whether they would look after the claim for him. That Cotnam told him that Baxter would not have to employ an attorney; that he would look after the claim to the extent of filing the intervention for him. The intervention for Baxter in the sum of one thousand dollars was duly filed in the chancery court and presented to the court with the other claims filed in the insolvency proceedings. The court disallowed the claim of Baxter on the ground that the fire occurred after the receiver had been appointed. The claim of Baxter was filed in the chancery court on the 19th day of April, 1909. One June 25, 1909, the decree of the chancellor disallowing the claim of Baxter, was entered of record, and Baxter admits that Cotnam told him shortly afterward that the claim had not been allowed by the chancery court. Shortly after this, Roy Campbell, an attorney at Little Rock, spoke to the receiver about Baxter's claim, and the circumstances of its disallowance were related to him by Cotnam.

Carlton testified that after the claim had been disallowed, he talked with Mr. Cotnam about a settlement, and Cotnam asked him to take the matter up and see if Baxter would settle for 85 per cent of his claim. After taking the matter up with Baxter, Carlton told him they would accept that amount, and Cotnam and the agent of the surety company, after consultation between themselves, reported to him that they could not pay the 85 per cent of the claim, giving as a reason therefor that the claim was for a loss which occurred after the appointment of a receiver, and on that account the claim had

been disallowed. On October 11, 1909, the present suit was instituted. The claims which were allowed by the court amounted to $22,170.64, and the assets of the company in the State of Arkansas, including the amount of the bond above referred to, were $24,000.

There was a verdict and judgment for the plaintiff, and the defendants have appealed.

*J. W. & J. W. House, Jr.,* for appellant.

1. Before a representation is actionable, it must be, (1) material; (2) it must be made by one who either knows it to be false, or not knowing, asserts it to be true; (3) it must be made with the intent to have the other party act upon it to his injury, and such must be its effect. 99 Ark. 442; 38 *Id.* 311; 101 *Id.* 100; 97 *Id.* 268; 19 *Id.* 18; 46 *Id.* 250. There was no misrepresentation. Fraud is never presumed. 11 Ark. 383.

2. The mere expression of an opinion can not furnish cause of action based upon fraudulent conduct or action. 137 Fed. 744; 50 S. W. 596; 120 Mass. 495; 101 Ill. App. 541; 140 Fed. 888; 6 Pa. Sup. 536; 32 Am. Rep. 569; 108 N. W. 723; 89 N. W. 638; 71 Conn. 1; 43 S. E. 52; 85 S. W. 174.

3. Appellee should have appealed. 95 Ark. 396.

4. False representation is not actionable unless it is made with knowledge of its falsity. 93 S. W. 810; 31 Ark. 289; 52 Am. Dec. 338; 25 *Id.* 54; 35 *Id.* 339; 52 Am. Rep. 285.

*B. F. Merritt,* for appellee, argued the cause orally.

HART, J., (after stating the facts). The plaintiff, in his complaint, bases his right to recover on the alleged fraudulent representations made in the letters set out in the statement of facts. The particular representations which he alleges were false and which were made with intent to deceive him, and which were relied upon by him to his loss and injury, are contained in a letter written by the defendants to Carlton on the 28th day of January, 1909. In that letter, the defendants stated that the assets of the Southern Insurance Company were in good condition and ample to meet the outstanding claims. In it the

defendant stated: "We have arranged with the Fidelity & Deposit Company for them to assume payment of any losses that may occur under Southern policies in connection with liabilities that now exist to the extent of $20,000."

The natural effect of this statement would be to repress any further inquiry upon the part of the plaintiff as to the solvency of the insurance company, and to lull him into a sense of security as to his policy. Representations of this character, if false and made with intent to deceive the plaintiff, and relied upon by him to his loss and injury, are actionable. The undisputed evidence, however, shows that the statement was true in every respect, and was made by the defendants in good faith. The receiver had in his hands four thousand dollars of the assets of the company. In addition to this, he had made an agreement with the surety company to deposit in the chancery court the sum of $20,000, the full amount of the bond upon which it was liable as surety, and under the agreement, the amount of the bond was to be administered as assets of the company. This made the sum of $24,000 as available assets of the company at the time the letter was written. The claims proved and allowed by the court amounted to $22,170.64. Thus, it will be seen that the assets were sufficient to pay all the outstanding claims against the company. It is true the chancellor disallowed the claim of the plaintiff, but under the ruling of this court in the case of the *Federal Union Surety Co.* v. *Flemister,* 95 Ark. 389, his action in so holding was error. In that case, which was decided after the chancellor had refused to allow the claim of the plaintiff in the present case, the court, in deciding a precisely similar question, held:

"1. The courts of this State have no authority to dissolve a foreign corporation, but may appoint a receiver to collect and distribute its assets in this State to its creditors.

"2. Where there was no adjudication of the insolvency of a foreign mutual insurance company, and no

decree dissolving the corporation, but there was an order of a chancery court appointing a receiver to collect and distribute its assets in this State to the creditors, a policy holder whose policy has not been cancelled, may recover for a loss which accrued after the receiver's appointment."

So it may be said that if the plaintiff had prosecuted an appeal from the action of the court in not allowing his claim, he would have recovered. Not having done so, he is in no attitude to complain of the defendants. Cotnam presented his claim to the chancellor for allowance, and the chancellor disallowed it on the ground that the loss occurred after the receiver had been appointed. Cotnam notified him of the ruling of the chancellor and of his reasons for so holding. It was not then the duty of Cotnam to prosecute an appeal from the decree of the chancellor. It was the duty of the plaintiff, himself, to do that. Hence, the loss suffered by the plaintiff arose from his neglect to prosecute an appeal from the decree of the chancellor refusing to allow his claim, and his loss did not result from any false representations made to him by the defendants in regard to the ability of the insurance company to pay losses on claims outstanding against it. The representations made by the defendants to the plaintiff in the letters set out in the statement of facts were true in every respect, and did not cause his loss in the present case. The testimony on this question is undisputed, and no inference unfavorable to the view we have expressed could be deduced from it.

It follows that the court erred in not directing a verdict for the defendants as requested by them, and for this error, the judgment must be reversed, and, it appearing that the case has been fully developed, and that no other testimony favorable to the plaintiff could be obtained on a new trial of the case, it is ordered that the complaint of the plaintiff be dismissed.

# BASS v. STARNES.

Opinion delivered May 26, 1913.

1. DEEDS—CONSIDERATION—PAROL EVIDENCE.—In an action for breach of covenants in a deed, it is admissible on the part of the defendant to show that the actual consideration was less than that expressed in the deed, for the purpose of diminishing the damages for breach of the covenant. (Page 360.)
2. DEEDS—EVIDENCE—BREACH OF COVENANTS OF WARRANTY—DAMAGES.—In a suit against a vendor of land for breach of covenants of warranty, evidence on the part of the vendor is admissible to show that the vendor told the vendee that there was an unexpired lease on the land conveyed, and that there was no rent to be paid on it, and that the vendee agreed to it, such facts being a part of the consideration in fixing the price of the land sold, and the evidence is admissible on the question of reduction of damages for breach of covenant of warranty. (Page 360.)
3. COVENANTS—COVENANT OF WARRANTY—BREACH—DAMAGES.—In the absence of special circumstances, the measure of damages for breach of covenant of warranty, when the encumbrance is an unexpired term or lease, is the fair rental value of the land to the expiration of the term. (Page 361.)
4. COVENANTS—BREACH—DAMAGES.—Nominal damages only are to be recovered for a merely technical breach of covenant against encumbrances. (Page 361.)
5. APPEAL AND ERROR—ERROR—WAIVER.—Where counsel urge no objections in their brief to instructions given by the court, any objections to them will be deemed waived. (Page 361.)
6. APPEAL AND ERROR—ORDER OF COURT—NOMINAL DAMAGES.—Where appellant is entitled to nominal damages only, the judgment will be reversed, but not remanded, and judgment will be entered in the Supreme Court for nominal damages and costs. (Page 362.)

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

STATEMENT BY THE COURT.

On the 14th day of December, 1910, Edgar Bass brought this suit in the circuit court against Noah Starnes and Edward Cleveland for the possession of a tract of land in Clay County, Arkansas. Before the trial of the case Starnes, who was in possession, had surrendered the land to Bass, who had purchased the same from Cleveland on the 6th day of January, 1909. The

action was tried at the April, 1912, term of the court, and was treated as an action against Cleveland for damages for breach of his covenant of warranty. The facts are substantially as follows:

On January 6, 1909, Edward Cleveland conveyed the land in question to Edgar Bass, and the consideration recited in the deed was $800.00 cash in hand paid. The deed contained the words "grant, bargain, sell and convey," and also the following clause, "and we do hereby covenant with the said Edgar Bass that we will forever warrant and defend the title to the land against all claims whatever." Plaintiff testified that the rental value of the land was six dollars per acre during the time he was kept out of possession.

Defendant introduced a lease from H. R. Weese to Noah Starnes, dated June 13, 1906. The lease was from the first day of January, 1906, to the first day of January, 1912, a period of six years. By the terms of the lease it was agreed that Starnes should take possession of the land and clear and put in cultivation as much as he might desire, and in payment therefor should have the crops grown on the place during the term of the lease. Starnes entered into possession of the land under the terms of the lease, and cleared and put into cultivation a portion of it.

Over the objection of the plaintiff, the defendant was also allowed to introduce evidence to the effect that he told Bass before he purchased the land that he could not move on it and have any benefits from it until the lease expired and that Bass agreed to this. There was a trial before a jury and a verdict for the defendant. From the judgment rendered the plaintiff has appealed.

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

The deed from Cleveland to Bass is plain, unambiguous and complete in its terms. Starnes' possession under the lease and appellant's knowledge thereof, in no wise affects appellant's right to recover for breach of the covenants of warranty in the deed. Cleveland's testimony to the effect that he told appellant that he

would get no possession of nor benefit from the land for three years was not admissible. 100 Ark. 365; 99 Ark. 218-223; 17 Cyc. 620 (D), and cases cited; 8 Am. & Eng. Enc. of L. 199 (2).

In an action for breach of covenants in a deed, evidence is admissible to show that the actual consideration was greater or less than that expressed in the deed for the purpose of increasing or diminishing the damages; but not for the purpose of defeating the deed or a recovery on the covenants. 71 Ark. 497; 54 Ark. 196; 144 S. W. 198.

*C. T. Bloodworth,* for appellees.

Under the lease, defendant Starnes was in possession of the land as tenant to Cleveland, and the testimony complained of is merely testimony showing a novation of the rent contract between Starnes and Cleveland, and appellant's agreement to accept Starnes as his tenant. The testimony was admissible to show the character of the possession. 2 Am. Enc. Ann. Cases, 1, and cases cited; 19 Ala. 722; 93 U. S. 379.

One who purchases land in possession of another, takes it subject to whatever right, title or interest he may possess. 76 Ark. 25. Courts will not limit themselves to the terms of a written contract in ascertaining the intention of the parties to it. 13 Ark. 112; 68 Ark. 326.

HART, J. (after stating the facts). In their brief counsel say that this appeal is prosecuted solely upon the theory that the court erred in admitting evidence to the effect that Cleveland told Bass when he purchased the land that he could not move on it and have any benefit from it until the lease had expired, and that Bass agreed to this. The deed in question contained a general covenant of warranty and the lease in question was a breach of that covenant. *Crawford* v. *McDonald,* 84 Ark. 415.

In the case of *Barnett* v. *Hughey,* 54 Ark. 195, in discussing the measure of damages in an action for breach of the covenant of warranty, the court said:

"In such actions, parol evidence is admissible, on the part of the plaintiff, to show that the actual consideration was greater than that expressed in the deed, for the purpose of increasing the damages, and, on the part of the defendant, to show that it was less, for the purpose of diminishing them; but not for the purpose of defeating the deed or a recovery on the covenants." Citing authorities.

Again, in the case of *Davis* v. *Jernigan,* 71 Ark. 494, the court said that "in actions for breach of covenants in the deed it is admissible, on the part of the plaintiff, to show that the actual consideration was greater than that expressed in the deed, for the purpose of increasing the damages, and on the part of the defendant to show that it was less, for the purpose of diminishing them; but not for the purpose of defeating the deed or a recovery on the covenants. Citing authorities.

In the case of *J. H. Magill Lumber Co.* v. *Lane-White Lumber Co.,* 90 Ark. 426, the court held:

"Though the recitals in a bill of sale can not be contradicted by parol evidence for the purpose of defeating such instrument, it is competent to prove by such evidence that the consideration has not been paid as recited, or to establish the fact that other considerations not recited in the deed were agreed to be paid, when such proof does not contradict the terms of the writing."

The vendor told the vendee that there was an unexpired lease on the land, and that there was no rent to be paid on it, and the vendee agreed to it. This fact then became a part of the consideration in fixing the price for which the land was to be sold.

Therefore, it will be seen that the testimony objected to was admissible on the question of the reduction of damages, and the court did not err in admitting it. Neither did the court err in refusing to give instruction numbered one, asked by the plaintiff, which is as follows:

"You are instructed to find for the plaintiff and against Cleveland for the amount of three years rent on the land in controversy, together with interest thereon

at 6 per cent from the time rent is ordinarily due to this date."

It is true that "where the incumbrance is an unexpired term or lease, the general rule, at least in the absence of any special circumstance, is that the measure of damages will be the fair rental value of the land to the expiration of the term. The underlying principle is that the damages should be estimated according to the real injury arising from the existence of the incumbrance, which, in the case supposed, is presumably and ordinarily the value of the use of the premises for the time during which the vendee has been deprived of such use." *Fritz* v. *Pusey* (Minn.), 18 N. W. 94; Rawle on Covenants for Title (5 ed.), sec. 191. See also case note 35, L. R. A. (N. S.), 799.

The vice of the instruction, however, is that it ignored the testimony of the defendant on the reduction of damages. Starnes had agreed to clear and put in cultivation as much of the land as he desired, and in consideration therefor was to have the land to the end of his term free from rent. Cleveland testified that he told Bass of the outstanding lease and that he could not have any benefit from the land until the expiration of the lease and Bass agreed to this. This evidence, as we have already seen, was competent to reduce the damages. It tended to show that the incumbrance had inflicted no actual injury upon the plaintiff and he was therefore, under the defendant's evidence, only entitled to nominal damages. The rule is that nominal damages only are to be recovered for a merely technical breach of covenant against incumbrances. Rawle on Covenants for Title, (5 ed.), sec. 188. See also *Chase* v. *Barnes,* (Kan.), 107 Pac. 769.

No objections have been urged by counsel in their brief to the instructions given by the court, and under our rules of practice any objections to them will be deemed to have been waived. Counsel in their brief specifically base their right to a reversal of the judgment upon the grounds which we have discussed.

Where a plaintiff is entitled to nominal damages only, the judgment will be reversed but the cause will not be remanded. In such cases judgment will be entered here for nominal damages and the costs. *Dilley* v. *Thomas*, 106 Ark. 274.

It follows that the judgment will be reversed and judgment will be entered here for the plaintiff for nominal damages and the cost of the appeal.

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GOLDSMITH BROTHERS SMELTING & REFINING COMPANY *v.* MOORE.

Opinion delivered May 26, 1913.

1. MARRIED WOMEN—CONTRACT OF SURETYSHIP—SEPARATE ESTATE.—The personal liability of a married woman on contracts is restricted to contracts made for her own use and benefit or for the use and benefit of her separate estate; and a married woman can not bind herself as surety or guarantor for the debts of her husband or for a third person. (Page 364.)
2. MARRIED WOMEN—CONTRACT OF SURETYSHIP—SEPARATE ESTATE.—Where a married woman becomes a surety for her husband, her separate estate is not chargable for the performance of her undertaking unless her contract created a lien, on her separate estate, as surety for the payment of the debt. *Held*, when a wife in undertaking to become surety for her husband uses the language: "and pledge my separate estate for the payment of said account," the language is too indefinite and uncertain, and does not create a lien upon her separate estate which equity will enforce. (Page 365.)
3. MARRIED WOMEN—CONTRACT OF SURETYSHIP—LIEN.—In order for a married woman to bind her separate estate by a contract of suretyship for the debt of her husband, it must appear from the writing that she intended to create a lien, and the particular property to which the lien is to attach, must be clearly described or pointed out. (Page 365.)

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

STATEMENT BY THE COURT.

This was an action instituted in the chancery court by Goldsmith Bros. Smelting & Refining Company against D. L. Moore and Mrs. Duncan L. Moore, his

wife. The complaint alleges that the plaintiff sold and delivered to the defendant, D. L. Moore, a bill of goods upon the faith of a letter written to it by his wife, which is set out in the complaint. The letter is as follows:

"Little Rock, Ark., September 8, 1911.

"Goldsmith Bros. Smelting & Refining Company, Heyworth Building, Chicago, Ill.

"Gentlemen: Mr. D. L. Moore of this city, who is engaged in the dental supply business under the name of D. L. Moore Dental Supply Company, desires to purchase a bill of goods from you, and desires some credit on same.

"The object of this letter is to notify you that I hereby guarantee the payment of any account which you may have against Mr. D. L. Moore or the D. L. Moore Dental Supply Company, and pledge my separate estate for the payment of said account.

"Yours truly,

"Mrs. Duncan L. Moore."

The complaint further alleges that Mrs. Duncan L. Moore was at the time she wrote said letter and is now the owner of a large amount of real and personal property in this State. That the exact nature, extent, character and location of said property is unknown to the plaintiff. The prayer is that the debt above mentioned be declared a lien upon the separate property of the defendant, Mrs. Duncan L. Moore, and that so much of it as may be necessary be sold in the satisfaction of said claim. Mrs. Duncan L. Moore filed a demurrer to the complaint, which was sustained by the court. The plaintiff has appealed.

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

1. Mrs. Moore was liable as a principal, and the contract was such as is authorized by the "married woman's act." 29 Ark. 346; 34 *Id.* 17; 39 *Id.* 238; 62 *Id.* 150; 92 *Id.* 604; Kirby's Digest, § 5207; Const., art. 9, § 7; Kirby's Digest, § § 5213, 5217; 103 Ark. 246; 78 Ark. 275; 92 *Id.* 604.

2. The obligation is an express charge upon her separate estate in equity. Pom. Eq. § § 1121-1128, note; § 1126, p. 2190; 29 Ark. 346; 47 S. W. 85; 4 *Id.* 386; 24 *Id.* 1128; 46 Mo. 532; 1 Am. Rep. 541; 15 Gray (Mass.), 328; 78 Am. Dec. 216; 18 Am. Rep. 612; 42 N. Y. 613; 12 Am. Rep. 480; 36 N. Y. 600; 37 *Id.* 35; 158 Mass. 94; 59 N. W. 351; 35 Oh. St. 296; 62 Ark. 150; 147 U. S. 118; 3 Minn. 202; 23 *Id.* 337; 17 Ark. 189; 32 *Id.* 445; 33 *Id.* 266; 34 *Id.* 32; 35 *Id.* 480; 45 *Id.* 117; 39 *Id.* 238; 10 *Id.* 516; 98 *Id.* 265; 78 *Id.* 275; 92 *Id.* 604; 40 *Id.* 62; 41 *Id.* 177; 52 *Id.* 126; 102 Ark. 383; 78 Ark. 516; 89 *Id.* 354; 70 *Id.* 5; 154 S. W. 187.

*Horace Chamberlin* and *Wallace Townsend,* for appellee.

A married woman has no power to guarantee her husband's debts. Kirby's Digest, § § 5207, 5214; 34 Ark. 17; 39 *Id.* 238; 2 Perry on Trusts, § § 660, 680; 32 Ark. 445; 33 *Id.* 266; 62 *Id.* 150; 66 *Id.* 117, 146 S. W. 499; 21 Cyc. 1567, and note; 47 S. W. 85; 86 N. W. 568. The demurrer was properly sustained.

HART, J., (after stating the facts). There is no direct and explicit averment in the complaint that the contract for the sale of the goods was for the use and benefit of Mrs. Duncan L. Moore or for the use and benefit of her separate property. Moreover, the letter set out in the statement of facts was made a part of the complaint and thus became a part of the record. It was the foundation of the action and will control the general allegations of the complaint. *American Freehold Land Mortgage Co.* v. *McManus,* 68 Ark. 263; *Beavers* v. *Baucum,* 33 Ark. 722; *Buckner & Co.* v. *Davis & Wife,* 29 Ark. 444; 31 Cyc. 85.

It is well settled in this State that a married woman can not bind herself as surety or guarantor for the debts of her husband or for a third person, but her personal liability on contracts is restricted to contracts made for her own use and benefit or for the use and benefit of her separate estate. *Sidway* v. *Nickol,* 62 Ark. 146; *Hardin* v. *Jessie,* (Ark.), 146 S. W. 499, and cases cited; *McCar-*

*thy* v. *Peoples Savings Bank,* 108 Ark. 151; *Sparks* v. *Moore,* 66 Ark. 437.

The contract in question was made for the purchase of certain dental supplies for the husband of Mrs. Duncan L. Moore, and was not made for her use and benefit or for the use and benefit of her separate estate. She became a surety for her husband and her separate estate would not be chargeable for the performance of her undertaking unless her contract created a lien on her separate estate or some portion of it, as surety for the payment of the debt. The words used are "and pledge my separate estate for the payment of said account." The question then is, does the language used create a lien upon her separate estate which a court of equity will enforce as an equitable mortgage? We think the language used is too indefinite and uncertain for that purpose. In such cases the form of the writing or agreement is not important, provided it sufficiently appears that it was thereby intended to create a lien, but the particular property to which the lien is to attach must be clearly described or pointed out. In the case of *Bell* v. *Pelt,* 51 Ark. 433, the court held:

"Where an instrument is intended to secure a debt by fixing a charge on land which it properly describes, equity will give effect to the intention of the parties by enforcing the lien, although the writing is not in the form of the ordinary technical mortgage and contains neither words of grant or defeasance."

Mr. Pomeroy, in discussing the question, said:

"The form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final intent and purpose rather than at the form; and if the intent appears to give, or to charge, or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows."

In the instrument sued on no particular property is described and in the application of the principles above

announced, in order to create a lien, in equity, on defendant's separate estate, it is necessary that the writing or agreement should describe or point out the particular property to which the lien is to attach, and, not having done so, it would not create an equitable lien.

The decree will be affirmed.

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WELLS v. LENOX.

Opinion delivered December 9, 1912.

1. JUDICIAL SALES—SALE UNDER FORECLOSURE—INADEQUACY OF PURCHASE PRICE.—Where property is sold at a judicial sale, in the absence of fraud and unfairness, mere inadequacy of price, however gross, does not invalidate the sale. (Page 368.)
2. JUDICIAL SALE—WHEN COMPLETE—RIGHT OF PURCHASER.—A judicial sale is not complete until confirmation by the court, and may be set aside before it is confirmed, and until confirmed by the court, a deed made to the purchaser confers no right to the property. (Page 369.)
3. JUDICIAL SALE—CONFIRMATION.—While the purchasers at a judicial sale acquire certain rights, it is proper for the chancery court to refuse to confirm the sale when the conduct of the parties has been such as to render unfair and inequitable a confirmation of the sale when it has been made for an inadequate price. (Page 377.)

Appeal from Desha Chancery Court; *Zachariah T. Wood,* Chancellor; affirmed.

*F. M. Rogers,* for appellant.

In the absence of fraud and unfairness, mere inadequacy of price, however gross, does not invalidate a judicial sale. 20 Ark. 381; 44 *Id.* 502; 47 *Id.* 86; 52 *Id.* 316; 56 *Id.* 240; 65 *Id.* 152; 66 *Id.* 490; 74 *Id.* 324; 77 *Id.* 216. There is no proof of accident or mistake.

*J. Bernhardt* and *Rose, Hemingway, Cantrell & Loughborough,* for appellees.

The property was sold for a grossly inadequate price. Where there is any unfairness, mistake or misunderstanding about a sale, to the prejudice of the rights of the owners the sale will be set aside. 20 Ark. 381; 44 *Id.* 502; 47 *Id.* 86; 52 *Id.* 316; 56 *Id.* 240; 65 *Id.* 152; 66 *Id.* 490; 74 *Id.* 324; 77 *Id.* 216; 34 *Id.* 346; 62 *Id.* 215;

Rover, Jud. Sales, § § 126-8; 12 A. & E. Enc. Law, 219; 73 Ark. 37; 86 *Id.* 255; 90 *Id.* 166; 67 *Id.* 200; 73 *Id.* 489.

KIRBY, J. On March 24, 1911, Sledge & Norfleet Company brought suit for the balance due upon a promissory note of S. H. and Addie A. Lenox and to foreclose a mortgage given to secure the payment thereof. At the October term, 1911, a decree was rendered in their favor for $1,844.25, and the property conveyed by the trust deed ordered sold and a commissioner appointed for that purpose. The commissioner advertised the sale for January 22, 1912, and on that day sold the real estate for $3,850 to M. Wolchanski, who waived the right to credit and paid the amount of his bid in cash and received from the commissioner a certificate of purchase which he subsequently assigned to J. E. Wells, appellant. The commissioner reported the sale to the April term, 1912, of the court and appellees, S. H. and Addie A. Lenox, filed exceptions to the report.

In February, 1912, appellees, S. H. and Addie A. Lenox, filed a complaint in the chancery court against the purchaser and his assignee, J. E. Wells, alleging that Wolchaski had assigned the certificate to Wells, that the latter had taken possession of the lands before the confirmation of the sale, that a part of the lands sold by the commissioner was not their property but the property of Addie F. Lenox, who was also a party to this suit, that the sale by the commissioner was fraudulent, unjust, inequitable and for a grossly inadequate price, and prayed an order restraining Wells from taking possession and other relief. The temporary restraining order was issued.

J. E. Wells, the assignee of the certificate of purchase, answered that he was the owner of the certificate of purchase issued to Wolchaski, that the property had been abandoned by Lenox at the time of his purchase thereof and that he entered for the purpose of protecting his interests as the holder of the certificate of purchase; denied the alleged right of redemption and that the sale was fraudulent, unjust, inequitable and for a grossly in-

adequate price; alleged the existence of a prior mortgage upon the said land to secure a debt of $4,700, the payment of which he assumed by the purchase thereof and $380 past due interest upon said first mortgage, all of which he was compelled to pay to the holder to protect himself. He also filed an intervention to the original, setting up the same matters.

The suits were consolidated, and upon hearing the chancellor found that no fraud was perpetrated upon appellees, S. H. and Addie A. Lenox, in reference to the sale. That they were by accident and mistake deprived of the opportunity of attending the sale of the land and of the opportunity to procure funds to satisfy the amount due thereon prior to the date of the sale and that the price for which the land sold at the commissioner's sale was grossly inadequate.

It ordered the appellees to pay to Sledge & Norfleet Company $1,948.30 and cost, and upon the payment refused to confirm the sale and decreed that it should be set aside. It further directed the court commissioner to pay to appellant, John E. Wells, the $3,850 he had paid for the certificate of purchase for said land. From the decree this appeal comes.

Appellant contends that the court erred in sustaining the exception to the report of the sale and setting aside the same.

From our review of the testimony we are not able to say that the chancellor's finding that the land sold for a grossly inadequate price is against the preponderance of the testimony. Several of the witnesses testified the lands were worth between $15,000 and $25,000—some of them placing the value at $20,000, an amount double the price for which they sold; the inadequate price alone, however, would not invalidate the sale. "The rule in reference to judicial sales is that in the absence of fraud and unfairness, mere inadequacy of price, however gross, does not invalidate the sale." *Brittin* v. *Handy,* 20 Ark. 381; *Fry* v. *Street,* 44 Ark. 502; *Colonial & United States Mortgage Co.* v. *Sweet,* 65 Ark. 152; *Sawyer* v. *Hentz,* 74 Ark. 324.

Such a sale is not complete, however, until confirmation and may be set aside before it is confirmed.

In *Wells* v. *Rice,* 34 Ark. 346, the court said: "But until confirmed by the court, a sale made under its decree is not completed and a deed to the purchaser confers upon him no right to the property.

"The theory of sales of this character is 'as the court says in *Sessions* v. *Reay,* 23 Ark. 41, 'that the court is itself the vendor, and the commissioner, or master, its mere agent in executing its will. The whole proceeding, from its incipient stage, up to the final ratification of the reported sale, and the passing of the title to the vendee, and the money to the person entitled to it, is under the supervision of the court. The court will confirm or reject the reported sale, or suspend its completion, as the law and justice of the case may require.' Ror. on Jud. Sales, § 1; 2 Frem. Void Jud. Sales, § 41."

And in *Greer* v. *Anderson,* 62 Ark. 215, the following:

"Courts may generally be expected to confirm sales which have been conducted according to the directions and upon the terms prescribed by them, unless intervening circumstances should make it unwise or unjust to do so. But they are not compelled to confirm them, and no purchaser at such a sale has the right to rely absolutely upon the order of the court directing the sale, and the fact that the agent of the court has pursued the terms prescribed in making the sale."

In *The Bank of Pine Bluff* v. *Levi,* 90 Ark. 166, the court said: "Before the confirmation of the commissioner's sale, irregularities may be shown that the sale was not made in accordance with the provisions of the decree; or any misconduct or unfairness may be shown, in order to set aside such sale. And upon all these matters, the chancery court passes when it makes its decree of confirmation. And from such an order or decree of confirmation an appeal lies. Ror. on Judicial Sales, par. 132."

It is nevertheless true that the purchasers at such

sale acquired rights which can not be disregarded except for sufficient reason. In *Robertson* v. *McClintock,* 86 Ark. 255, the court said:

"It is now, however, the settled law of this State, as it is of most of the States, that the highest bidder at a judicial sale, to whom the property has been struck off by the commissioner, acquires vested rights, which must be respected by the court. *Colonial & U. S. Mortgage Co.* v. *Sweet,* 65 Ark. 152; *Banks* v. *Directors of St. Francis Levee Dist.,* 66 Ark. 493; *George* v. *Norwood,* 77 Ark. 216.

"Under these decisions, the confirmation is not the sale, but only what the word implies, the approval of something already done. The sale is made by the commissioner. Confirmation only gives the court's sanction to something that has already taken place, and authorizes the commissioner to execute the deed. The purchaser can not take possession until he receives this, but it will not do to say that a sale which the court must confirm amounts to nothing. If the sale has been unfairly made, or is for a shockingly inadequate price, the owner can object to the confirmation."

The evidence shows that appellees were and had been long indebted to Sledge & Norfleet Company and that upon the recovery of the judgment and the decree of the sale of the property mortgaged to secure the debt, S. H. Lenox went to the Union Trust Company of Little Rock to borrow money to pay off said judgment and the prior mortgage upon said lands. He was told by the president of said banking company that he thought that there would be no trouble about lending him the amount desired and that he should get up his abstracts and submit them as soon as he could. He immediately ordered the abstracts made in December in Desha County; there was some delay about their completion and when finally delivered they were found not to be correct. Meanwhile the date of sale was approaching and appellee, Lenox, was anxious about procuring the loan and insisted with the officers of the company that it should not be longer de-

layed, and, that the lands having been advertised for sale, that the bank should lend them enough money in any event to pay off the judgment under which the sale was ordered. He was assured by the president of the company that he would let him have the money as soon as they could look over the abstracts, and also that he would arrange the matter, and thought he could get Mr. Norfleet to extend the time of sale until the abstracts could be received and the necessary papers prepared. Lenox was thereafter assured by another person that he could and would procure the loan for him if the trust company did not, but understood that he was to get the money from the trust company and declined the offer.

About the 10th or 12th of January, 1912, Lenox again went to the officers of the trust company about the loan and was urged to hurry his abstracts. He thereupon directed by telephone the abstract company at Arkansas City to prepare and deliver the abstracts by a certain day, which it agreed to do. It failed, however, to finish the abstracts in that time. The trust company wrote to Sledge & Norfleet Company at Memphis that they expected to make the loan to pay off the decree and subsequently Mr. Reyburn, its president, had several telephone conversations with Mr. Norfleet at Memphis, in one of which he suggested a postponement of the sale until matters could be concluded. He stated "Mr. Norfleet did not expressly agree to a postponement at that time but did not refuse it, and I understood that there would be no difficulty about it. I asked Norfleet to send his mortgage and what abstracts of title he had in his possession in order that the trust company might determine the amount necessary to take up the outstanding debts. Mr. Norfleet agreed to have Mr. Rogers send all papers to me for his information. On January 12, 1912, Mr. Rogers wrote a letter to the Union Trust Company, addressing it by mistake to Pine Bluff, Arkansas. The letter was forwarded to Little Rock and reached me on January 15. In this letter Mr. Rogers said: 'At the request of Mr. F. M. Norfleet, I herein enclose you origi-

nal mortgage to S. H. Lenox, and a pencil memorandum, showing the various payments made on the note and the balance as due thereon on the 15th day of March, 1911. The original note is filed in the chancery court at Arkansas City. The decree was for the amount shown due on this statement, plus interest up to the 20th day of October, 1911; it bears interest from that date up to the present time at the same rate. I sincerely trust that you will make the loan. Kindly advise me both here and at Arkansas City how the matter progresses, as I will be at Arkansas City all next week."

On receipt of this letter the Union Trust Company wrote Messrs. Sledge & Norfleet that they had received the Lenox papers and that they were misdirected, but they did not include the abstract of title which it was necessary to have before the loan was made, and that Mr. Lenox had assured them that it was with these papers, and concluded by asking them to send the abstract at once if they had it, and saying it is only about a week now until the sale, and if we are going to do anything we must do it promptly. On the 18th of January, Mr. Rogers wrote the Union Trust Company, suggesting the postponing of the sale until February 10, as follows:

"Gentlemen: Mr. Lenox wrote the Desha Bank & Trust Company requesting an abstract of two tracts of land to be completed and delivered by the 20th. I take it that this was in reference to procuring the loan from you to pay off Sledge & Norfleet's decree. Mr. Thane and I find that Mr. Lenox has 160 acres which was not covered by any mortgage except to Sledge & Norfleet. If you make the loan, this will give you first lien on this acreage. Mr. Thane tells me that he can not get the abstract ready under ten days. Neither Sledge & Norfleet or I wish to sell this property if the sale can be avoided. I therefore suggest that if there is a strong probability of your making the loan that you have Mr. Lenox and his wife write immediately by return mail at this point, requesting that the sale be postponed until February 10. This will give ample time to complete the loan."

Reyburn testified this letter was probably received at the bank's office on the afternoon of January 19, but that he was not in at the time and it was put on the file of correspondence with reference to the Lenox matter and in some way covered up by some other letters in the file. That he was in the office a short time Saturday morning on the 20th but did not discover the letter until about noon of the 22d of January, nor had any intimation of its contents until Monday, January 22. On Saturday night, January 20, the day after the receipt of said letter in the office of which he was ignorant, he telephoned from his residence to Mr. Norfleet at his home in Memphis, asking why he had heard nothing further about the Lenox matter and "Mr. Norfleet told me he had written Judge Rogers, that Judge Rogers had written me or would write me that there would be an adjournment of the sale so as to give me time to go through papers and complete the loan with Lenox for the purpose of paying off the decree. When I had this telephone conversation I was satisfied that the sale would not be made on the following Monday, January 22, and gave the matter no further concern. After talking with Mr. Norfleet I tried to get Mr. Lenox on the phone in Little Rock but could not find him that night. Sunday night he called my residence on the phone and I advised him of the information which Mr. Norfleet had given me and told him that Mr. Rogers would not make the sale next day—Monday—but would adjourn it. He was greatly relieved, and I heard nothing further about the matter until about 12 o'clock on January 22, when Mr. Lenox phoned me that Mr. Rogers was going ahead and make the sale and wanted to know why I had not answered his letter of the 18th. I told him that I had no such letter and immediately began an investigation and found the letter already referred to. Mr. Rogers' letter was dated January 18, which was Thursday, and my last telephone conversation with Mr. Norfleet was on Saturday night, January 20, and I thought Mr. Rogers had received or would receive further notice from Mr. Norfleet not to

make the sale, while Mr. Norfleet had evidently thought I had received the Rogers letter of the 18th and knew the conditions on which the sale would be adjourned.

On the 22d, the day of the sale, Norfleet wrote Reyburn as follows: "I had a letter today from Judge Rogers, saying there were 160 acres of land described in our trust deed not in the one held by Mr. Rose, and he had adjourned the sale of the land on a request he expected to receive from you in the mail of Saturday's or Sunday's date, asking him to do so, with the understanding if the title was satisfactory, which he was satisfied it was, you would take up the loan, and there would be no occasion for making the sale."

On the 22d Mr. Lenox called up Mr. Thane, the abstracter at Arkansas City, on the telephone and understood he had a conversation with Mr. Rogers and Mr. Rogers was present with Thane listening to the conversation. Lenox asked if Rogers had received Mr. Norfleet's message and Thane, after talking with Rogers, replied, "No; no other than his instructions." Lenox said, "Why, Mr. Rogers, Mr. Reyburn had told me a few minutes ago they had instructed you to call this sale off," and Mr. Rogers replied, "I am following my instructions." Lenox then asked Rogers to call Reyburn over the telephone and Rogers replied that he should have Reyburn call him. He was unable to get Reyburn by telephone for an hour or such a matter, and finally got him on the phone and Mr. Reyburn told him that Mr. Norfleet had given Mr. Rogers his instructions and that he would not be molested down there. Lenox then went to Reyburn's office, still feeling uneasy about the situation, but did not find him until about 3 o'clock on the day of the sale and after it was made. Rogers stated that he did not communicate with Lenox over the phone prior to the sale, that on that day about noon he was in the director's room in the bank at Arkansas City awaiting a reply to his letter of the 18th inst.; that Mr. Thane was called to the phone and he heard him say, "He is here." Thane then turned to me and said, "Lenox is

now talking about his matter; do you wish to say anything to him?" and my reply was, "Please tell him that unless he or Mr. Reyburn requests the postponement, the sale will occur before 3 o'clock this afternoon. I am not positive but my recollection is that I said "request by wire." After the day of the sale, the next day, probably, Mr. Lenox called me over the phone and asked what had been done. I told him and he said, "Why did you sell it?" I replied, "Because you would neither pay nor ask a postponement." "Why did you not act on my message to you through Mr. Thane on yesterday?" His reply was, "That he could not find Mr. Reyburn." My recollection of the hour of Lenox's conversation was about 1 o'clock. I remained at the bank waiting for the message until 2:10 p. m., and then went to the courthouse and had the commissioner make the sale.

Lenox on cross examination by Rogers answered as follows:

Q. 6. Did he not tell you that I requested him to say to you that that sale would occur before 3 o'clock unless you or Mr. Reyburn asked me to adjourn the sale over?

A. 6. Well, now, I did not understand it that way, Mr. Rogers; the way I understood that was I said, 'Why, Mr. Rogers, Mr. Reyburn said he told you to put off this sale,' and the way I understood it you said, 'Well, you tell Mr. Reyburn to call me up, you tell Mr. Reyburn that I want to talk to him, to call me up before 3 o'clock;' I think that's the identical words.

Q. 7. Don't you remember that Mr. Thane told you that I asked him to say to you that the sale would occur before 3 o'clock unless I was requested by you or Mr. Reyburn to adjourn it over?

A. 7. I do not remember it that way; no, sir. It might have been, but I did not take it that way.

On re-direct examination Lenox answered as follows:

Q. Mr. Rogers asked you in cross examination if you did not understand him to say at the telephone, or asked Mr. Thane to tell you over the telephone, that the

sale would not be postponed unless you or Mr. Reyburn requested it. If you had understood that message as Mr. Rogers stated it to you, would you not have requested postponement?

A. Most assuredly I would, then and there.

It is evident that Sledge & Norfleet and their attorney were disposed to accept the payment of their judgment instead of compelling a sale under the decree of the court for its satisfaction, and that they were willing to grant a continuance of the sale to another day to give time in which to complete the papers necessary to procure the loan for the payment of their claim. It is also apparent that the bank and trust company had led Lenox to believe that it would make the loan and its president had understood from Mr. Norfleet at Memphis that the sale would be postponed and assured Lenox that it would be done, and after this assurance, which was justified certainly by the letters of Norfleet to Reyburn, Lenox took no steps to get the money from others from whom he could have procured it to pay the judgment and was necessarily prevented from attending the sale on account of it, not thinking it necessary to be there upon that day, and understanding that it would be postponed.

After his conversation on the day of the sale with the attorney who was directing the commissioner, he was unable to find the president of the trust company and have him assure the commissioner that the judgment would be paid upon postponement of the sale and he also states that he understood from the attorney that he was following his instructions and not that the sale would be made in any event unless its postponement was requested. His calling the attorney on the next day after the sale, asking why it had been made, shows that he did not understand that it would be made and still thought the sale would be postponed. There was no fraud intended by the conduct of any of the parties, but certainly it can not be said that there was not such a mistake on the part of Lenox warranted by the conduct

of the judgment creditor, Norfleet, as would render unfair and inequitable the confirmation of the sale made upon the day it was advertised for an inadequate price as the testimony shows. Under all the circumstances we are not able to say that the sale was not unfairly made as found by the chancellor, and the decree setting the same aside and refusing to confirm it is not erroneous, and is accordingly affirmed.

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## FORDYCE LUMBER COMPANY *v.* LYNN.

Opinion delivered May 19, 1913.

1. MASTER AND SERVANT—INJURY TO SERVANT—SIMPLE TOOLS—LIABILITY—SAFE APPLIANCES.—In an action for damages for personal injuries sustained by plaintiff while using one of a number of sticks pointed at the end and six feet long, while unchoking a lath machine in a saw mill, the sticks being taken from another department of the lumber mill because of their size, to be used for this specific purpose, the sticks will be held to be simple tools, which the defendant master need not inspect in the performance of his duty to provide safe appliances for his servants. (Page 386.)
2. MASTER AND SERVANT—ASSUMPTION OF RISK.—Where an employee in a saw mill used a stick intended for the purpose, to unchoke a lath machine, and was injured by the breaking of the stick due to a defect easily seen, when he acted without direction from his employer, he will be held, as a matter of law, to have assumed the risks arising from the defects in the stick. (Page 387.)

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

STATEMENT BY THE COURT.

Appellee brought this suit against the Fordyce Lumber Company for damages for personal injuries resulting in the loss of his right hand, which occurred while he was unchoking, or cleaning out, a sawdust box, or chute, at the lath machine at which he was employed.

The negligence alleged was that the lumber company had failed to exercise reasonable care to furnish him a reasonably safe place and reasonably safe instrumentalities with which to perform his work; specially, that it failed to exercise ordinary care in furnishing him a stick,

not reasonably safe and strong, to be used in unchoking said lath machine when the saws of same should become obstructed by dust or debris, and that by reason of said negligence, he received the injury complained of.

The answer denied any negligence, and plead assumption of risk and contributory negligence in bar of the action.

Appellee was twenty-three years old when the accident occurred, and had been working for the lumber company about nine months. He first worked at the lath machine in catching stock. He also worked, putting slabs in the long conveyor chain that runs out to the fire. He was changed from first one place to the other, and worked mostly at tying lath behind the little machine, and had worked at the little lath machine tying lath before he was hurt, about fifteen days. Before he began work at this machine, he was told by the foreman to go upstairs and tie lath, and be particular to keep the lath machine going. His regular duty on the day he was hurt was tying lath. It was the duty of the feeder to unchoke the sawdust chute, and of the tyer to take the feeder's place and keep the machine going during his absence. The machine at which he was hurt was about three feet long, and in the middle of it there are three saws about eighteen inches in diameter that run a quarter of an inch apart, and about an inch and a quarter of which project up above the surface of the table. The feeder pushes the lath in the saws, and they are held in place by a guide which pushes the lath, and the grader then takes the bundle. The saws are about eighteen inches in diameter. The sawdust box was on the front side of the machine beneath the saws. The lath machine sometimes choked up. There was a dust trough to the left of the machine. The dust pit or box was three feet at the top and six inches at the bottom. To get the sawdust out of the box or receptacle, you take a stick six feet long, and with it you push the sawdust and other particles falling from the laths gradually down to the lower part of the sawdust receptacle. One man worked the stick down from above where the sawdust went out of the box, and then a man below the

mill floor worked up toward him. The box sometimes became choked for the reason that it was tapering—it was smaller at the bottom than at the top. A small piece of lath would get in the box, and the sawdust would get in there and choke. When the sawdust got up to the saws, it would smoke.

Appellee was feeding the machine when he was hurt, the regular feeder having gone over to the store, and had run about three bundles through it. His brother was tying and grading also. When he was injured, he was unchoking the lath machine, and described the occurrence as follows: "In unchoking the machine, I took a stick about six feet long, and worked it down to where I supposed was the bottom of the pit where the narrow part came in. I would have to put my weight on the stick and work it gradually. When I had worked the stick to the bottom, another man worked up to it from beneath, and sometimes the sawdust would slip down five or six inches and hang again. I think about the time the stick struck the bottom, it overbalanced me, and I struck the saw. The saws were right in front of me. Another time I was working the stick down, there was a hole in the floor beside the man where I was working. The pit that received the sawdust was between me and the saws. I had to lean over in order to work the stick down. The trough or sawdust pit was to my right, and I stood in front of the machine. My right hand was next to the machine. I was unchoking it and the sawdust pit in front of me. I could not push the stick through the sawdust without working it in the manner just stated. The teeth of the saw which hurt me were about one and one-fourth inches long. I did not shut the machine down when I began to unchoke the sawdust spout. It had never been the custom to do this. I had never seen anybody else shut it down. The three saws were located about six and a half or eight and a half inches from the edge of the table. The table through which the saws ran was a flat one, and had an apron attached to it. The apron was iron. While I was working the stick down, it broke in two as I was leaning forward. My right hand went into the saws. It

went under the table and came in contact with the saw. I received a cut on my hand, and had the hide of this finger knocked off. My right hand was cut so badly that nothing but the little finger was left. It is cut off just above the thumb and cut right straight across down to the root of the little finger. All of the fingers and the thumb, except my little finger, are gone. The little finger is perfectly stiff. I got the stick I was using near the end of the stairway that goes up in the room. Mr. Wells had put the stick there.

"There were six or eight sticks in the pile piled up near the steps of the fire room, and I went around about eight feet from where I was and picked one up. I could have picked up any stick I might have selected. I didn't look at the stick."

Witness's brother went down below, and was working from the bottom with a stick up the chute, and pulled out a piece of the stick that broke off when appellee was using it from above. He said the stick was cross grained and broke in two, and split diagonally about two and a half inches at the point of breaking. The sticks were about five feet long and about an inch square, with one end somewhat sharpened. They had been taken off the slasher saws, and it seems as though no special effort was made to furnish any particular grade of stick for the purpose. Another witness testified that what was meant by the grain in lumber was the stripes that run lengthwise in a stick. The grain runs lengthwise, usually, and it isn't true that it will break in two on account of the cross grain in handling it unless it is rotten

The court instructed the jury, which returned a verdict against the lumber company, and from the judgment thereon, it appealed.

*T. D. Wynne,* for appellant.

1. There is no duty resting on the master to inspect those common tools and appliances with which every one is conversant. The servant assumes those risks. 1 Labatt on Master and Servant, § 154, p. 331; 4 Thompson on Negl. (2 ed.), § 4708; 55 Ark. 484; 88 *Id.*

36; 82 S. W. 1026; 118 Pac. 764; 99 *Id.* 131; 78 N. W. 572; 47 N. Y. S. 285; 101 N. Y. 396; 5 N. E. 56; 98 Fed. 192; 29 Pac. 175; 69 N. W. 352; 71 Atl. 649; 68 N. E. 936; 116 Am. St. 373; 76 N. W. 497; 51 S. W. 874; 71 Atl. 649; 74 N. W. 91; 47 N. E. 1012; 51 N. W. 350; 69 N. W. 352; 90 Ark. 392; 57 *Id.* 506.

2. Appellee contributed to his injury by his own negligence. 66 Ark. 239; 90 *Id.* 392.

3. The mere fact that the stick broke will not raise a presumption of negligence. 90 Ark. 331; 89 *Id.* 52.

*Powell & Taylor,* for appellee.

1. The simple appliance rule does not apply to this case. 26 Cyc. 1136-8; 20 A. & E. Enc. Law (2 ed.), 89; 4 Thomps. on Negl. (2 ed.), § 4708; 1 Labatt on Master and Servant, § 154, p. 331; 64 S. E. 65; 54 So. 252; 138 S. W. 1150; 49 N. E. 854; 92 N. W. 535.

2. The appliance causing the injury was defective when originally furnished. It was not open, obvious and patent. It was selected by the foreman and used in obedience to his commands. 138 S. W. 1150; 49 N. E. 854; 92 N. W. 535; 88 Ark. 36; 82 S. W. 1026; 56 Kan. 109; 134 Ind. 226; 118 Pac. 764; 54 So. Rep. 252; 132 Ga. 221; 78 N. W. 572; 30 Fed. 925; 18 N. Y. App. Div. 223; 101 N. Y. 396; 92 Ark. 350; 88 N. W. 758.

3. Recovery has been allowed for defects in simple instruments and appliances in 96 Fed. 446; 50 N. E. 657; 49 *Id.* 854; 69 Pac. 184; 73 N. E. 540; 75 N. E. 1093; 54 L. R. A. 456; 205 Pac. 305; 67 N. E. 342; 87 N. Y. S. 1031; 56 Fed. 1009; 58 N. W. 878; 9 S. W. 790; 46 Minn. 18; 66 Ark. 237; 95 *Id.* 588; 144 Mass. 229; 137 Mass. 204; 47 S. W. 311; 100 Ind. 181; 55 Ill. 234; 56 Ark. 206.

4. In the absence of knowledge on his part the servant has a right to presume that the master has performed the duty which he has assumed. 1 Labatt on M. & S., pars. 7-14; 26 Cyc. 1204; 88 Ark. 181; 90 *Id.* 233; 91 *Id.* 343; 91 *Id.* 389; 48 *Id.* 334; 119 S. W. 73; 92 Ark. 350.

5. The servant does not assume the risk. 77 Ark. 374; 77 *Id.* 458; 89 *Id.* 424; 92 *Id.* 102; 95 *Id.* 291. There is no burden of inspection or examination placed on the

servant. 48 Ark. 333; 101 *Id.* 197; 2 Labatt on M. & S., § 603, p. 1743; 47 N. E. 1012; 93 Ark. 569; 121 S. W. 273; 152 U. S. 684; 83 Ark. 318; 78 Tex. 486; 82 Ark. 372; 4 Thomps. on Negl., par. 3803 c.; 88 Ark. 181; 100 *Id.* 465; 151 S. W. 1005.

KIRBY, J., (after stating the facts). It is insisted for appellant that the rule of law, devolving the duty upon the master to exercise ordinary care to provide the servant with reasonably safe instruments and appliances for the performance of his work and to exercise ordinary care in the inspection thereof, has no application to the facts of this case, which, it is insisted, comes within the exception to the rule, relating to simple tools and appliances, and that the court should have directed a verdict in its favor.

The instrument complained of in this instance was a common ordinary stick or strip about six feet long and one inch square, pointed at the end, and its structure and grain were obvious and as easily comprehended by the servant as the master and by one man as another. The sticks were not manufactured for the particular use except the sharpening at one end, and were selected from another department of the mill on account of their length and size adapting them to the use to which they were put. There was no dangerous machinery in the chute, in the cleaning out and unchoking of which the sticks were to be used, with which the person using it could come in contact, and the sticks were not expected to last permanently or long, and were likely to be broken or split and destroyed in the using, as was apparent from the number supplied. Appellee acted upon his own initiative, and without direction from any one, and could consume as much time in unchoking the sawdust chute as was necessary without hurry or haste, and when the chute choked up, walked around the machine to where the pile of sticks lay, some six or eight feet away, and picked up one of them for that purpose while his brother went downstairs to assist from below. The stick was an instrument or appliance as simple as any that can be used in the performance of any kind of work.

Thompson on Negligence, says (vol. 4, sec. 4708 2 ed.): "A servant assumes the risk of injuries from simple and ordinary appliances and methods, the nature of which he understands, or which is easily understood. It is a part of this doctrine that the duty of inspection by an employer of the appliances used by his employees does not extend to the small and common tools of every day use, of the fitness of which the employees using them may reasonably be supposed to be competent judges."

In Labatt on "Master and Servant," vol. 1, sec. 154, p. 331, it is said: "That the duty of inspection does not extend to the small and common tools of every-day use, of the fitness for use of which the employees using them may reasonably be supposed to be competent judges."

In *Masich* v. *American Smelting & Refining Co.*, 118 Pac. 764, a case where the plaintiff was injured by getting his hand caught between rollers in a rock crusher about which he had been employed for some time; his work required him to shovel ore into the breakers, and when a rock became lodged in the crushers or rollers, to push it through with a stick, for which purpose the company furnished sticks cut from rough pine boards. While attempting to push some rock through the rollers with a pine stick three feet long, one inch wide and half an inch thick, his hand and arm were drawn between the rollers and crushed. It was alleged that the smelting company was negligent in furnishing him a defective stick, the surface of which was rough and splintered at the point where plaintiff took hold of it, and that by reason of its condition, his glove on his right hand became fastened to the stick, and was held by it so that he could not withdraw his hand from the glove or turn the stick loose, by reason of which his hand and arm were drawn between the rollers and crushed.

The court held that the stick was a simple appliance, and that no negligence could be imputed to the master for the failure to inspect it, and quote in support of the decision from the opinion in *Longpre* v. *Blackfoot Milling Co.*, 99 Pac. (Mont.) 131, as follows:

"Among the practical duties incumbent upon him (the master) is that of inspection of the machinery and appliances to discover defects in them, both at the time of furnishing them and during the course of the employment; for this is the only means by which he may guard the safety of those employed by him in the use of them. * * * But it is not always absolute. It is not the duty of a railroad company or other persons engaged in great industrial enterprises, to inspect, much less to test, every tool or appliance put in the hands of an employee; this duty arises only when the appliance is of such character that a man of ordinary prudence would, under the same circumstances make the inspection as a precaution against injury to his servant. The master is not required to inspect simple appliances, such as hammers, saws, spades, hoes, lanterns, push sticks, and the like, the character and use of which are understood by all alike. A tool of this class is so simple in its construction, so well understood by men of ordinary intelligence that it would seem absurd to say that the master should make careful inspection of it before he commits it to the hands of his servant, who has the same capacity to understand its character and uses that he, himself, has." Continuing, it said:

"The cases cited and relied upon by this court in the Longpre case above, fairly illustrate the exception to the rule, which requires that the master shall inspect the appliance which he furnishes to his servant. So long as it is the rule of law that the master is relieved from the duty of inspecting simple tools and appliances, and that burden is imposed upon the servant, the rule must be susceptible of application, or it becomes a protection to the master in theory only, and is without practical value. * * * The complete description of the instrument as given in the record is a pine stick three feet long, an inch wide and one-half inch thick. If it was not a simple tool or appliances, then we are unable to imagine what application the term "simple" can have when used to characterize the instrumentalities of any occupation."

In *Ry.* v. *Larkin,* 82 S. W. (Tex.) 1026, a case where a brakeman complained of the railroad's failure to inspect a lantern furnished him, which, by reason of some defect not patent to ordinary observation, exploded and injured him, the court said:

"It is not the duty of a railroad company to inspect every implement and tool that it furnished to its employees. That duty arises whenever the machinery or implement is of such character that a man of ordinary prudence will, under the same circumstances, inspect the machinery or implements as precaution against injury to the servant. * * * A master is not required to inspect the common tools and appliances which are committed to the custody of a servant who has the capacity to understand their character and uses. * * * If this requirement were sustained, then every farmer or housekeeper who furnished an ax to his or her servant with which to cut wood for use on the premises, or for other purposes, must use that care which would here be required with regard to the lantern by inspection to discover the condition of the axe before he purchased it, and during the use of it by his servant, he must keep up the order of inspection in order to insure safety. * * * Likewise, it is a matter of common knowledge that a lantern globe is one of the simplest appliances that can be furnished to a servant for use as well as being in common use; and the court knows, as a matter of law, that it does not require special knowledge or skill to understand the lantern; nor is there any reason why the servant who handles it should not be fully acquainted with its condition, especially when, as in this case, it is committed to his exclusive control and care. There may be, and doubtless are, cases, in which it is a question of fact that should be submitted to the jury, as to whether the machinery or implements, tools and the like were of such character as to require inspection and safeguard against the injury; but there was no reason for submitting the question to the jury in this case."

See also *Sterling Coal Co.* v. *Fork,* 141 Ky. 40, 131 S. W. 1030, 40 L. R. A. (N. S.) 837, and case note on

page 832 thereof; *Vanderpoole* v. *Partridge,* 112 N. W. 318, 13 L. R. A. (N. S.) 668, and authorities in case note; *Sheridan* v. *Gorham Mfg. Co.,* 66 Atl. 576; 13 L. R. A. (N. S.) 687.

The defect or cross grain in the stick, selected by the servant from the number supplied, was obvious and patent, and as easily discovered by the servant as it could have been by the master, and, it being a simple tool, no duty devolved upon the master to inspect it, and appellant assumed the risk attendant upon its use.

In *Marcum* v. *Three States Lumber Co.,* 88 Ark. 36, the court said:

"Where the servant is engaged in ordinary labor with tools of simple construction, which are used by himself alone, and where the facts are undisputed, reasonable minds must inevitably come to the same conclusion, hence, there is nothing to submit to the jury."

See also *St. Louis, I. M. & S. Ry. Co.* v. *Goins,* 90 Ark. 392; *Henry Wrape Co.* v. *Huddleston,* 66 Ark. 238; *Fullerton* v. *Henry Wrape Co.,* 151 S. W. 1005.

It may be that if appellee had adopted a different method of unchoking the chute with the stick used, that no injury would have occurred in any event. If, instead of bearing down with his whole weight upon the stick to push it through, he had worked in unchoking it by prizing and lifting the obstruction therein from the side or end of the chute, he might have accomplished the purpose as well, and if the stick had broken, there would have been no throwing him forward nor upon the saws. The method of doing the work was entirely under his own control, as well as the selection of a stick from those furnished with which to do it.

In *Chicago, R. I. & P. Ry. Co.* v. *Smith,* 107 Ark. 512, we said: "There is no hard and fast rule that may be laid down as governing the liability of an employer for defects 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 it should not."

In that case, the servant was not permitted to make his own selection of the tool to be used by himself alone.

It follows, from the principles announced that no negligence was shown upon the part of the master, and that the injury occurred from an ordinary risk incident to the employment, which was assumed by appellee, upon engaging therein.

The court erred in not directing a verdict for appellant, and its judgment is reversed and the cause dismissed.

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

Opinion delivered May 19, 1913.

1. EVIDENCE—EXPERT TESTIMONY—HOW ADMISSIBLE.—Expert witnesses may not decide disputed questions of fact, but may only give their opinions upon matters upon which their opinions are sought, in order that the jury may determine the question therefrom. (Page 392.)
2. EVIDENCE—STATEMENTS OF INJURED PERSON—RES GESTAE.—In an action for damages for personal injuries against a railroad company, testimony of the attending physicians as to statements made to him by the injured party are not admissible, being hearsay and not a part of the *res gestae.* (Page 394.)
3. EVIDENCE—PERSONAL INJURIES—EXPERT TESTIMONY—FOUNDATION.—In an action for damages against a railroad company for personal injuries due to negligence, where no witness corroborated the testimony of the plaintiff as to the cause of the injury, but several witnesses contradicted her testimony, statements by her to her physician who treated her are incompetent as a foundation upon which to base an expert opinion as to the cause of the injury. (Page 395.)
4. APPEAL AND ERROR—INCOMPETENT TESTIMONY—PREJUDICIAL ERROR.—In an action for damages for personal injuries, against a railroad company, it is necessary for the plaintiff to prove that she was injured under such circumstances as would show negligence upon the part of the defendant before a recovery could be had, and when incompetent testimony has been admitted which tends to strengthen plaintiff's case, the error in admitting same is prejudicial. (Page 395.)

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

STATEMENT BY THE COURT.

Appellee brought this suit for damages for personal injuries, alleged to have been sustained while a passenger, boarding appellant's passenger train at Oliphint, Arkansas.

It was alleged that the railroad company negligently failed to stop the train a reasonable length of time to enable her to enter the car, negligently caused the train to give a quick and sudden start, and then to come to a quick and sudden stop, while she was on the steps of the platform, causing her body to be violently twisted and jerked, and to be wounded, bruised and lacerated upon the body and limbs, causing internal injuries in the region of the stomach, sexual organs, hips and back, from all of which injuries she has suffered great physical pain and mental anguish, and that her injuries were permanent, etc.

The defendant denied all the allegations of negligence and pleaded contributory negligence of appellee in bar of the action.

The plaintiff testified that she was a woman of twenty-five years of age, the mother of two children; that she bought a ticket from the agent of the railroad company at Oliphint, got on the train, and just as she got to the platform, the train started up with a jerk and threw her back; that she caught with her hand, and the train stopped suddenly and threw her on her side, and that her side struck the hand railing. She said further that she went on to Newport, the point of her destination, and went to the doctor's office to consult him about the injury. No witness corroborated her statement as to the injury, or occurrence, and she made no complaint to any of the railway employees about having been injured.

All of the train crew testified, each of them stating that there was no rough handling of the train in the stop at Oliphint on the morning on which plaintiff claimed to have received the injury. That the train was stopped

the usual length of time; that it was not started up and stopped again after the first stop was made, and that no complaint was made by any one of any injury that morning. The porter stated that he did not know of any rough handling of the train at Oliphint on that morning; that plaintiff was not thrown backward or forward by the starting or stopping of the train while she was getting on or off, and that she made no complaint about being hurt on the train, and that if she had done so he would have told the conductor about it.

Several physicians testified, as experts, as to the effect, result and permanency of the injury, two of them giving opinions over the objections of the railroad company, based upon the history of the case as related to them; one of them, Doctor Brown, when he was consulted by her for treatment shortly after the injury was alleged to have occurred, and the other, Doctor Jones, upon his examination, made after the suit was brought, and who treated her after Doctor Brown left the city.

Doctor Jones stated: "At the time of my first examination, February 13, 1912, the patient gave me a history of her case. She said she had never had any female trouble in her life, and had borne two children, and at that time their ages were eleven and three; had never had a miscarriage. On September 24, 1911, she had been jerked by the train. She said she got on the train at Oliphint, and that the train started with a jerk as she reached the top step. 'It snatched me,' she said. 'About five minutes later, I noticed a burning pain in the left side. This hurting went into the opposite side the following day, and the whole abdomen was very sore and tender.' Her menstruation, or monthly flow, started the following day and stayed five days. 'It came five days earlier than my time,' she said. Since the injury, her monthly flow lasts five and six days, whereas, before, it only lasted about three days. She suffers from painful menstruation ever since the injury; had never suffered before that time. She has suffered from leuchorrhoea since her injury, and she was never bothered with it be-

fore. She can not lift or stoop, her back hurts most of the time, standing or walking causes pains in her left side, and she has headache 'most every day.' " From this history and diagnosis, the physician was permitted to state, over objections, reaching to his repetition of the statement of how the injury occurred, his opinion as to the cause of the trouble.

Doctor Brown, whom she claims to have consulted on the day of the injury, said he found her in his office lying on a lounge, and she gave him a history of the case, stating how the injury occurred, and that she seemed to be suffering pain at the time, and he found a slight discoloration upon the muscles of the left loin, and there seemed to be some inflammation there.

This testimony was also objected to, being based upon the history of the case given by appellee.

These physicians testified that the enlargement of the neck of the womb, the inflammation inside thereof, and the disease of the fallopian tube was attributable to, and resulted from, the blow and the injury received. Two other physicians testified that it was not possible to produce any such internal injury as was claimed resulted from the blow and bruises. That such conditions could not result from an external injury.

There was also testimony relating to the probable permanent disability of appellee and her earning capacity.

The court instructed the jury, and from the judgment on their verdict against the railroad company, it brings this appeal.

*E. B. Kinsworthy, Campbell & Suits* and *T. D. Crawford,* for appellant.

1. The court's instruction 8, on the measure of damages, was erroneous in that it left the jury to their opinion as to the amount they should award for bodily pain and suffering, instead of limiting their opinion or belief by the evidence, which they could not arbitrarily disregard. 105 Ark. 205; 93 Ark. 209.

2. It was error to permit the medical experts to testify as to the cause of plaintiff's condition, based upon a history of her case as related to them by the plaintiff, herself. 184 Mo. 19; 203 Ill. 192; 35 Fed. 730; 4 L. R. A. (N. S.) 460; 88 Mich. 598, 16 L. R. A. 437; *Lee* v. *Kansas City Southern Railway Company,* in U. S. Court, Western District, Ark., Texarkana Division, ms. op. by Youmans, D. J.; 36 Ark. 124.

3. Where the remarks of an attorney are of such character that their exclusion from the jury will not cure the injury done, a motion to exclude them need not be made, and the question as to whether they were improper may be presented on appeal. 2 Okla. Cr. 362, 102 Pac. 57; 4 Okla. Cr. 641, 111 Pac. 1002.

4. The verdict is grossly excessive. 76 Ark. 193.

*Jones & Campbell,* for appellee.

1. Instruction 8 was not erroneous. The construction the jury would naturally put upon it would be that they should assess such damages for pain and suffering, if any, as they believed, or found, from the evidence to exist. If there was any objection to the omission of the words, "from the evidence," after the word "believe," it should have been specially presented. 104 Ark. 327; 97 Ark. 409; 89 Ark. 522; 88 Ark. 16; 102 Ark. 640; 93 Ark. 209.

2. There was no error in admitting the testimony of the medical experts. 104 Ark. 606; 55 Ark. 258; 1 Wigmore on Ev., § 668; 62 Pac. 747; 210 Ill. 508; 54 Ill. 485; 2 Jones, Law of Ev., § 352; 1 Greenleaf (16 ed.), § 430 l.; 135 Ia. 264; 132 Mass. 439; 48 Wis. 513; 6 Humph. (Tenn.) 347; 61 Am. Dec. (Ky.) 188; 16 Tex. Civ. App. 93; 11 Ark. 139; 5 Cyc. 613; *Id.* 608; 43 N. J. L. 86; 181 Mass. 202; 109 Cal. 673; 11 Cinc. Sup. Ct. 98; 18 Tex. Civ. App. 560; 48 Vt. 350; 61 Fed. 580.

3. If there was any impropriety in the argument of counsel, it should have been objected to at the time. Even if an objection had been made, the argument under the circumstances was not improper. 100 Ark. 221; 86 Ark. 607; 98 Ark. 93; 91 Ark. 93; 91 Ark. 576; 32 L. R. A. 145.

4. The damages awarded are not excessive. 101 Ark. 183; 88 Ark. 226.

KIRBY, J., (after stating the facts). It is urgently insisted that the court erred in permitting the medical experts, Doctors Brown and Jones, to testify as to the cause of appellee's condition from a history of her case as related to them by her, and repeated by them to the jury, and with this contention we agree.

There was no testimony relating to the occurrence of the injury as claimed by appellee, except her own statement of it. All the employees of the railroad company on the train testified that the train stopped a reasonable length of time for the taking of passengers aboard; that there was no rough handling or unusual jerking of it, and that it did not start up and stop again, after stopping at first, as appellee claimed it did. The description of the occurrence of the injury, as related to these two physicians and by them to the jury, as part of the history of the case, upon which they based their opinions, necessarily resulted in bolstering up the statement of the appellee as to the occurrence of the injury. The jury might have inferred from it that she told the truth upon the stand, about receiving the injury, because she had related the occurrence to Doctor Brown, the first physician, in the same way on the day she said it was received, and to the next physician, Doctor Jones, thereafter. That since she had told it, alike each time to these physicians, as related by them to the jury, that it must be true.

Expert witnesses are not called to decide disputed questions of fact, but only to give opinions upon the matter upon which their opinions are sought that the jury may determine the question.

Mr. Jones, in his work on Evidence, second edition, section 349, says: "The declarations of the party to his physician, or to other persons, *as to the cause of the injury,* or those charging liability upon other persons, are not admissible when not made at the time of the injury. * * * The narration of *past occurrences,* for example,

the manner in which a party has been injured, are no more competent when related by a physician than when stated by a nonprofessional witness."

In 5 Enc. of Evidence, p. 609, it is said: "The rule which allows a medical expert to give a clinical history of the case, including what was told him by his patient, does not extend so far as to allow the witness to repeat what he was told as to how personal injuries were caused." See also Lawson, Expert and Opinion Evidence, page 176; Rogers, Expert Testimony, page 115; Wigmore, section 1722.

In *Ringelhaupt* v. *Young,* 55 Ark. 132, this court said: "As to how the opinions of experts should be elicited and adduced as evidence, when the expert is not personally acquainted with the material facts in the case, Chief Justice Shaw, in delivering the opinion of the court in *Dickinson* v. *Fitchburg,* 13 Gray 546, 556, correctly stated the law as follows: 'In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued: Either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether if certain facts testified of are true, he can form an opinion and what that opinion is.' Thompson on Trials, sections 593, 595, and cases cited."

In that case, the expert witness was allowed to give his opinion upon what he knew about the matter, because he did know the facts upon which it was based.

And in *St. Louis & S. F. Rd. Co.* v. *Fithian,* 106 Ark. 491, where it was claimed that the court had erred in permitting expert witnesses to answer hypothetical questions that did not include a material undisputed fact, a case where the witnesses were testifying as to the proper construction of a railroad track upon a curve from which a switch track led off at a different curvature, after an examination of the place after the train wreck and the injury had occurred, the court said:

"It was proper to permit the expressions of their opinion under the circumstances, and appellant could have tested their knowledge of the existing conditions and discovered whether this fact was taken into consideration by them in forming their opinions, if it had desired to do so, upon proper examination."

There is no question but that it would have been error to permit the relation, by the physicians, of the history of the case, including a statement of how the injury occurred, if it had resulted in the death of the appellee before the trial. It could not be considered part of the *res gestae,* and otherwise would have been only hearsay evidence, and not admissible. *Fordyce* v. *McCants,* 51 Ark. 509.

Testimony relative to the statements made by the injured person to his attending physician as to how the accident happened, and what caused it, is not admissible in a suit to recover for alleged negligent injury. It is but hearsay, when not a part of the *res gestae,* and the fact that it is recited by the physician to whom it was related as the history of the case when the injured person sought treatment for the injury, does not make it any the less so. *Halloway* v. *Kansas City,* 184 Mo. 19; *Federal Betterment Co.* v. *Reeves,* 4 L. R. A. (N. S.) 460; *Jones* v. *Portland,* 88 Mich. 598, 16 L. R. A. (N. S.) 437; *Lee* v. *K. C. So. Ry. Co.,* 206 Fed. 765.

In *Polk* v. *State,* 36 Ark. 124, this court said: "The proper course is to take the opinion of the expert upon the facts given in evidence; not as to the merits of the case, or the guilt or innocence of the prisoner, but as to the cause of the death, so that the jury may first determine whether any crime has been committed by any one at all. If the expert has been present, and heard all the evidence as to the symptoms and appearances, detailed upon the trial, he may give his opinions upon the facts so stated, *if they be found true by the jury,* but, can not, himself, judge of their truth. If he has not been present and heard them, they may be repeated to him, in the presence of the court and jury, and his opinion concerning

them required upon the same supposition of their truth. But, in either case, the opinion is upon a hypothetical state of affairs, and its value depends upon the view *the jury* may take of the truth of the facts, to which witnesses have sworn. It can not be based upon any facts which the expert may have heard outside, and may believe to be credible; and, if based upon his own knowledge of particular facts, he should, himself, detail the facts, and give his opinion thereon."

In view of the fact that no witness corroborated the statement of the appellee as to the occurrence of the injury, and that the testimony of all the train crew tended to show that there was no stopping or starting of the train as she claimed at the time of the injury, and there was no complaint made by appellee, at the time, that she had been injured, it can not be said that her statement relating how the injury occurred to the physicians from whom she sought treatment for it as recited by them before the jury, as a foundation upon which to base an expert opinion as to the cause of the injury, was not prejudicial, notwithstanding the proof in the case as made by appellee showed the injury to have occurred in the same way. It was necessary for her to prove that she had been injured under such circumstances as would show negligence upon the part of the railroad company before any recovery could be had, and since this incompetent testimony tended to strengthen her case before the jury, it was necessarily prejudicial.

Other assignments of error are insisted upon, relative to the giving of an instruction upon the measure of damages, and also the excessiveness of the verdict, but it will not be necessary to pass upon them.

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

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

Opinion delivered May 26, 1913.

1. RAILROADS—INJURY TO PERSON ON TRACK—DUTY TO TRESPASSER.—Under the act of 1911, p. 275, which requires railroads to keep a constant lookout for persons on the track, a railroad company owes to a trespasser on the track a duty to keep a constant lookout to avoid injuring him, and contributary negligence on the part of the person on the track will not excuse the failure of the railroad to exercise this duty, where if such lookout had been kept, his perilous position could have been discovered in time to have prevented the injury by the exercise of ordinary care. (Page 407.)
2. RAILROADS—INJURY TO PERSON ON TRACK—NEGLIGENCE QUESTION FOR JURY.—Where deceased was run over and killed by a railway engine, it is a question for the jury as to whether the railway employees, exercised the degree of care required by the statute in keeping a lookout. (Page 407.)
3. RAILROADS—DEATH—RECOVERY FOR PAIN AND SUFFERING.—Where deceased is instantly killed by being run over by a railway engine, there can be no recovery for pain and suffering for the benefit of the estate of the deceased. (Page 408.)

Appeal from Lawrence Circuit Court, Eastern District; *R. E. Jeffery,* Judge; affirmed.

STATEMENT BY THE COURT.

J. T. Burch brought suit, as administrator, for damages for the death of his intestate, R. L. Burch, alleged to have been wrongfully caused by the negligence of the railway company. It was alleged that the deceased was a licensee, and on November 17, 1911, while in the discharge of his duty as a lineman for the telegraph company, put his speeder upon the railroad track in front of the station at Hoxie, for the purpose of going south, looking after the telegraph wires. That after he had gone about 150 yards, the employees of the railway company, while running an engine backward in the direction he was traveling, "and without keeping proper lookout for persons upon its tracks, as required by law, and without regard for the life and welfare for plaintiff's intestate, and without sounding proper alarm, or giving proper signals,

ran down and over the deceased, wounding and injuring him, from which he suffered great physical pain and mental anguish, and from which injury he died in a short time on the same day." Alleged as an element of damages, funeral expenses in the sum of $250, and asked damages for the estate, both actual and exemplary.

The defendant denied the allegations of the complaint; that deceased was a licensee upon its tracks, and that its agents and servants failed to keep a proper lookout for persons upon its tracks, or to give the proper signals and alarms as required by law, as alleged. Denied specifically each allegation of negligence, and plead contributory negligence and assumption of risk of the deceased in bar of the action.

R. L. Burch was a lineman for the Western Union Telegraph Company, and was killed by being run over by the tender of an engine backing south on the appellee company's tracks at Hoxie, on November 17, 1911. He got off of a passenger train, took his speeder off of the train, put it on the track and started south; the train ran on up to the switch, backed the coaches in on the switch and the engine pulled out on the main line, backing south, the direction in which Burch was going. He looked around before the engine struck him, threw up his hands twenty or thirty steps from the engine before he was struck and run over. The testimony is conflicting as to the speed of the engine, it being estimated all the way from eight to thirty-five miles an hour, some of the witnesses saying it was going about twice as fast as the speeder, upon which Burch rode. There was testimony showing that signals for the crossing of the Frisco railroad were given, and that the engine was brought to a standstill, or virtually so, before crossing it, and that shortly after making this crossing, it ran over and killed the deceased. The engine was in charge of a hostler and his helper, who had relieved the crew upon the arrival of the train at Hoxie, and the hostler, an old engineer, stated that Burch was killed while he was backing the engine back to the pit in the yards, after having put the coaches in on the siding. That after they cut loose and

pulled out onto the main line, the helper got off at the Frisco crossing; that he looked up and down the track, east and west, saw no trains, and upon the signal from the helper, continued on down south; that he went across the crossing slowly and by the depot, and opened up the engine, and was going faster as soon as he got past the depot, and the Van Noy's building, where the sound would not be so annoying. That he whistled for the dirt road crossing south of the depot some seventy-five yards south of the wye. His attention was attracted to an old woman on the dirt road approaching the crossing, who seemed to be old and infirm. That he did not see Burch on the speeder at any time at all, and supposed he must have gotten on the track when he was looking up and down the Frisco track, when the engine was at a stand-still before crossing. That Burch was killed before he knew there was any one in danger. He heard a voice over by the bank building, and his hand was on the brake valve, and he instantly put it in the emergency, and he had cut off the steam about that time, or before he heard the sound and shut the throttle off. That there was absolutely nothing else that could have been done to stop the engine after he heard the voice of distress, indicating danger. When he put his head out of the window before the engine came to a stop, he saw the wreck of the speeder and the man. He was the first man to reach Burch, and said, "I found him killed and pretty badly mangled. I saw a slight movement of his head. He didn't speak or breathe that I heard or saw." It was a cloudy day and raining, and the wind was blowing from the south. The engine was going about eight miles an hour. Witness thought he was not able to see deceased, because he was on the track so close behind the tender, which obscured him from view. That he could not see a man less than fifty feet in front of the engine's tender.

Tom Lewis, the helper, testified that he was on the engine; that they took the train to the north wye and cut the engine off and came back down the track; that he got off the engine and flagged the crossing; that the engine stopped before reaching the crossing about thirty-

five or forty feet; that it was a rainy day and the wind was blowing from the south; that the whistle was sounded twice; that he was on the rear of the tank, swinging back at arm's length from the hand rail, west from the tank and on the left-hand side, with the engine moving backward, going south, standing in the stirrup; that he ran down to the crossing and didn't see anything; looked both ways on the Frisco, and then, with his face toward the engine and his back to the south, he signalled the hostler to come on across, which he did. That he got on the engine and looked down toward the Iron Mountain yards, and did not see anything. That he got down about the Van Noy building and looked down the track again and did not see anything and never did see Burch until he was within about two feet of him. Burch was flagging with his left hand and pulling the speeder with his right, and made an attempt to get off. He threw up his leg, like he had started to get off, and the engine struck him at that time. That he hallooed and signalled the hostler to stop as soon as he saw Burch and the hostler put on the air-brakes. He said that after he looked down the Iron Mountain track at the crossing he turned, and looked up and down the Frisco, and then, with his face toward the engine, signalled the hostler to come on across and caught the left-hand side of the tank and remained in that position until Burch was struck. "It was raining very hard and the wind was blowing in my face, and I had on a rain hat, and it would kind of blow off, and I could not hold my head up is about the only reason that I could give why I couldn't see Burch. The engine whistled two blasts at the Frisco crossing, and then whistled for the dirt road crossing two longs and two shorts is all the sounds, I believe."

Several witnesses saw the occurrence and one testified that Burch was on his speeder going south. He saw the engine before it hit him, looked around, threw his hands up about twenty or thirty steps from the engine before it struck him. The engine was going pretty fast, witness thought about twelve or fifteen miles an hour. He also heard some one halloo, but didn't know whether it

was Burch or some one on the engine. When the engine struck him, he ducked right down on the inside of the tracks. Part of the speeder was on one side and part of it on the other. It was torn up. Witness stated he was about seventy-five yards away. When he got to deceased, he was gasping and threw his head back with his mouth open, but witness did not hear him say anything. The train was stopped in about forty feet after it passed over him. This witness said the whistle was sounded before the Frisco crossing was passed, but not afterward, that he heard. It was about 156 yards from the switch where the cars were placed to the Frisco crossing and about 150 yards from the Frisco crossing to where Burch was killed.

Burch came up on the train, the engine of which killed him, and took his speeder off the train when it went up to the switch track to switch the coaches. He went into the depot to get some kind of papers, and came back out to put his car on the track just a few seconds after the train went up, and when the engine was up near the switch, according to this witness, who also said that a man could take off and put the speeder on the track by himself. He did not see Burch when he put the speeder on the track, and did not know whether any one helped him or not. The first he noticed him was as the train came across the crossing, and a little boy, standing near, said: "If that fellow don't look out, he is going to get hit by that train," and the train kept going on, and hit him. "I believe the train blowed two whistles before it got to the crossing. I was about 100 yards from him, and Burch was about fifty yards ahead when it whistled; about even with the Van Noy door, something like that." He thought a man could have lifted a speeder off from the time the whistle sounded at the crossing before it struck him, if he had heard it. He was about twice as far from the engine as Burch was. This witness said the engine did not come to a stand-still at the crossing, but slowed down. He ran immediately tc the injured man who didn't speak, "but just kinder raised his head

and gasped." The engine didn't slow up. He said Burch didn't have time to get the speeder off the track after he threw up his hands and before it struck him.

Another witness, watching the occurrence, saw the man get on the speeder near the baggage room and start off down the track, south. The engine was above the crossing at that time, and when it got near the man going south on the main track, he kept looking at him, supposing he was some railroad man that knew his business, or that the men on the engine knew he was there. The engine got nearer and nearer, and when they were nearly on him, Burch threw up his hand, and it wasn't but a minute until he was under the tender. This witness thought Burch would have had time to have gotten off the track between the time the engine was at the Frisco crossing and the time it struck him. It was about 100 yards below the crossing where he was struck. That you could see a man down the track as far as you could see. That there was nothing to prevent the employees of the engine from seeing him, except the tender, that they would have to look over. That the engineer might not have been able to have seen right close up in front of the tender. That he could have seen Burch from the Frisco crossing. That Burch, if he had been looking back, could have seen the engine approaching. That he was going the other way from it, south.

Another witness said he was fifty yards away on the west side of the track, and saw Burch before the engine struck him. He was on the speeder, and looked like he was trying to get off of it. He was throwing up his hands and hallooing. The engine was pretty close to him then, in fact, it was right on him. The engine was going pretty fast, and it didn't slow up from the time he threw up his hands until it hit him. That it ran over him and knocked the speeder out from under him. That he heard some one halloo when it first struck him.

Arthur Hudson, a witness for the plaintiff, testified that he was 100 yards away from the baggage room, in front of Reed's restaurant, and thought the engine was

going fifteen miles an hour. That Burch discovered the approach of the engine about thirty or forty feet before it hit him. That he threw up his hands and hallooed. That he heard some one halloo after the engine struck him, but he didn't know whether it was Burch or not. It was a sort of a scream. That he saw the deceased when he got on the speeder at the baggage room. The engine was above the crossing then, and there was no alarm sounded just before it struck him. It whistled two little short whistles for the crossing. He did not see it stop for the crossing. Did not notice Burch until after he got on the speeder, and did not see him put it on the track. He named several others who were standing there. That he had come up that morning on the train from Alicia. He could not see that Burch made any effort to get off of the speeder. Other witnesses testified that he would have had time to fall off the speeder twice before the train reached him after he discovered the engine approaching.

Thomas Henry testified: "I saw Burch put his speeder on the track and start off, and I saw the engine at the crossing. He put his speeder right on in front of the engine. The engine had stopped for the crossing, when this man, Burch, put his speeder on the track, and started off. Then the helper highballed the hostler, and the engine came on and the helper caught the handle on the back end of the tender, and when the engine came even with me, it whistled for the crossing, when Burch was three or four rails in front. He turned back and saw the engine, and hallooed 'Help,' and pulled the speeder with his right hand and threw up his left hand. The engine was so close on him, I couldn't tell whether he threw his leg up or not. It hit the speeder, knocked it from under him, and threw him across the rail."

In reply to a question as to whether or not deceased had time to get off the speder, after he saw the engine, witness said: "Well, it looked to me like he could have fell off of two speeders in that time."

On cross examination, he said: "When the engine

crossed the Frisco, it was five or six rails from Burch. A rail is forty foot, I think. Burch was at least 200 feet from the engine, maybe further. He was south of the restaurant at that time. I suppose he travelled six rails further before he was struck. The engine was going about twice as fast as the speeder. The engine was within three rails of him when he threw up his hands. He went a rail-length and a half, maybe two, after that. The engine did not slow up after he hallooed and threw up his hand." "That he was within 100 yards of Burch when he was struck, and ran to him. He was drawing his eyes and kinder working his head, and the way he was working his mouth, I just put it up that he was trying to say something."

Another witness said that he saw the man on the speeder, maybe sixty or seventy feet in front of the engine and in a moment, he saw him look back. That he began to wave at the engine, and he could see no one in the fireman's cab on the engine. This witness thought Burch was going to catch hold of the engine, and let it push him on into the yards. He threw up his hand again. It was set stiff; then the tender seemed to set the speeder in the middle of the track, and he doubled up under it. He made about one stroke with the speder lever. When he came out from under the engine, it had just doubled him up in a pile. He was about sixty-five or seventy-five yards from him, and ran to him and he just raised his head and gasped. Burch was about sixty feet from the engine when he waived his hand. This witness thought he could have had time, unless the fright paralyzed him, after seeing the engine coming to have gotten out of the way. He also said the speeder was going about as fast as the engine, when he first noticed the engine, about as fast as a man could trot. That he did not see the speeder put on the track.

William Hayden, a witness for the defense, saw Burch get off the train the day he was killed, and assisted him in unloading his speeder and tools, as he worked the express off the train that day. "He turned to me and

asked me if he would have time to make it down before the next train. I told him, 'I wouldn't try it.' He said, 'I can make it to the switch.' He loaded the speeder and tools and started. I went back into the express room. I heard the engine pass, and I ran out, because I knew Burch was on close. I didn't get to see him, for the engine got between me and him. I saw him come out from behind the engine. The train was up at the wye when Burch asked me about the next train, and I told him I wouldn't try to make it."

One witness for the plaintiff testified that he was on the east side of the track coming from the south end of Hoxie in a top buggy; that he saw the engine about 100 feet south of the Van Noy restaurant, and it smoked like the brakes might be on, and when he reached the tracks, he saw the body of a man who had been killed, and learned it was a lineman who had been run over and killed. Had had twenty-two years' experience in the locomotive department of the railroad companies, and five years running an engine, and, in his best judgment, the engine was running between eight and ten miles an hour. He didn't see the man on the speeder on the track, but there might have been something to obstruct his view. That he was within 140 feet of the Frisco crossing, and that the body was about fifty feet north of this road crossing on the track.

It was also in evidence that railroad trains have the right-of-way over the speeders, except when the speeders are running as specials on a schedule, and persons on speeders are supposed to flag trains and keep out of the way of them.

Dr. J. E. Pringle, a local surgeon for the Iron Mountain, at Hoxie, reached the injured man within five minutes after he was struck, and found him dead. The engine and tender had run over him about the hips, and cut him nearly in two. He was of the opinion that the shock was so great that it rendered him absolutely insensible to pain. "The extent of the shock seemed to be complete. I do not think this man could have been conscious

of any pain. Assuming that he raised his head and gasped two or three times after he was run over, I would say he suffered no conscious pain from the injury received."

Doctor Vasterling, a witness for the defendant, and chief surgeon for the Missouri Pacific Railway Company since July, 1909, and in charge of the hospital department in St. Louis for twenty-two years, answering a hypothetical question as to the injury, stated that, in his opinion, the man was instantly killed; that the movement of the head and gasps was no more than the relaxation of the muscles.

The court directed a verdict as follows: "Gentlemen of the Jury, the case which is now submitted to you and which is being tried, the case of Burch against the railroad, will at this time be withdrawn from you, because, under the law, in my judgment, there is not sufficient showing on the part of the plaintiff to show liability on the part of the railroad company. There is no evidence, to my mind, that the deceased exercised proper care to take care of himself, and to escape, as shown here. He is a licensee of the railroad company by reason of his association in the capacity of lineman, and, having that right, the law required him to keep a lookout to avoid danger, unless the railroad, in the absence of his keeping a lookout, discovered him in time to avoid the injury, the railroad company would not be liable on account of failing to keep a lookout.

"So, under the law, there is not sufficient showing on the part of the plaintiff to warrant a finding for the plaintiff in this instance. It is unfortunate that a human being should be killed in this manner, but, since the law requires a certain showing made before the railroad company can be liable for it; and, in the absence of such showing, I will instruct you to return a verdict for the defendant."

From the judgment thereon, this appeal comes.

*W. P. Smith* and *O. C. Blackford,* for appellant.

1. The court's action in directing the verdict was

an invasion of the province of the jury. The issues of fact, whether or not the deceased exercised proper care for his own safety or was guilty of contributory negligence, whether he was negligent in not leaping from the speeder when he discovered the engine nearing him, instead of throwing up his hands, calling out and then continuing on down the track, whether the defendant's employees were negligent in failing to give the signals required by law, and to keep a proper lookout, etc., were questions about which the evidence was conflicting, and were for the jury's sole determination.

2. The only evidence that deceased could have gotten off the track after discovering the approach of the engine, was opinion evidence merely. It was for the jury to say whether or not he was, under the circumstances shown in evidence, negligent in not falling off of the speeder. 99 Ark. 425; 95 Ark. 94; 78 Ark. 100.

3. It was also a question for the jury whether or not the engine was on the main line at the time he placed his speeder on the track and attempted to go south, and whether, under facts developed, he exercised the degree of vigilance amounting to ordinary care for his own safety. 96 Ark. 643.

4. The burden was on the defendant to show that the constant lookout required by law was kept, and that it was not guilty of negligence in failing to stop the engine after deceased was discovered, or could have been discovered, if such lookout had been kept. 77 Ark. 10; 81 Ark. 277; 84 Ark. 248.

*E. B. Kinsworthy, Campbell & Suits* and *T. D. Crawford,* for appellee.

1. The court was right in directing the verdict. The proof shows that signals were given both at the Frisco crossing, and at the dirt road crossing near which deceased was killed, so that his getting in the way of the engine was inexcusable. It is positive that a constant lookout was being kept, and that the peril of deceased was not discovered in time to have avoided the killing.

2. If the judgment of the trial court was right, it will not be reversed, even if the reason given for such

judgment was erroneous. 73 Ark. 418. The death of Burch was instantaneous. There was no period of conscious suffering. Under no view of the evidence could the administrator recover more than nominal damages. A case will not be reversed for error involving nominal damages merely. 74 Ark. 358; 53 Ark. 127; 9 Cush. 108; 125 Mass. 93; 133 Mass. 507; 135 Mass. 292; 12 So. 954; 100 Pac. (Mont.) 960; 4 C. B. (N. S.) 296; 60 N. J. Law 444, 38 Atl. 759; 41 Atl. (Vt.) 652; 44 Atl. 686.

KIRBY, J., (after stating the facts). Without regard to whether he was a trespasser or a licensee upon its tracks, the railroad company owed the deceased the duty to keep a constant lookout to avoid injuring him, and his contributory negligence would not excuse its failure to discharge this duty, where if such lookout had been kept, his perilous position could have been discovered in time to have prevented the injury by the exercise of ordinary care. Acts 1911, p. 275; *St. Louis, I. M. & S. Ry. Co.* v. *Gibson*, 107 Ark. 431, 155 S. W. (Ark.) 510.

The undisputed testimony shows that the tracks at the place of the injury were straight and unobstructed in any way from north of the Frisco crossing, where the engine was placing the coaches on the switch track, to the place where the injury occurred. A man upon the engine keeping a lookout could have easily discovered deceased upon the speeder on the track before running him down.

The testimony is in conflict as to whether the wind was blowing and it was raining at the time as the helper said it was, making it necessary for him to keep his head down, in order to keep his hat on, which caused his failure to see the deceased and it is also in conflict as to the time the deceased got on the track and the distance from the engine at the time of getting on the track, and, under all the circumstances of the case, the jury could have found that a proper lookout might have discovered deceased's perilous position in time to have avoided injuring him, by the exercise of ordinary care.

Whether, under the circumstances as detailed, the

railroad company's employees exercised that degree of care in keeping the lookout required by law, was a question properly for the jury. Several witnesses thought deceased had time to jump or fall off of the speeder and escape from the train after he discovered its near approach, but the fact remains that he did not do so, and even if he had had time he may have been so paralyzed by fright as to have been unable to do so, and, from the evidence, it appears that such was the case; but if he negligently failed to escape from the engine, that did not warrant the railway company in running him down, nor excuse its failure to keep the lookout required by law, nor its duty to avoid injuring him if it could do so by the use of ordinary care after his perilous position was, or could have been, discovered.

We are of the opinion, however, that the undisputed testimony shows that the death of the deceased was instantaneous and painless. He was virtually cut in two above the hips by the wheels of the tender and engine passing over him and only moved his head slightly and gasped after it passed over him. The physicians testified that these movements were due to muscular relaxation and contraction and the shock was complete and death painless. Such being the case, there can be no recovery for pain and suffering for the benefit of the estate and the court did not err in directing the verdict.

The judgment is affirmed.

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## GAYLORD v. STATE.

Opinion delivered June 2, 1913.

1. CRIMINAL LAW—EVIDENCE—CONFESSION.—Where the record shows that a written confession of defendant was, after being identified by the witnesses, introduced in evidence and read to the jury. it is not error to permit witnesses to state what the confession contained. (Page 410.)

2. APPEAL AND ERROR—INSTRUCTIONS—HOMICIDE.—In a trial for murder, where the State did not rely upon evidence of dying declarations of deceased, it is not error for the trial court to refuse to

give an instruction that the dying declarations of deceased should not be considered. (Page 411.)

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

*John E. Clerget,* for appellant.

When a confession has been reduced to writing, the writing itself is the best evidence thereof, and parol testimony as to the confession is inadmissible until the absence of the written instrument is satisfactorily accounted for. Kirby's Dig., § 3145; 2 Bishop, New Crim. Prac., § 1260.

It must be shown that the confession was read to the accused and that he assented to it. 2 Tex. App. 97; 101 Mo. 514; 136 Mo. 644; 137 Ala. 17. And when offered in evidence it should be read in its entirety and taken together, including all that was said at the time relating to the subject and as a part of the confession, whether favorable to the accused. 3 Enc. of Ev. 348; 42 Ark. 70; 69 Ark. 599.

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

There was no error in admitting the evidence of the confession. *Greenwood* v. *State,* 107 Ark. 568.

McCULLOCH, C. J. This is an appeal from a judgment of conviction of the crime of murder in the first degree. Appellant, Boss Gaylord, is accused of murdering one Herbert Williams, who was a rural mail carrier, and the crime was committed on a country road while Williams was on his route collecting and delivering mail. He was riding a bicycle, and he was found desperately wounded lying on the roadside near the bicycle. He had three distinct wounds on his head which, according to the testimony of experts, were inflicted by a blunt instrument and which caused his death. One of the blows fractured the skull and proved fatal, though he lived nearly a month. The surgeon who attended him testified that he appeared to be in a dying condition from the time he first saw him after the wounds had been inflicted. Ap-

pellant was arrested the next day, and the State adduced at the trial proof of many circumstances which tended to establish his guilt. In addition to that, it was proved by testimony of several witnesses that he made a confession in which he stated that he assaulted Williams and inflicted the blows which caused his death. What purports to be a written confession, signed by appellant and attested by two witnesses, appears in the record.

The first and principal contention of appellant's counsel is that the bill of exceptions does not show that the written confession was read to the jury and that it was improper to admit oral testimony as to its contents.

One of the witnesses testified to an independent confession, and three or four witnesses who were present when the confession made in the jail of Pulaski County was reduced to writing, were introduced, and some of them stated the substance of what appellant said.

We are of the opinion that the record fairly reflects the fact that the written statement, after being identified by the witnesses, was introduced in evidence and read to the jury. It was handed to the witnesses while they were on the stand and they identified it. The filing mark of the clerk appears on the paper, and in the bill of exceptions it immediately follows the testimony of the witnesses who identified it. It is true the instrument is not preceded by an affirmative statement that it was then read to the jury; but it is fairly inferable from the way in which it appears in the record that it was read to the jury. The bill of exceptions recites in the beginning that what follows was the testimony adduced in the case, and it would be a strained construction of the bill of exceptions to say that it fails to show that this paper, about which all the witnesses were asked, was not before the jury.

The witnesses who related what defendant said in his confession stated nothing further than what the writing itself showed, and it is, therefore, unnecessary to decide how far the State had the right to go in introducing proof concerning the confession which had been re-

duced to writing. Inasmuch as we hold that the writing itself was introduced, and that the witnesses stated no more than what it contained, no prejudice could, in any event, have resulted.

Error of the court is assigned in refusing to give an instruction telling the jury that there were "no dying declarations of the deceased to be considered in the case."

The State did not attempt to prove a dying declaration of the deceased and did not rely on that character of proof to sustain the conviction. Therefore, it was unnecessary to say anything about a dying declaration in the instructions.

The court gave correct instructions to the jury upon all the phases of the case, and the record as presented to us is entirely free from error. The testimony is abundantly sufficient to sustain the verdict.

Judgment affirmed.

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## BURTON v. BLYTHEVILLE REALTY COMPANY.

Opinion delivered June 9, 1913.

1. COUNTERCLAIM AND SET-OFF—WHAT CLAIM MAY BE USED AS SET-OFF.—Under Kirby's Digest, § 6001, which provides that "A set-off can only be pleaded in an action founded upon a contract, and must be a cause of action arising upon contract or ascertained by the decision of a court." *Held*, where plaintiff brought an action against the members of an old partnership on a joint and several liability, an account due from plaintiff to a new partnership could be availed of as a set-off, although the new partnership consisted of persons different from the old. (Page 413.)
2. COUNTERCLAIM AND SET-OFF—LIQUIDATED DAMAGES.—The damages in a cause of action for brokers' commissions are not unliquidated and unavailing as a set-off, when there is no controversy over the price to be paid for the services; the only issue being whether the services had been performed. (Page 414.)

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

*Appellant, pro se.*

1. The rent contract and notes sued on were individual contracts made with Green, Houchins and Crockett, doing business as the Blytheville Realty Company, and the alleged commission sales were separate and distinct contracts, not related to, connected with or growing out of, the rent contract, and entered into with separate parties. The account for commission sales can not be set off against appellant's claim. Kirby's Dig., § 6099; 27 Ark. 490, 491; 66 Ark. 400-408, 412; 95 Ark. 488; 83 Ark. 283; 12 Ark. 318; 64 Ark. 551; 72 Ark. 44.

2. The demands of appellees are for unliquidated amounts, and can not be set off against appellant's claim. 43 N. E. 1089; 161 Ill. 339; 66 N. W. 834, 836; 47 Neb. 875.

*Appellee, pro se.*

The basis of this action is not the rent contract but the notes executed by the defendant company to appellant. Where appellees were sued upon these notes; they not only had the right, but, under the statute, it was their duty to plead the account for commissions on sales as a set-off or counterclaim. Kirby's Dig. § § 6101, 6104; Anderson's Law Dict. 943; 34 Cyc. 629; 16 Ark. 97, 100; 51 Ark. 370; 14 Ark. 668.

The fact that Suggett succeeded Crockett as a member of partnership does not abrogate appellees' right to plead the set-off. Moreover, want of mutuality was not pleaded, nor raised by exception to the evidence. 72 Ark. 44. See also 101 Ark. 493; 93 Ark. 503.

McCULLOCH, C. J. Appellant instituted this action to recover the amount of a series of notes executed by appellees, a partnership composed of C. V. Green, H. H. Houchins and T. A. Crockett, doing business under the style and firm name of Blytheville Realty Company.

After the execution of the notes T. A. Crockett sold out his interest in the firm to O. B. Suggett, who succeeded him.

Appellees answered admitting the execution of the notes, but pleaded, by way of set-off, several items for

commissions on sales of real estate made by them for appellant.

The record is imperfectly abstracted and does not show what the judgment of the court was, but there is enough in the abstract to show that appellant raised the question as to the right of the appellees to plead their claim against appellant for commissions against their liability on the notes executed to appellant.

It is contended, in the first place, that appellant's claim being based upon the joint and several liability of Green, Houchins and Crockett, and the account for the alleged commissions being due from appellant to the new firm composed of Green, Houchins and Suggett, the latter can not be pleaded as a set-off against appellant's claim.

Our statute on the subject reads as follows:

"A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of a court." Kirby's Digest, § 6101.

It will be observed that the statute does not define a set-off nor undertake to limit the right to plead it except in the particular expressly named.

This court, in the case of *Leach* v. *Lambeth,* 14 Ark. 668, decided that "a debt due from a sole plaintiff to one of several defendants, may be pleaded under the statute as a set-off, by the defendant to whom such debt is due."

Of course, if it can be pleaded by one of the defendants, it inures to the benefit of all so far as there being any recovery in the cause, for if it extinguishes the debt of the plaintiff there can be no recovery against any of the defendants.

Our statute at the time that decision was rendered used language somewhat different, but the effect was the same under the present statute so far as the question now presented is concerned. At that time the statute on the subject of set-off provided:

"That when two or more persons are mutually indebted to each other, and one of them commences an

action against the other, one debt may be set-off against the other, although they may be of a different nature."

The court in the case just cited said that the statute being remedial it should be construed liberally.

The Kentucky Court of Appeals, under a statute quite similar in its terms, decided that one of several defendants could set-off his separate demand against a plaintiff who sued upon a joint and several contract. *Dunn* v. *West,* 5 B. Monroe, 376; *Powell* v. *Hogue,* 8 B. Monroe, 443. In reaching that conclusion the court said:

"The plaintiff can not be injured by discharging his own liability. There is no other person jointly interested with him in the debt, to be prejudiced by it; and as it is a voluntary assumption of the payment of the whole by one defendant, the other defendants jointly bound with him have no cause to complain."

This disposes of the first of appellant's contentions.

The other is that a claim which is in dispute can not be made the subject of a set-off.

That contention is not correct. It is true that we have held that unliquidated damages for breach of contract can not be made the subject-matter of set-off. *B. A. Stevens Co.* v. *Whalen,* 95 Ark. 488, and cases cited.

Our statute was taken substantially from the Kentucky statute on the subject, and the highest court of that State reached the same conclusion. *Shropshire* v. *Conrad,* 2 Metcalf (Ky.), 143.

But the claim of appellees was not unliquidated. There was a dispute whether the appellees had performed services in selling property under contract with appellant, but the verdict of the jury settled that issue, and it does not appear that there was any controversy as to the price to be paid for the services performed, at least, the abstract furnished by appellant does not disclose any dispute on the subject.

Therefore, the rule concerning unliquidated damages does not apply in this case.

The record is free from error so far as appears from the abstract, and the judgment is therefore affirmed.

## CORNEY v. CORNEY.

Opinion delivered July 14, 1913.

1. APPEAL AND ERROR—MATTERS CONCLUDED BY FORMER JUDGMENT.—A. obtained a decree of divorce from his wife, B. B. obtained an order vacating the decree of divorce, and on appeal to the Supreme Court, the last decree was reversed, leaving the original decree in force. B. filed a complaint in the chancery court asking that the judgment of the Supreme Court be set aside on the ground of fraud. *Held,* matters relating to the original cause of action for divorce and B's. defense thereto, and also the grounds for vacating the decree of divorce were concluded by the former judgment of the Supreme Court and can not be reopened. (Page 416.)
2. JUDGMENTS—JUDGMENTS OBTAINED BY FRAUD—HOW PROVED.—In order to show that a judgment of the Supreme Court was obtained by fraud it is necessary to allege specifically what the fraud consisted of, and that it was material, so that it can be seen that the judgment of the court was or might have been affected by it. Fraud is never presumed, and must be specifically alleged and proved in order to entitle the complaining party to relief. (Page 417.)
3. JUDGMENTS—JUDGMENT OBTAINED BY FRAUD—RELIEF—PROPER FORUM. —In the absence of a statute giving a complete remedy at law, a court of equity is the appropriate forum for granting relief against fraud in the procurement of judgments. (Page 417.)

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

*Appellant, pro se.*

*Robert L. Rogers,* for appellee.

McCULLOCH, C. J. Appellant, Mary F. Corney, was formerly the wife of appellee, R. B. Corney, and they resided in Crawford County, Arkansas, where appellee obtained a decree for divorce, which was rendered by the chancery court of that county on May 6, 1907, on the ground of adultery.

Subsequently appellant filed a complaint in that court to set aside the divorce decree, and on January 13, 1910, a decree was rendered vacating the former decree for divorce. Appellee, R. B. Corney, prosecuted an appeal to this court. The case came on for hearing, and the order of the chancery court vacating the divorce decree was reversed and the petition was dismissed, leav-

ing the original decree in force. 97 Ark. 117. The judgment of this court was rendered on December 19, 1910.

On December 23, 1912, appellant filed her complaint in the chancery court of Crawford County praying that the judgment of the Supreme Court be reviewed, reopened and set aside so as to leave the order annulling the divorce decree in full force and effect. The chancery court sustained a demurrer to the complaint and rendered a decree dismissing it, from which she has prosecuted an appeal to this court.

Most of the matter set forth in the complaint relates to the original cause of action for divorce and appellant's defense thereto, and also to the original grounds for vacating the divorce decree. Of course, these matters are concluded by the former judgment of this court.

The only grounds urged for setting aside the judgment of this court are found in the fifth paragraph of the complaint, wherein it is alleged that appellee did "cause to be prepared an answer and cross complaint to plaintiff's complaint redundant with new matter, and was read for the first time by this plaintiff after the cause had been submitted and passed upon by the Supreme Court, and did proceed to surreptitiously cause same to become a matter of record in the files of this court on or about the 17th day of November, 1910, and did secure from the clerk * * * a certified copy of this pretended answer, and the same dated and file marked April 30, 1909, and was made a part of the record in the Supreme Court on the 17th day of December, 1910."

This allegation is an attempt to set up fraud on the part of appellee in the procurement of the judgment of this court. But we are of the opinion that it falls short of presenting a question of fraud. The substance of the allegation is that appellee, while the cause was pending in this court, wrongfully and fraudulently procured the filing and antedating of a paper purporting to be his answer in the cause and filed it in this court as a part of the record. The complaint does not allege what the contents of this answer were so as to show that it contained

any material matter. The allegation is that the answer and cross complaint was "redundant in new matter." An examination of this opinion of this court when the case was here on appeal shows that we disposed of it, not upon the pleadings, but upon the proof taken in the trial below. In order to show that the judgment of this court was obtained by fraud, it is necessary to allege specifically what the fraud consisted of, and that it was material, so that it can be seen that the judgment of the court was or might have been affected by it. Fraud is never presumed, and must be specifically alleged and proved in order to entitle the complaining party to relief.

The judgment of this court should not be set aside merely because the answer was wrongfully put into the record, unless it be shown that it was material and had some bearing upon the decision of the case.

The allegations of the complaint are insufficient, therefore, to constitute a proper allegation of fraud in the procurement of the judgment, and the chancellor was correct in sustaining the demurrer.

Counsel for appellee insist that the demurrer was properly sustained on the additional ground that the chancery court had no jurisdiction to review and sets aside a judgment of this court.

We think that the suit in the chancery court was the appropriate remedy if fraud had been properly alleged. The statutes of this State provide that the court in which a judgment has been rendered shall have the power, after the expiration of the term, to vacate or modify such judgment on the ground, among other things, of "fraud practiced by the successful party in the obtaining of the judgment or order." Kirby's Digest, § 4431, 4th subdivision.

This statute does not apply to judgments of this court, for the proceeding thereunder is the exercise of original jurisdiction, which this court does not possess. *Jacks* v. *Adair*, 33 Ark. 161.

In the absence of a statute giving a complete remedy at law, a court of equity is the appropriate forum for

granting relief against fraud in the procurement of judgments.

Affirmed.

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McINTOSH v. STATE.

Opinion delivered June 2, 1913.

LARCENY—INDICTMENT—ALLEGATION OF OWNERSHIP.—In an indictment for larceny, the allegation of ownership is material and must be proved as alleged. Correctly naming the owner is essential to the identification of stolen property.

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

*P. C. Barksdale* and *J. E. London,* for appellant.

In cases of larceny the allegation of ownership of the money must be proven as alleged in the indictment. 73 Ark. 32; *Ib.* 169; 70 Ark. 144; 13 Ark. 105. The verdict is contrary to the evidence.

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

1. The exceptions were not carried into the motion for a new trial and therefore are treated as abandoned. 73 Ark. 453-6.

2. The testimony is sufficient to sustain the conviction.

WOOD, J. The appellant was convicted on an indictment which charged her with grand larceny, committed by stealing sixty-four dollars ($64), the personal property of one Luther Stevens. One of the grounds of the motion for a new trial is that the verdict is contrary to the evidence.

The evidence tended to show that the appellant, in Sebastian County, Arkansas, some time in November, 1912, did steal the sum of sixty-five dollars ($65), the property of a "certain white man." But there is no evidence in the record identifying the money which appellant is alleged and shown to have stolen, as the property of Luther Stevens, as charged in the indictment.

There is a total lack of evidence to show that the "white man," whose money appellant is alleged to have stolen, was Luther Stevens. In indictments for larceny, the allegation of ownership is material and must be proved as alleged. Correctly naming the owner is essential to identify the stolen property. *Fletcher* v. *State,* 97 Ark. 1; *Merritt* v. *State,* 73 Ark. 32. See also *Andrews* v. *State,* 100 Ark. 184; *McCowan* v. *State,* 58 Ark. 17; *Blankenship* v. *State,* 55 Ark. 244.

As the evidence failed to sustain the allegation that the money was the property of Luther Stevens, the judgment must be reversed and the cause remanded for a new trial.

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BOARD OF DIRECTORS OF CRAWFORD COUNTY LEVEE DISTRICT *v.* CRAWFORD COUNTY BANK.

BOARD OF DIRECTORS OF CRAWFORD COUNTY LEVEE DISTRICT *v.* MOORE.

Opinion delivered June 2, 1913.

1. LEVEE DISTRICT—ASSESSMENT—VALIDITY OF STATUTE.—The act of March 15, 1909 (Laws 1909, p. 159) provides for a valid method of assessment. *Alexander* v. *Board of Directors,* 97 Ark. 322. (Page 421.)
2. LEVEE DISTRICTS—CONCLUSIVENESS OF LEGISLATIVE ASSESSMENT.—Where the Legislature has fixed the amount of assessments which may be levied upon the lands benefited by a levee, its finding is conclusive as to the amounts, unless an arbitrary and manifest abuse of power is shown. (Page 421.)
3. TAXATION—UNIFORMITY—CONSTITUTIONAL REQUIREMENTS.—Absolute equality and uniformity in matters of taxation are unattainable, and substantial or approximate equality and uniformity is all that the Constitution requires. (Page 422.)

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; reversed.

*E. L. Matlock,* for appellant.

1. The Legislature has determined the benefits accruing to the lands in the district. This is final. Only an arbitrary and manifest abuse of the power can be

reviewed, not mere mistakes of judgment. 30 Ark. L. Rep. 252; 98 Ark. 113; 85 *Id.* 12; 83 *Id.* 344; 81 *Id.* 562.

2. The fact that part of the lands are above overflow is not sufficient to show that the same would not be benefited by the levee. 59 Ark. 513; 64 *Id.* 258; 81 *Id.* 562; 99 *Id.* 100.

3. Whether the plaintiffs are benefited as much as others can not be determined by the courts. That was a matter for the Legislature. 72 Ark. 119; 64 *Id.* 258.

4. 97 Ark. 322 settles the question as to the method of assessment. See also 77 Ark. 384; 81 *Id.* 562.

5. Precise uniformity of taxation is not always obtainable. 96 Ark. 410. The constitutional requirement is satisfied when assessments are imposed equally upon all standing in like relation. 64 Ark. 555; 70 *Id.* 549; 70 *Id.* 451.

*Sam R. Chew* and *Jesse Turner,* for appellee.

1. Assessments for local improvements must be based on special benefits to accrue therefrom, and must be laid in substantial proportion to such benefits, and not in excess thereof. 97 Ark. 322; 86 *Id.* 1; 71 *Id.* 17; 69 *Id.* 68; 68 *Id.* 375; 64 *Id.* 375; 59 *Id.* 513.

2. The Legislative determination is not universally conclusive. Paige & Jones, Taxation by Assessment, § § 34, 86, 666; Cooley on Taxation 661-2-3; 57 Miss. 378; 65 Pa. St. 146; 181 U. S. 324; 71 Ark. 17; 69 Ark. 68; 48 Ark. 370; 83 *Id.* 54; 86 *Id.* 240; 85 *Id.* 469.

3. The constitutional requirement of uniformity and equality is violated by the act. 71 Ark. 17; 55 Ark. 148; Cooley on Taxation, p. 1260; 65 S. W. 643; 68 Ark. 376; 59 *Id.* 513; 64 *Id.* 258; 197 U. S. 430; 81 Ark. 562; 98 *Id.* 543; 99 *Id.* 100, 508; 100 *Id.* 366.

McCULLOCH, C. J. The plaintiff (appellee) in each of these cases owns land situated within the territorial boundaries of the Crawford County Levee District as prescribed by the special statute creating that district, and they instituted separate actions in the chancery court of Crawford County to enjoin the collection of assessments.

The act of March 15, 1909, creating the district, provides that the directors shall "assess and levy, annually, a tax upon the valuation as it shall appear each year upon the real estate assessment book of Crawford County, Arkansas, upon all lands and real estate within said district."

That method of assessment was declared to be valid by the decision of this court in the case of *Alexander* v. *Board of Directors,* 97 Ark. 322, as being a legislative determination that benefits to real property in the district will accrue in proportion to the value thereof assessed for State and county taxes. That method of assessment has likewise been upheld by this court in numerous cases. *St. Louis Southwestern Ry. Co.* v. *Grayson,* 72 Ark. 119; *Porter* v. *Waterman,* 77 Ark. 383; *St. Louis Southwestern Ry. Co.* v. *Board of Directors Red River Levee District,* 81 Ark. 562.

The legislative determination is conclusive and can not be reviewed by the courts unless there has manifestly been an arbitrary abuse of the power.

The last expression of the court on that subject is found in the case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Board of Directors,* 103 Ark. 127, where the former decisions on the same subject are cited.

In *Moore* v. *Board of Directors of Long Prairie Levee District,* 98 Ark. 113, we said:

"Only an arbitrary and manifest abuse of power by the Legislature would be reviewed, and not merely mistakes of judgment. To hold otherwise would be to take away from the law-makers the powers committed to them and to substitute the judgment of the courts, requiring the latter to review every matter alleged to have been erroneously determined by the Legislature."

In *Salmon* v. *Board of Directors,* 100 Ark. 366, the court 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 law-makers, or of those empowered by the law-makers to make assessments, in fixing the amount or rate of assessment, will not be reviewed and corrected by the courts."

Now, in the present cases, it is conceded that the lands of the plaintiffs will receive some benefit from the construction of the levee; but it is contended that the lands will not be benefited in the same proportion, and that the basis of assessment is unjust.

The cases fall, however, squarely within the principle announced in the decisions cited above, and to sustain the contention of plaintiffs is to overrule those cases.

The most that can be said, from the proof in these cases, is that, according to the preponderance of the evidence, the lands of the plaintiffs will not be benefited as much as other lands in the district, and that the benefits from the construction of the improvement will not accrue to the lands in the same proportion as other land values. So, the contention, after all, is that the Legislature has made a mistake of judgment in determining that the benefits will accrue in proportion to value, and that that is a fair and just basis.

The controlling principle in such cases can not, we think, be stated any clearer than has been done in many of our previous decisions, and, as before indicated, to decline to apply those principles in these cases would be to overrule those decisions, which have been steadily adhered to. Absolute equality and uniformity in matters of taxation are unattainable, and substantial or approximate equality and uniformity is all that the Constitution requires. *Shibley* v. *Fort Smith & Van Buren Bridge Dist.*, 96 Ark. 410.

Our conclusion, therefore, is that the chancellor, in each of the cases, erred in holding that the assessment was invalid. For that reason, the decree in each case is reversed, and each cause is remanded with directions to enter decree dismissing the complaint for want of equity.

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

Opinion delivered June 9, 1913.

1. INDICTMENT—STYLE OF COURT.—The caption of an indictment contained the style of the case, but omitted the name and style of the court in which the indictment was returned; the preliminary clause of the indictment was as follows: "The grand jury of Cross County, in the name and by the authority of the State of Arkansas, accuses, etc." *Held*, as there is but one court in the county by which a grand jury is empanelled, and that is the circuit court, a specification that the presentation is by "the grand jury of Cross County" is by necessary implication a statement that it is in the circuit court of that county as required by Kirby's Digest, § 2243. (Page 424.)
2. RAILROADS—FAILURE TO MAINTAIN AGENT—EVIDENCE.—Where a railroad company is indicted under act of April 13, 1905, Acts of 1905, No. 161, page 405, for failure to keep an agent at a certain station, evidence that the agent, who was a merchant and conducted a store a short distance from the depot, did not keep the station open or attend there for the purpose of accommodating shippers and travellers, is sufficient to warrant a conviction under the indictment. (Page 425.)

Appeal from Cross Circuit Court; *W. J. Driver*, Judge; affirmed.

*E. B. Kinsworthy, R. E. Wiley* and *T. D. Crawford*, for appellant.

1. The indictment is defective in that it fails to describe the court in which it is found. Kirby's Digest, § 2243; 73 Ark. 280; 5 N. C. (Murph.) 281; 22 Cyc. 230; 5 How. (Miss.) 20; 7 Tex. App. 52; 44 Tex. 376; 9 Phila. 593; 2 McCord 181; 60 Ala. 93.

2. The verdict is not sustained by the evidence under the act, April 13, 1905. The testimony shows a substantial compliance with the act. The general rule is, that *reasonable* care is the measure of a railroad's duty in the maintenance of stational facilities. 4 Elliott, Railroads, § 1590.

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

1. The indictment does show the court it was re-

turned in substantially as required by Kirby's Dig., § 2243.

2. The undisputed testimony shows that the statute was violated. Act July 1, 1905.

McCULLOCH, C. J. Appellant was indicted by the grand jury of Cross County for violation of a special statute approved April 13, 1905, requiring appellant to erect and maintain a depot at Levesque, a station on its line in Cross County, Arkansas, and to "keep an agent at its depot at Levesque * * * to sell tickets, receive freight, and issue bills of lading therefor, and to deliver freight." The statute provides that each violation of its terms shall constitute a misdemeanor, punishable by fine of not less than $50.00, nor more than $100.00, and that each day of such failure or refusal to keep an agent at said depot shall constitute a separate offense.

There was a trial before a jury, which resulted in appellant's conviction of violating the statute, and judgment was rendered for recovery of the fine assessed by the jury.

There are two questions raised on this appeal, one as to the sufficiency of the indictment, the other as to the legal sufficiency of the evidence.

The validity of the indictment is attacked on the ground that it does not contain a specification of the name of the court in which the indictment was returned.

The statute provides that an indictment must contain "the title of the prosecution, specifying the name of the court in which the indictment is presented, and the name of the parties." Kirby's Digest, section 2243.

The caption of the indictment contains the style of the case, "*State of Arkansas* v. *St. Louis, Iron Mountain & Southern Railway Company,*" but the name or style of the court is not mentioned in the caption. The preliminary clause of the indictment reads as follows: "The grand jury of Cross County, in the name and by the authority of the State of Arkansas, accuse the St. Louis, Iron Mountain & Southern Railway Company, a corporation, of the crime of failing to keep agent at depot at Levesque, committed as follows, towit:"

We are of the opinion that that is sufficient, by necessary implication, as a specification of the name of the court. There can be but one court in the county by which a grand jury is empanelled, and that is the circuit court; and a specification that the presentation is by "the grand jury of Cross County," is by necessary implication a statement that it is in the circuit court of that county. If the name of the court is, either in express words, or by necessary implication, specified, either in the caption or in the body of the indictment, we think it is sufficient to comply with the requirements of the statute.

The attack on the validity of the indictment is not well founded.

We are also of the opinion that the evidence is legally sufficient to sustain the conviction.

One of the witnesses testified that the agent, who was a merchant and conducted a store a short distance from the depot, did not keep the depot open or attend there for purpose of accommodating shippers and travelers as required by the statute. This witness was contradicted by several others introduced by appellant, but there was enough evidence, we think, to justify the jury in finding that the terms of the statute had not been complied with.

Judgment affirmed.

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## JACKSON v. STATE.

Opinion delivered June 2, 1913.

1. LARCENY—FELONIOUS INTENT—EVIDENCE—SUFFICIENCY.—Where defendant was charged with the crime of larceny for stealing a hog, the evidence *held* sufficient to show a felonious intent. (Page 428.)
2. VERDICT—APPEAL—FINALITY.—Where the testimony is conflicting, the verdict of the jury will be held binding on appeal. (Page 429.)
3. INSTRUCTIONS—REQUESTS COVERED BY INSTRUCTIONS GIVEN.—It is not error to refuse requests for instructions, where the matters embraced in the requests are fully covered by instructions given. (Page 429.)

4. APPEAL AND ERROR—WAIVER OF ERROR—MOTION FOR NEW TRIAL.—The error of permitting cross examination of defendant is waived when not made a ground in the motion for a new trial. (Page 429.)

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

*John E. Clerget,* for appellant.

1. There is no evidence of an intent to convert. The burden was on the State to prove the intent. Greenleaf on Evidence (15 ed.), § § 35, 50.

2. The jury should not be permitted to disregard undisputed evidence. 96 Ark. 500.

3. The intent to unlawfully deprive the owner of his property must exist in the mind of the defendant. 24 A. & E. Enc. Law, 45 to 49; Kirby's Dig., § 1830; 78 Ark. 299; 105 Minn. 217. This intent must be proved. 32 Ark. 238.

4. Proof of another crime is not admissible. 72 Ark. 589; 75 *Id.* 427; 84 *Id.* 119; 92 *Id.* 481.

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

1. The findings of the jury are conclusive on appeal on matters of fact. 95 Ark. 175, 324.

2. The instructions refused were fully covered by others given by the court. 100 Ark. 199, 201.

HART, J. The defendant, John Jackson, was convicted of larceny charged to have been committed by stealing a hog belonging to R. B. Brown, and from the judgment of conviction, he has duly prosecuted an appeal to this court.

R. B. Brown testified substantially as follows:

I live near Plumerville in Conway County, Arkansas, and the defendant lives near me. During the month of August, 1912, I turned out seven shoats, and on the same day late in the evening, I met a neighbor who told me my hogs were in his field, and he would try to get them out. The next morning I penned up four of the hogs, but three of them never came up. In a day or two, I was informed that the defendant had taken up one of them, and upon meeting the defendant, asked him about

it. My mark was a hole in the right ear. The defendant said that he had taken up a hog, but he was not marked like mine. He said that the hog he took up was marked with a smooth crop and swallow fork in the left ear, and that there was no mark in the right ear. I accepted his statement, and did not go to examine the hog he had taken up. My hog did not come up, and I again learned that he had a hog in his pen marked in my mark. In the course of two or three weeks, I went to his house, and went around to his pen, which was in his back yard. I saw a hog in the pen and recognized it as my hog. The mark had been changed to a smooth crop and swallow fork in the right ear. The hog had been freshly marked, and the marked place had not yet healed up.

On cross examination, he stated that Jackson told him that he cared nothing about the hog, and that if he would pay him six dollars for his expenses in keeping the hog, he could have it. This Brown declined to do. Brown also stated that Jackson had had him arrested for permitting his hogs to run at large within the limits of the fencing district. The son of the prosecuting witness corroborated the testimony of his father in all essential respects.

The defendant adduced testimony tending to show that the hog he took up was marked with a smooth crop and swallow fork in the right ear, and that it was an old mark. Several witnesses who examined the hog while in the pen testified to this fact. Other testimony tended to show that the defendant went to a justice of the peace after he had taken up the hog within the limits of the fencing district, and asked him how to proceed in advertising the hog. The justice of the peace prepared a form of advertisement, which was given to the defendant. The defendant advertised the hog for sale, and became the purchaser thereof at the sale. The defendant said that he took up the hog in controversy in his field, and that it was at the time marked with a smooth crop and swallow fork in the right ear. That he did not claim the hog as his own, but advertised it as an estray.

The principal contention made by counsel for the

defendant is, that the evidence is not sufficient to sustain the verdict, but we can not agree with his contention in this respect. In the case of *Blackshare* v. *State,* 94 Ark. 548, the court said:

"An effort on the part of one who takes up cattle as estrays to post them would not justify such one in converting such cattle to his own use. The law requires one taking up estrays to do something more than simply to make an effort to post them. (See chapter 149, Kirby's Digest.) An effort, but failure, to comply with the estray laws before converting estrayed animals to one's own use would be evidence to be considered by the jury as tending to prove the absence of a felonious intent in making such conversion. But that is as far as it could go. Where one has taken and converted the animals of another to his own use, if, at the time of the taking, there was the felonious intent to deprive the true owner, whoever he might be, of the permanent use and benefit of his property, the one so taking the animals of another under our statute would be guilty of larceny. One so charged may set up in defense an effort to comply with the estray laws, and the testimony adduced to establish such defense may be considered by the jury in determining the question as to whether the accused took the animals with a felonious intent at the time of the taking to convert them to his own use, and to permanently deprive the owner of his property."

In *Jackson* v. *State,* 101 Ark. 473, the court held: "In a prosecution for larceny of hogs, the good faith of an alleged attempt by the accused to notify the owner, and whether he converted the hogs to his own use by marking them, were questions for the jury." See also, *Cravens* v. *State,* 95 Ark. 321; *Douglass* v. *State,* 91 Ark. 492; *Brewer* v. *State,* 93 Ark. 479.

It will be noted that the prosecuting witness testified positively that the hog belonged to him, and that the mark on it had been changed. He said that when he first was informed that the defendant had up the hog, he questioned him about it, and the defendant told him the hog he had up was not marked like his at all, and that

the hog had no mark at all in the right ear, but was marked in the left ear. That the mark had been recently changed, and the freshly cut ear had not healed.

Other testimony showed that the hog was marked in the right ear. From this the jury was warranted in finding that the defendant at the time he took up the hog, had the felonious intent of converting it to his own use, and this was sufficient to warrant a conviction. It is true that a number of witnesses testified that the mark on the hog was an old mark, and other evidence on the part of the defendant tended to show that he never did claim to own the hog, but took it up within the limits of the fencing district, and advertised it for sale under the provisions of the fencing act. This conflict in the testimony, however, was settled by the verdict of the jury, and, according to the settled rules of this court, we can not invade the province of the jury, and its verdict is binding on us.

Counsel for the defendant also urges that the court erred in refusing certain instructions asked by him on the question of reasonable doubt. This phase of the case was fully covered by other instructions given by the court, and we have repeatedly held that it is not prejudicial error to refuse instructions when the matters embraced in them are fully covered by the instructions given. *Turner* v. *State,* 100 Ark. 199.

The defendant took the stand in his own behalf, and counsel for the defendant urges that the court erred in requiring him to answer certain questions propounded to him on cross examination. In regard to this assignment of error, it is sufficient to say that it was not made one of the grounds of his motion for a new trial, and, under our rules of practice, he will be deemed to have waived it. *Burris* v. *State,* 73 Ark. 453; *Ince* v. *State,* 77 Ark. 418; *King* v. *Black,* 92 Ark. 598.

The judgment will be affirmed.

## WARD v. COOPER-SEARAN GROCERY COMPANY.

Opinion delivered June 9, 1913.

EVIDENCE—PAROL PROOF OF CONSIDERATION OF WRITTEN CONTRACT.—Though the recitals in a bill of sale can not be contradicted by parol evidence for the purpose of defeating the instrument, parol evidence is admissable to show that the consideration was not as recited, and in a controversy as to the amount due by plaintiff to defendant under a bill of sale, it is competent to show how the parties arrived at the amount due.

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

*R. L. Floyd,* for appellant.

Parol evidence is not admissable to contradict, vary or add to any of the terms of a written contract. 94 Ark. 132; 88 Ark. 213; 86 Ark. 162; 83 Ark. 163; 80 Ark. 505; 17 Cyc. 596; *Id.* 632; 80 Mo. App. 145; 47 Minn. 367; 45 N. W. 861; 9 Enc. of Ev. 406; *Id.* 408; 21 How. 289; 1 Am. & Eng. Enc. of L. (1 ed.), 416.

*J. H. Harrod,* for appellee.

The parol testimony complained of does not contradict the written agreement, but only explains how one of the items of the account was arrived at. It was admissible.

HART, J. The plaintiff, W. W. Ward, brought this suit against the Cooper-Searan Grocery Company to recover the possession of four promissory notes, amounting in the aggregate to $665.00, executed by W. P. and Frank D. Allen, and payable to himself. The plaintiff, for himself, testified substantially as follows:

The notes in controversy are my individual property, but I pledged them to the Cooper-Searan Grocery Company to secure a five hundred dollar note of the Faulkner Grocer Company, of which I was a member. I never sold the notes to the defendant, but did sell to J. B. Dickinson the business of the Faulkner Grocer Company, in Little Rock, Ark., and at the time of the sale, executed the following instrument of writing:

"Little Rock, Ark., September 6, 1911.

"Received of J. B. Dickinson, the sum of five hundred dollars, in payment of business of (formerly Faulkner Grocer Company) myself at 223 West Fifth Street (West Capitol Avenue), in Little Rock, Ark. J. B. Dickinson to assume payment of accounts as follows:

"Chas F. Penzel Grocery Company.....$ 133.33
"Cooper-Searan Grocery Company..... 1,731.29
"Plunkett-Jarrell Grocery Company..... 297.47

(Signed) "W. W. Ward."

The reason the notes in controversy were not delivered to me at the time the sale was made was, that Mr. Dickinson said that the notes were in the office of the Little Rock Trust Company as collateral security. The above exhibit to my testimony constituted the entire agreement between us.

S. L. White, an attorney for the plaintiff, testified that he drew up the instrument copied above, and that it reflected the entire agreement, as stated to him by the parties who were present at the time, and that no reference was made to the notes in controversy by either of them in his presence.

J. B. Dickinson, for the defendant, testified: The Faulkner Grocer Company, a business conducted by the plaintiff, was about to go into bankruptcy. I bought out the business for the Cooper-Searan Grocery Company, and other creditors of the company. I paid the plaintiff five hundred dollars to cover his exemptions, and to induce him to make the sale instead of filing a petition in bankruptcy. He executed at the time the receipt copied above and exhibited with his testimony. The amount due the Cooper-Searan Grocery Company was $1,731.29. This amount was arrived at this way: The grocer company owed the defendant $2,403.79, and this amount, by agreement between us, was credited with the notes in controversy, amounting to $665.00, leaving a balance due defendant of $1,731.29.

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

Counsel for the plaintiff contends that the court erred in permitting J. B. Dickinson to testify that at the time of the sale of the grocery business by the plaintiff, that the plaintiff agreed to, and did turn over to the defendant, the notes in controversy to be credited on the debt owed by him to the defendant. Counsel insists that the effect of this testimony was to vary and contradict the writing copied above which he contends was the entire agreement between the parties. In the case of *J. H. Magill Lumber Company* v. *Lane-White Lumber Company,* 90 Ark. 426, the court held:

"Though the recitals in a bill of sale can not be contradicted by parol evidence for the purpose of defeating such instrument, it is competent to prove by such evidence that the consideration has not been paid as recited, or to establish the fact that other considerations not recited in the deed were agreed to be paid, when such proof does not contradict the terms of the writing."

In the application of the rule there announced, we do not think that the court erred in admitting the testimony. The testimony did not contradict the terms of the writing, but only served to explain it. It was competent to show how the parties arrived at the amount due by the plaintiff to the defendant, and this was the purpose of the testimony in question.

In making the sale, Dickinson was acting as representative of the defendant company, and his testimony to that effect did not vary or alter the receipt he gave to the plaintiff. His testimony in this respect only served to identify the principal for whom he acted, and was competent for that purpose.

The judgment will be affirmed.

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

Opinion delivered June 9, 1913.

1. CARRIERS — BAGGAGE — NEGLIGENCE — **When plaintiff delivered his trunk to defendant railway company at Newport on the 9th of the**

month for delivery at Hope, and it was not delivered until the evening of the 11th, four regular passenger trains having gone from Newport to Hope in the meantime, defendant will be held negligent as a matter of law, for delay in transportation. (Page 436.)

2. CARRIERS—FAILURE TO DELIVER BAGGAGE PROMPTLY—DAMAGES FOR MENTAL SUFFERING.—In an action against a railroad company for damages on account of delay in transportation of baggage, plaintiff can not recover damages because of inconvenience and mortification suffered on account of the delay in receiving his baggage. (Page 436.)

3. CARRIERS—DELAY IN TRANSPORTING BAGGAGE—DAMAGES.—Plaintiff can not recover from a railroad company, the value of articles purchased by him, made necessary by the negligent delay of the railroad company in failing to transport and deliver his baggage promptly. (Page 436.)

4. CARRIERS—DELAY IN TRANSPORTING BAGGAGE—DAMAGES—PENALTY.—Plaintiff may recover from a railroad company, which negligently failed to transport and deliver his baggage promptly, the expenses he incurred in his endeavor to locate the baggage, and also the penalty for such neglect provided in Public Acts, 1911, p. 249. (Page 437.)

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

STATEMENT BY THE COURT.

The plaintiff, L. L. Campbell, brought this action against the St. Louis, Iron Mountain & Southern Railway Company for damages sustained by him by reason of an alleged negligent delay in transporting his baggage from Newport to Hope in the State of Arkansas. In addition to actual damages, plaintiff also seeks to recover the penalty for failure to deliver baggage as provided for in Act 252 of the General Acts of 1911. The facts are substantially as follows:

On the afternoon of October 9, 1911, plaintiff purchased a ticket from Newport to Hope, Ark., and checked a trunk as his baggage. He told the agent that he was going to Hope to be married, and would attend certain social functions prior to the marriage. The next morning, he went down to the depot to take the train leaving there about 5 o'clock. He could not find his trunk, and, after searching the baggage room, the agent decided that it had been sent north by mistake. When plaintiff

reached Little Rock, on his way to Hope, he called on the station master at the union depot and explained the matter to him. The station master told him the trunk would reach him that afternoon. The trunk was not delivered at Hope until about 7 o'clock on the evening of the 11th, which was about one hour before the marriage was to occur. In the meantime, the defendant had already attended the social functions, and says that he was very much inconvenienced and embarrassed by reason of the fact that his trunk had not come, and that he did not have proper clothes to wear at the entertainments. The plaintiff expended about five dollars for telegraph and telephone messages in trying to locate his trunk. He also purchased a pair of shoes, a shirt, a pair of gloves and a necktie for about ten dollars. He arrived at Hope at 11:30 o'clock on the morning of the 10th of October. Other facts will be referred to in the opinion.

The jury returned the following verdict: "We, the jury, find for the plaintiff, and assess his damages as follows: Expenses, $13.80; for inconvenience and hardship, $100.00; for penalty, $100.00."

From the judgment rendered, the defendant has duly prosecuted an appeal to this court.

*E. B. Kinsworthy, Campbell & Suits* and *W. G. Riddick,* for appellant.

1. The proper measure of damages for a carrier's delay in forwarding and delivering a passenger's baggage, is the value to the owner of the use of the baggage during the delay. 9 Sedgwick, § 854; 13 Cyc. 157; 6 Cyc. 449; 114 Pac. 949; 109 S. W. 949; 116 N. W. 581; 30 S. W. 487; 21 S. W. 303; 21 S. W. 411; 80 S. W. 386; 97 S. W. 1090; 116 Tenn. 624.

2. The allegations as to deprivation of anticipated pleasure in attendance upon social functions and being subjected to embarrassment, humiliation and mortification, or "inconvenience and hardship," as was finally substituted, should have been stricken from the complaint. They amount to no more than an allegation of mental anguish, for which there can be no recovery unless

accompanied by a personal injury. 67 Ark. 123; 64 Ark. 538; 69 Ark. 402; 70 Ark. 136; 65 Ark. 177; 21 S. W. 411; 67 Ark. 437; 3 Willson Civ. Cas. Ct. App. 390. Evidence as to the cost of other clothing purchased by appellee should have been excluded. 30 S. W. 487; 109 S. W. 949; 97 S. W. 1090.

3. There is no liability upon the carrier if it transports a passenger's baggage upon the same train with the passenger, or within a reasonable time thereafter. Acts 1911, 249; 99 Ark. 149. What is a reasonable time is always a question for the jury. 75 Ga. 745; 6 Cyc. 442; 9 Ky. Law Rep. 934; 59 Md. 390; 106 Ill. App. 563; 86 N. Y. S. 525.

*Stayton & Stayton* and *Gustave Jones,* for appellee.

1. It was proper to allow appellee damages for his actual expenses. The true rule as to the measure of damages for delay in transporting baggage is the usable value of the articles during the delay, and any incidental expenses involved in being deprived of the use thereof by reason of the delay. 6 Cyc. 676; 13 *Id.* 32; *Id.* 156. And where notice was given that the baggage was desired to be transported promptly in order that the owner might have the use of the wearing apparel at a specified time, and for a special occasion, the fact that the owner would be forced to buy other clothing should a delay occur, may properly be held as being within the contemplation of the parties when the contract was made. 13 Cyc. 34; 88 Ark. 77, 89, 90.

2. Damages for inconvenience and hardship was proper. By the delay, appellant became liable for such special damages as was fairly attributable thereto. 95 Ark. 213; 88 Ark. 77; 88 Ark. 201; 94 Ark. 324.

3. The court was right in instructing the jury, as a matter of law, that the delay was unreasonable. 15 Am. & Eng. Ann. Cases, 391, note; 55 Ark. 134; 63 Ark. 353; 69 Ark. 568.

HART, J., (after stating the facts). Counsel for the defendant first insist that what is a reasonable time for

the transportation of baggage is always a question for the jury, and that the court erred in telling the jury, as a matter of law, that the delay in the transportation of the baggage was caused by the negligence of the defendant. We do not agree with them in this contention. The undisputed evidence shows that the plaintiff told the agent, when he checked the baggage, that he was going to Hope to get married, and would need the trunk as soon as he got there. He checked the trunk in ample time for the agent to have placed it on the train on which plaintiff embarked. The plaintiff arrived at Hope at about 11:30 o'clock on the morning of the 10th, and his trunk arrived there at 7:00 o'clock on the evening of the 11th. During this time, four regular passenger trains had passed between the two places, and the baggage could have been transported on either of these trains. But one reasonable inference can be drawn from these facts, and that is, that the defendant was negligent in the transportation of the plaintiff's baggage.

Under the instructions of the court, the plaintiff was allowed to recover for the inconvenience, hardship and mortification suffered by him on account of the delay in the transportation of his baggage. This was to allow him to recover for mental anguish unaccompanied by physical injury. In the case of the *Chicago, Rock Island & Pacific Ry. Co.* v. *Whitten,* 90 Ark. 462, the court held that in an action to recover damages for injury to baggage, the plaintiff could not recover any damages for alleged mental suffering, because he had not suffered any physical injury. The holding of the court in that case is conclusive here, and the plaintiff was not entitled to recover damages, because of the inconvenience and mortification he suffered on account of the delay in receiving his baggage. Neither was he entitled to recover the value of the articles of clothing purchased by him. They were articles that could be worn on other occasions by a person of his station in life, and, in the absence of testimony to the contrary, it must be presumed that he received value for the money he paid out for this purpose. The measure

of a passenger's damage for a carrier's delay in forwarding his trunk is the value of the use of the property during the time of the delay. Elliott on Railroads (2 ed.), vol. 4, sec. 1662-a; Hutchinson on Carriers (3 ed.), vol. 3, § 1366; 6 Cyc., page 676; *Texas & N. O. R. Co.* v. *Russell* (Tex. Civ. App.), 97 S. W. 1090; *Mexico Central Ry. Co.* v. *DeRosear* (Tex. Civ. App.), 109 S. W. 949.

Plaintiff was entitled to recover the expenses he was put to in undertaking to locate his trunk. See authorities *supra.* He was also entitled to recover the penalty. See General Acts of 1911, page 249.

It follows that for the errors indicated, the judgment must be reversed, and, inasmuch as under the undisputed evidence plaintiff was entitled to recover the sum of five dollars for reasonable expenses in undertaking to locate his baggage, judgment will be entered here for that amount and for the $100 penalty assessed against the defendant by the jury.

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

Opinion delivered June 9, 1913.

1. CUSTOMS AND USAGES—REQUISITES—PROOF.—The custom of a master mechanic of a railway to employ firemen in the railway yards as well as in his office, may be proved by any one having a knowledge of the custom, but the custom must be shown by the witness to be certain, uniform, definite and known. (Page 440.)
2. CUSTOMS AND USAGES—EVIDENCE.—The testimony of an employee of a railroad company who had been employed only fifteen days, and had no specific knowledge of the custom, is incompetent to prove that the custom of a master mechanic was to employ firemen in the yards as well as in his office. (Page 440.)
3. CUSTOMS AND USAGES—EVIDENCE.—Evidence of a single act of a master mechanic of a railroad company is incompetent to prove that it was his custom to perform said act in said way. (Page 441.)

Appeal from Desha Circuit Court; *Antonio B. Grace,* Judge; reversed.

*E. B. Kinsworthy, J. C. Knox* and *T. D. Crawford,* for appellant.

1. The issues are the same as in 104 Ark. 236. The court erred in admitting the testimony of Joseph Paffe as to the master mechanic hiring firemen in the yards.

2. There is error in the instructions. 104 Ark. 236.

*C. P. Harnwell,* for appellee.

1. The testimony shows that the master mechanic did hire firemen in the yards. Paffe's testimony was competent and shows the custom. 146 S. W. 855; 104 Ark. 236.

2. Wirbel was not a trespasser; he was directed to seek the master mechanic in the yards; there was no error in the court's charge, and the finding of the jury should not be disturbed. 146 S. W. 855.

3. Even a trespasser or licensee is entitled to recover under the evidence. 123 S. W. 298; 134 *Id.* 1189; 139 *Id.* 301; 142 *Id.* 189.

HART, J. Appellant prosecutes this appeal to reverse a judgment rendered against it in favor of appellee for damages for personal injuries alleged to have been sustained by him by reason of the negligence of the appellant. This is the second appeal in the case. The opinion on the former appeal is reported in 104 Ark. 236, under the style of the *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wirbel.*

On the 15th day of December, 1909, Harry Wirbel went to the office of the master mechanic of the appellant's line of railway at McGehee, Ark., for the purpose of securing employment as a locomotive fireman. The office of the master mechanic was situated in the yards of the company, and the person in charge of the office directed Wirbel to seek the master mechanic in the yards. Wirbel went out into the yards, and went down a path running by the coal chute. He saw a door open there, and asked the man who was running the machine if he had seen the master mechanic. About that time the coal-

hoisting machinery broke, and Wirbel was severely injured thereby.

The evidence adduced in his behalf tends to show that the machinery was defective, and that appellant had been advised of that fact. R. McCuen testified that he worked for appellant in the capacity of engineer and coal chute fireman at McGehee during the latter part of October and November, 1909. He said that the master mechanic hired the fireman, and that he was hired in the yard. That he did not know whether or not it was the custom of the master mechanic to hire firemen in the yards or in his office. Joseph Paffe was the engineer and fireman in charge of the coal-hoisting machinery at the time Wirbel was injured, and had been so employed for about fifteen days. His deposition taken on interrogatories and cross interrogatories, was read in evidence at the trial. We copy from his direct examination the following:

Q. Do you know whether or not the master mechanic was in the habit of transacting business outside of his office and in the yards of the company at McGehee?

A. Yes; the master mechanic did transact all kinds of business outside of his office, and in the yards at McGehee. As a matter of fact, he was in the yards a great part of the time and transacted the greater part of his business, and that fact was generally known and acted upon.

Q. Was the master mechanic, or any other official of the company, hiring firemen at McGehee during the month of December, 1909, or at any other time or times?

Objected to by counsel for defendant on the ground that the witness has not shown that he was qualified to answer this question. The objection was overruled by the court and the defendant, at the time, duly saved its exceptions.

A. Yes; the master mechanic was hiring firemen at McGehee in December, 1909, and both previous to and subsequent to December 15, 1909. That was part of his business, and he hired them in his office, in the yard, or anywhere else he saw them.

On cross examination, he was asked:

Q. Did you ever see the master mechanic employ locomotive firemen in the railway company's yards, outside of his office?

A. No; I never saw him hire anybody.

Here counsel for defendant renewed his objection to the testimony of the master mechanic employing firemen in the yards of the company.

Q. Did you ever see the master mechanic at McGehee hire a locomotive fireman at all, inside of his office or outside? If you did, state when it was, where it was, and who the fireman was?

A. I have already answered this question.

The testimony on the part of the appellant showed that the master mechanic had authority to employ firemen, but that he could only do so in his office upon written application filed by the person seeking such employment. That it was against the rules of the company for him to employ them in the yards of the company.

On the former appeal, the court held that if the master mechanic had authority to employ firemen, and was accustomed to doing so anywhere in the yards where he might be found, and the person in charge of the office of the master mechanic directed Wirbel to seek him in the yards, Wirbel had a right to rely upon the invitation, and it was the duty of appellant to exercise ordinary care to protect him from injury while he was seeking the master mechanic. The court held, further, that if he was injured by the negligence of appellant while so engaged, and while in the exercise of ordinary care himself, appellant would be liable for the injury.

The existence of a custom on the part of the master mechanic of employing firemen in the yards of the company at McGehee was a question of fact for the jury, and the court submitted it to them under the evidence stated above. Counsel for appellant contend that this was error, and that it was error to admit the testimony of Mr. Paffe to the effect that the master mechanic at McGehee was accustomed to hiring firemen in the yards. A custom must be certain, uniform, definite and known, and the

existence of a particular custom of the kind under consideration here may be testified to by any person who possesses knowledge of the custom. For instance, as applied to the present case, if one or more persons had knowledge that the master mechanic commonly and uniformly performed the duty of hiring locomotive firemen in the yards of the company at McGehee for a certain and definite period of time, such testimony would establish a reasonable presumption or inference that the master mechanic, in so doing, was acting in the line of his duty, as a matter of custom, acquiesced in by the appellant for the purpose of its business. See *St. L., I. M. & S. Ry. Co.* v. *Hendricks,* 48 Ark. 177; see also *St. L., I. M. & S. Ry. Co.* v. *Caraway,* 77 Ark. 405. The difficulty here is, that the testimony is not sufficient to show the existence of such custom on the part of the master mechanic. It is true that in response to a question on his direct examination, Paffe stated that the master mechanic was in the habit of hiring firemen in the yards of the company at McGehee, but on cross examination, he also stated that he never saw him hire anybody. It will be remembered that Paffe had only been in the employment of the company for a short time, viz., a period of about fifteen days. His cross examination must be considered as explanatory of his testiomny given on direct examination, and, when so treated and considered, it is manifest that he possessed no knowledge whatever of whether or not the master mechanic, as a matter of custom, hired firemen in the yards of the company. So, then, it will be seen that his testimony amounted to no more than a mere conclusion on his part, or at most a statement of matters which he had learned from others, and would be merely hearsay. In either event, his testimony was not competent to show the existence of a custom of which he possessed no knowledge whatever. This leaves only the testimony of witness, McCuen, to establish the existence of the custom. His testimony only showed the single act of hiring himself, and falls far short of establishing the existence of a custom on the part of the master mechanic of hiring firemen in the yards of the company.

It follows that the court erred in admitting the testimony of witness, Paffe, to establish the existence of a custom on the part of the master mechanic of hiring locomotive firemen in the yards of the company, and the court also erred in submitting the question of the existence of the custom to the jury, because there was no evidence upon which to base a submission of this question.

For the errors indicated, the judgment must be reversed and the cause remanded for a new trial.

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## CLINTON v. ROSS.

Opinion delivered December 2, 1912.

1. SALE OF CHATTELS—CONDITIONAL SALE—RESERVATION OF TITLE.—In conditional sales of personal property, where the title is retained by the vendor, until the purchase price is paid, the vendee acquires an interest that he can sell or mortgage without the consent of the vendor but the vendor's right to recover the property, if the purchase price is not paid is not prejudiced by such sale or mortgage. (Page 446.)
2. CONTRACTS—STATUTE OF FRAUDS.—An agreement in writing wherby C agreed to pay a debt due from B to R, upon the purchase of certain property by C from B; *held*, not to be in violation of the statute of frauds. (Page 446.)
3. CONTRACTS—CONSIDERATION—TIME OF PAYMENT.—Where a contract, whereby C agrees to pay to R a certain sum, is complete upon its signature and delivery, C is bound to pay the debt within a reasonable time, and it is not prejudicial error to allow proof that the time agreed upon was sixty days. (Page 446.)
4. CONTRACTS—NECESSARY SIGNATURES.—Where C agrees to pay to R a debt owed to R by B, it is not necessary that the contract be signed by R, since it was made by C and B for R's benefit, and was signed by C, the party to be charged thereunder. (Page 446.)

Appeal from Polk Circuit Court; *Daniel Hon*, Judge on exchange; affirmed.

STATEMENT BY THE COURT.

W. N. Ross brought suit against W. E. Clinton and W. J. Batson, alleging, that on June 6, 1911, Batson was indebted to him in the sum of $600.00 for goods and moneys furnished to enable him to operate a sawmill,

and, as security for such supplies, agreed that all the lumber manufactured by him should be stacked upon the yards and become the property of Ross until the account was paid. That on June 8, appellant, desiring to purchase the 300,000 feet of lumber on the yards of the mill of defendant, Batson, agreed with plaintiff and Batson that the lumber was to remain the property of Ross until it was paid for, and that he would pay for same before it was removed and disposed of, and within sixty days from the date of the agreement, in writing, which was made on August 6, 1911, a copy of which was attached and exhibited with the complaint. A balance of $545.01 was claimed to be due upon the agreement, and judgment was asked therefor, with interest from the 6th day of August, 1911. The contract reads as follows :

"Whereas, this contract, made and entered into by and between Will Batson and Ed Clinton and Will Ross, witnesseth:

"That, whereas, Will Batson is justly indebted to Will Ross in the sum of six hundred dollars, for money and goods furnished by said Will Ross to enable him to run his mill and cut lumber on the Churchwell land, about three miles west of Beaver Town, in Polk County, Arkansas, and that said sum of money, etc., was furnished with the understanding and agreement betwen Will Batson and Will Ross that all lumber sawed at such mill should be the property of Will Ross, and should be shipped in his name, and that same should not be sold or disposed of without the consent of said Will Ross; and,

"Whereas, said Ed Clinton now desires to buy said lumber, and that there is now still on mill yards, on the place aforesaid, about something like 300,000 feet of lumber, now in stacks.

"Now, therefore, this agreement witnesseth, that each of the parties hereto have agreed, and they do each hereby agree, that said Ed Clinton may purchase the said lumber with the distinct understanding that the title thereto shall not pass to Ed Clinton, but shall remain in Will Ross until the debt due Will Ross by Will Batson

is fully paid. And the said Ed Clinton does hereby specially agree that he will pay the debt due to Will Ross by Will Batson before the said lumber shall be removed or sold, and that he will pay to said Will Ross within..... days, the said sum due him, whether the lumber is removed or sold or not; but that, in any event, he will pay when the lumber is removed, if removed before that many days have elapsed.

"This the ..... day of ....., 1911.

(Signed) "W. E. Clinton.

(Signed) "W. J. Batson."

A demurrer was filed and overruled, and appellant made a separate answer, denying any indebtedness on the part of Ross to appellee, and that any goods or moneys were furnished him to enable him to operate a sawmill, as alleged; that Ross became the owner of the lumber cut and manufactured by Batson for any purpose, and that there was any agreement between Ross and Batson and Clinton that Clinton should buy the lumber, with the understanding that it should remain the property of Ross until paid for, and that there was any agreement on his part to pay for the lumber before it was disposed of, removed or sold, and that he agreed to pay for the lumber within sixty days from the execution of the instrument, and that sixty days thereafter would be the 6th of August, as alleged. Alleged that the contract sued upon and attached to the complaint was without consideration and not binding, and pleaded the statute of frauds. The contract was shown to have been entered into, and was, in fact, signed June 6, 1911, and appellee was permitted to testify, over objection, that the blank left in the contract for the number of days was left when the typewritten copy was prepared and before the agreement as to the time was made when the contract was signed. That sixty days was then agreed upon, and it was omitted to be inserted in the contract.

Appellant testified that there was no agreed time when the money was to be paid, and that he only agreed that if he got the lumber, he was to pay for it when he got ready to move it. That he stated to both Ross and

Batson that he did not feel like paying any money on it until he knew he was going to get the lumber. That he never got the lumber, it having been destroyed by fire after the execution of the agreement. He said, further, that he only signed the contract, agreeing to pay for the lumber in the event he bought it, and at the time of such signature, he and Batson had not agreed upon the price, and that there was no time mentioned in which he was to pay for the lumber. Clinton moved some of the lumber after the contract was made. The court instructed the jury, after which they returned a verdict for the amount sued for against both defendants, and from this judgment, appellant appealed.

*Elmer J. Lundy,* for appellant.

1. A collateral promise to pay the debt of another already contracted is within the statute of fraud, and all requirements of the statute must be complied with. 12 Ark. 174; 31 Ark. 613; 45 Ark. 67; 52 Ark. 174; 76 Ark. 292; 88 Ark. 592; 20 Cyc. 187, 188; 12 Enc. of Ev. 8; 11 Mich. 219; 87 N. E. 597; 78 N. E. 126; 22 How. (U. S.) 28; 2 Am. Dec. 115; 56 Miss. 649; 35 Conn. 343; 37 Am. Dec. 148; 105 Ill. 433.

2. The contract, by reason of its incompleteness and the necessity for parol evidence to complete the promise and agreement, was insufficient to satisfy the statute of frauds. 85 N. E. 797; 56 Ark. 139; 45 Ark. 18; 20 Cyc. 258, 261; 28 Am. & Eng. Enc. of L. (2 ed.), 873; 3 Am. Dec. 509; 40 Am. Dec. 698.

3. A consideration is essential to support the promise. None is mentioned in the contract nor shown in the evidence. 5 East. 10; 3 Am. Dec. 475; 37 Am. Dec. 148; 45 Ark. 67; 86 N. E. 490; 20 Cyc. 281, 282; 29 Am. & Eng. Enc. of L. (2 ed.), 848.

4. Parol evidence is inadmissible to supply missing terms of the contract, or to vary or add to its terms. 56 Ark. 139, 146; 45 Ark. 18; 20 Cyc. 260, 261; *Id.* 317, 318; 29 Am. & Eng. Enc. of L. (2 ed.), 849, 850; 28 *Id.* 873; 2 Am. & Eng. Ann. Cases, 286; 17 *Id.* 205; 19 Am. Rep. 706; 54 *Id.* 879; 48 *Id.* 516.

No brief filed for the appellee.

KIRBY, J., (after stating the facts). It is insisted that the contract is within the statute of frauds, and, by its terms, not complete, that there was no consideration for it, and that the court erred in admitting parol testimony to supply the missing terms.

All the parties recognized that Batson had the right to sell the lumber after the payment of Ross's debt, and that the title to it remained in Ross until the debt was paid. Ross, in fact, had no interest in the lumber beyond the amount of his claim against Batson for money and supplies furnished, to enable him to manufacture it, nor any concern as to what became of the price for which it was sold, beyond the amount of his debt, which was to be paid to him.

In conditional sales of personal property where the title is retained by the vendor, until the purchase price is paid, the vendee acquires an interest that he can sell or mortgage without the consent of the vendor, but the vendor's right to recover the property, if the purchase price is not paid, is not prejudiced by such sale or mortgage. *Sunny South Lumber Co.* v. *Niemeyer Lumber Co.*, 63 Ark. 268; *Snyder* v. *Slatter*, 92 Ark. 530; *Triplett* v. *Mansur-Tibbetts Implement Co.*, 68 Ark. 230; *Bank* v. *Collins*, 66 Ark. 240.

The contract entered into between the parties here is an agreement upon the part of appellant to pay the debt owed by Batson to appellee, the amount of which is specified therein, and a recognition of his, Ross's, right to the lumber until the payment thereof. It was not a sale by Ross of the lumber to Clinton, but an agreement on the part of Clinton to pay Batson's debt to Ross, upon the purchase of same from Batson, the manufacturer, and satisfies the statute of frauds requiring such contract to be in writing. And if it be conceded that the court erred in permitting the introduction of testimony to show that he agreed to pay the debt within sixty days from the date of the execution of the contract, the number of days being left blank in same, it would not prejudice appellant's right, for he was bound by the contract, in any

event, to pay the debt within a reasonable time after the execution of the contract, which was complete upon its signature and delivery. It is unimportant that the contract was not signed by appellee, for it was made by both the others for his benefit, and signed by appellant, the party to be charged thereunder.

We do not find any prejudicial error in the record, and the judgment is affirmed.

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## JONES v. STATE.

Opinion delivered June 2, 1913.

1. CRIMINAL LAW—EVIDENCE—ACCESSORY—CONVICTION OF PRINCIPAL.—The conviction of the principal is *prima facie* evidence of his guilt on the trial of an accessory before the fact of the crime; but the record of the conviction does not exclude other competent evidence of the guilt of the principal, nor does it prevent the dispute of such record collaterally on the issue of the guilt of the accessory. (Page 450.)
2. CRIMINAL LAW—PARTIES—ACCESSORY.—Under sections 1560, 1561, of Kirby's Digest, an accessory before the fact is deemed a principal, and is to be punished accordingly, but he must be indicted as an accessory and can not be charged as a principal offender. (Page 451.)
3. CRIMINAL LAW—TRIAL—CONDUCT OF COURT.—In a trial of A for murder as accessory before the fact, the jury asked the court: "Must the confessions of the defendant introduced in evidence be considered against him?" and the court answered, "Yes, in connection with all the other evidence in the case;" *held*, the answer of the court did not intimate the court's opinion of the truth or falsity of the confession of the guilt or innocence of the defendant, and it was therefore not improper. (Page 451.)

Appeal from Fulton Circuit Court; *George W. Reed*, Judge; affirmed.

*Lehman P. Kay* and *Hal L. Norwood*, for appellant.

1. It was error to permit the sheriff, Caruthers, to testify that Davis was convicted of the killing of Moore, and further error to state to the jury that evidence of Davis's conviction was evidence of his guilt. The conviction of Davis could only be proved by the record or by a

duly certified copy thereof. 25 Pa. St. 221; 12 Tex. App. 408; 40 Ga. 465; 26 Gratt, (Va.) 953; 39 Miss. 702; 80 Ga. 127; 75 Va. 925.

2. Where the prosecuting attorney, in his argument to the jury, makes statements which are prejudicial to the defendant, even though they are followed by an admonition from the court to the jury not to consider such statements, and the same are withdrawn by the attorney, yet, if such withdrawal and admonition are not sufficient to overcome the prejudicial effect of the statements, this court will reverse the case. 95 Ark. 238; 58 Ark. 472; 61 Ark. 130; 58 Ark. 353; 70 Ark. 305.

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

1. There was no error in admitting oral proof of the conviction of Davis, because appellant had already admitted that fact in a pleading filed by him. He could not have been prejudiced by admitting the oral evidence of it. 67 Ark. 278, 281. And the court's answer to the question asked by the jury. 106 Ark. 362.

2. The statements of the prosecuting attorney objected to were mere expressions of his opinion of the facts, invited, in fact, by appellant's counsel, and not error. 96 Ark. 177, 181.

KIRBY, J. Appellant was charged with being an accessory before the fact to the murder of Charley Moore, and was convicted and sentenced to five years' imprisonment in the penitentiary, and from the judgment, he brings this appeal.

The testimony shows that on February 19, 1912, Charley Moore had started to his home from town in a buggy, in company with Will Melton, and that, as they were crossing Warm Fork Creek, he was shot from ambush, apparently with a shotgun and a rifle, and Melton saw two men running away over the hill. The men ran from the place where the shots were fired, and an examination of the ground showed that two men had been standing there. Moore died that night.

The sheriff and two of his deputies testified. J. B.

Hodges, one of them, that the appellant told him he knew who killed Charley Moore; that Eliphus Davis and Howard Sayers killed him, and that he had furnished the guns to kill him with, and they had told him how it was done. Sharp, the other deputy, testified that when he had Jones under arrest in connection with the bank robbery at Mammoth Spring, and told him of the attempted robbery, and that his son, Ben, had been killed, he asked who gave it away, and upon being told it was Lifus Davis, said: "Then, if they are doing that way about it, I will tell who killed Charley Moore." Being asked who did the killing, he said, "Lifus Davis and Howard Sayers," and to the question how he knew, replied, "I know, because I furnished them guns to kill him with."

The sheriff testified that the appellant told him he knew who killed Charley Moore, that the plot to kill him was made up at his house and at his table, and that Davis and Sayers had his guns. The sheriff stated, further: "J. E. Davis (Lifus) was convicted at the last August term of the killing of Charley Moore, and I took him to the penitentiary." This statement was objected to, and the objection being overruled, exceptions were duly saved.

John Caruthers also testified that the defendant stated to him that Lifus Davis and Howard Sayers killed Charley Moore; that they had his guns, and that they would do the work.

Another witness, Mrs. Hutchinson, testified that she was at Doctor Jones's home about February 15, and saw Howard Sayers and Lifus Davis there; that Doctor Jones, the appellant, went through the room where she was sewing and came back with a shotgun and a riflegun in his hands, and took them out on the porch where Davis and Sayers and his son, Ben Jones, were. That she did not see what he did with them, but when she started home, she had to get up on the hub of the wagon to get on her horse, and saw something wrapped up lying in the wagon, which belonged to Lifus Davis. That, after Charley Moore was killed, she was at Doctor Jones's home when Lifus Davis came there and wanted her to swear an alibi,

and that Ben Jones, Howard Sayers and Doctor Jones were present. She then related how Lifus Davis suggested she should testify in order to show that he was not present at the killing, and that Doctor Jones nodded his head toward her during the conversation, as if to give his approval to the suggestions that she should swear to the statements made, and that there was no truth in the statements. Appellant called at Davis's house after he had been sent to the penitentiary, and got his gun. He did not testify at the trial.

Certain remarks of the prosecuting attorney were objected to, and after the jury had been out considering the verdict, it returned into court, and asked if they must consider defendant's confessions against him, to which the judge replied: "Yes, in connection with all the other evidence in the case," and to the jury's further question: "Was the evidence of Davis's conviction of murder in the second degree evidence of Davis's guilt?" to which the court replied: "Yes." To all of which the appellant at the time objected and saved proper exceptions.

It is contended, first, that the court erred in permitting the sheriff to testify that J. E. (Lifus) Davis, was convicted of the killing of Charley Moore, and that he had taken him to the penitentiary.

It is not denied that such was the fact, but contended only that the guilt of the principal, Davis, could not have been shown otherwise than by the introduction of the record of the conviction. The objection went to the introduction of any such testimony at all, rather than to the manner thereof, and had a specific objection been made, it would doubtless have proved effectual, but none was made.

The conviction of the principal is *prima facie* evidence of his guilt on the trial of an accessory before the fact of the crime, but the record of the conviction does not exclude other competent evidence of the guilt of the principal, nor does it prevent the dispute of such record collaterally on the issue of the guilt of the accessory. *State* v. *Mosley*, 31 Kan. 357; 1 Wharton, Criminal Law, p. 350. At the common law, the record of the conviction,

if it had transpired, could not be dispensed with, but, under the statute (sections 1560-1, Kirby's Digest), an accessory before the fact of the crime of murder "shall be deemed in law a principal, and be punished accordingly," although he must be indicted as such accessory, and can not be charged as a principal offender. *Hunter* v. *State,* 104 Ark. 245, 149 S. W. (Ark.) 99. And the common law, relating to the trial and conviction of such accessory, has also been changed, it now being provided that "An accessory before or after the fact may be indicted, arraigned, tried and punished, although the principal offender may not have been arrested and tried, or may have been pardoned or otherwise discharged." Section 1566, Kirby's Digest.

The testimony is sufficient to show the killing of Charley Moore, by Lifus Davis shooting him from ambush with guns furnished him for the purpose by the appellant, without regard to the sheriff's statement that he had been convicted of the crime and sent to the penitentiary.

No error was committed by the court answering the question of the jury that Davis's conviction of murder in the second degree was evidence of his guilt, for, as already said, the conviction of a principal is *prima facie* evidence of his guilt, upon the trial of an accessory.

Neither did the court err in answering the jury's question, "Must the confessions of the defendant introduced in evidence be considered against him?" by replying, "Yes, in connection with all the other evidence in the case."

There was no intimation of the court's opinion of the truth or falsity of the confession, or the guilt or innocence of the defendant in making such reply; nor any suggestion that the confession should be taken as true, but only that the jury should consider it as evidence in connection with all the other evidence in the case.

Some remarks of the prosecuting attorney, objected to, were invited, and were not more than a statement of his opinion from the evidence in the case, and others, upon being objected to, were withdrawn, and the jury

directed to disregard them, and no prejudice could have resulted to the defendant therefrom.

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

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## CARSON v. FORT SMITH LIGHT & TRACTION COMPANY.

Opinion delivered June 2, 1913.

1. GAS COMPANIES—RIGHT OF CONSUMER TO USE GAS PAID FOR.—Where plaintiff has a contract with a gas company to furnish gas, upon placing a certain sum of money into a meter, when plaintiff puts that sum in the meter, he has the right to consume the amount of gas for which he has paid, as the gas became his property, with the right to consume it at its convenience. (Page 457.)
2. GAS COMPANIES—FAILURE TO FURNISH GAS.—Where a gas company advances its rates, and a consumer becomes liable for the new rate, the act of the gas company in turning off the gas before the time for payment under the new rate, was a wrongful and unwarranted act. (Page 457.)
3. DAMAGES—TORT—PROXIMATE CAUSE.—A gas company which wrongfully turns off the gas of its consumer, is answerable for all damages, directly traceable to the wrong done, and arising without an intervening agency and from no fault of the person injured. (Page 457.)

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

STATEMENT BY THE COURT.

John Carson and his wife sued the Fort Smith Light & Traction Company for damages, alleging that the damage resulted from the company's wrongfully turning the gas already paid for out of the meter and depriving them of the use thereof.

Appellee company is a public service corporation furnishing gas to the people of Fort Smith, it's consumers, under contract, one of whom was John Carson. The gas was being used for all purposes in his home and measured by meter, into which, upon the dropping in of a quarter, 1,000 feet of gas was delivered. The price of the gas at first was twenty-five cents per thousand feet, and under the contract or the application made by Car-

son for gas, the bills were to be paid monthly. The company gave notice of the increase of the price of gas to thirty-five cents per thousand cubic feet, effective the 1st of April. On the 19th day of April, John Carson, upon leaving home to go to his work two miles distant, left a quarter with his wife to be dropped into the meter in case the gas should be consumed before his return. A quarter's worth of gas usually lasted twenty-four hours. About noon this money was put into the meter. About 3:30 the gas company's agent came and took the money out of the meter—$3.45; changed the meter so it would thereafter register at the rate of thirty-five cents per thousand feet, and turned off all the gas, turning the meter back to zero. He could have collected the money from the meter and changed it without turning off the gas. The day was damp and cold in the morning, and Mrs. Carson had been sick for two or three weeks, and was just convalescent. Upon the fire's going out, she complained to the agent of the gas company, insisted that he should return her quarter for the gas paid for and not consumed, and was told that the gas would flow again upon dropping in another quarter. She told him she had no other quarter and called up the manager of the gas company and told him that "the fellow had taken all her money and left no gas in the meter, and that she was sick and had no fire and did not have a cent of money in the house," and the manager told her that was the instructions, to take all the money in the meter. She then rang up her husband, told him what had occurred, and he told her to try and get a quarter. She then sent her little six-year old boy to six of her neighbors to try to borrow a quarter, and failed to get one. The older boy was in school, and her sister-in-law, who was staying with her, was not acquainted in the neighborhood. There were some places in the neighborhood to which the boy did not go because the people were not her acquaintances, and she did not associate with them. After failing to get the quarter to put in the meter, she wrapped up and sat around a-while, and finally got so cold she went to

bed. She began sneezing and almost had a chill before going to bed. She had been sick in bed before for three weeks, and was just recovering. Her lungs began to fill up, and by night, she had a pronounced case of asthma, and was in a very bad condition.

Her husband returned home at about 7 o'clock, and put a quarter in the gas meter and gas was immediately supplied. He also got medicine for her; they were not able to get the physician there until the next day. She did not lie down that night, and for about three months thereafter was sick and could not lie down to sleep, but had to sit propped up, and she still sleeps about as much sitting up in bed as she does lying down.

The physician testified that she had been suffering from grippic bronchitis, for which he attended her about two weeks, and that she had gotten better and been discharged as a patient, and when he was called again to see her, he found her suffering with asthma, with which she is still affected.

On that day the weather bureau statistics show the temperature was, at 7 A. M., 49 degrees; at 12 noon, 61 degrees; at 2 P. M., 68 degrees; at 3 P. M., 72 degrees; at 4 P. M., 75 degrees; at 5 P. M., 70 degrees; at 6 P. M., 66 degrees, and at 7 P. M., 65 degrees.

The company's agent, who changed the meter, said Mrs. Carson asked him why he turned the gas off, and he explained to her, "Because she had been using it nineteen days on the twenty-five-cent rate, and other people paid thirty-five cents. She did not understand me, and seemed to be a little bit mad, and I told her to call up Mr. Parker, and she did so, and came back and told me all right."

The testimony shows that twenty-five cents worth of gas, 1,000 feet, usually lasted the family twenty-four hours, and that it had only been burning from 12 until 3:30 o'clock after the last quarter was dropped in. The man changing the meter register testified, however, that there was only about ten cents worth of gas in the meter not consumed when he changed it and turned it back to zero.

The court instructed a verdict for the defendant, and from the judgment thereon, this appeal comes.

*J. A. Gallaher,* for appellants.

1. The court erred in excluding the contract sought to be introduced in evidence by plaintiffs.

2. A peremptory instruction to find for the defendant was an invasion of the province of the jury. 10 Cyc. 350; 105 Ark. 136.

3. The contract to furnish gas was never changed from twenty-five cents to thirty-five cents per 1,000 cubic feet. The corporation could change the price of the gas only on January 1 or July 1. Act 282, Acts 1905; 91 Ark. 89-92.

4. That appellee had the right to take out the money in the depository of the meter, at any time, is admitted; but it was not necessary to stop the flow of the gas in order to extract this money, and when, in addition to withdrawing the money, appellee stopped the flow of gas that the last deposit had paid for, it committed a wilful tort. Cooley on Torts, 60, 69.

5. What constitutes ordinary care is a question for the jury. 13 Cyc. 71; *Id.* 76; 150 S. W. 348.

6. Appellee knew when it cut off the gas that it was committing a wrongful act. Appellants are entitled, therefore, to exemplary damages. Hale on Torts, 34. The refusal or failure of a public service corporation to furnish gas which it has contracted to furnish to its patrons is a tort. 146 Ind. 655; 36 L. R. A. 539; 46 N. E. 17; 6 L. R. A. (N. S.) 1171.

*Hill, Brizzolara & Fitzhugh,* for appellee.

Plaintiff admits that the price of gas had been increased to thirty-five cents per thousand on the 1st of April; that she knew of this advance in price; that she had gotten about 18,000 feet of the gas, on which she had paid only twenty-five cents per thousand. When appellee removed the money from the meter, it left appellant still indebted to appellee, for gas used, in the sum of $1.28. Appellee acted within its legal rights in taking the money

from the meter, and was guilty of no negligent, careless or wrongful act.

KIRBY, J., (after stating the facts). The testimony is undisputed that the appellee company had been furnishing gas to appellants at 25 cents per thousand cubic feet and had the right to change the price thereof upon notice to its customers and that the notice of the change in price to take place on April 1 had been duly given to appellants; that appellants were upon a slot meter which measured 1,000 feet of gas for consumption upon dropping a quarter into it; that John Carson's wife, upon the day the meter was changed, put a quarter into it about noon; and at 3:30 appellee's agent "robbed the meter;" that is, collected the money therefrom—$3.45; changed the meter to register according to the new price fixed for gas and turned it back to zero, turning out all the gas therein. The company's agent, at the time the appellant complained of his action in shutting off the gas, said his instructions were to do so and that it was because they had been burning gas from the first to the nineteenth of the month at the old rate of 25 cents and owed the difference, and that the gas would continue to be furnished at the new rate upon dropping the quarter in the meter as usual.

Appellants had not been notified that they were behind with the payment of their gas bills nor that the gas would be shut off on that account, and it was the custom of the company and the terms of the contract required that the bills should be paid monthly, nothing being said in it about the slot meter. In any event, it can not be questioned that appellants had the right upon putting the quarter into the meter to consume the amount of gas for which it paid and when it was so deposited and the gas turned into the meter, it was delivered to them and became their property with the right to consume it at their convenience, so long as the terms of the contract were not violated in so doing. *Chouteau* v. *St. L. Gas Light Co.*, 47 Mo. Appeals, 326; *Schmeer* v. *Gas Light Co.*, 147 N. Y. 529; 42 N. E. 202; 30 L. R. A. 653;

*Blondell* v. *Gas Co.,* 89 Md. 732; 43 Atl. 817; 46 L. R. A. 187.

It may be true that the gas company had the right under its contract to shut off the supply of gas to appellants to compel the payment of amounts already due for gas consumed, or furnished, but it could not do so until after giving notice in accordance with the terms of the contract, and certainly with the slot meter in use and the money deposited therein for the payment of 1,000 cubic feet of gas according to the old price, and of that much upon the price of a thousand feet according to the last rate fixed, it had no right to turn the gas already delivered to appellants out of the meter. If according to the usage they were entitled to continue to consume one thousand feet of gas for each quarter deposited in the meter until the meter could be changed to register in accordance with the advanced price, which we do not decide, the gas in the meter was already paid for, and if it can be said they should be held to the payment of the advance price for all the gas consumed since they were notified it should go into effect, then they would only have owed for the difference in the price, which would have been collected on the first of the succeeding month and could not have warranted their agent in turning the gas already delivered in the meter out. It was as much a wrongful act as if he had taken or destroyed any other of the personal property or effects of these appellants in their home.

It was a tort, pure and simple, committed without justification or excuse, and for which the gas company should be held answerable for all damages directly traceable to the wrong done and arising without an intervening agency and from no fault of the persons injured. *Coy* v. *Indianapolis Gas Co.,* 146 Ind. 665; 46 N. E. 17; 36 L. R. A. 535; *Indiana Gas Co.* v. *Anthony,* 26 Ind. App. 307; 58 N. E. 868; Thornton, Oil & Gas, § 534.

The question of damages is not affected by reason of the fact that it can be said that such a condition as resulted from the turning off of the gas could not have

been within the contemplation of the parties under the contract and duty of the company to supply it, since the action arises out of its wrongful conduct in turning out the gas already delivered which may also have constituted a breach of the contract to furnish.

The evidence is conflicting as to the amount of gas already measured by the meter that was turned out, appellee claiming that only 10 cents worth remained unconsumed while appellants claim that the gas paid for should have lasted twenty-four hours and had only been burning three.

It is true it is undisputed that the gas was not disconnected from the premises and that it would have continued to be supplied upon the dropping of another quarter into the meter, and also that appellant's husband had another quarter and was notified of the condition immediately after the gas was turned out but did not regard it of sufficient moment to come and bring or send the money with which to purchase more gas to comfortably heat the dwelling, and that her efforts to procure it in the neighborhood were fruitless.

These views, which are concurred in by the majority of the judges, Mr. Justice SMITH dissenting, settle the law of the case and call for reversal of the judgment. An agreement can not, however, be reached by the majority in the application of the law to the facts of the case. The writer and Mr. Justice WOOD are of the opinion that under the law stated above the proof is sufficient to show substantial injury to appellant as the proximate result from appellee's wrongful act and that the cause should be remanded for a new trial.

The conclusion of the CHIEF JUSTICE and Mr. Justice HART is that the alleged wrongful act was not the proximate cause of the injury, which they think resulted from appellant's own failure to minimize the damages by procuring from her husband, or some one else, the trifling sum necessary to pay for more gas, and that she should only be allowed to recover nominal damages, for recovery of which causes are not remanded.

Mr. Justice SMITH is of the opinion that the judgment should be affirmed.

Thus it will be seen that four of the judges agree to the reversal of the judgment, but only two of them favor remanding the cause for a new trial.

From an adjustment of the views of all the judges the only net result that can be extracted is that the judgment must be reversed, but the cause will not be remanded for a new trial. Appellant is, therefore, entitled to a judgment for nominal damages. So it is ordered that the judgment be reversed, and that judgment be entered here in favor of appellant for nominal damages, which carries judgment for costs in both courts.

SMITH, J., dissenting. No question is made as to appellee's right to increase the price of gas, nor is it questioned that appellants knew the price had been increased. The increased rate became effective on April 1, and unless some discrimination was practiced, all users of gas should thereafter have paid at the rate of 35 cents per thousand cubic feet and that was, of course, the rate which appellants should have paid; and the mere fact that the meter had not been changed gave them no right to be furnished gas at a price less than that charged all other consumers. Appellee had the right to change the meter at any time after the 1st of April, and the fact that it had not changed the meter prior to the 19th of April was no reason why it should not then be changed. In my view, no cause of action arose for changing this meter and for taking the money therefrom, the amount of which admittedly was insufficient to pay for the gas which had already been consumed when charged for at the rate of 35 cents per thousand cubic feet, and for these reasons I think the judgment should be affirmed.

However, if this view of the law is not correct, the appellants were entitled to recover any damages sustained by them; and if their evidence is to be believed, that damage was not merely nominal but very substantial. And there was enough proof, in my opinion, to send to the jury the question of appellant's discharge of their duty to minimize the damages.

## HOPSON v. HELLUMS.

Opinion delivered June 2, 1913.

1. DRAINAGE DISTRICTS—CONSTRUCTION AND SALE OF BONDS.—The act of 1909, page 829, which provides for the organization of a drainage district, the issuance of bonds, and the constructions of the drain, and that in order to hasten the work, the commissioners may borrow money and issue bonds therefor, or take up the estimates of the work done by the contractors by issuing them negotiable evidences of debt (§ 15), does not contemplate that there should be but a single bid which would dispose of both the bonds and the work, and a single contract let by the commissioners in that manner is made without authority. (Page 464.)
2. DRAINAGE DISTRICTS—SALE OF BONDS.—Act of 1909, page 841, § 15, authorizing the commissioners to borrow money by issuing bonds, to meet the expenses of the work, does not prohibit the contractor doing the work from purchasing the bonds, but it does prohibit the commissioners from selling and delivering bonds to the contractor in payment for his work done, in advance. (Page 466.)

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; reversed.

*A. H. Rowell,* for appellant.

The bonds are void because they were issued without a petition from the land owners asking that they be issued. Act No. 150, Acts 1913. It is necessary for the commissioners to comply with this act before they issue any bonds. There was no delivery of the bonds.

It is essential to the sale of a chattel that there be a meeting of minds and agreement of both parties to the sale and purchase, and title does not pass so long as something remains to be done between purchaser and seller. 90 Ark. 131; 95 Ark. 421.

This is not a question of vested rights. A vested right must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title. Black, Constitutional Law, 430.

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

1. The act relied on by appellant can not invalidate bonds lawfully issued prior to the passage of the

act, and this is true even though the commissioners may have had knowledge that the act in question was pending in the Legislature at the time the bonds were issued. 2 Ark. 279; 29 Ark. 110; 30 Ark. 493; 31 Ark. 711; 94 U. S. 429; 57 N. J. L. 298; 26 Am. & Eng. Enc. of L. 565; 36 Cyc. 1191.

2. The act is void as impairing the obligations of both the contract between the district and Hahn & Carter and the contract between the latter firm and Hoehler & Cummings, for the sale of the bonds. 28 Ark. 555; 33 Ark. 691; 40 Ark. 424; 47 Ark. 515; 6 Enc. U. S. Sup. Court Rep. 768; *Id.* 835, 845.

SMITH, J. Appellant was the plaintiff below, and alleged in his complaint that he was the owner of a large amount of land situated within the limits of the Kirsh Lake Drainage District, which had been assessed for the purpose of making the improvement therein contemplated. The suit was brought against the commissioners of the drainage district, as such, and against Edgar J. Hahn and W. B. Carter, partners, doing business under the firm name of Hahn & Carter and the Bank of Pine Bluff. In his complaint, appellant alleged substantially the following facts: That on the 31st of October, 1912, the commissioners of the drainage district had on that day entered into a contract with the said Hahn & Carter for the construction of a main canal and laterals of the Kirsh Lake Drainage District, and their contract was reduced to writing and contained the following provisions: "Section 3. And the said Hahn & Carter, parties of the second part, further agreeing and offering as a part of their bid, which is to be taken as a whole and not separate from their bid to do the construction of said canal, to accept in lieu of cash for work on their contract, the entire issue of bonds of said drainage district, and to pay to the legal custodian of the funds of said drainage district in full par value for the within issue of bonds." The payments were to be made as follows: $25,000 as soon as the commissioners of the district had, in accordance with the law, executed said bonds

with the approved opinion of some bond attorney, whose opinion is authority on that question, and not less than $10,000 each month thereafter until all of said bonds are paid for in full.

In pursuance of said contract, the said board on the 11th day of February, 1913, passed a resolution, authorizing the issuance of $135,000 of bonds, but they were not issued until later. It was further alleged that in the meantime the inhabitants of said district had become dissatisfied with said contract and secured the passage of an act of the General Assembly of the State of Arkansas, which became a law on the 8th of March, 1913, which provided that thereafter it should be unlawful for the commissioners of the drainage district to issue any bonds whatever, without first being petitioned by the majority of the land owners, and also a majority in acreage and in value, asking that bonds be issued and further provided that all bonds issued without such petition should be void as against the district. Plaintiff further alleged that while said act was pending before the General Assembly, the defendants with knowledge of its pendency, and great probability of its ultimate passage, and in order to defeat the purpose of the said act, the said board on the 1st day of March, 1913, issued its bonds to the amount of $135,000 in pursuance of the resolution passed by it on that day. This resolution provided that the attorney of the board be instructed to deliver the 135 bonds of $1,000 denomination each to the Bank of Pine Bluff, Ark., as trustee for the account of E. J. Hahn, the contractor, under his contract with the board; and the said bank, being a depository of the funds of the said district, was authorized and instructed to send said bonds to the purchaser from the contractor, E. J. Hahn, and receive payment therefor, and the funds derived from the sale of said bonds were to be deposited one-half in the Bank of Pine Bluff and the other half in the Simmons National Bank, also of that city, to the credit of the drainage district. That said bonds were immediately delivered to the Bank of Pine Bluff, which, for

the purpose of aiding said Hahn & Carter in defeating the legislative intent, shipped the same beyond the limits of the State of Arkansas to the National Bank of Commerce of St. Louis, Mo., which holds them subject to its order.

Plaintiff alleged that the said contract with Hahn & Carter was beyond the power of the board, and that the issue of said bonds was wrongful, and he prayed that the said board and the Bank of Pine Bluff be required to recall said bonds and to cancel them. And he further alleged that if said bonds are cancelled, the said board, unless restrained, will proceed to issue its certificates or warrants to the said Hahn & Carter in payment for work done by them as contractors; and that said certificates or warrants will have all the effect of the bonds aforesaid, and the passage of said act of March 8 will be of no avail. And the plaintiff therefore prayed that said commissioners be restrained from issuing any warrants or certificates in payment for said work; and that they be restrained from selling or disposing of said bonds; and that the contract with the said Hahn & Carter be set aside and held for naught.

The commissioners filed an answer, six lines in length, in which they denied that they had exceeded their power in issuing the bonds, or that they had any power to recall them; and they demurred to the complaint for the reason that it did not state a cause of action.

Hahn & Carter answered and denied that their contract was invalid, but said that said bonds were duly issued in pursuance of said contract; and that before the issuance of said bonds they had entered into a binding contract with Hoehler & Cummings, bond dealers, of Toledo, Ohio, to sell them said bonds, and alleged that if they are not allowed to deliver them under said contract they will be liable to the purchaser thereof for damages; and they say that the said act of March 8, 1913, is an attempt on the part of the General Assembly to impair the obligations of the contract between them and the drainage district, and of the contract between

them, and the said Hoehler & Cummings; and they denied that said bonds are held subject to their order, or that the same would be returned to them on their demand, but say that the same would not be returned without the assent of Hoehler & Cummings, who will refuse to agree thereto, and who insist on their rights under the contract aforesaid. They demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The Bank of Pine Bluff answered and denied that the bonds were held subject to their order, but say that they shipped them to the National Bank of Commerce of St. Louis, Mo., which holds the same for the benefit of whomsoever may be entitled thereto, and stated that they have information that the firm of Hoehler & Cummings claim the ownership of said bonds under a contract with said Hahn & Carter; and that said bank would not send said bonds back without the assent of said Hoehler & Cummings, which can not be obtained, and they, too, demurred to the complaint, because it did not state facts sufficient to constitute a cause of action. The plaintiff demurred to the several answers, because he says none of them state facts sufficient to constitute a defense; and the cause was heard on these demurrers, and the court sustained the demurrer to the complaint and overruled the demurrer to the answers, and upon plaintiff's refusal to plead further, having elected to stand on his demurrer, his complaint was dismissed for the want of equity and he prosecuted this appeal from that order.

It is insisted that the act of the Legislature and the order of the court operated to impair the obligation of the contract for the sale of these bonds; and that Hoehler & Cummings should not, therefore, be required to surrender them up for cancellation and that they will not do so because they contracted to purchase them from Hahn & Carter, before the passage of said act.

Plaintiff attacks the entire contract, and says that it was entered into by the commissioners without author-

ity, and we think his position is well taken. This entire proceeding was had under Act 279 of the Acts of 1909, but this act did not contemplate that there should be a single bid which would dispose of both the work and the bonds, as was done here, but that these should be separate acts upon the part of the commissioners. The letting of the contract to do the work contemplated the clearing of the right-of-way, and the digging of the canal and lateral ditches; and a sale of bonds was one means provided for the raising of money to pay for the improvement. Some might desire to bid on the work, who would not be able to handle a bond issue, and some bond buyers might not want their purchase of bonds hampered with the contractor's obligation to construct the improvement, and Hoehler & Cummings are not assuming to do that work here. To make a single offering of the two propositions might require the contractor to place a discount on the bonds, to insure their disposal without loss, or such arrangement might induce the bond buyer to place a high figure on the cost of the improvement, in order that he might be safe in subletting the work. But, however that may be, these commissioners can exercise only the authority conferred upon them and must proceed in the manner pointed out in the act, under which their district was organized. Abbott on Public Securities, § § 46 and 48; *Morrilton Waterworks Improvement District* v. *Earl,* 71 Ark. 4; *Watkins* v. *Griffith,* 59 Ark. 344. Section 13 of this act, No. 279 of the Acts of 1909, provides that no work exceeding one thousand dollars in cost shall be let without public advertisement, and the thousand dollars of course means money and not bonds, which might be worth more or less than their face value.

Section 15 of this act provides that to hasten the work, the commissioners may borrow money at a rate of interest not exceeding 6 per cent, and issue bonds therefor, or they may, when it is so agreed, take up the estimates of work done by the contractors by issuing them negotiable evidences of debt, bearing interest at

not exceeding 6 per cent. If the bonds are issued, a fund is provided, which can be used for paying cash for the work as it progresses. If money is not raised by issuing bonds, then the contractor must take these negotiable evidences of debt for his work, and finally receive his money when the district has collected its revenue. Here the contract between the district and the contractors expressly stated that the proposition of the contractors is not a divisible one, and it must all, therefore, stand or fall together, and, for the reason which we have stated, we think the contract entered into was not one which the directors were authorized to make, and the decree of the court below is therefore reversed and the cause remanded with directions to overrule the demurrers to the complaint, and to sustain the demurrer to the answer, and for further proceedings in accordance with the law as here declared.

SMITH, J., (on rehearing). It is insisted in the motion for rehearing that the case was decided upon a point not briefed by either side, towit: that the contract had been let upon a bid based upon an offer to accept bonds in payment for the work. It is true that this point was not presented in the briefs, but it was presented by the pleadings in the case. We were asked to decide the effect of the special act of the General Assembly, set out in the original opinion, upon the validity of the bonds which had been issued by the commissioners, the cancellation of which was asked in the complaint. Under the allegations of the complaint, as explained by the exhibits, it appeared that the contract for the construction of the canal was a voidable one, and our decision to that effect was decisive of the case, and accordingly no other question was discussed in the opinion. It is now alleged in the motion for rehearing that the recital of the contract, which controlled our decision, is an erroneous one, and the fact is alleged and conceded that the contract was let upon a money basis, upon which there was competitive bidding for the work. We think our decision that there must be a common basis upon

which all bidders may compete, and that basis must be a money basis, is correct and we reaffirm it, and under the facts of this record, as we understand them to be, judgment could be rendered upon the pleadings; but, as the cause has been remanded, the parties may amend their pleadings to present such issues as are actually within the existing facts.

It is strenuously urged that we are in error in our interpretation of this drainage law, in that we have placed limitations upon the discretion of the commissioners which are not placed there by the drainage act, under which they had proceeded. We recognize the principle, well established by our own decisions, as well as by those of other courts, that where a discretion is imposed by the law in the discharge of duties, such as those exercised by the drainage commissioners, that that discretion is to be exercised by the executive officer, who has the function to perform, and the duty to discharge, rather than by the court which reviews their action. *Cherry* v. *Bowman,* 152 S. W. 133, 106 Ark. 39. There is nothing in our opinion, nor is there anything in the act, under which these commissioners were proceeding, which forbids the sale of their bonds privately, nor does the act require that they be sold at par. Neither does the law prohibit the commissioners, after the contract has been let, from making the sale of the bonds to the contractor, who is constructing the improvement. The issuance of bonds is authorized to furnish means for anticipating the collection of the revenues, and this money can be realized by a sale of bonds to the contractor, as well as to any other person, and there is no inhibition in the law against the use of money thus raised paying for the construction of the improvement. But no authority is found in the statute for the board to deliver bonds to contractors in advance. It can either issue bonds for borrowed money, or issue to contractors as the work progresses, negotiable evidences of debt, in payment for work actually performed in constructing the improvement. Before any money was borrowed, or

before work was performed by the contractors, the Legislature withdrew authority for issuance of bonds, except upon petition of a majority of the land owners. Therefore the contract exhibited with the pleadings concerning the issuance of bonds was not an enforceable one, if its recitals reflect the board's action in letting it.

Rehearing is denied.

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## CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. ALLEN.

Opinion delivered June 9, 1913.

RAILROADS—INJURY TO PERSON INVITED ON TRAIN—NEGLIGENCE.—Where a railroad company invited plaintiff, a town marshal, to board its cars to protect them from being broken into, the invitation was to ride on a moving train in the usual manner in which it was intended it should be riden on, and the railroad company will not be held liable for an injury to plaintiff where he was injured while attempting to alight from the side of a car while it was in motion.

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

*Thos. S. Buzbee* and *Geo. B. Pugh,* for appellant.

1. The burden was on plaintiff to show the authority of Clary to authorize persons to ride on defendant's trains. He made no attempt to do so.

2. But if Clary had such authority, the invitation would embrace the right to ride on such trains and in such manner it is intended they should be ridden on. The injury was caused by plaintiff's own negligence.

*Thomas & Lee,* for appellee.

1. Plaintiff was more than a licensee as he was on the train by special invitation of Clary to protect defendant's property. 52 Fla. 327; 42 So. 854.

2. Clary was a general agent and had *apparent,* if not actual authority to make the invitation. 55 Ark. 627; 44 *Id.* 138.

SMITH, J. Appellee was the plaintiff below, and alleged in his complaint that he had been night marshal

of the city of Brinkley, and that on the night of June 19, 1912, he was at the depot of the defendant in that city and undertook to arrest two men, who had boarded a freight train of defendant; that in order to make the arrest plaintiff was compelled to go on top of a box car, and that before he could alight from said car the train began to move slowly, and that while undertaking to alight from said car he was run against by a box car on the sidetrack, which had been left in such close proximity to the main track that a person on the side of said train could not pass without being struck, and that plaintiff was knocked off the side of the car, on which he was riding, as it passed the car on the sidetrack.

The complaint further alleged that plaintiff had been instructed by the special agent of the defendant company, a Mr. Clary, to ride said train from the depot to the coal chute, so as to prevent cars from being broken into.

The answer specifically denied all the material allegations of the complaint, and alleged that Clary had no authority to instruct, or permit, plaintiff, or any other person, to ride upon defendant's freight cars, or any of them, and further alleged that plaintiff's injuries were the result of his own carelessness and negligence.

To support the allegations of the complaint, the following proof was offered. The plaintiff testified as follows:

"We were instructed by Mr. Clary to ride this train. There had been lots of merchandise cars and passenger cars, but more merchandise cars, that had things of different kinds stolen out of them. Mr. Clary told the chief, Mr. Owens, and myself to keep them out and ride these trains down there, and make a special effort to stop it. I had been doing that, I suppose—well, I made several trips down there before this night. This morning we were speaking about there were two hoboes in the depot. I went in there and asked them where they were going, and if they had tickets and they said "yes;" said

they wouldn't be in there if they didn't. I walked on out, and it was just about time for 44, going east. That is, the passenger going east. There was a train coming, and I thought that was it, and I was going to see where they went. It was a freight train, and I walked out, and one of these men got on the car ahead, and I caught a car just as it stopped for the crossing when they got on. There was another one got on lower down. I got on there and arrested one of them, and the other one was ahead of me. I had this one with me, and he was climbing down on the inside, and I was on the outside. He was on the ladder between the cars. It was dark and I couldn't see very far in front. It was about 3 o'clock in the morning. This car was sitting on the sidetrack. This car and the train had been striking together, I could hear that, and that called my attention to look around, but I could not see what was making the noise; but when the car got in a few feet of me I saw what it was, but didn't have time to jump, but I got close as I could to the car, and the one on the sidetrack knocked me off and sprained my ankle. I could not walk, and I thought my leg was broken. There was some more boys at the depot with me, and I got up the best I could and hopped up there, and they came down and got me to the depot and called up the doctor, and he treated me and put splints on my leg and kept them there about two weeks. The first few days it pained me terribly. I had to keep it up high to get any relief.

"I was working as night marshal of the city of Brinkley, under Mr. Owens. Mr. Clary was special agent of the defendant. He had instructed me to ride the train and make a special effort to stop thefts. On one occasion there were about sixteen or seventeen hams taken out. This was the occasion Mr. Clary made this request of me. This car, on the sidetrack, was so close to the train that a man on the side of the box car on the track that this train was on, could not pass without being struck. The car was bruised up by being struck by this

passing train. This was shortly after 3 o'clock in the morning.

"I went there for the purpose of making this arrest, in pursuance of instructions from Mr. Clary.

"I was the regular night marshal. The city of Brinkley pays my salary. I had been acting as deputy marshal for six months. I don't know how long the train was. I think it was a through freight train. I got on more towards the front than the back. I rode the train something like fifty or seventy-five yards to the first switch beyond the Cotton Belt crossing, I was on the right side, going east. I had the man arrested, and he was coming down the front end on the inside, between the cars, and I was coming down on the outside. I did not have hold of him, but expected to get off with him. I do not know what became of him after I got down. One of the men was two cars ahead. I did not get to him at all. The train was not going very fast at that time. I supposed it would stop at the coal chute. The train had come to a stop, and whistled for the Cotton Belt crossing when I got on. I was down almost to the Brinkley Hotel, and had that much of the length of the train ahead of me. Mr. Clary was not there that night that I know of."

L. C. Owens testified in substance as follows:

"I am city marshal of Brinkley. I know Mr. Clary. He is special agent of the defendant. When he comes to Brinkley he looks after broken-into box cars, and such things as have been lost on the railroad, and things of that kind."

Q. I will ask you, Mr. Owens, if you had any conversation with Mr. Clary, prior to this accident, with reference to cars being broken into at Brinkley, and, if so, state to the jury what it was, and if you had any instructions from him.

A. Along some time before that Mr. Clary came over there and said he was having a great deal of trouble about these things, and said he would like for me to give him all the assistance I could in protecting the com-

pany's interest about the depot and yards. They had some trouble on the passenger trains, which was supposed to happen at Brinkley, about the coal chute and up at the depot, and asked me to assist him in everything I could, and I did.

Q. State to the jury whether or not he said anything to you and Mr. Allen about riding trains from the depot to the coal chute and back.

A. He asked us to ride them. I don't know what the numbers are of these trains that go east sometimes in the morning. He wanted us to ride that train up to the coal chute, which is about half a mile, and then there is one that comes west inside of fifteen or twenty minutes, and sometimes we would sit down there until that train came back west; and, if it was late, we would walk back. I did that several times. I and Mr. Clary put in the big part of one night riding from the coal chute to the depot and back. So I told Mr. Allen to keep a close lookout around the depot and yards, as much so as possible, and especially around those passenger trains, and that is about all I know.

Q. You and Mr. Allen rode the trains back and forth between the depot and the coal chute?

A. Mr. Allen worked at night and I worked in the day. He would make his report that he had done so. I wasn't down there with him. I only rode the passenger trains myself.

Q. Mr. Allen was present when Mr. Clary gave you these instructions?

A. I can't say positively, but Mr. Clary gave me these instructions—to look after this, and, so far as I could to catch these criminals and hoboes, and I told Mr. Allen to keep a close lookout as far as he could.

Q. You told Mr. Allen that?

A. Yes.

"I rode the trains with Mr. Clary. He and I rode the passenger trains at night. I think it was 44 east, and 43 west, and then I worked two or three nights later. I recognized it was my duty, and the duty of my

deputies, to arrest all criminals, whether they were stealing from the railroad or not. It was as much our duty to protect railroad property as the property of anybody else."

This was all the testimony, and it is very questionable whether it is sufficient to support the finding that Clary had authority to direct appellee to ride on appellant's train. But if Clary had authority to give this invitation, still appellee had the right to act only within the scope of the invitation. If the invitation to look after cars in the yards at the depot, and upon the tracks at the coal chute, included the right to ride from one to the other, and on freight trains as well as on passenger trains, still that invitation would embrace only the right to ride on such trains in the place and manner which it is intended they should be ridden on. Here, it is not contended that any member of the train crew knew of appellee's presence on the train, and of course nothing could be known of his purpose. Yet at 3 o'clock in the morning, in an unlighted yard, appellee attempted to climb down the side of the car and to alight from the moving train, before it reached the coal chute, where it would stop. Moreover, this train was in motion when appellee climbed upon it and had not reached its stopping point when he attempted to alight from it, and it was under the control of the crew provided for that purpose.

The proof herein set out does not support a finding by the jury that appellee was acting within the scope of his invitation or employment at the time of his injury, and, if he was not, then appellant owed him no duty to exercise care to make the place reasonably safe for appellee to do an act, not within the scope of the invitation or employment.

We are of the opinion that appellant committed no breach of any duty to appellee, and, therefore, it is guilty of no negligence of which he can complain, and the judgment of the court below is, therefore, reversed and the cause remanded for a new trial.

## LAWHORN v. STATE.

Opinion delivered June 9, 1913.

1. CHATTEL MORTGAGE—SALE OF MORTGAGED PROPERTY—CRIMINAL INTENT.—Under Kirby's Digest, § 2011, making it unlawful for any one to sell, barter or exchange property subject to mortgage, it is necessary, in order to convict defendant, to show that he intended, by the barter, sale or exchange, to defeat the holder of the mortgage lien in the collection of the debt thereby secured. (Page 476.)
2. CHATTEL MORTGAGES—SALE—QUESTION FOR JURY.—Where defendant is indicted and tried for unlawfully disposing of mortgaged property, he is entitled to have the issue of his authority to dispose of the property submitted to the jury. (Page 477.)
3. CHATTEL MORTGAGES—SALE OF MORTGAGED PROPERTY—CRIMINAL RESPONSIBILITY.—Where the mortgagee of property disposed of the same with the consent of the mortgagor, but agreed to deliver the proceeds of the sale to the mortgagor, the mortgagee is not criminally responsible under Kirby's Digest, § 2011, although he fails to deliver the proceeds to the mortgagor. (Page 477.)

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

STATEMENT BY THE COURT.

The appellant was tried and convicted at the February term, 1913, of the Fulton Circuit Court for the offense of selling mortgaged property. The indictment alleged, substantially, that the said I. E. Lawhorn on the 10th day of October, 1911, with the intent to cheat and defraud one E. L. Jackson, did feloniously sell, barter, and dispose of six hundred pounds of seed cotton of the value of $18, upon which cotton the said E. L. Jackson then and there had a lien by virtue of a certain mortgage. Many exceptions were saved at the trial and have been presented for our consideration, but we discuss only the question of instructions, as it is decisive of the case.

E. L. Jackson for the state testified as follows: That in May, 1911, he and one R. A. Holloway were engaged in the general mercantile business, as partners, and the defendant Lawhorn became indebted to them in the sum of thirty-five dollars, and to secure this debt, gave them a mortgage on a crop of cotton to be raised

by him in that year, described as "two-thirds of six acres of cotton to be raised on J. H. Decker's farm in the year 1911." He further testified, that on the day before the defendant sold the cotton, he was told by him that he was going to take the cotton down to Salem and sell it, as he could get more for it there than he (witness) could pay him for it. That he did not consent that this should be done, but he told the defendant that if he did do so he must bring him the proceeds of it; "that is, must pay me what the cotton brought, and that is the only way I gave my consent." That the defendant paid him only a part of the money derived from the sale of the cotton. It was also shown that before the cotton was picked, Jackson bought out the interest of his partner and became the sole owner of the debt secured by the mortgage.

The evidence on the part of the defendant tended to show that Jackson consented to the sale, but required that the proceeds of the cotton be paid him. That ten dollars of the money was paid to a merchant at Salem for supplies furnished defendant, on the credit of his landlord, to enable him to make a crop and one dollar was paid to Jackson and the remainder was spent for other purposes, not authorized by Jackson. Other cotton was picked by defendant, but became involved in litigation between Jackson and defendant's landlord, and Jackson failed to collect his entire debt.

Instructions were asked by defendant to the effect that if Jackson consented to the sale of the cotton, or that if the sale was not made with the intent existing at the time to defeat the enforcement of the mortgage, that defendant could not be convicted. These instructions were refused and defendant was convicted and given a sentence of six months in the penitentiary, and this appeal is prosecuted from that judgment.

*Kay & Black,* for appellant.

1. Before defendant could be found guilty it must be shown that he made the sale with the intent to defeat the mortgagee's debt. This question should have been

submitted to the jury. 68 Ark. 491; Kirby's Dig., § 2011; 34 Ark. 469.

2. Where the mortgagee consents to the sale, the mortgagor can not be convicted, even though he violates a condition that the proceeds should be accounted for. 69 Iowa, 741; 94 Ga. 766; 63 Ala. 61; 7 Cyc. 62, notes.

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

1. It is not necessary to show a criminal intent under the statute. 43 Ark. 284.

2. Appellant did not have the consent of the mortgagee. 63 Ala. 61; 69 Ia. 741; 37 Ark. 412; 44 S. W. 491; § § 1868, Sand. & Hill's Dig., 2011 Kirby's Dig., and 1693, Mans. Dig. The offense is complete when the property is sold. In the sections in S. & H. Dig. and Kirby's Dig., *supra,* there is no provision relating to consent on the part of the mortgagee. The Legislature has thus taken away from the mortgagee the right of consent to sale. There is no error.

SMITH, J., (after stating the facts). It is insisted upon the part of the State that "It is not necessary to show a criminal intent, since the statute itself defines what shall constitute the crime," and to support this position, we are cited to the opinion by Chief Justice COCKRILL in the case of *Beard* v. *State,* 43 Ark. 284, where he said: "The statute (disposing of mortgaged property) upon which the indictment in the case is based, makes it a crime to dispose of personal property under the particular circumstances. When a party voluntarily does the act prohibited, he is charged with the criminal intent of doing it, and no further intent need be shown." *Seelig* v. *State,* 43 Ark. 96; *U. S.* v. *Ulrici,* 3 Dillon, 532; *Com.* v. *Nash,* 7 Met. (Mass.), 472.

There was a strong dissenting opinion in that case by Justice EAKIN, in which he contended that a conviction could be had only where the proof showed the sale was made with the intent to deprive the mortgagee of his debt. But the opinion in that case was based upon section 1693 of Mansfield's Digest, which has since been

amended by the act of March 7, 1893, which is carried into Kirby's Digest as section 2011; and this section now expressly requires that the proof show that the sale, barter, exchange, removal or disposal of the property be made with the intent to defeat the holder of the lien in the collection of the debt secured thereby. Moreover, defendant was entitled to have the issue of his authority to sell the cotton submitted to the jury. If Jackson gave the defendant permission to sell the load of cotton in question, then such permission and the sale thereunder extinguished the mortgage lien thereon. Jackson could not waive his lien, and afterwards attempted to assert it in a criminal prosecution, because the disposition had not been made of the proceeds of the sale of the mortgaged cotton which should have been made. This prosecution and conviction was for disposing of mortgaged property and there was no mortgage lien after a sale had been made with the mortgagee's assent.

The judgment in this case is therefore reversed and the cause remanded.

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## LOUISIANA & NORTHWEST RAILROAD COMPANY v. WILLIS.

Opinion delivered June 9, 1913.

CARRIERS—INJURY TO PASSENGER—PASSENGER STANDING IN CAR—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—A passenger on a moving railway train is not guilty of contributory negligence as a matter of law when standing near the door, on a crowded car, and the question of his contributory negligence is one for the jury, where he is injured by reason of the train breaking in two and coming together again, throwing him down and injuring him, before the train had proceeded more than thirty-seven rail lengths out from the station.

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

STATEMENT BY THE COURT.

This suit was brought by appellee to recover damages for personal injuries alleged to have been sustained from the negligence of appellant company while he was

a passenger upon one of its passenger trains operated between the stations of Magnolia and McNeil.

It was alleged that because of the negligence of the company the train broke in two and that the front of it was stopped suddenly, permitting the rear end to collide with it and produce such a jar and shock as to throw appellee against a stove and break two or three of his ribs.

The railway company denied any negligence on its part and any injury or damage to appellee, and plead his contributory negligence in standing unnecessarily on the rear platform of, or within the coach, in bar of recovery.

It appears from the testimony that the appellee, J. R. Willis, a travelling salesman, forty-five years of age, has been living in the town of Magnolia for years. That on the morning of June 24 he took passage on the train of appellant company, and after purchasing a ticket and checking his baggage he stopped on the platform of the car a minute or two and stood there talking to his son, Roy, giving him instructions about what should be done in his absence. That just as the train started he stepped inside the coach, which seemed crowded, and he saw only one vacant seat. There were two seats turned facing each other, and upon them three young ladies were seated, the extra space being filled with boxes and packages belonging to them. Seeing only this seat, and not desiring to disturb the young ladies, he turned and put his hand on the door on the right-hand side and stood looking back towards the back end of the coach, and in a minute or two there came a sudden jolt and jar, the coach having struck something with great force and he was thrown violently against a stove three or four feet from him and two of his ribs broken and another injured. He was confined to his bed eight days, suffering a great deal, and unable to go about his work for about five weeks, and still feels the effects of the injury when bending over or straightening up.

Appellee was being paid for his services on a basis of 6 per cent of sales made by him, which, at that time

of the year, amounted to about $1,500 per week, and on an average of which sum at his percentage basis his salary loss would have amounted to about $450, during the time he was unable to work.

Other testimony tended to show that there were several vacant seats on the car at the time, any of which could have been occupied by appellee.

The coach was a compartment car, made for an accommodation train, with a compartment in one end for negro passengers, the middle for baggage and express and the rear end for white passengers.

The train ran something like 1,100 feet when it broke in two, and, the engine being stopped, the rear end collided with it, making a violent jolt or jar, more violent than appellee had ever experienced in travelling on any kind of train. No one else was injured at the time; the man who was standing by appellee at the time being thrown down, but not striking against anything in falling. He also stated that he saw only the one vacant seat, indicated by appellee. Another witness stated that there was another vacant seat by him where two other seats were thrown together, three men occupying the seats, and the conductor testified that there were ten seats with a capacity for two persons, each, in the car, and that he had only twelve passengers on the morning of the accident. Appellee glanced over the car and saw only the one vacant seat, as described, and was standing temporarily, talking to the man near the door, when the collision occurred. Other witnesses stated there were twelve or fifteen passengers, including children.

The court instructed the jury, which returned a verdict in appellee's favor for $450, and from the judgment thereon this appeal comes.

*C. W. McKay,* for appellant.

The court should have granted appellant's request for a peremptory instruction. While ordinarily it is not negligence *per se* for a passenger to stand up on a moving train, yet if his standing is so unnecessary and protracted as to render it imprudent, he is guilty of con-

tributory negligence in so doing, and the question of his negligence under such circumstances will be taken from the jury. 87 Ark. 104; 83 Ark. 22.

If there is a vacant seat in the coach which the passenger has time and opportunity to occupy, and he fails to do so, but remains standing, he is guilty of contributory negligence. 3 Thompson on Neg., § 2970. See also 71 Ark. 592.

*J. E. Hawkins,* for appellee.

The court is justified in withdrawing a case from the jury only where there is no dispute as to the facts, or where the facts are such that all reasonable men must draw the same conclusion from them. 61 Ark. 555; 76 Ark. 231; 85 Ark. 503; 144 U. S. 408; 139 U. S. 469; 149 U. S. 43; 64 Vt. 107; 3 Hutchinson on Carriers (3 ed.), § 1174. In this case there were conflicts in the testimony, and the established facts were such that reasonable minds might draw different conclusions from them.

Whether or not appellee was guilty of contributory negligence in standing while the train was in motion was under the evidence purely a question for the jury. It was not negligence as a matter of law. 85 Ark. 507, 508; 3 Hutchinson on Carriers (3 ed.), § 1098; *Id.* § 1216, and note; 83 Ark. 25; 76 Ark. 227; 95 Ark. 225; 87 Ark. 104; *Id.* 572; 21 Wash. 119; 38 C. C. A. 536; 27 S. W. 170; 6 Cyc. 650.

KIRBY, J., (after stating the facts). It is insisted for reversal that the court erred in not directing a verdict for appellant and that appellee was guilty of contributory negligence as a matter of law.

It may be regarded as undisputed that appellee boarded the car before the train started, talked with his son a minute or two on the rear platform and when the conductor gave warning that he was ready to go appellee stepped inside the coach, and upon a glance over it discovered that it was crowded, and noticed only one seat not occupied by a passenger, an inside seat, which was filled with bundles and packages, belonging to the three young ladies, who occupied the two seats facing each

other. He braced himself near the door-facing and stood a minute or more talking to another man when the collision occurred, throwing him violently against the stove and breaking his ribs. Another one of the passengers testified that there was a seat unoccupied where he and two other men were seated on two seats facing each other, which appellee could have taken. None of the passengers who were seated were injured, nor was the passenger who was standing with the appellee at the time, although he was thrown to the floor by the jar and jolt.

There was no printed rule, or notice, in the car, warning passengers not to stand in the car, although there was a notice on the outside of the door of the car, warning them against standing on the platform thereof.

In *St. Louis, I. M. & S. Ry. Co.* v. *Harmon,* 85 Ark. 507, it was said: "It has never been held by this court, nor do the authorities generally establish the proposition, that in the absence of such rule promulgated and posted by the company for ths protection of passengers standing in the car would as a matter of law constitute negligence, unless the circumstances were such as to render it obviously dangerous to stand."

There was no evidence indicating that it was obviously dangerous to stand a minute or so in the coach before being seated and the train was just leaving the station and necessarily proceeding at a slow rate of speed until it could get started, and the injury occurred within thirty-seven rails' length of the starting point. It can not be said as a matter of law that appellee was bound to proceed instantly and procure a seat at the expense of being unnecessarily hasty in beating other passengers to a seat or in crowding them and removing their bundles from unoccupied seats that he might sit down. He could have been, although he did not say he was waiting for the conductor's return that he might have him to require the packages removed and furnish him a seat.

Standing in a passenger car is not necessarily neg-

ligence as a matter of law, and ordinarily it is a question for the jury, and in this case the passenger's standing can not be said as a matter of law to have been protracted and unnecessary. Our court has held that a passenger upon a freight train even is not guilty of contributory negligence *per se* in standing up, unless the standing was so prolonged and uncalled for that the facts could be susceptible of but one conclusion.

In *Pasley* v. *St. Louis, I. M. & S. Ry. Co.,* 83 Ark. 25, it said: "It can not be said as a matter of law that every time a passenger on a freight train arises from his seat, he is guilty of contributory negligence. It is only when his standing is so protracted or so uncalled for that the court can say, as a matter of law, that it is unnecessary and imprudent that the question of his negligence will be taken from the jury." See also *St. Louis, I. M. & S. Ry. Co.* v. *Harmon, supra; St. Louis, I. M. & S. Ry. Co.* v. *Hitt,* 76 Ark. 227; *St. Louis, I. M. & S. Ry. Co.* v. *Hartung,* 95 Ark. 225; *St. Louis, I. M. & S. Ry. Co.* v. *Richardson,* 87 Ark. 104; *St. Louis, I. M. & S. Ry. Co.* v. *Gilbreath,* 87 Ark. 572; 6 Cyc. 650; 3 Hutchinson on Carriers, 1216.

This case is not like that of *Crum* v. *St. Louis, I. M. & S. Ry. Co.,* 71 Ark. 592, relied upon by appellant, and the decision therein is not controlling here.

There the plaintiff stood ten minutes on a freight train while it ran a mile and a half, his excuse being that he was waiting for the ice to melt and cool the water and the court thought the water would have cooled as effectually and as soon without his standing to watch the operation and that the exposure caused thereby was unnecessary and held him guilty of contributory negligence as a matter of law.

The court did not err in refusing to direct a verdict for appellee and the case was properly submitted to the jury on instructions fairly presenting the issues and the judgment is affirmed.

# PEKIN STAVE COMPANY v. RAMEY.

Opinion delivered June 9, 1913.

1. MASTER AND SERVANT—NEGLIGENCE—SUBSEQUENT REPAIRS AS EVIDENCE.—In an action against a master for an injury to a servant, it is prejudicial error to permit proof that the manner of the operation of the appliance causing the injury was immediately changed or the defect remedied, in order to show negligence in the master. (Page 489.)
2. APPEAL AND ERROR—PREJUDICIAL ERROR.—In an action against a master for injury to a servant, the admission of evidence that a shield was placed about the saw which injured plaintiff, after the injury, drawn out by plaintiff's counsel after persistent effort, is a reversible error. (Page 489.)
3. MASTER AND SERVANT—INJURY TO SERVANT—LIABILITY.—A servant can recover damages for injuries received through the negligence of the master only when the negligence complained of is the proximate cause of the injury, and that the injury ought to have been foreseen in the light of attending circumstances. (Page 489.)
4. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.—Where a servant operates an unguarded saw without any objection, he assumes the risks attendant thereon, but he does not assume the risk of injury from blocks thrown by the saw, caused by the master's negligence, unless he was aware of the negligence and appreciated the danger. (Page 489.)
5. INSTRUCTIONS—ASSUMPTION OF A FACT.—An instruction on the assessment of damages in a suit for personal injuries is erroneous when it assumes that the plaintiff's injury is permanent. (Page 490.)

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

*T. D. Wynne* and *Garner Fraser*, for appellant.

1. It was obvious error to allow counsel for appellee in his opening statement to impress upon the minds of the jury the fact that a hood or apron had been placed about the saw immediately after the accident, and afterwards on the trial to bring out testimony to prove that fact. 70 Ark. 182; 78 Ark. 148, syllabus 7; 79 Ark. 393; 89 Ark. 556; 82 Ark. 561.

2. The modification requested by appellant of the court's instruction 3 is elementary law and was fully warranted by the evidence. It should have been given.

56 Ark. 221; 90 Ark. 392; *Id.* 411; 93 Ark. 155; 95 Ark. 564; 100 Ark. 465; 101 Ark. 201; *Id.* 537; 32 Ark. 722.

3. Instruction 4, given at appellee's request, erred in assuming, without proof, that appellee was getting wages, and in assuming that his injuries were permanent, which was a matter in dispute.

4. The court erred in refusing appellant's request to instruct the jury in effect that they should indulge the presumption that the defendant exercised due care until the contrary was shown by a preponderance of the evidence; that it did not insure nor guarantee plaintiff against injuries, that they should not assume negligence on the part of defendant merely from the happening of the accident, and that it was not liable unless the negligence complained of was the proximate cause of the injury, and the latter the natural and probable consequence of that negligence.

*E. G. Mitchell* and *Guy L. Trimble,* for appellee.

1. The jury were clearly instructed by the court not to consider statements with reference to what occurred after the accident. 70 Ark. 183; 89 Ark. 562.

2. Appellant's objection to instruction 4 was general, and not sufficient to call the court's attention to any specific reason for changing its phraseology. 98 Ark. 353; 98 Ark. 425; *Id.* 211; *Id.* 227. But, as drawn, the instruction does not assume permanent injury.

3. It was not error to refuse to modify instruction 3, as requested. 101 Ark. 201.

KIRBY, J. This is the second appeal of this cause, which is sufficiently stated in the opinion rendered on the first appeal, reported in the 104 Ark. 1. 147 S. W. (Ark.) 83.

The court reversed the case because of an erroneous instruction, which was held, in effect, to be peremptory and amounting to a direction of the verdict, and said:

"From the testimony adduced at the trial, we are of the opinion that there was sufficient evidence to warrant a finding that the defendant was negligent in not exercising ordinary care to furnish a safe machine near

which the defendant was directed to work by reason of its failure to supply it with an apron or shield in order to prevent the saw from hurling the blocks; or that the defendant was negligent in permitting the blocks to accumulate upon the floor to such a height as to fall upon the saw."

It also said the testimony was sufficient to warrant the jury in finding that the saw furnished was a reasonably safe instrumentality for performing the work and it was a question of fact for the jury to determine whether the defendant was negligent in permitting the blocks to accumulate near the saw as was done on this occasion.

Upon the trial anew, virtually the same testimony was introduced as upon the former trial, the appellant objecting to a statement of the attorney for appellee that it, immediately after the accident and injury, provided a shield around the saw to prevent it coming in contact with blocks and occasioning injury such as occurred to appellee, and to the introduction of testimony relating thereto.

In the opening statement to the jury, appellee's counsel said: "We will show you, gentlemen of the jury, by their own testimony, by their own employees, it is not disputed or denied, never has been and I assume never will be, that this saw could have been protected at very small cost, of almost nothing; they did protect it immediately afterward." This was objected to, and the court said: "You can state what was done before the accident, but not afterwards."

Counsel for appellee said further: "The proof will show, gentlemen of the jury, it has been repeatedly shown by witnesses and by the facts in the case, that within five minutes after he (Ramey) was hurt, they had at no cost put a hood on it, fixed it, and since then they have never hurt a man by that saw." The court, on appellant's objection, said to counsel, "Go on," and to the jury, "You will not consider anything they did after-

wards, but before and at the time of the injury," without any further remark.

The appellant asked the court to exclude all the remarks of counsel in regard to placing the shield about the saw after the accident from the consideration of the jury and to instruct them not to consider it, to which the court said: "Gentlemen of the jury, that is just what I said before. * * * You are not to consider what they did did afterwards, but before it was on, at the time of the injury."

H. S. Lacy testified that it was his duty to remove the blocks as they fell from the cut-off saw, where he was at work at the time of the injury. "There was a way to prevent the saw from throwing blocks. An apron put there would have shoved the blocks off to one side. An apron two and a half feet wide and four feet long would have been sufficient." Counsel then asked the witness if appellant did not put one there after the accident. This being objected to, and the objection sustained, counsel immediately said: "I will ask you if they did not put one there within five minutes after Ramey was hurt? "Do not answer." The court likewise sustained the objection. Counsel for the plaintiff then said: "I want to ask if since then it has thrown any blocks, your honor, and want it written down and I will pass on, write down. I want to ask if since that apron was put there, if it is a fact it has ever thrown a block." Upon objection, the court said: "You can show if it has not thrown any blocks since, you can show the reason why it has not." Objections were made and exceptions saved to this ruling. Counsel for appellee asked: "State whether or not, since Mr. Ramey got hurt, if there has ever been anybody else hurt by blocks thrown that way?" To which the witness replied: "Not to my knowledge," and upon being asked, "Why?" said: "Because there was a shield to protect that." He then described the shield. By counsel for appellee: "Therefore, it could not throw blocks?" A. "The saw

could not pick up the blocks from underneath, because it could not get underneath the saw."

Appellant moved to exclude this testimony, relating to the changed condition since the accident and its objections were overruled and exceptions saved.

During the examination of F. M. Pittman, another witness for appellee, the following occurred:

"I worked there several weeks after that and did not see the saw throw any blocks." Upon objection, the court told the witness to answer, to which the witness replied, "No; I did not." Q. "Why did it not throw the blocks after that? Tell the jury why it did not?" Counsel for the defendant objected to the question and objections were overruled and exceptions saved by the defendant. A. "Well, there was a protection put there what is called an apron, put so the blocks could not get under the saw, could not drop under that, I suppose." Q. "All the time since, you never saw it throw any blocks." A. "No, sir; I never did." Counsel for defendant objected to the answer and asked that it be stricken from the record and the jury instructed not to consider it. The objection was overruled and exceptions saved.

During the examination of Finis LeMay, another of the witnesses for appellee, the following occurred: "I will ask you if that cut-off saw ever threw blocks at any time after that?" Counsel for defendant: "I object to the question." Court: "Ask if he knows." "Q. How long did you work after that?" A. "I worked about a year." Q. "State whether or not in the year you worked at that saw it ever threw any more blocks?"

The defendant objected to this testimony, the objections were overruled and exceptions were saved by the defendant. Q. "Did it or not?" Objected to, objections overruled by the court and defendant saved its exceptions. A. "After that they put a sheathing on to keep it from throwing blocks." Counsel for defendant: "I move that be stricken from the record." The court:

"Overruled." Exceptions were saved by the defendant to the ruling of the court.

This witness being recalled and asked again:

"State whether or not it could have thrown blocks after that?" Objections being overruled and exceptions saved to this question, witness answered: "No; I don't think it could."

The court instructed the jury, giving instruction numbered 3 for the plaintiff, as follows:

"You are instructed that the plaintiff assumed all the risks ordinarily incident to the work he undertook to do for the defendant, but not the risk of failure of defendant to do its duty," and declined to modify it at appellant's request, by adding the following:

"But the plaintiff did assume the risks if he was aware of the condition of the machinery around which he worked and the perils and dangers incident thereto."

Appellant also objected to two of the other instructions given and complains of the court's refusal to give several requested by it, among those one, numbered 4, as follows:

"The jury is instructed that before the plaintiff can recover you must find that the negligence complained of was the proximate cause of the injury, and satisfying yourself in this respect you must believe that the injury was the natural and probable consequence of the negligence as alleged in plaintiff's complaint, and that the injury, if any, ought to have been foreseen in the light of the attending circumstances."

The jury returned a verdict against the appellant and from the judgment thereon it appealed.

It is contended for reversal that the court erred in permitting appellee to show that a shield or hood was placed about the saw to make its operation safer immediately after the injury to appellee and also in refusing to give appellant's requested instruction numbered 4, and in failing to modify, as requested, instruction numbered 3, given for appellee.

It has been repeatedly held by this court that it is prejudicial error to permit proof of the fact after the occurrence of an injury, that the manner of the operation of the appliance causing it was immediately changed or the defect remedied in order to show negligence of the master in furnishing it. *St. Louis, I. M. & S. Ry. Co.* v *Steed,* 105 Ark. 205; 151 S. W. (Ark.) 259; *Prescott & N. Ry. Co.* v. *Smith,* 70 Ark. 179; *St. Louis S. W. Ry. Co.* v. *Plumlee,* 78 Ark. 148; *Fort Smith Traction Co.* v. *Soard,* 79 Ark. 393; *St. Louis, I. M. & S. Ry. Co.* v. *Walker,* 89 Ark. 556; *Bodcaw Lbr. Co.* v. *Ford,* 82 Ark. 561.

This proof of the fact of putting a shield and apron about the saw after the injury occurred did not come out incidentally as in the Ford case, *supra,* but appears to have been the result of persistent effort on the part of appellee's counsel from the beginning of his opening statement to the conclusion of the introduction of testimony, finally resulting in the court allowing it to go to the jury. It can not be said that the evidence established, conclusively, negligence upon the part of the stave company in operating the cut-off saw unprotected by a shield or hood and this testimony was prejudicial and calls for a reversal of the case.

Appellant's requested instruction numbered 4 was also a correct statement of the law and should have been given, but the case would not have been reversed for the court's failure to give it, alone.

Instruction numbered 3 for appellee should have been modified as requested by appellant. The modification only tells the jury that the plaintiff assumed the risk if he was aware of the condition of the machinery around which he worked and the perils and dangers incident thereto.

The testimony shows conclusively that he knew the manner of the operation of the cut-off saw which was open and obvious; that he was a grown man of reasonable intelligence, and made no complaint about the operation of it without a shield or hood, and if the stave

company was negligent in so operating it he assumed the risk incident to its operation and could not hold the master liable for injuries received by him on account of its being operated without a hood. *Emma Cotton Oil Co.* v. *Hale,* 56 Ark. 221; *St. Louis, I. M. & S. Ry. Co.* v. *Goins,* 90 Ark. 392; *Ark. Mid. Ry. Co.* v. *Worden,* 90 Ark. 411; *St. Louis, I. M. & S. Sy. Co.* v. *Wells,* 93 Ark. 155; *Mo. & N. A. Ry. Co.* v. *Van Zant,* 100 Ark. 465; *Asher* v. *Byrnes,* 101 Ark. 201; *Chicago Mill & Lbr. Co.* v. *Wells,* 101 Ark. 537; *Fullerton* v. *Henry Wrape Co.,* 105 Ark. 434; *Ry.* v. *Edwards,* 154 S. W. (Ark.), 209.

Of course the appellee did not assume the risk of the negligence of the master in piling or allowing the blocks to accumlate about the cut-off saw to such an extent that it was liable to strike and throw them and produce the injury that did result, unless he was aware of such negligence and appreciated the danger arising therefrom or incident thereto, as this modification told the jury. *Asher* v. *Byrnes,* 101 Ark. 201.

The court erred in refusing to modify the instruction as requested.

Instruction numbered 4, relating to the assessment of damages, is open to the objection that it seems to assume that appellee's injury is permanent, but it could and would have been corrected if a specific objection had been made. It will doubtless not be given in the same form upon the trial anew.

For the errors designated, the judgment is reversed and the cause remanded for a new trial.

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WHITE *v.* MOFFETT.

Opinion delivered June 9, 1913.

1. DEEDS—INNOCENT PURCHASER—UNRECORDED PRIOR CONVEYANCE.—One who purchases land in good faith for a valuable consideration and without notice of any adverse claim thereto, acquires a good title as against the unrecorded title of a prior purchaser from the same grantor. (Page 496.)

2. DEEDS—PRIOR RECORDED INSTRUMENTS AS NOTICE TO PURCHASER.—A purchaser of real estate must take notice of all prior recorded instruments at the time of his purchase. (Page 496.)

3. DEEDS—PRIOR RECORDED INSTRUMENTS—CONSTRUCTIVE NOTICE—DUTY TO MAKE INQUIRY.—A person purchasing an interest in land takes with constructive notice of whatever appears, in the conveyance constituting his claim of title, and if anything appears in the conveyance sufficient to put a prudent man on injuiry, which, if inquired into with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry, and if he does not make it, he is guilty of bad faith or negligence, and the law will charge him with the actual notice he would have received if he had made inquiry. (Page 496.)

4. DEEDS—BONA FIDE PURCHASER—BURDEN OF PROOF.—Where a party who has purchased land relies upon the defense of being a *bona fide* purchaser, and shows that he paid a valuable consideration, the burden of showing that he purchased with notice is upon the party alleging it, or who relies on the notice to defeat the claim of a *bona fide* purchaser. (Page 497.)

5. APPEAL AND ERROR—INSUFFICIENT PROOF.—Where defendant in the trial below objected to the introduction of evidence offered by the plaintiff, and his objection was sustained, he can not be heard to insist that he should recover because there was no proof offered by the plaintiff on the issue. (Page 497.)

6. APPEAL AND ERROR—ISSUE NOT RAISED BELOW.—Question not raised below will not be considered on appeal. (Page 497.)

7. DEEDS—LOSS—EFFECT.—Where a deed is effective to pass title to lands, its effect can not be divested by loss or destruction. (Page 497.)

8. DEEDS—LOSS—SUBSEQUENT DEED.—Where a deed was lost before being recorded, a subsequent deed to another party, with notice of the first deed, conveys no title. (Page 498.)

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

STATEMENT BY THE COURT.

The appellees, John B. Moffett and others, brought this suit in ejectment for a certain forty acres of land in Miller County, Arkansas, particularly describing it, alleging that they were the owners thereof and the children and heirs of N. R. Moffett, who died seized and possessed of said land on December 4, 1905, leaving them, his children and Frankie Moffett, his widow, surviving

him. They deraigned their title to said tract of land through a deed from Thomas P. Carroll to their father, N. R. Moffett, of date November 4, 1901, which was alleged to have been lost or misplaced, and that it was placed of record in Miller County June 12, 1906.

Benjamin F. White filed a separate answer, denying that appellants were the heirs of N. R. Moffett, and the owners and entitled to the possession of the lands claimed, and also that N. R. Moffett died seized and in possession thereof, or that he was ever the owner of the said land, as claimed. The defendant deraigned title through a chain of conveyances set out, the first one a warranty deed from T. P. Carroll and wife, executed to Frankie Moffett on January 6, 1905, recorded January 6, 1905. Then follows a deed from her, conveying the land to Sam Johnson on January 18, 1905, recorded March 24, 1906. Sam Johnson and wife conveyed same by warranty deed to Charles H. Cline on March 13, 1908, which was recorded March 14, 1908, and Charles H. Cline and wife conveyed same by warranty deed to appellant, White, on June 11, 1908, which was recorded on August 5, 1908. The answer also alleged that White was the owner and entitled to the possession of the land and that the deed from T. P. Carroll and wife to Frankie Moffett, and from Frankie Moffett to Sam Johnson, already referred to, were both placed of record before the alleged deed in the complaint, relied upon by appellees. Denied information sufficient to form a belief as to the deed relied upon by appellees was ever executed or that the consideration therein mentioned was ever paid.

From the testimony it appears that T. P. Carroll and wife, in consideration of the sum of three hundred dollars, one hundred dollars of which was paid in cash and two notes for $100 each, due January 1, 1903, and one due January 1, 1904, conveyed the lands by warranty deed to N. R. Moffett, November 4, 1901, which was not filed for record until June 12, 1906, after the deeds from said Carroll and wife conveying the same land to Frankie Moffett, the widow of N. R. Moffett and from her to Sam

Johnson were both recorded. It was also shown that appellees were the children of N. R. Moffett, who purchased the lands before his marriage to Frankie Moffett, who was his third wife, and that he lived on the place as his homestead until the time of his death, and that the widow continued to reside thereon until 1905 and 1906, and died in 1908.

Carroll testified that he sold the land to N. R. Moffett, made him a deed thereto, but did not remember the date and that later, after his death, his widow stated to him that the deed was lost and had not been recorded, and demanded that he make a deed to the place to her which he did, after a consultation with a justice of the peace, upon the payment by her of between $80 and $100, the balance of the purchase money which was still due. He said, "The reason I made this second deed was that the other deed was lost or destroyed, or something, and she was willing to go before a justice of the peace and swear that it was lost or destroyed, and they told me that I could make the deed." That Moffett lacked between $80 and $100 of paying for the land when he died. He was not married when he purchased the land, but married shortly thereafter.

There was also testimony tending to show that Frankie Moffett had no property and there was some testimony indicating that there was some cotton on hand at the time of Moffett's death. The deed from Carroll and wife to Moffett conveying the land was introduced in evidence, as were also the others set out in the answer. Mr. Cline testified that he bought the land from Sam Johnson in March, 1908; that he had an abstract of the title furnished and talked with J. D. Sanderson, who was an abstracter, and had been recorder of Miller County for some years, and was told the title to the land was all right. He also, after being furnished the abstract, submitted it to an attorney and had him investigate the title and that he declared that it was all right. That he knew of no one making any claim of ownership to the lands adverse to Sam Johnson, except the bank's claim,

for the lien shown on the said abstract, and had no knowledge of any claim by the heirs of N. R. Moffett, and learned for the first time about the middle of November, 1911, that they were making claim of ownership to the lands. That Sam Johnson was in control and possession of the lands when he purchased them. He also stated that he did not examine the record, but he examined the abstract furnished him, read it, and employed an attorney, who pronounced it all right and the title good.

White testified that he was the owner of the lands and purchased them from his brother-in-law, Cline, who assured him that he had made investigation as to the title and that it was perfect; that he also examined the abstract and could see nothing wrong with the title. That he had lived on the forty acres of land adjoining the one in question for three or four weeks before purchasing it and did not hear at any time of any one making claim to it until the fall of 1911; never heard of the Moffetts before their claiming title; that Sam Johnson was in possession of the land at the time he bought it, but acknowledged his right and delivered possession to him upon demand, and he had paid the taxes thereon ever since.

Appellee offered testimony to show that Sam Johnson was not an innocent purchaser of the land, but upon objection of appellant the court refused to allow the testimony to be introduced. After the testimony was all in the court instructed the jury to return a verdict for appellees and from the judgment thereon this appeal is prosecuted.

*William H. Arnold* and *Gustavus G. Pope,* for appellant.

1. The deed from Carroll to Frankie Moffett and the deed from her to Sam Johnson were both recorded prior to the recording of the deed from Carroll to N. R. Moffett. Johnson acquired a good title. 56 Ark. 223; 70 Ark. 256. Appellant acquired a good title when he purchased from Johnson through Cline, notwithstand-

ing N. R. Moffett's deed was recorded prior to such purchase.

The record of a deed which is not in line of a party's title is not constructive notice to him. 99 Ark. 447; 76 Ark. 525; 147 S. W. 70; 104 S. W. 36; 78 Fed. 563; 69 Ark. 99; 87 Ark. 492. The vendee of a *bona fide* purchaser stands in the same attitude as his vendor and is entitled to the same protection. 49 Ark. 207.

The continuous chain of title back to Carroll, the payment of taxes and the adverse possession of Frankie Moffett and Sam Johnson justified Cline and appellant in accepting the title as good. 90 Ark. 149; 101 Ark. 163.

2. If appellant had consructive notice of the claim of the Moffett heirs, yet he would have an equitable interest in the land by virtue of the amount paid by Mrs. Moffett to satisfy the balance of the vendor's lien retained by Carroll, and also the taxes paid since that date. 84 Ark. 283; 69 Ark. 198; 43 Ark. 498.

One who holds land under an equitable title can not be ejected therefrom. 85 Ark. 25.

*E. F. Friedell,* for appellees.

1. The recording of the deed from Carroll to N. R. Moffett long before Cline and White bought was notice to them, and they can not be innocent purchasers. Kirby's Dig., § 762; 69 Ark. 447; 75 Ark. 230; 92 Tex. 558; 84 Ark. 12; 50 Ark. 327; 35 Ark. 103.

2. The destruction of a deed though not recorded, will not operate to revest the title in the grantor. Carroll's deed to Mrs. Moffett was inoperative. 80 Ark. 9; 42 Ark. 173; 52 Ark. 497; 21 Ark. 80.

**KIRBY, J.,** (after stating the facts). It is contended by appellant that since the deed from Carroll to N. R. Moffett, the father of appellees, was not placed of record until more than two years after the deeds made by said Carroll and wife to Frankie Moffett, his widow, and from her to Sam Johnson, conveying the land, had been recorded, that they were not bound to take notice of same, it not being in their chain of title, and that in any

event their grantor, Sam Johnson, was an innocent purchaser of the lands and that they acquired all his rights, as such, without regard to the record of said conveyances.

There is no question but that one who purchases land in good faith for a valuable consideration and without notice of any adverse claim thereto, acquires a good title as against the unrecorded title of a prior purchaser from the same grantor. *Long* v. *Langsdale,* 56 Ark. 239; *Penrose* v. *Doherty,* 70 Ark. 256. It is also a well established principle of law that a purchaser of real estate must take notice of all prior recorded instruments in the line of his purchased title. *Thompson* v. *Bowen,* 87 Ark. 492.

It is equally true that, "A person purchasing an interest in lands 'takes with constructive notice of whatever appears in the conveyance constituting his chain of title.' If anything appears in such conveyance 'sufficient to put a prudent man on inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry, and if he does not make it he is guilty of bad faith or negligence,' and the law will charge him with the actual notice he would have received if he had made it." *Gaines* v. *Summers,* 50 Ark. 327; *Stroud* v. *Pace,* 35 Ark. 103.

Appellants insist that since the deed from Carroll and wife, the common source of title, to N. R. Moffett, appellees' father, was not placed of record until more than two years after the deed from Carroll and wife to Frankie Moffett and her deed to Sam Johnson conveying the same lands were recorded, that they were not bound by constructive notice thereof, nor required to look for the record of any such conveyance or instrument, it not being in their chain of title.

We do not deem it necessary to determine whether they were bound to take notice of such deed from its record, for the reason that both the appellant and his immediate grantor had notice in fact of the deed from

Carroll to N. R. Moffett, at the time of their purchase of the land, the abstract of title furnished them showing such deed, although it was shown to be recorded after the deeds to Frankie Moffett and Sam Johnson, already referred to, were put of record.

Of course, if Sam Johnson was an innocent purchaser of the land, appellant having succeeded to his title, would also be entitled to the same protection as an innocent purchaser, and in *Osceola Land Co.* v. *Chicago Mill & Lbr. Co.,* 84 Ark. 1, this court said:

"When a party relies upon the defense of being a *bona fide* purchaser and shows that he has paid a valuable consideration, the burden of showing that he purchased with notice is upon the party alleging it, or who relies on the notice to defeat the claim of a *bona fide* purchaser." Appellant contends in his argument that Sam Johnson was a *bona fide* purchaser, although the answer does not allege it, and that his deed recites a valuable consideration paid, and there being no evidence tending to show that he was not such purchaser, that the court erred in its direction of a verdict. Appellees realized at the time of the trial that the burden was upon them to show notice on the part of Sam Johnson to defeat the claim that he was a *bona fide* purchaser of the lands and offered to prove this fact, but the court, upon objection of appellant, declined to receive, and rejected such proof, and he can not be heard now to insist that he should recover the lands because there was no proof, showing that Sam Johnson, a grantor in his line, was not an innocent purchaser, when the proof of such fact was rejected upon his objection. The case can not be tried here on an issue not raised below. *Newton* v. *Russian,* 74 Ark. 92; *Schenck* v. *Griffith,* 74 Ark. 562.

The deed from T. P. Carroll and wife to N. R. Moffett, appellees' father, was effectual to pass the title to the lands, which could not be divested by the loss or destruction of such deed of conveyance.

*Cunningham* v. *Williams,* 42 Ark. 170, 12 S. W. 1216, 6 L. R. A. 783; *Campbell* v. *Jones,* 52 Ark. 493; *Ames* v.

*Ames,* 80 Ark. 9; *Foster* v. *Elledge,* 153 S. W. 819, 106 Ark. 342.

Appellants had actual notice of this deed before purchasing the lands and knew that it was prior in time to Carroll's deed to Frankie Moffett, and her deed to Sam Johnson, under which he claims title, and he can not occupy the position of a *bona fide* purchaser for value without notice. Carroll and his wife, having conveyed the title to the lands by the deed to N. R. Moffett, had no title thereafter and the second deed to Frankie Moffett did not operate to convey any.

It follows that appellees were entitled to recover the lands, and the court did not err in directing the verdict.

The judgment is affirmed.

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## ALLEN v. CLARK COUNTY.

Opinion delivered June 23, 1913.

**COUNTIES—COUNTY CLERK—FEES.—Where the tax books were partially made out by the county clerk then in office, and completed by his successor in office, in a controversy between the two as to the division of the fees for the work; *held,* the county is only bound to the payment for the tax books, and where the county clerk, who delivered the tax books to the collector is satisfied with the fees as apportioned by the court, the former clerk will not be heard to complain.**

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

STATEMENT BY THE COURT.

Appellant, while county clerk of Clark County, and before his term expired and his successor, appellee, was inducted into office on October 31, 1912, began to make up the tax books for the year, and presented a claim for $914.10 against the county for work done thereon, itemizing it. Appellee, Williams, succeeding to the office, made the tax books, or rather completed and delivered them to the collector and presented his claim to the county court for fees due therefor, showing the whole

amount of the work done at the rate prescribed by law to be $1,069.90, of which he claimed to have done three-eighths, of the value of $401.19, which was deducted from the whole amount, leaving $668.71, which he designated on his account as the "balance due Allen, the former clerk." The county court heard testimony in the case, and decided that the amount due for making the tax books was $1,069.90, and allowed Williams' claim for three-eighths thereof, $401.19, and Allen's, for only $668.71, the remainder. Allen appealed from the allowance of Williams's claim, and from the judgment allowing a portion only of his account to the circuit court, where the cases were consolidated. Upon trial there, the court rendered the same judgment as was rendered by the county court, and ordered and adjudged that the clerk of the county court issue a warrant in favor of each of said parties for the amount of his claim as adjudged, and gave judgment against Allen for costs. From this judgment, Allen brings this appeal.

*John H. Crawford,* for appellant.

1. This case should have been tried on the common-sense construction of the statute fixing the fees for the work of making up the tax books, that is, that the outgoing and incoming clerk, out of the total amount allowed for the work, should be paid a proportionate share thereof, based upon the number of words and figures actually carried into the books. This follows from the doctrine of *quantum meruit.* Kirby's Dig., § 3494, subdiv. 4. "The laborer is worthy of his hire." Luke 10:7.

2. Under the proof, Williams is not entitled to the amount claimed by him. Constructive fees are not allowed by law. Kirby's Dig., § 1458. See also Kirby's Dig., § 3494, subdiv. 4; 25 Ark. 235; 31 Ark. 266; 32 Ark. 45; 44 Ark. 31; 57 Ark. 487; 85 Ark. 385; 47 Ark. 442, 443; 50 Ark. 431; 55 Ark. 387; 57 Ark. 565; 73 Ark. 600.

*McMillan & McMillan,* for appellee.

1. The only question really before the court on appeal is, whether the judgment of the trial court is right

on the whole record. 6 Ark. 436; 7 Ark. 238; 100 Ark. 175.

2. There was nothing owing by the county to any one until the completed tax books were delivered to the collector. The law provides one compensation, or rather one rate of compensation, for all the duties of the clerk in making up these books, when they have all been completed. See Kirby's Dig., § § 7018, 7020, 7021, 7022, 7026, 7027, 7031, as to the various duties of the clerk in making up the tax books. See also, 66 Ark. 91; 25 Ark. 235.

KIRBY, J., (after stating the facts). The law contemplates that the county shall pay the fees for making the tax books to the county clerk who makes and delivers them to the collector as required by law, and does not contemplate that it shall pay more than the fees allowed for the service. Kirby's Digest, § § 3494-5 and 7018-7026.

It is not necessary to determine whether the tax books of the county for the year 1912 could be made and delivered by the clerk whose term expired on October 31, of the year, since it is not claimed that he completed and delivered the tax books to the collector. The appellee, Williams, completed the tax books upon going into office, and delivered them to the collector, as required by law, and in his claim of fees for the service, conceded five-eighths of the value thereof to appellant, his predecessor. The county is only bound to the payment for the tax books, and since appellee, who made and delivered them to the collector, is satisfied with the division of the fees therefor, as adjudged by the court, it has no cause for complaint.

No error was committed in rendering the judgment, and it is affirmed.

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CITY OF PRESCOTT v. WILLIAMSON.

Opinion delivered June 23, 1913.

APPEAL AND ERROR—EXCLUSION OF EVIDENCE—PREJUDICE.—It will not be said to be prejudicial error where a trial court sustained objections to certain questions, when the appellant did not state what he ex-

pected to prove by the witness, and where the record nowhere discloses what the answers of the witnesses would have been.

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

STATEMENT BY THE COURT.

The city of Prescott brought this suit to extend Greenlawn Street and condemn a right-of-way therefor through and across two lots belonging to appellee.

The testimony tends to show that the two lots were of the value of from five to eight hundred dollars, and were 100 feet wide by 240 feet long, and that the extension of the street through them required a strip of land 60 feet wide by 480 feet long, leaving a strip eight feet wide on the south side of the street, and thirty-two feet wide on the north side of the street, the length of both lots. Some of the witnesses stated that the damages to the lots would be the value thereof as the fractions remaining would be practically worthless, while others stated that the land remaining would be from two to three hundred dollars in value, and one witness testified that the value of the lots was about a thousand dollars, and that the land not taken in opening the street would be worth three or four hundred dollars. Appellees introduced only one witness who testified that the market value of the two lots was six to six hundred and fifty dollars, and that if the street was extended through as contemplated, that the remainder of the lots not taken would be practically worthless. The jury returned a verdict assessing the damages at five hundred dollars, and from a judgment thereon, the city brings this appeal.

*H. B. McKenzie,* for appellant.

The evidence sought to be brought out by the questions to the witness, Greeson, was competent, as tending to show the effect of an improvement on the value of the land, and was admissible. 71 Ark. 38; 11 Ballard on Real Prop., § 167; 64 Ark. 555, 559.

*J. O. A. Bush,* for appellees.

The question propounded to Greeson and others,

for the exclusion of which complaint is now made, was not proper, because (1) it was not in proper form; (2) if it was intended as a "hypothetical" question, it should have stated the facts upon which the conclusion is to be drawn, and, (3) there is nothing in the question itself nor in any part of the record, to show what the answer would be or what point the appellant expected to prove. 101 Ark. 442; 58 Ark. 353; 73 Ark. 409-10.

KIRBY, J., (after stating the facts). It is contended for reversal that the court erred in refusing to permit W. W. Greeson and other witnesses to answer whether they knew that appellees owned the two others lots north of and adjoining the two through which the right-of-way was sought to be condemned, in refusing to allow witnesses to answer the question as to what would be the damage to the lots, or the land taken for the street, considering that the strips remaining would adjoin several other lots, the property of appellees, and in refusing to allow them to answer the following question: "If the defendants would be benefited in view of their ownership of adjoining property for any other reason in a special way in which the public generally would not share by reason of the opening of the street as asked by the plaintiff, then, taking this benefit into consideration, what do you consider the difference in the market value after the street is opened, if any?" It is not shown what the answers of any of the witnesses to any of these questions would have been. The appellant nowhere stated what it expected to prove by either of them. Conceding without deciding that the questions were proper, and that the answers thereto would have been competent testimony, we are not able to say that any prejudicial error was committed in refusing to allow the witnesses to answer them since the record does not disclose what their answers would have been. *Jones* v. *State,* 101 Ark. 442; *Meisenheimer* v. *State,* 73 Ark. 409; *Vaughan* v. *State,* 58 Ark. 353.

No exception was made to the instruction of the court, and it is not claimed that the verdict assessing

damages is excessive. The testimony is amply sufficient to sustain the verdict, and the judgment is affirmed.

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## TEDFORD AUTO COMPANY v. THOMAS.

Opinion delivered June 16, 1913.

1. REFORMATION OF INSTRUMENT—SUFFICIENCY OF EVIDENCE.—A written contract will not be reformed except upon clear and satisfactory proof that the writing fails by reason of fraud, accident or mutual mistake in the preparation or execution thereof, to express the agreement intended to be entered into; so plaintiff can not procure the reformation of a sublease, where it conveys the property intended and the terms agreed upon, upon the sole ground that defendant did not correctly state the amount he paid the original lessor. (Page 506.)
2. EVIDENCE—VARYING WRITTEN INSTRUMENT BY PAROL.—A written instrument can not be varied by parol evidence of antecedent propositions, correspondence, prior writing or oral statements or representations, the same are deemed merged in the written contract. (Page 506.)

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

STATEMENT BY THE COURT.

The appellant filed a complaint, the object and prayer of which was to reform a lease which appellant alleges it was induced to enter into by the false and fraudulent representations of the appellee, and to recover from appellee certain rents which had been paid him, pursuant to the terms of said lease. To this complaint, a demurrer and cross complaint was filed. The cause of demurrer was that the complaint did not allege facts sufficient to constitute a cause of action. The court sustained the demurrer and entered judgment on the cross complaint, and appellant appealed.

The complaint alleged that on or about December 10, 1910, appellee was the holder of a five-year lease on the building situated at 917 Main Street, Little Rock, Ark., and also owned a lot of machinery, tools, and appliances suitable for garage use, which were located in said building, and on that date sold all the tools and machin-

ery, and sublet the building and premises to appellant. That this was upon consideration that the monthly rental should be the same as that which appellee had himself agreed to pay, and this was represented to be $150 per month for the first year, and $162 per month for the second year, and $200 per month for the remaining part of the lease. That acting upon these representations, appellant paid the agreed price for the tools and machinery, and executed the lease for the premises at the monthly rental stated above, and that he entered into the possession of said property, and paid the rent for the remainder of the month of December, 1910, and for each month thereafter, until and including April, 1912. Appellant further alleged the fact to be that appellee had not contracted to pay the amount of rent represented, but had only contracted to pay $90 per month for the first year, and $104.77 per month the second year, and $117.27 per month for the remainder of the lease. It was further alleged that at the time of making said agreement, appellant asked appellee to assign him his lease, but appellee replied that he did not have a copy thereof, and that his lessor was out of the city, and that appellant signed the contract in reliance upon the fact that his rent was the same as that which appellee had been paying. Appellant offered to pay appellee on the first of each and every month, during the remainder of said lease, the same rent which appellee had agreed to pay the owner of the building, and he asked that his contract be reformed so that he should be required to pay no more, and he also asked judgment for the excess over that sum, which he had already paid, amounting to $973.30.

In addition to his demurrer, appellee filed a cross complaint in which he asked judgment for the rent at the contract price, from and after the month of May, 1912. The court sustained the demurrer, and rendered judgment upon the cross complaint, and this appeal is taken from that action.

*James A. Comer,* for appellant.

To maintain an action for damages for false and

fraudulent representations, it must be proven, (1) the fraud related to some matter of inducement to the maker of the contract; (2) that it wrought injury; (3) that the relative position of the parties was such that the contract was based on faith in the statement, and (4) that he did rely upon them in full belief of their truth. The complaint stated a cause of action. 47 Ark. 148; 74 *Id.* 46; 71 *Id.* 309; Benton's Prath. 2 Ward (No.) 385, 20 Am. Dec. 623; 9 Col. 404; 88 Wis. 397; 8 Cal. 159; 163 Ill. 328; 49 Ark. 339; 60 Mech. 470; 87 Ark. 625; 13 Ark. 593; 46 *Id.* 122; 71 *Id.* 185.

*Mehaffy, Reid & Mehaffy,* for appellee.

1. The allegations in the bill do not accord with the contract. The lease is the foundation of the action, and controls the averments in the complaint. All other allegations are merely explanatory. 99 Ark. 218. No reference is made to any other lease or price. Appellant was familiar with its terms, and got what he bargained for and paid rent under the lease.

2. Reformation can be had only where fraud or mistake inheres in the execution of the instrument. 84 Ark. 349. The proof must be clear. 71 *Id.* 614; 75 *Id.* 72; 81 *Id.* 421.

3. Where it is attempted to annex a parol conditional stipulation, it must appear that such stipulation was omitted through fraud, accident or mistake. 60 S. E. 455; 6 So. 264.

4. No case was made for the admission of parol testimony. 38 Ark. 339; 30 *Id.* 186; 13 *Id.* 593; 83 *Id.* 283. The parties were dealing at arm's length with each other. 121 Ill. 161; 11 N. E. 416. See 51 Pac. 888; 47 Ill. 99; 76 *Id.* 71; 20 Am. Rep. 261, 265; 16 Ky. 51.

SMITH, J., (after stating the facts). The lease contract was exhibited with the complaint, and is the foundation of the action, and the allegations of the complaint are explanatory of its terms. *Cox* v. *Smith,* 99 Ark. 218. This lease contract makes no reference to any other lease, or the prices contained therein, and furnishes no means outside of its express terms for measuring the amount of

rent, but its terms are plain and unambiguous, and requires no construction of its terms to ascertain its meaning, nor any reference to any other instrument to ascertain the amount of rent contracted to be paid. It is not alleged that appellant was unacquainted with the terms of the lease exhibited, nor is it contended that he did not get what he bargained for, at the price he agreed to pay, except that he says his rent should have been only that paid by his lessor.

Notwithstanding the allegations of the complaint, as to the false representations, appellant does not ask its rescission, but only its reformation, and this is asked in the face of the fact that appellant always knew the terms of his written contract, and had paid the rent as agreed for about eighteen months. It is not alleged that appellant was deceived in regard to the property itself, or its adaptability to the purpose for which it leased it, nor that the rental value is not in fact equal to the amount agreed to be paid. In the case of *Mitchell Mfg. Co.* v. *Kempner,* 84 Ark. 349, it was said that "a written contract will not be reformed except upon clear and satisfactory proof that the writing fails by reason of fraud, accident or mutual mistake, in the preparation or execution thereof, to express the agreement intended to be entered into," and it was there further said: "The pleadings and proof present no grounds for reformation of the contract. It is neither alleged nor proved that any contract. was agreed upon other than the one signed by the appellee, nor that appellant's agent misrepresented the contents of the writings presented to appellee for their signature.

The solemn written engagements of contracting parties can not be reformed or amended except upon clear and satisfactory proof that the writing fails by reason of fraud, accident, or mutual mistake in the preparation or execution thereof, to express the agreement intended to be entered into."

The case of *Comer et al.* v. *Lehman Durr & Co.,* 6 So. 264, was a proceeding to reform a mortgage, and the court there said: "Equity will reform written contracts

so as to make them evidence what they were intended to evidence—the pact between the parties; but it will not amend a contract entered into under a misapprehension of facts by one party, or both, so as to make of it an agreement which the parties, or either of them, did not contemplate, and which the parties, or one of them, might have declined to execute had both been cognizant of all the facts. This would be, not to make the writing speak the true terms of the agreement, the real intent of the parties —but to make a new contract, embodying terms on which the minds of the parties not only had not met, but with respect to which, in this case, according to the aspect of the evidence most favorable to the complaints, one of the parties had resorted to misrepresentation to avoid. This may have been fraud, it may have afforded grounds for equitable relief against the contract made, but it is not grounds for making a new contract between the parties."

There is nothing in the written contract of lease between appellant and appellee that requires any reference to any other lease, or for that matter to any other writing or transaction to determine the amount appellant was to pay, and in the absence of any allegation of fraud, or such mistake as a court of equity would relieve against, in the execution of this lease, parol evidence will not be permitted to vary it. "Antecedent propositions, correspondence, prior writings, as well as oral statements and representations, are deemed to be merged in the written contract which concerns the subject-matter of such antecedent negotiation, when it is free from ambiguity and complete." *Barry Wehmiller Mach. Co.* v. *Thompson,* 83 Ark. 283.

There are no allegations in the complaint which would authorize the introduction of evidence to vary the terms of the written lease, and under its terms, the court did not err in sustaining the demurrer and rendering judgment on the cross complaint for the rent due, and the decree is therefore affirmed.

## BURGESS v. STATE.

Opinion delivered June 30, 1913.

1. APPEAL AND ERROR—VERACITY OF WITNESSES—VERDICT—CONCLUSIVENESS.—In a criminal case, the veracity of the witness is concluded by the verdict of the jury. (Page 509.)

2. INSTRUCTIONS—CREDIBILITY OF WITNESSES—SPECIFIC OBJECTIONS.—An instruction that "You will disregard the testimony of any witness which you may believe to be false; and if you believe that any witness has testified wilfully falsely to any material fact, you may disregard the whole of the testimony of such witness, if you believe it totally unworthy of credence," is not objectionable as telling the jury that they might disregard all of the testimony, even though they believed portions of it to be true; but if the instruction is so construed, the objection should have been specifically called to the court's attention. (Page 510.)

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

*Charles Jacobson* and *Mahony & Mahony,* for appellant.

1. It is an essential requisite to impeaching a person that the witness knows his general reputation among his neighbors for truth and veracity, and from that knowledge would not believe him on oath. Evidence of particular acts * * * is not admissible. 67 Ark. 112.

2. The testimony admitted was incompetent and prejudicial. Taken in connection with instruction 4, given over defendant's objection, the error calls for a reversal. 56 Ark. 226; 68 *Id.* 336; 72 *Id.* 438.

3. The letter from Kolb as corroborative of Hammond's testimony was improperly refused. 77 Ark. 545.

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

1. It was appellant's duty to call the attention of the court to any seeming error in the court's charge. A general objection is not sufficient. 107 Ark. 361. No mention is made of the objectionable instructions in the motion for new trial. 94 Ark. 390-2; 94 *Id.* 378-9.

2. The letter of Kolb was inadmissible. 97 Ark. 567.

SMITH, J. Appellant was convicted in the Union Circuit Court under an indictment charging the larceny of a promissory note of the value of $140, and the property of one Mrs. M. F. Norman. His punishment was assessed at one year in the penitentiary, and he prosecutes this appeal from that judgment. Appellant had contracted to buy a forty-acre tract of land from Mrs. Norman, for the consideration of $250, and after having made some payments, owed a balance, evidenced by the note alleged to have been stolen. Appellant had been given a bond for title to the land, and demanded a deed upon presentation of the note, under the claim that he had paid the note. The appeal questions chiefly the sufficiency of the evidence, and, while it is not altogether satisfying, it is legally sufficient to sustain the verdict. In fact, the veracity of the witnesses is the principal question in the case, but that question is concluded by the verdict of the jury, and it will serve no useful purpose to review this evidence.

The court gave an instruction on the impeachment of witnesses, which is challenged, and is said to be error calling for the reversal of the case. It reads as follows: "You will disregard the testimony of any witness, which you may believe to be false, and if you believe that any witness has testified wilfully falsely to any material fact, you may disregard the whole of the testimony of such witness, if you believe it totally unworthy of credence." Appellant insists that this instruction tells the jury that if any part of the statement of a witness is wilfully false, they may disregard it all, even though they believe portions of it to be true. The instruction does not say so, and, if it is susceptible of that construction, the fact should have been called to the attention of the court. Evidently, what the court intended to tell the jury was that, if they believed a witness had testified wilfully falsely, they could disregard such portions as they believed to be false, or they would be warranted in rejecting it all, if they did not believe any of it to be true.

There was an attempt to impeach both the State's

principal witness, and the principal witness for the defendant, and this instruction applied to each, and a specific objection should have been made to call the court's attention to the objection now urged. The rule in regard to false swearing is clearly stated in the opinion in the case of *Frazier* v. *State,* 56 Ark. 242, where an instruction was discussed, which read as follows: "If the jury find that any witness has sworn falsely to any material fact, they may, if they see proper, disregard the whole testimony of such witness." And, in discussing this instruction, Justice Hemingway said: "False swearing as to a particular fact warrants a jury in discrediting the entire testimony of a witness only when it is wilful, and the instruction is incomplete in omitting this. Moreover, the instruction might be construed as warranting a jury in disregarding testimony which it believed to be true, if it emanated from a witness who had sworn falsely to some other fact. Thus construed, it does not reflect the law, for, although a witness is found to have wilfully testified falsely to a material fact, the jury will not be warranted in disregarding other parts of his testimony which appear to be true."

The instruction complained of is not as clear as it should be, or probably would have been, if the objection now made had been made at the trial. The instruction tells the jury they may disregard the testimony of any witness, which they believe to be false, and this, of course, is true whether the witness wilfully testified falsely or not, and it further says that if the testimony was wilfully false on any material fact, the jury may disregard all of it, if they believe it totally unworthy of credence. The instruction does not authorize the jury to disregard any part of it believed to be true, but, if it is open to that construction, that fact should have been called to the attention of the court. *Schuman* v. *State.* 106 Ark. 362.

Other exceptions were saved and are argued in the briefs, but we do not regard them as of sufficient importance to discuss here, and we do not think they sustain the claim of prejudicial error.

The judgment of the court below is therefore affirmed.

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TENNESSEE LIFE INSURANCE COMPANY *v.* NOLEN.

Opinion delivered June 16, 1913.

LIFE INSURANCE—MISREPRESENTATIONS—WAIVER.—The first part of an application for a policy of life insurance which provided that the policy, together with the answers and explanations given to various questions asked in that part of the application, shall form the exclusive basis of agreement between the insured and the company; *held*, to operate as a waiver of the falsity of answers contained in other parts, and cut off the defense of fraudulent misrepresentations contained in those other parts, as to occupation, health, etc.

Appeal from Little River Circuit Court; *J. T. Cowling,* Judge; affirmed.

*A. D. DuLaney,* for appellants; *W. F. Davis,* Nashville, Tenn., of counsel.

The court's construction of the contract is erroneous, in that the effect of it is that appellants can not raise the question of fraud, however gross it may be, committed by the insured in part 2, of his application, making the policy with reference to this issue incontestible, although the company reserved in the policy one year from the date of its issuance to contest it, except for nonpayment of premium.

An incontestable clause from date of issuance of a contract is void, as against public policy, so far as such incontestable clause would include fraud in procuring the contract. 2 L. R. A. (N. S.) 821; 108 Ia. 224, 50 L. R. A. 774; 96 Ark. 495; 27 L. R. A. (N. S.) 1026; 127 S. W. 749; 103 Ky. 21; 6 Enc. of Ev. 16; 42 L. R. A. 247; 103 Ga. 256; 4 Am. & Eng. Ann. Cas. 364; 123 Ky. 21.

Appellants should have been permitted to introduce proof with reference to the alleged false and fraudulent representations made in part 2 of the application, and the question of the truth or falsity of said representations should have been submitted to the jury, *supra;* 58 Ark. 528; 105 Ark. 101; 66 L. R. A. 322; 25 Cyc. 933, note 18.

See also on the question of fraud entering into a written contract. 43 Ark. 448; 92 S. W. (Ky.) 17, 5 L. R. A. (N. S.) 747; 143 Fed. 850; 35 Ins. Law Journal 202; 87 Kan. 641; 41 L. R. A. (N. S.) 1137.

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

1. The policy will be given that construction most favorable to the insured, where the policy is susceptible to two different constructions. 42 L. R. A. 261; 152 S. W. (Ark.) 995.

2. The appellant insurance company is bound by part 1 of the application. 24 N. E. (Ill.) 538; 16 S. E. (W. Va.) 580.

3. The contract is not against public policy. 2 L. R. A. (N. S.) 821, note, p. 822; 42 L. R. A. 264; 51 N. Y. Supp. 393; 124 *Id.* 775; 42 L. R. A. 253; 61 S. W. (Tenn.) 62; 96 Ark. 495; 150 S. W. 393.

McCULLOCH, C. J. This is an action on two life insurance policies issued by appellant company on the life of one John Nolen, payable to the latter's wife, appellee, Josephine Nolen.

Each of the policies contain a clause reciting that it "is issued in consideration of the application therefor, which application is hereby made a part of this contract, and attached or copied hereon, * * * and the payment of the premimum for one year's term of insurance and the payment of a like sum * * * on or before the 8th day of May in every year thereafter during nineteen years of the life of the insured.

On the reverse of each policy there appears the following, among other, printed clauses:

"*Incontestability:* This policy shall be incontestable after one year from the date of its issue, except for nonpayment of premium."

"*Statements:* All statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statements shall avoid

this policy unless they are contained in the written application for insurance, a copy of which is hereto attached."

Attached to the policy is the application, in three parts, the first, the application proper, containing the name, age and occupation of the applicant; his place of birth and place of residence; a summary of all other insurance on his life; the name of his wife, the beneficiary, and a request for the kind of insurance desired. That part concludes with the following clause: "I agree that this policy, together with the answers and explanations given to the above various questions, shall form the exclusive and only basis of agreement between me and the Tennessee Life Insurance Company."

Part 2, which was signed by the applicant, contains questions and answers concerning occupation, environments, family history and hereditary influences, health record, clinical history, and habits as to the use of intoxicating beverages, tobacco and narcotics.

Part 3 constitutes the report of the medical examiner.

The answer pleads as a defense, a breach of the warranties as to the truth of answers in part 2, and also pleads fraudulent misrepresentations concerning the health and habits of the deceased.

In the progress of the trial the court ruled that, by the terms of the policy, the agreement in part 1 constituted a waiver of the warranties and representations contained in part 2. Appellant saved its exceptions to that ruling, and the case was tried solely upon the issue whether deceased was in good health when the policies were delivered. The verdict of the jury settled that issue in favor of the appellee, and no question is raised here as to the sufficiency of the evidence to sustain the verdict, nor as to the instructions of the court upon that issue.

Learned counsel on both sides devote their argument to the question whether a clause in a policy, making it incontestable from date of issue, is valid, so as to cut off the defense of fraudulent misrepresentations which operated as an inducement to the issuance of the policy.

We do not, however, find that clause in these policies. On the contrary, there is a clause, printed on the back of each policy, to the effect that it "shall be incontestable after one year from the date of its issue." The assured died, and this action was commenced within the year. Therefore, that clause does not come into play.

There is the question in the case, and we consider it vital, whether the agreement, contained in part 1 of the application, to the effect "that this policy together with the answers and explanations given to the above various questions, shall form the exclusive and only basis of agreement," between the assured and the company, operated as a waiver of the falsity of answers contained in other parts, and cut off the defense of fraudulent misrepresentations contained in those parts.

That question the learned circuit judge decided in favor of appellee, and we consider that the only ruling presented now for review.

There is a sharp division in the authorities whether or not a clause in a policy stipulating for immediate incontestability, is void as being against public policy so far as it cuts off the defense of fraudulent misrepresentation in procuring the policy. The cases on that subject are cited in the briefs of counsel.

It is contended that that question has been decided by this court in the case of *National Annuity Association* v. *Carter,* 96 Ark. 495. But an examination of the opinion of the court in that case shows that the language referred to was used with reference to warranties, and not fraudulent misrepresentations. The question is, therefore, an open one so far as this court is concerned, but, as before stated, we do not regard that question as raised here. The question upon which the trial judge decided the cause was entirely different, and we are of the opinion that his ruling was correct.

Conceding that it is against sound public policy to permit the company to stipulate for immediate incontestability, even against fraud, yet the parties, when they come to close the contract, may stipulate for a waiver of

matters which have been inquired into in the application. We see no reason why the company should not be permitted to contract that it will waive all inquiry into the truth of answers which it has had an opportunity to fully investigate. That is a different thing from waiving all inquiry as to fraud. As the company saw fit, on the application and examination of the physician, to inquire specifically into certain matters concerning the health and habits of the applicant, this gave an opportunity to make full examination concerning those matters, and the truth or falsity of the answers made by the applicant. With that opportunity for examination, we see no reason why the company should not be permitted to waive any further inquiry into those matters.

The matters and things which are brought forward by appellant in its answer as a defense, were embraced within part 2 of the application, and, therefore, fell squarely within the terms of the waiver.

That being the only question in the case, it follows that the judgment should be affirmed, and it is so ordered.

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## CARRIER v. COMSTOCK.

Opinion delivered May 19, 1913.

1. TAX SALES—OVERDUE TAXES—ENTRY OF WARNING ORDER ON RECORD.—The Act of 1881, p. 65, requires that when a complaint is filed to foreclose a lien for overdue taxes that "on the filing of such complaint, the clerk of the court shall enter on the record an order * * *" *Held*, though the statute is mandatory and its provisions must be substantially complied with, it does not prescribe the manner of placing the order upon the record, but merely prescribes a place where a land owner may search for legal notice of the proposed foreclosure, and firmly attaching to a page of the chancery record a copy of the order, printed on a separate sheet, constitutes substantial compliance with the statute, and is sufficient to give the court jurisdiction of the cause. (Page 520.)
2. TAX SALE—OVERDUE TAXES—PUBLICATION—VALIDITY.—Where the chancery record shows that the order was printed and pasted in the record book, the contention that the order was published before being entered on the record, is not sustained where the record shows that the printed order on the record, was on paper printed on only one side. (Page 520.)

3. DESCENT AND DISTRIBUTION—RIGHT OF WIDOW WHEN DECEASED HUSBAND DIES WITHOUT OTHER HEIRS—BURDEN OF PROOF.—Under Kirby's Digest, § 2642, giving the widow all of the property of her deceased husband, when he died without relatives of any kind, the proof need not show to a certainty that deceased left no other heirs, and the testimony of the widow alone raises a *prima facie* case in her own favor, throwing the burden of proof upon a stranger to show that there were other heirs. (Page 521.)

4. DESCENT AND DISTRIBUTION—RIGHT OF WIDOW IN ABSENCE OF HEIRS OF DECEASED HUSBAND—PRESUMPTION.—Testimony of deceased's widow that she knew of and heard nothing of any of his heirs, raises a presumption that deceased left no other heirs. (Page 522.)

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

*Allen Hughes,* for appellants.

1. The warning order was not entered of record. 74 Ind. 56; 52 Iowa, 171; 130 N. Y. 509; 23 Cyc. 835; 1 Black on Judgments, § 106; 93 Tex. 259; 131 Cal. 552; 34 Cyc. 585; 24 Am. & E. Enc. Law (2 ed.), p. 108; 30 Cal. 539.

2. It was not entered of record before the publication. 55 Ark. 30; 47 *Id.* 131; 18 Wall. 372.

3. Mrs. Comstock is not the heir. The proof is not sufficient to show there were no heirs nor lineal descendants. The burden was upon her. Kirby's Dig., § 2642; 90 N. C. 385; 48 S. C. 415; 6 Houst. (Del.) 447; 14 Ill. 218; 83 Ky. 219.

4. The claim is stale. 93 Ark. 298.

*H. F. Roleson* and *Daggett & Daggett,* for appellees.

1. The warning order was entered of record. The only object was notice. 55 Ark. 34.

2. The contention that the warning order was published before it was entered of record is not sustained by the testimony.

3. Mrs. Comstock is entitled to the possession and makes a *prima facie* case of ownership. Kirby's Dig. § 2745; 76 N. W. 922; 1 Wall. 371; 26 Fla. 461; 20 Col. 150; 17 Vt. 165; 81 Am. Dec. 108; 66 N. W. 1083; 35 Col. 129.

4. Mrs. Comstock is the heir. 48 S. C. 415; 14 Ill. 218; 9 Mo. App. 169; 1 Demblitz, Land Titles, 318; 5 Cow. 314; 25 Wend. 205.

5. There is no question of laches. 94 Ark. 122.

McCULLOCH, C. J. Appellees instituted an action at law against appellants in the circuit court of Lee County to recover a tract of land containing eighty acres in that county.

Appellants moved to transfer the cause to the chancery court, which motion was granted, and on final hearing a decree was entered in favor of appellees, from which an appeal has been prosecuted.

Appellees assert title to the land under a sale persuant to a decree of the chancery court of Lee County for overdue taxes. G. B. Comstock, the husband of Mrs. Mary Comstock, one of the appellees, became the purchaser of the land by an assignment of the certificate of purchase from two individuals to whom the land was struck off at the commissioner's sale. The records of the chancery court in that proceeding establish the fact that a deed was duly executed pursuant to the sale, but the deed has been lost. It is not contended that the evidence is insufficient to establish the fact that Comstock became the purchaser at the overdue tax sale. It is alleged that G. B. Comstock died without blood relations and that the lands descended to Mrs. Mary Comstock, his wife, under the statute which provides that "if there be no children, or their descendants, father, mother nor their descendants or any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate." Kirby's Digest, § 2642. She conveyed an undivided interest to her coappellee.

Appellants had at the time of the commencement of the action been in the actual possession of the land for a shorter time than the statutory period of limitation, but they defend on two grounds, namely, that the overdue tax decree and sale thereunder were void, and that the proof is not sufficient to establish the fact that Comstock left no heirs.

The ground of attack upon the overdue tax decree is that the clerk failed to enter the warning order on the record before he caused the same to be published in accordance with the requirement of the statute.

The statute provides that upon a complaint filed for the purpose of foreclosing the lien for overdue taxes "on the filing of such complaint the clerk of the court shall enter on the record an order, which may be in the following form."

The proof shows that the order was not transcribed on the record, but was printed on a separate paper and pasted on a page of the record so that a portion of it protruded from the bottom and was folded back within the record.

The contention is that this is not such an entry of record as the statute requires.

This court held in *Gregory* v. *Bartlett,* 55 Ark. 30, that in an overdue tax proceeding the court acquired no jurisdiction and the proceedings were void if the clerk failed to enter the warning order on the record as required by the statute. The court, speaking through Chief Justice COCKRILL, said:

"The statute does not authorize the clerk to make the order in any manner other than by entry on the record, and authorizes publication of nothing except a copy of the record. To say that the clerk can dispense with the record and make his entry in the first instance in a newspaper, would be to disregard a plain provision of the statute and dispense with one of the means the law affords for imparting information to the land owner. But when a statutory provision is plain, and is made to aid in accomplishment of a useful end, it can not be treated as merely directory, and so be disregarded." To the same effect see *Taylor* v. *Leonard,* 94 Ark. 122.

In *Pope* v. *Campbell,* 70 Ark. 207, the court held that the record referred to in the statute was the chancery record, and that entering the order upon the record of proceedings at law was insufficient and avoided the decree.

It is argued that the language of the statute requiring the clerk to "enter on the record an order" means to transcribe the order upon the record, and that printing it upon a separate paper and attaching same to a page of the record is not sufficient. Several cases are cited in the brief which tend to show that a literal interpretation of the words of the statute means that the order shall be written or printed upon the page of the record itself and not upon a separate paper attached to the record. But we do not think that a literal interpretation of the language of the statute is called for, though the statute is mandatory and its provisions must be substantially complied with. The purpose of this requirement was, as stated by Judge COCKRILL in *Gregory* v. *Bartlett, supra,* to afford information to the land owner, to prescribe a place where he may search to find information concerning foreclosures of liens for overdue taxes. The statute does prescribe the place where the order shall be entered, and as the court held in *Pope* v. *Campbell, supra,* that part of the statute is mandatory. But the statute does not prescribe in so many words the manner of placing the order upon the record, and there is no reason to believe that any requirement in that regard was in the minds of the law-makers. The statute does not undertake to deal with the question of the permanency of the record, but it merely prescribes a place where the land owner, before the court proceeds to an adjudication and the sale is made by the commissioner, may search for legal notice of the proposed foreclosure. The question of the manner in which the order shall be placed upon the record is a matter of form and not of substance, and this seems not to have been within the mandatory purpose of the framers of the statute. A statute may be mandatory in some respects without being so in others. Black on Interpretation of Laws, p. 336.

In *Leigh* v. *Trippe,* 91 Ark. 117, we held that the statute regulating tax sales provide that the clerk shall keep two separate records of lists of land sold to indi-

viduals and to the State, but that keeping those records in a single book was substantial compliance with the statute. In disposing of the question we said:

"There is no reason to believe that the provision for keeping the two lists separate was intended to be mandatory, and no reason to so treat it. That is merely a matter of detail, and the keeping of the lists separate affords no protection to the owner. If he searches the record at all for the sale of his land at a tax sale, he finds it in the list. He is chargeable with notice of the contents of that list, it affords all the information that would be obtained from a separate list, and he is not misled by the absence of, or failure to keep, such lists."

Applying that doctrine to the present case, we hold that, so far as the method of entering the order upon the record is concerned, only substantial compliance with the terms of the statute is required, and that firmly attaching to a page of the chancery record a copy of the order printed on a separate sheet constitutes substantial compliance and is sufficient to give the court jurisdiction of the cause.

It is also contended that the record shows that the printed sheet was pasted in the chancery record after the publication thereof in the newspaper. But we are of the opinion that that contention is not sustained by the appearance of the record. It is manifest, of course, that the order was put in type and printed on a separate sheet before it was pasted on the record, but it does not necessarily follow that the sheet was not pasted in the record until after the publication in the newspaper. It is printed on one side of the paper, which is evidently not a part of the newspaper in which it was published. The mere circumstance that the entry is printed upon a page is not, of itself, sufficient to establish the fact that it was placed there after the publication in the newspaper.

Our conclusion, therefore, is that the attack of appellants upon the validity of the overdue tax decree and the sale made thereunder is not sustained.

The remaining question is as to the right of Mrs. Comstock to recover the whole of the property under the statute of descents.

It is conceded that the proof is sufficient to establish the death of G. B. Comstock; that he died without lineal descendants, and that Mrs. Comstock is entitled to dower in the lands; but it is insisted that the proof is insufficient to show that Comstock left no kindred of the blood and that the whole estate descended to Mrs. Comstock.

The only testimony on this point is that of Mrs. Comstock herself, which is very brief, and is as follows:

"G. B. Comstock was my husband. I was married to him in 1886, and lived with him eight years. I do not know whether he is dead or not. He left me in the fall of 1894. He never said anything as he rode off. I have not heard anything from him since and do not know where he went, or what became of him, or whether he is dead or alive. I do not know of any relatives he had living at the time of his death, and I never heard of his having any while I was his wife. I did not know where he came from, nor anything concerning his personal or family history before I met him. When he left, he did not say where he was going."

The burden of proof was upon appellees to establish the fact that Comstock left no other heirs. They must recover, if at all, upon the strength of their own title, and not upon the weakness of the title of their adversaries.

But it does not follow that the proof must show to a certainty that there were no other heirs. This can be shown by circumstances and by reasonable inferences, or the proof may establish a state of facts from which the law will raise a presumption between the parties to the litigation. In other words, we think that the evidence, while very meager, was sufficient to make out a *prima facie* case in favor of the widow, which then cast upon a stranger the burden of showing that there were other heirs. The widow here has shown that she knew nothing of her husband's antecedents; that she had never

heard of him having any heirs, and it is inferable from her testimony that her husband never mentioned to her having any kindred, and up to the date her deposition was taken no other heirs had ever appeared as claimants to his property. Under those circumstances, there is not only some inference of fact, however slight it may be, that there are no other heirs, but the law ought to, and does, raise, as between the widow and a stranger, a presumption that there are no other heirs. It is sufficient to make a *prima facie* case in favor of the widow.

In an early New York case, where the inquiry was as to the right of the State to declare an escheat in its favor, one of the judges, delivering the opinion of the court, said:

"I am inclined to think that the proof was, *prima facie,* sufficient to show that Tool died without heirs. * * * He was never heard to speak of his family, father, mother, wife or children. What better evidence, then, does the nature of the case admit? Of whom are inquiries to be made? The place of his birth is not known. Most of the witnesses think he was an Irishman; but he never spoke of the place of his nativity; nor does there appear to be any clue by evidence of a higher or more satisfactory character. Very slight proof, I admit, on the part of the defendant, that the patentee had relatives or connections, would counterbalance this negative evidence. But in the absence of any such proof, I think the evidence on the part of the plaintiff may be considered, *prima facie,* sufficient." *People* v. *Etz,* 5 Cowan, 314.

The doctrine of this case is approved by Mr. Dembitz in his work on Land Titles (volume 1, page 318), where he cites the case among others, and makes the following statement of the law:

"When the commonwealth, or a purchaser from the commonwealth, seeks to recover lands escheated by failure of heirs, he or she had the burden of satisfying the jury that the decedent died without heirs, and proof

that a man's intimate acquaintance for several years never heard him speak of his family, parents, wife or children, is *prima facie* evidence that he had no heir if the place of birth is unknown, or there is no clue to better evidence. It has even been held that, after advertisement and inquiry, nobody claimed the premises as heir or person last seized, this is enough to put the other side on their defense."

This seems to us to be the reasonable doctrine to apply in a case of this sort where there is a controversy between the widow, claiming an estate by descent, and a stranger to the title, and the proof is sufficient, we think, to make out a *prima facie* case in favor of appellees, which has not been overturned by any other testimony adduced.

Appellants' plea of laches need not be considered, as the appellees are not asking equitable relief but seek to recover on the strength of the legal title conveyed under the commissioner's deed.

Decree affirmed.

HART and SMITH, JJ., dissent.

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CHATFIELD v. JARRATT.

Opinion delivered June 16, 1913.

1. APPEALS—MUST BE TAKEN, WHEN.—Under Kirby's Digest, § 1199, which provides that an appeal or writ of error shall not be granted except within one year next after the rendition of the judgment, order or decree sought to be reviewed, unless the party applying therefor was an infant, the time begins to run from the date of the rendition of the judgment or decree, and not from the date of the entry of the judgment. (Page 526.)
2. APPEALS—NECESSITY OF ENTRY OF JUDGMENT.—After the rendition of a judgment, the case is at an end so far as the successful party is concerned, and it is not essential to the enforcement of the judgment that it should be entered of record. (Page 526.)
3. ABATEMENT AND REVIVAL—JURISDICTION—RIGHTS OF PARTIES IN ESTATE.—When a plaintiff who succeeded in the litigation died before the entry of the judgment, the chancery court had no jurisdiction to revive the cause, but those who succeeded to the

rights of the plaintiff had the right to move the court to make an order for the entry of the judgment as of the true date of its rendition. (Page 526.)

4. APPEAL AND ERROR—REVIVOR.—When a successful plaintiff died after a judgment had been rendered in his favor, but before it had been entered, the only procedure for the losing party to pursue was to appeal within the time prescribed by the statute and move, in the Supreme Court, for a revivor. (Page 527.)

Appeal from Lee Chancery Court; *R. D. Smith,* Special Chancellor; appeal dismissed.

*R. E. Wiley,* for appellant.

1. After the death of a party to a suit while the case is under advisement, the court may enter its judgment *nunc pro tunc,* but the entry can not properly be made until a proper revivor and substitution of parties is had. 73 Pac. 813; 17 Ark. 100, 105; 20 Ark. 336; 23 Ark. 18; 34 Ark. 300; 72 Ark. 185; 40 Ark. 224; 75 Ark. 12; 85 Ark. 334; Kirby's Dig., § § 4432, 6265, 6266.

2. The motion for revivor was in time. The case could not be appealed to this court until final judgment had been entered in the chancery court. Until the judgment roll was made up in the trial court no copy thereof could be had to incorporate in the transcript of the record required by statute. Until the judgment is entered the time within which an appeal must be taken does not begin to run. Elliott on Appellate Procedure, § 118; Black on Judgments (2 ed.), § 106, p. 151; *Id.* § 110, p. 157; 35 Neb. 761, 763; 92 N. W. 294; 40 Neb. 740; 38 L. R. A. 243; 107 N. W. 753; 9 Minn. 318, 350; 20 Minn. 559; 36 Minn. 117; 24 How. Pr. (N. Y.), 193; 60 N. Y. 112; 95 N. Y. 542; 68 N. Y. S. 777; 114 N. Y. S. 792; 71 O. St. 50; 105 Tenn. 521; 15 N. J. Eq. 398; 39 N. J. Eq. 230; 125 Ia. 335; 54 W. Va. 581; 206 Pa. 91; 11 La. Ann. 181; 80 S. W. (Ky.) 823; 1 Wall. 690; 6 Wall. 153.

*F. N. Burke* and *H. F. Roleson,* for appellee.

The right of appeal existed at once when the decree was rendered in November, 1911, and appellant's time

commenced to run from that date. 57 Ark. 185; 69 Ark. 48; Kirby's Dig., § 1199.

The chancery court had no further control over the case after the expiration of the term. 36 Ark. 513.

No revivor was necessary in order to put the decree of record nor to make the record speak the truth as to the date of rendition of the decree. No correction of the decree was asked. 13 Ark. 654; 54 Ark. 551, 552; Kirby's Dig., § 6176; 54 Cal. 519.

PER CURIAM. This action involves the title to real estate. John R. Jarratt filed his petition in the chancery court of Lee County to confirm his title to the tract of land in controversy, and appellant intervened, claiming title to the land and objecting to confirmation.

The cause was prosecuted as an adversary proceeding, and resulted in a decree in favor of plaintiff, which was rendered on November 21, 1911, a day of the November term, 1911, of said court. The clerk failed to enter the decree upon the record until the next March term of court, but entered it on March 20, 1912.

Appellant filed with the clerk of this court on March 3, 1913, a transcript of the record, and prayed an appeal which was granted by the clerk, and on March 10 suggested the death of John R. Jarratt and moved that the cause be revived in the name of his widow and heirs at law.

It appears that John R. Jarratt died on January 1, 1912, which was more than one year before the motion to revive was filed.

On May 8, 1913, the chancery court of Lee County, on motion of the widow and heirs of John R. Jarratt, made an order directing the entry of said decree as of November 21, 1911, the true date of its rendition. This order was made upon notice to appellant, who was present by attorney.

The case is presented now on motion to revive, and the question also arises whether the appeal was taken in time to give this court jurisdiction.

The statute provides that "an appeal or writ of error shall not be granted except within one year next after the rendition of the judgment, order or decree sought to be reviewed, unless the party applying therefor was an infant," etc. Kirby's Digest, § 1199.

The question presented, therefore, is whether the time for appeal runs from the date of the rendition of the judgment or the date of its entry.

Counsel for appellant cites in his brief numerous authorities holding that the time for appeal runs from the date of the entry of the judgment and not from the date of its rendition.

It may be conceded that the weight of authority is on that side of the question; but there are authorities holding to the contrary, and our court has already taken a position on the side which holds that, under a statute providing for appeal within a given time after the rendition of the judgment, the time begins to run from that date, and not from the date of the entry. Ex parte *Morton,* 69 Ark. 48. We think that view is undoubtedly correct, for the language of the statute is plain. There is a well-defined distinction between the rendition or pronouncement of a judgment and the entry thereof upon the record, and the law-makers have seen fit to give a certain time running from the date of the rendition of the judgment.

In California the statute was the same as our statute on the subject, and the courts of that State held that the time for appeal ran from the date of the rendition of the judgment. The California cases were cited with approval by Judge RIDDICK in delivering the opinion in the case of Ex parte *Morton, supra.*

We are thus committed to that rule.

It is argued that the rule ought to be otherwise, for the reason that it is necessary to present to this court a transcript of the judgment or decree appealed from in order to give the court jurisdiction and that that can not be done until the judgment is entered.

If we concede that reasoning to be sound, still it does not help that view of the question. The law-makers

have prescribed a certain time within which to take an appeal and perfect it, and it is the duty of the appellant to take all necessary steps to perfect the record within that time which was deemed sufficient by the law-makers for that purpose. If the judgment or decree has been omitted from the record, it is within the rights of the losing party to move for an entry of it, and it is his duty to do so if he desires to appeal from it. It devolves upon him to take whatever steps are necessary to perfect his appeal.

It is further insisted that the chancery court should not have made an order for a *nunc pro tunc* entry until the cause had been revived in the name of the widow and heirs.

After the rendition of the judgment the case was at an end so far as the successful party was concerned, and it was not essential to the enforcement of the judgment that it should be entered of record. Ex parte *Morton, supra.* The chancery court had no jurisdiction to revive the cause after it was ended, but those who succeeded to the rights of the plaintiff, that is to say, his privies in estate, had the right to move the court to make an order for the entry of the judgment as of the true date of its rendition. The only way for the losing party to proceed was to appeal within the time prescribed by statute and move here for a revivor. *Temple* v. *Culp,* 105 Ark. 222.

It follows, therefore, that the appeal was not taken within the time prescribed and that this court has no jurisdiction of the cause, and the appeal is hereby dismissed.

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## BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN *v.* COLE.

Opinion delivered June 16, 1913.

INSURANCE—WARRANTY—BREACH—EVIDENCE.—C. became a member of defendant fraternal order in Texas, in November, 1911, and in his medical examination for a benefit certificate, he was asked

"Q. Do you use wine, spiritous or malted liquors? A. No."

In a suit to collect on the certificate, *held*, evidence of witnesses who knew insured in 1912 after he removed from Texas to Arkansas, as to his habits, is inadmissible, being too remote to have any bearing on the question of the habits of insured concerning the use of intoxicating liquors prior to his admission to the order.

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

*W. S. Chastain,* for appellant.

Testimony as to Cole's habits with reference to drinking by witnesses whose acquaintance with Cole began nine months subsequent to his representation that he did not drink, was too remote to prove his habits at the time the representation was made and prior thereto, and was incompetent. 151 S. W. 257.

*Cravens & Cravens,* for appellee.

The verdict will not be disturbed if there is any legal evidence to sustain it. 70 Ark. 140. There is sufficient evidence in the record to sustain the finding that Cole was not an habitual user of intoxicating liquors.

McCULLOCH, C. J. Appellee's intestate, W. E. Cole, while residing at Smithville, Texas, in November, 1911, became a member of a subordinate lodge of appellant, Brotherhood of Locomotive Firemen and Enginemen, a fraternal insurance society; and on December 4, 1911, a benefit certificate was issued to him, which provided that the benefit of $1,500 should be payable to him in the event of his becoming afflicted with any of the bodily ailments for which a benefit is provided in the constitution and laws of the order. Pulmonary tuberculosis is one of the ailments for which payment of benefit is provided in the constitution. Cole became afflicted with that disease shortly after he became a member of the order, probably in December, 1911, or January, 1912, and died in January, 1913, after the trial of this cause below and the rendition of a judgment in his favor.

He instituted this action in the circuit court of Sebastian County, Fort Smith District, against appellant

in November, 1912, to recover the full amount named in the benefit certificate, and a trial was had on December 21, 1912, and resulted in a judgment in his favor.

The policy or benefit certificate was issued pursuant to a written application signed by Cole, which contained statements concerning his health, etc., the truth of all the statements contained in the application and medical examination being, by the terms of the policy, made warranties. The following question and the answer thereto, the truth of which is warranted in the application, was contained therein: "Q. Do you use wine, spirituous or malted liquors? A. No."

Appellant pleaded as a defense, among other things, a breach of the warranty with respect to the truth of that answer, and on the trial of the case introduced proof tending to establish the fact that during the months of September, October and November, 1911, immediately prior to Cole's becoming a member of the order, he frequently used intoxicating liquors to excess and was a habitual drunkard.

The testimony adduced by appellant was sufficient, if believed by the jury, to establish its defense concerning a breach of warranty with respect to the habitual use of intoxicants.

The plaintiff Cole was permitted, over the objection of appellant, to introduce testimony of two witnesses, who resided at Fort Smith, Arkansas, concerning the habits of Cole with respect to the use of intoxicants after he removed to and became a resident of that city in August, 1912, up to the time of the trial. This was done over the objection of appellant, and the ruling of the court admitting that testimony is now assigned as error.

We are of the opinion that the assignment is well taken and that the testimony was inadmissible.

Appellant confined its testimony to a period of about three months preceding the admission of Cole as a member of the order and while the latter was residing in Smithville, Texas.

The testimony tends to show that Cole left Smithville about the time he joined the appellant order and

that he took up his residence at Fort Smith in August, 1912.

The two witnesses spoken of above knew him after he had moved to Fort Smith and testified concerning his habits after that time.

We think that was too remote to have any bearing on the question of his habits concerning the use of intoxicants prior to his admission into the order. The testimony can not be justified on the ground of presumption of continuance of a habit once established, because a retroactive effect can not be given to such a presumption. Jones on Evidence, § 58; *Murdock* v. *State,* 68 Ala 567; *State* v. *Dexter,* 115 Iowa, 678; *Erskine* v. *Davis,* 25 Ill. 251; *Taylor* v. *Creswell,* 45 Md. 422.

The question at issue in this case was as to the habits of Cole at the time he applied for admission into the order and made the statements in his application in November, 1911, and, as before stated, the testimony of appellant was confined to the period immediately preceding that date.

Testimony relating to his habits with respect to the use of intoxicants during a period immediately succeeding that date might have had some bearing on the question of his habits on or before the date named. *Johnston* v. *Ashley,* 7 Ark. 470; *Clinton* v. *Estes,* 20 Ark. 216. But the period covered by the testimony of the witnesses mentioned was too remote to have any bearing upon that issue. The period covered by the testimony began about nine months after the date of the application and about that length of time after he had removed from Smithville, Texas, and subsequently became a resident of Fort Smith. In the meantime, it had developed that Cole was afflicted with the ailment mentioned and which had progressed to its final stage at the time of the trial of this cause. So, the period was remote and the place and circumstances were entirely different, and we are of the opinion that it was incorrect to allow the jury to consider the testimony as having any bearing upon the hab-

its of the party prior to the time he became a member of the order.

The testimony of those witnesses was prejudicial because, without it, the testimony of Cole was uncorroborated.

The erroneous admission of this testimony calls for the reversal of the cause.

The instructions given were in accord with the law stated by this court in the case of *Metropolitan Life Insurance Co.* v. *Shane,* 98 Ark. 132.

For the error indicated the judgment is reversed and the cause remanded for a new trial.

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EVANS *v.* McCLURE.
Opinion delivered June 16, 1913.

1. LANDLORD AND TENANT—SUBLEASE—LIABILITY OF ORIGINAL LESSEE.—Where A. leased premises from B. and, without B's consent, sublet to C., A. is still liable to B. for the rent where B. did not accept a surrender from A. and agree to release him from liability. (Page 535.)

2. LANDLORD AND TENANT—RENT—PAYMENT IN ADVANCE—EFFECT OF.—A. leased premises from B. for five years at a rental of $300 per month, the contract stipulating that A. pay B. $900 as an advance payment of rent, which, under the terms of the contract, was to be applied on the rent for the last months of the lease. A. subleased the premises and they were sublet again to C.; C. defaulted in the payment of the rent after several months and claimed that the $900 be applied on the rent for which he was in default. *Held,* by the terms of the contract the payment of $900 paid by the original lessee, was a payment in advance of rent, and there being no provision in the contract that it should be paid back, it is not recoverable by C, nor to be applied on the rent on which he is in default. (Page 536.)

3. COSTS—STATEMENT OF FACTS—PRACTICE IN SUPREME COURT.—Where the facts are undisputed in an action, and the defendant offered to prepare a short statement of facts, which would have been satisfactory to the court, but was required by the plaintiff to put into the record the detailed testimony of witnesses at a cost of $41.70, *held,* although the plaintiff was successful on appeal, the $41.70 costs will be taxed against the plaintiff. (Page 537.)

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

STATEMENT BY THE COURT.

Rumina E. McClure owned a lot on Main Street, in the city of Little Rock, Arkansas, on which was a building equipped and fixed up for the display of motion pictures, and rented it for that purpose to E. H. Hulsey for the term of five years from and after the first day of November, 1910, at a monthly rental of $300, payable in advance. The lease contract was in writing, and, among other provisions, contained the following:

"Nine hundred dollars to be paid, in advance, for the last months of the term of this lease, and three hundred dollars on or before the first day of November, 1910, and the residue at the rate of three hundred dollars monthly, on the first day of each succeeding month, in advance, until the first of August, 1915. It is understood and agreed, between the parties hereto, that, on the nine hundred dollars mentioned herein, it being an advance payment of rent, for the last three months of the term of the lease, that the same shall bear four per cent interest, per annum, and that the interest aforesaid shall be deducted from the payment of rent falling due on the first day of July, 1915.

"And it is further agreed that if any rent shall be due and unpaid, or if default be made in any of the covenants herein contained, it shall then be lawful for the party of the first part to re-enter the said premises and the party of the second part agrees to vacate said premises, without notice, and if it becomes necessary to bring action at law to recover possession, to pay a reasonable attorney's fee therefor."

Hulsey assigned a one-half interest in said lease to O. McLane, then Hulsey and McLane assigned said lease to L. G. Bissinger, and on the 14th of February, 1911, the latter assigned it to George P. Caven and John F. Evans. Caven and Evans paid $175 of the rent for April, 1911, and later in the month the balance of the rent for that month was demanded of them. They re-

fused to pay the balance of the rent and claimed that the nine hundred dollars which Hulsey had paid to Mrs. McClure, under the provision of the lease above copied, should be applied towards the payment of the rent. They also refused to pay the rent for the month of May when it fell due on the first of the month. Mrs. McClure then brought this action against them in the circuit court, under our statutes, to recover possession of the building. The defendants were evicted on the 12th day of May, 1911, and Mrs. McClure took possession of the building. She rented it for one hundred dollars for the month of May. Afterwards she leased it for five years at $275 per month.

The court instructed the jury to return a verdict for the plaintiff, and, from the judgment rendered, the defendants have appealed.

*June P. Wooten,* for appellants.

Appellee terminated the lease by refusing to recognize appellants as lessees under it. Appellees claim that the deposit being for the last three months of the term, appellants could not have demanded that it be appropriated towards the rent for any other month or months, would be correct had there been no termination of the lease, but the termination of the lease ended the liability for rent. Liability for the last three months of the lease being an impossibility, appellants are entitled to a return of the amount deposited or to additional possession until the deposit and interest are exhausted in rent. 81 Kan. 780, 106 Pac. 1057; 24 Cyc. 1326; 77 Pa. St. 423; 21 Pa. Sup. Ct. 635; 7 Leigh (Va.) 660; 194 Mass. 389, 80 N. E. 608; 169 N. Y. 381; 62 N. E. 426; 55 N. Y. 280; 13 N. Y. 127; 1 Underhill L. & T. 583, and authorities cited; 81 N. Y. S. 678, 40 Misc. 247; 24 Cyc. 1144; 27 Col. 77, 59 Pac. 737; 1 E. D. Smith (N. Y.), 416; 51 N. Y. App. Div. 274; 64 N. Y. S. 1007, and cases cited; 71 N. J. L. 478, 59 Atl. 18; 16 Misc. Rep. 83; 37 N. Y. Sup. 632; 174 N. Y. 492, 61 N. E. 58.

*James A. Comer,* appellee.

Under our statute, a lessee forfeits all right of possession who fails to pay rent according to the contract. Kirby's Dig., § 4708; 57 Ark. 303. The authorities cited by appellant do not apply, because they arose in actions brought by the lessee after dispossession, and not in actions for unlawful detainer.

Can the question of ownership of the $900 be interposed as matter of defense in an action for unlawful detainer? See 36 Ark. 323.

Even if this sum be treated as a "deposit," it was not a covenant running with the land, but a personal covenant between Hulsey and appellee, and did not pass to appellants by the assignment of the lease. 103 N. Y. Supp. 865; 99 N. Y. Supp. 911; 44 O. St. 605. And the authorities do not sustain appellant's contention that the $900, if treated as a deposit, could be applied to the payment of rent falling due monthly. 81 N. Y. Supp. 678; 36 N. Y. Supp. 979; 67 N. Y. Supp. 902; 124 Pac. 369; 49 App. Div. (N. Y.) 135; 84 N. Y. Supp. 237. If appellants meant by the statement that "appellee terminated the lease by refusing to recognize appellants as lessees under it," to say that there was a constructive dispossession, the answer is that a constructive dispossession, where the lessee continues in possession, does not dispossess. By continuing in possession he condones that which might have been regarded as a constructive dispossession. 126 Ill. App. 971.

The courts usually follow the construction of a contract placed thereon by the parties to it. 122 U. S. 131; 184 Mass. 526. And this court will not construct a new and different lease between the parties from that which they entered into. 56 O. St. 48; 4 Wis. 468.

Rent voluntarily paid in advance can not be recovered back from the lessor. 121 Mich. 370; 149 Fed. 937; 95 S. W. 138; 70 Ark. 61; 86 Ark. 175; 170 Ill. 86.

HART, J., (after stating the facts). It is claimed by counsel for the defendants that the nine hundred dollars paid by Hulsey, the lessee, to Mrs. McClure, the les-

sor, was in the nature of a deposit by the tenant to secure the performance of stipulations contained in the lease and that upon their eviction by Mrs. McClure they were entitled to recover the balance of same, after deducting the rent due Mrs. McClure. They rely upon the case of *Cunningham* v. *Stockton*, 81 Kan. 780; 106 Pac. 1059, and other cases of like character. In that case the court said:

"The lease did not contain an express statement that the money advanced should constitute a deposit to insure performance by appellee, but the advancement of so large an amount, the payment of the same before the construction of the building was begun and about six months before possession could be obtained, and the provision that the amount advanced should be applied on the rental for the last year of the term clearly indicated that it was a deposit to insure performance, by appellee."

The monthly rental in that case was $350, and the amount paid in advance and stipulated to be applied on the rent for the last year of the term was $4,200.

In the instant case the facts are essentially different. The defendants refused to pay the rent after it became due and contended that the nine hundred dollars was to secure the payment of the monthly instalments of rent after they matured. Their position leads to the conclusion that they, as assignees of the lessee, would be entitled to remain in possession without payment until their default amounted to a sum equal to nine hundred dollars, and that Mrs. McClure could not evict them for such default since she could apply the deposit in satisfaction of the delinquent rent. In discussing a similar contention, in the case of *Barrett* v. *Monro,* 40 L. R. A. (N. S.) 763, the Supreme Court of Washington said:

"This construction would read into the lease a stipulation which it does not contain. Had appellants thus applied the deposit, and had the default continued until it was exhausted, they would have been without security

for future rent, or for damages which might result from a further breach, and thereafter would have been subjected to a constant liability of losing their lease for the remainder of the term, without certainty of obtaining another tenant at an equally remunerative figure. They would also have been subjected to any damages they might sustain in recovering possession, and by reason of depreciation in rental value for the remainder of the term. It was respondent's duty to make the stipulated monthly payments."

It is a fundamental principle of law that courts do not make contracts for parties but only enforce their rights under contracts made by them. The contract under consideration here does not provide that the nine hundred dollars should be returned to the lessee after the termination of the lease, nor can it be gathered from the terms of the lease itself, or from them when considered in the light of the attendant circumstances that it was the intention of the parties to secure performance of the stipulations contained in the lease by a deposit of the nine hundred dollars. By the direct and express terms of the lease itself, the payment of the nine hundred dollars was simply a payment in advance of the rent. At the time the defendants refused to pay the rent the lease had over four years to run and it will be noted that the payment of the nine hundred dollars was made by the original lessee. He still stands liable to his lessor for the rent after it accrued subsequently to his assignment of his lease. This is so because Mrs. McClure did not accept a surrender from him and agree to release him from liability. Underhill on Landlord & Tenant, Vol. 2, § 650; Tiffany on Landlord & Tenant, Vol. 1, page 1130. By the express terms of the contract the nine hundred dollars paid by the original lessee to the lessor was, as we have already seen, simply a payment in advance of rent and the contract, not containing any provision that it should be paid back, and it is not recoverable by the defendants. See *Bloch* v. *Tucker,* 107 Ark. 349; *Werner* v. *Padula,* 49 App. Div. N. Y. 135; *Forgoston* v. *Brofman,* 84 N. Y. Supp. 237.

The facts in this case were undisputed and presented for the decision of the trial court a question of law only. The trial court certified that a short statement of facts might properly have been prepared and this the defendants offered to do, but they were required by plaintiff to put into the record the detailed testimony of the witnesses at a cost of $41.70.

Therefore, under rule No. 15 of this court, the cost so incurred, viz., $41.70, will be taxed against the plaintiff. It follows that the judgment will be affirmed.

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## COLE v. TURNER.

Opinion delivered June 23, 1913.

LANDLORD AND TENANT—LANDLORD'S LIEN—WAIVER.—Where a landlord makes advances to his tenant and takes as security the tenant's note with a surety thereon, and agrees to a transfer of the lease from the tenant to a subtenant, and in order to collect the amount of his advance, recovers judgment against the tenant and surety, the landlord will be held to have waived, by his conduct, his landlord's lien upon the crops of the tenants.

Appeal from Poinsett Chancery Court; *Charles D. Frierson,* Chancellor; affirmed.

*L. C. Going,* for appellant.

1. Sarter had a lien upon the property attached as against Pickett and Furnatta, and such lien was not waived by taking a note with personal security. Kirby's Dig., § 5033; 36 Ark. 96.

2. The purchase of the crop by appellee was subject to the landlord's lien. 70 Ark. 79; 69 Ark. 306; 72 Ark. 132; 69 Ark. 551.

3. Cole is entitled to be subrogated to the rights of Sarter. 37 Cyc. 414; 14 Barb. (N. Y.) 481; 39 N. C. 22; 14 O. St. 376; 19 Am. Dec. 629; 110 Ala. 479; 115 Ill. 431; 94 Ill. 165; 70 N. C. 125; 68 Ark. 449; 139 S. W. 645; 69 Ark. 43; 145 S. W. 567.

*Appellee, pro se.*

The lien of a landlord for rent and supplies exists only as between the landlord and tenant, is personal only

to this relationship, and is not assignable. 31 Ark. 597; 36 Ark. 567; 39 Ark. 346; Kirby's Dig., § 5032. Appellant has no right of subrogation.

HART, J. J. A. Sarter owned a farm in Poinsett County, and in the year 1911 rented it to Pickett and Furnatta to be worked by them upon shares. For the purpose of enabling them to plant and grow their crops he furnished them one hundred bushels of corn and took their note for $65, the purchase price thereof, with B. F. Cole as surety. Cole was a merchant and took a mortgage on the crop for supplies to be furnished the tenants during the year. About the 1st of November, Furnatta sold his interest in the crop to Pickett. Then Pickett made an exchange of gathering crops with W. H. Turner, his brother-in-law, who lived in another county. Some weeks later Pickett sold his interest in the crop to Turner and told Sarter, his landlord, about it. About a week later, Turner also told Sarter that he had purchased the crop. Turner finished gathering the crop and he and Pickett paid off the mortgage which Pickett had given to Cole on the crop. They also paid the rent. Later on Sarter went to Cole and demanded the payment of the note on which he was surety for the purchase price of the corn furnished by him to his tenants. Then he brought suit against Cole and the makers of the note and recovered judgment. Cole paid the judgment. Cole said that he asked Sarter why he did not remind him that the note was not paid before he had released his mortgage on the crop, and that Sarter told him that he thought it was not necessary because the tenants would take care of the note.

Cole brought this suit against Turner and asked that he be subrogated to the landlord's lien upon the crop for advances made by him.

The chancellor found for the defendant, and the plaintiff has appealed.

We need not decide the question of whether Cole was entitled to be subrogated to the landlord's lien for supplies furnished his tenants because we hold that the landlord, by his conduct, has waived his lien for rent and ad-

vances made to his tenant by taking a note therefor with personal security. 24 Cyc. 1273. This is so because there is nothing in the acceptance of personal security inconsistent with the lien conferred by the statute for rent or advances where there is no evidence of an intention on the part of the landlord to treat the original claim as discharged by the acceptance of a note with personal security. Under the state of facts disclosed by the record in the instant case, we are of the opinion, however, that the landlord, by his conduct, waived his lien for the advances made to his tenants. He admits that Pickett told him that he had sold his interest in the crop to Turner, and that about a week later Turner told him that he had bought out Pickett. The landlord made no objection to the sale, and acquiesced in it.

Subsequently, he received payments of his rents and made no attempt whatever to assert any lien for supplies furnished by him to his tenants. Subsequently, he brought suit against the tenants and the surety on the note, and recovered judgment against them. He at no time attempted to assert any lien for the advances made, and by his conduct, showed that he assented to the tenants' sale of the crop, and relied wholly upon the personal security he received when the note was executed for its payment. His whole conduct shows that he did not intend to rely upon his landlord's lien for the satisfaction of the note. We hold that under the circumstances, his conduct was inconsistent with an intention on his part to retain and enforce his lien against his tenant. Underhill on Landlord and Tenant, vol. 2, par. 846.

Therefore, the decree will be affirmed.

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## TAYLOR v. MALONEY.

Opinion delivered June 23, 1913.

JUSTICE OF THE PEACE—OPEN ACCOUNTS—JURISDICTION.—A justice of the peace is without jurisdiction when it appears that several actions are brought on items constituting an open account, and where the sum of the items sued on exceeds $300.

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

*Cockrill & Armistead,* for appellant.

*J. H. Harrod,* for appellee.

SMITH, J. Appellee was the plaintiff below in each of the three suits, which were consolidated in the circuit court on appeal from the judgment of the justice of the peace, in which they were instituted. These suits were all begun on the 15th of August, 1911, and their subject-matter was as follows: The first suit was for professional services rendered appellant for the years 1906, 1907 and 1908, at $100 per year. The second suit was also for the sum of $300, being for professional services rendered appellant for the years 1908, 1909 and 1910, at $100 per year from May 1, 1908. The third suit was for services in drawing appellant's last will and testament, $150, services in removing cloud on title on certain lots in the city of Little Rock, $100, and regular services, $50, making the total amount of each suit $300. Each of these accounts was sworn to by appellee, and on appeal to the circuit court, they were consolidated and tried before the court sitting as a jury, and a judgment was rendered against appellant in the sum of $700.

Appellee testified that he was a parcticing attorney, in the city of Little Rock, and had been for a number of years, and had been employed by appellant to represent her in legal matters for the annual fee of $100 for each year, and he testified that in addition he performed the services in the preparation of the will and in removing cloud from the title to the lots. He admitted having been paid $10 for his services in 1908, and appellant claims that this was all she ever owed appellee, and this sum was the charge made by appellee for preparing appellant's will, and that she was never otherwise indebted to him.

The question of jurisdiction presents itself, and the decision of that question depends upon the determination as to whether or not these items constitute separate demands. We have a number of decisions on the question of jurisdiction of suits, originating in the courts of jus-

tices of the peace, and the law of such cases has been thoroughly settled by these decisions, and the only difficulty is in the application of the law as therein announced, to the facts of the cases which arise.

It has been held that, "Where several notes, each belonging to a series, and each for less than $100, though aggregating more than $300 were joined in one suit, jurisdiction of the action was in the court of a justice of the peace, and not in the circuit court." This is true because each note constituted a separate cause of action. *American Soda Fountain Co.* v. *Battle,* 85 Ark. 213; *Brooks* v. *Hornberger,* 78 Ark. 595; *Smith* v. *Davis,* 83 Ark. 372.

It is also settled that several accounts, each constituting a separate cause of action, and no one of which exceeds $100, can not be combined to bring the amount in suit within the jurisdictional limits of the circuit court. *Paris Mercantile Co.* v. *Hunter,* 74 Ark. 615; *Berry* v. *Hinton,* 1 Ark. 252.

A case which is well considered and frequently cited, and which was cited with approval in the case of *Paris Mercantile Co.* v. *Hunter, supra,* is the case of *Gregory* v. *Williams,* 24 Ark. 177. That was a case, the facts of which were very similar to this. In that case the plaintiff brought three separate suits before a justice of the peace for the hire of a negro girl slave for the years 1862, 1863 and 1864, respectively. The hire for each year being within the jurisdiction of the justice of the peace, but in the aggregate exceeded that jurisdiction. It was contended there that the amount due for the services for each year constituted a separate demand, distinct in itself, and for the recovery of which the plaintiff had a right to institute a separate and distinct action. That the respective sums arose upon distinct contracts and fell due at different times and did not therefore constitute one debt or demand, but that each was a separate demand, for which separate suit would lie. Chief Justice YONLEY, speaking for the court, said: "While it is true that every written acknowledgment of indebtedness, which may be made the foundation of an action at law is a separate

demand, it is not true, as a proposition of law, that the several items of an open account, although of different dates, and arising out of different dealings and transactions between the parties are each separate demands, and can be sued upon as such. All the items of indebtedness, in the nature of accounts, subsisting between the parties, at the time of the commencement of a suit for the recovery, constitute the debt, demand, or sum in controversy, and is an entire demand; and if the aggregate of all the items amounts to a sum beyond the jurisdiction of the justice, the difficulty can not be obviated and jurisdiction conferred upon that court by bringing suits upon the several items of the acccount.''

That the items composing appellee's demand constituted an open account is shown both by his evidence, and by the suits he brought, as he sues in each case for the sum of $300, composed of the items stated, and not for the amount of each of these items, as separate counts. The reasoning of the court in the case of *Gregory* v. *Williams, supra,* applies with equal force here, and the judgment rendered there must also be rendered here.

The judgment of the circuit court is therefore reversed and the cause dismissed.

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COTTON BELT SAVINGS & TRUST COMPANY *v.* MORROW ET AL.

Opinion delivered June 16, 1913.

1. MECHANICS' LIENS—SUBCONTRACTOR—LEVEE DISTRICT.—A subcontractor on the construction of a levee for a levee district has no lien on the property of the district for labor or material furnished. (Page 550.)

2. LEVEE DISTRICTS—CONSTRUCTION—ASSIGNMENT OF RIGHT UNDER CONTRACT.—A levee district awarded a contract to M. to construct a levee, and M. procured plaintiff trust company to agree to finace the work and take the district's bonds; M. agreed to furnish all labor and materials, and gave a bond conditioned on his paying all liabilities for labor and materials. M. assigned his income arising under the contract with the district to plaintiff trust company, directing the district to deliver checks for work done and a monthly estimate to the trust company. *Held,* the assign-

ment from M. to the trust company entitled the latter only to the net profits due M. and that subcontractors were entitled to be paid by the district for their labor and material furnished, as against the trust company under its assignment. (Page 551.)

3. LEVEE DISTRICT—SALE OF BONDS.—A levee district contracted with a trust company to place its bonds with the company for sale; the trust company with the consent of the district assigned its interest and right to profits arising from the sale of the bonds to one G., but the bonds were never sold. *Held*, in an action against the levee district by the assignee of the income of the contractor, G. had no right to enforce his claim by an intervention. (Page 551.)

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

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

*Coleman & Gantt*, for interpleader, James Gould.

*Mehaffy, Reid & Mehaffy* and *E. S. Matlock*, for the levee district.

*Sam Dent Bell, Hill, Brizzolara & Fitzhugh* and *C. A. Starbird*, for the interveners.

SMITH, J. The General Assembly of 1909 passed an act creating Levee District No. 1, of Crawford County, Arkansas, which act described the boundaries of a district to be protected from overflow, by the construction of a levee therein provided for, and authorized the board of directors to borrow money, and issue bonds in payment of the work not to exceed $100,000. Later, at the same session of the General Assembly, this act was amended in several respects, and authorized a total bond issue of not exceeding $250,000. The board of directors, named in and provided for by the act, organized and advertised for bids for the construction of this improvement, and the contract was let to A. M. Morrow on the 7th day of July, 1909. Morrow commenced the actual construction of the levee in the latter part of July, and a formal contract was later entered into between him and the levee district.

It appears that Morrow had neither the individual means, nor the personal credit to perform this contract,

but he succeeded in enlisting the interest and support of the Pine Bluff Trust Company, a banking institution located at Pine Bluff, and of which one D. C. Bell was the executive officer. This trust company deposited with the officers of the levee district a certified check for $9,600, which accompanied Morrow's bid, and the levee officials were assured by Bell that Morrow would be amply able to comply with the contract, if it was let to him; that the trust company had the means to finance the enterprise, and could and would do so, by taking the bonds of the levee district, if no other disposition of them was made. Morrow entered into a written contract with the levee district under date of August 17, 1909, whereby he agreed to build the levee, and to construct certain concrete work, embraced in the engineer's specifications, and to accept in pay therefor the first mortgage bonds of said district at par, and it was provided in said contract that said bonds should be placed in trust in the hands of the Pine Bluff Trust Company, and by it sold at a price of not less than 90 per cent on the dollar, and the proceeds from such sale to be held by the trust company, and paid out by it to the builder on monthly estimates of the district engineer on signed orders of the directors of the district. It was further agreed that the proceeds of all bonds should be deposited with the said trust company, which should pay to the levee district 2 per cent per annum upon the monthly balances of the funds arising from the said sale until the same were expended, as per the terms and conditions of the contract, it being there expressed that the sum of $210,000 was but an approximation of the whole cost of the construction of the said levee under the builder's contract.

It was evidently contemplated by the parties in interest, that the levee district would soon be prepared to issue its bonds, and Morrow put a large force of men at work on the construction of the levee and entirely completed one part of the concrete work, which was embraced in the specifications, and received pay therefor. At the time Morrow received his estimate from the engineer for his

first month's work, the district had made no sale of the bonds, and Morrow did not have funds with which to pay his subcontractors, and various complications arose which interfered with the bond issue; and the bonds were never issued under the act which authorized the issuance of $250,000 of bonds, and under which the parties were then proceeding. Morrow continued the construction of the levee, and received from the engineer estimates for the work done both in September and in October, and borrowed from the trust company large sums of money, which he used to meet his obligations to his subcontractors. During all of this time the trust company and others were expecting the levee district to get in shape to issue its bonds.

On the 6th day of November, 1909, Morrow and the trust company entered into a written contract, which contained the following recitals, among others: That a verbal agreement had been entered into between Morrow and the district whereby the trust company had agreed to exert its influence to aid Morrow in procuring the contract for building the Crawford County Levee, and put up the certified check called for by the instructions to bidders issued by said levee district in advertising for bids, and had acted as agent for Morrow in selling the bonds which, under his contract with the levee district, should be paid to him for the construction of said levee, and had procured a contract of sale for the said $210,000 of bonds at 92 per cent of their face value; and that as the trust company had furnished Morrow certain sums of money, and might, at its option, advance other sums of money, it was agreed that for the purpose of securing the payment of any sums of money which were then, or might thereafter, be owed by the said Morrow to said trust company until the completion of the building of the said levee, the said Morrow set over, assigned and transferred to the trust company all his interest in the proceeds of said bonds, and authorized the trust company to collect and apply the same to the payment of such indebtedness, and it was stipulated that for such sums as

were advanced to said Morrow by the trust company, before final settlement of all the accounts between him and the trust company, that the company should have the right to apply the proceeds of said bonds to such indebtedness the same as if made before the completion of said levee work.

This contract further recited that the trust company should have, as its compensation, a commission of $1,050, and all interest which had accrued or might thereafter accrue on said bonds, before their delivery to the purchaser. This compensation was in lieu of the original agreement between Morrow and the trust company, wherein he had agreed to pay a commission of one per cent on the bonds and a certain percentage of the contract price, which the levee district was to pay for the work.

A firm of lawyers in Chicago, Ill., had been employed to pass upon and approve the bond issue, but they made a number of requirements which were never complied with, and it was afterward agreed that the firm of Rose, Hemingway, Cantrell & Loughborough of Little Rock should be employed to pass upon this bond issue, and to direct all the legal steps essential to their validity. This employment was suggested in a letter, written for the Pine Bluff Trust Company to the president of the levee district, in which the recommendation was contained that that firm also represent the levee district in certain litigation then pending, which involved the constitutionality of the act itself, and the validity of the assessments made under it. This firm had fixed its fee at $1,000, and Bell proposed to share its payment equally with the levee district, if that firm was given entire control of that litigation, and of the district's bond issue. This proposition was accepted, and that firm was employed and represented the district in said litigation. But for various reasons, these bonds were never issued.

The trust company was unable to handle these bonds, or to find a purchaser for them, and Judge James Gould was employed for that purpose. The contract therefor

was made on the 18th of August, 1909, at Pine Bluff, Ark., by which Morrow and the trust company assigned and transferred to the said Gould all interest and profits which they had in the sale of the $210,000 of Crawford County levee bonds over and above the price of 92 per cent on the dollar and accrued interest; in other words, Gould agreed to pay to Morrow and the trust company 92 per cent and accrued interest for said bonds, and the rights which Gould seeks to enforce in this litigation grows out of this agreement. The levee district was advised of this contract and assented to it.

Morrow was compelled to shut down his construction of the work, which he did about the 1st of December, because the trust company declined to make him any furthere advances of money, and because he was unable to secure and sell the bonds of the levee district. The proof shows that Bell had made a number of visits to Van Buren in connection with this work, and ordered the work closed down, and directed the settlement, which was finally made, and out of which this litigation grows.

The Legislature of 1911 changed the boundaries of this levee district and excluded therefrom a considerable part of it, and authorized a bond issue of not exceeding $175,000, which bonds were sold, and out of the proceeds of this bond sale, the levee district has undertaken, both to complete the Morrow contract, and to discharge the obligations of that contract, in its partial performance. When the work under Morrow's contract was suspended, the levee district issued certificates of indebtedness to Morrow's subcontractors, and the material and supply furnishers in the sum of $47,277.25, and the engineers' estimates given Morrow for the work done by him amounted to $57,422. The court found that these certificates of indebtedness were so issued under the direction of Bell. Prior thereto, and on the 18th of September, 1909, Morrow had given to the Pine Bluff Trust Company an order to the levee district for all this income arising out of the contract to build the levee, and this order was presented to the president of the levee board and by him

endorsed "Accepted," and upon this order the Cotton Belt Savings and Trust Company, and the Pine Bluff Trust Company, which had been succeeded by the Cotton Belt Savings and Trust Company, brought this suit jointly to distribute the money in the treasury of the levee district due on the Morrow contract, claiming priority and attacking the payments made by the levee district to Morrow's subcontractors and material and supply furnishers.

There were a large number of interventions filed in this suit by some of the subcontractors, with whom Morrow did not settle, and gave orders on the levee district, and some material and supply furnishers who did not receive orders from Morrow to the levee board, and who were not paid by the levee district for that reason.

The trial court found the issues against the plaintiffs, and ordered the fund distributed, first, to the interveners, and the balance to the plaintiffs, and dismissed the intervention of James Gould for the want of equity, and the trust companies and Gould appeal from that decree.

The chancellor prepared a written opinion in which he made certain findings of fact, and, among others, that the agreement before referred to, dated September 18, 1909, between Morrow and the trust company, which was called an assignment of Morrow's right under the contract to receive money in payment of the work due thereunder, was an assignment of the net profits due Morrow by the levee district, and not the gross amount which was earned. The part of the contract which received this construction reads as follows: "For a valuable consideration, I have sold and assigned to the Pine Bluff Trust Company all of my income arising out of the construction contract I have with this board, * * * including retained percentage, etc.;" and this contract further authorized and directed the levee board to furnish to the Pine Bluff Trust Company, from month to month, estimates of the work done, when prepared by the engineer, and to deliver checks to the Pine Bluff Trust Company,

taking its receipt therefor. The court also found the facts to be that Bell was clothed with the full authority to act for the trust company in all matters relating to this contract, and that while so acting, he directed the levee district to issue its interest-bearing certificates of indebtedness to the subcontractors and material furnishers. But, whether Bell had the express authority from the trust company to direct that this action be taken by the levee district or not, the fact is clearly established by the evidence that he did direct the issuance of these certificates, and that they were issued in obedience to his directions. But we think the chancellor's construction of the contract is correct, and that it is supported by the action which the parties to it took under it. Bell was thoroughly familiar with this transaction, and he acted both for himself and Morrow, from its inception down to the time of his death, which occurred before the trial of the cause below, and his deposition was never taken.

The contract between Morrow and the levee district for the construction of the levee contains the following section:

"And when all the work embraced in this contract has been completed agreeably to the specifications, and according to the directions and to the satisfaction and acceptance of the chief engineer, there shall be a final estimate made of said work, agreeably to the terms of this agreement, when the balance appearing due to the said party of the first part shall be paid to him in bonds as above upon his giving, under seal, a release to the said board of directors, from all claims or demands whatsoever growing in any manner out of this agreement."

The bond which Morrow was required to execute in the sum of $53,000, contained the covenant that Morrow should be responsible for, and pay all liability incurred, in the prosecution of the work for labor and material, and that his bond should be void only when that had been done. The provisions quoted from the contract and bond were evidently inserted, not to protect the levee district from any claims of liens in favor of these subcontractors,

but this language was evidently employed for the purpose of protecting the subcontractors, who had no liens under the law. *Goyer* v. *Williamson,* 107 Ark. 189, 154 S. W. 525. It was known that Morrow was not personally able to pay the large sums of money which would necessarily become due to his subcontractors and material furnishers, and the action taken by the parties to this transaction sustain the interpretation of the court below given to the various contracts in evidence, that the trust company should receive for Morrow only the net profits derived by him from the performance of the contract. Morrow could only assign to the trust company what belonged to him and the officer acting for the trust company knew what these rights were, for this officer had represented to the officials of the levee board that Morrow would be able to meet his obligations, if the contract was awarded to him, and when this official closed down the work and declined to make further advances for the trust company, and there had been no sale of the bonds to provide a fund for the payment of these obligations, Bell authorized what must have been in the contemplation of the parties, when the contract was made, that Morrow's obligations be first paid. This view of the contract between Morrow and the levee district is strengthened by a consideration of another section of it, which provides that Morrow should furnish all the labor and material necessary to complete the levee, and that when completed according to the contract, he should give a release to the board of directors for all claims or demands whatsoever growing in any manner out of that agreement, and he should then receive final payment.

The stopping of the work on Bell's order was an end of the contract, so far as Morrow was concerned, and to be entitled to full pay for the work done, including the retained percentage of 15 per cent, which the levee district was authorized to withhold until a full compliance with the contract, required that Morrow should settle with these subcontractors and material men. And, as Bell was not willing to advance for the trust company any

more money, and as the bonds had not been sold, these settlements could be made only by the issuance of certificates of indebtedness. And certainly it was not in the contemplation of the parties, and is not fair that when this had been done, that the levee district should be compelled to pay these demands a second time, or to pay such part of them a second time, as would enable the trust company to collect all of its advances to Morrow, and enable Gould to collect his commission on the bond sale which he had negotiated. The chancellor dismissed the claim of Gould for his commission of 8 per cent upon this bond issue, or even that per cent upon the sum due Morrow from the levee district, and we think that finding was correct. These bonds were never sold nor issued, and the act which authorized their issuance was repealed, and if Gould has any remedy, it is not against this levee district, and can not be enforced in this proceeding.

The chancellor found from the evidence before him the sum due upon the various interventions, and no complaint is made here of the correctness of any of these findings, it being objected only that he decreed that they should have priority in payment, but as has been stated, we approve his action in that respect, and affirm his order.

The levee district filed a counterclaim against the trust company for one-half of the fee paid the firm of Rose, Hemingway, Cantrell & Loughborough, and the chancellor found that it should have judgment against the trust company therefor, and we think that finding is not against the preponderance of the evidence.

Upon the whole case, we think the chancellor's finding and decree is not contrary to the clear preponderance of the evidence, but that, on the contrary, equity has been done and the decree of the court below is accordingly affirmed.

Mr. Justice KIRBY dissents, except as to the finding and judgment on the intervention of Gould.

The intervention of Gould will therefore be dismissed at his cost, and the intervener will pro rate in the distri-

bution of the sum due Morrow by the levee district as directed in the decree below, and any balance which remains after the demands of said interveners have been discharged will be paid to the appellant, Cotton Belt Savings & Trust Company, as successor to the Pine Bluff Trust Company.

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## HAMILTON v. RANKIN.

Opinion delivered June 16, 1913.

1. SALES—TIME OF PAYMENT—PRESUMPTION.—Where A. purchased corn of B. and directed it to be delivered at a designated place, and there is nothing said as to the time of payment, the law presumes that it was a cash sale, and the delivery and payment are concurrent acts and conditions, and there being no intention to sell on credit, nor any waiver of the right to receive cash, no title passed to the vendee, no cash payment being made. (Page 554.)
2. SALES—BONA FIDE PURCHASER—RIGHT OF SELLER.—Where A. purchased corn from B., and, though the price was cash, did not pay the same, and sold the same to C., C. paying A. no cash, but only crediting A's account, C. is not a bona fide purchaser, and B. may replevy the corn from him. (Page 555.)
3. CONFUSION OF GOODS—QUALITY OF GOODS—REPLEVIN.—Plaintiff's right to replevy corn from defendant, is not defeated where defendant mixed the corn with other corn of his own, where it appears that all the corn was virtually of the same kind, quality and value. (Page 555.

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

*W. E. Beloate*, for appellant.

A sale is presumed to be for cash, unless there was at the time a contract for a different mode of payment. Tiedeman on Sales § § 151-168; 63 Ark. 87; 55 Ark. 45. Crediting the account of Land by Rankin is not a payment such as would constitute Rankin a *bona fide* purchaser. 76 Ark. 282; 63 Ark. 87.

Replevin will lie for goods intermingled with others where the kind, quality and price is the same. 70 Ark. 105.

Although this action is brought in the nature of replevin, it is no less an action for conversion, and, the property having been left in possession of the defendant, even if the property could not be set apart appellant would be entitled to judgment for the value thereof. 65 Ark. 448; 10 Ark. 86; 42 Ark. 100; 94 Ark. 1.

*W. P. Smith* and *H. L. Ponder,* for appellee.

It is clear from the evidence that Rankin was a *bona fide* purchaser for value and without notice of any fraud. Cobby, on Rep., § § 244, 245, 263; 42 Ark. 473.

Rankin's act in crediting Land's account with the amount of the purchase, as soon as he purchased the corn from Land, constitutes him a *bona fide* purchaser. 49 Ark. 207; 55 Ark. 47.

There can be no recovery in replevin where the property is mingled and the proof shows that it is not the same in quality or value. 24 Am. & Eng. Enc. of L. (2 ed.) 482; 33 Fed. 177; Cobby on Replevin, § § 399, 400; 44 Ark. 450, and cases cited.

KIRBY, J. John W. Hamilton brought an action in replevin in the justice court against Charles A. Rankin for one hundred and one bushels of corn of the value of seventy-five cents per bushel and recovered judgment, from which an appeal was taken to the circuit court and upon the trial there the court directed a verdict against him, and from the judgment thereon he prosecutes this appeal.

It appears from the testimony that Doctor Land phoned Hamilton, asking the price of corn, and upon being told it was seventy-five cents per bushel, directed him to bring him one hundred bushels and deliver it at the barn of Charles A. Rankin. Hamilton brought the corn, threw it into two stalls in Rankin's barn, in one of which there was already some corn, and, after doing so, took the weight tickets to Doctor Land to get the money. Doctor Land refused to pay in cash, but offered in payment his (Hamilton's) note for $75, which he (Hamilton) had before made to Mrs. Ed Marks and which had been

assigned to Doctor Land. Hamilton refused to accept the note in payment for the corn, giving as his reason that he sold the corn to pay his rent, and that he could not take the note in payment, and demanded the money and also the weight tickets, which Doctor Land refused to return and also to pay the money. He then demanded the corn from Rankin, who refused to give it to him.

Doctor Land testified that he called Hamilton on the phone, and, after learning the price of corn, told him to bring him one hundred bushels and deliver it to Rankin's barn. That he sold the corn to Rankin, and offered to pay Hamilton with his note given to Mrs. Marks; that Hamilton refused to take the note in payment and replevied the corn from Rankin. He said also that he owed Rankin on account, and that he sold him the corn, and that Rankin applied it and gave him credit on his account; he did not pay him any money. He did not tell Hamilton before getting the corn that he had the Marks note, nor that he would be expected to take it in payment therefor until after the corn had been put in Rankin's barn.

It was also shown that appellee bought some other corn after appellant demanded payment of him before the suit was brought and had it thrown in on top of the corn brought to the barn by Hamilton, and that all of the corn was of about the same kind, quality and value, and that there was more than 100 bushels of corn in the stall when the suit was brought.

Rankin testified that he bought the corn from Doctor Land and paid him therefor by crediting the amount to his account, which was the agreement when he purchased it.

There was nothing said as to the time of payment for the corn after the price was learned and the seller was directed by the purchaser to deliver it at a designated place, and the law presumes that it was a cash sale and the delivery and payment were concurrent acts and conditions. There was no intention to sell on credit, nor any waiver of the right to receive cash, and no title passed to

the vendee, the purchase price not having been paid in cash. 1 Mecham on Sales, § § 538-543; Tiffany on Sales, § 268; 35 Cyc. 325.

Neither can the appellee be regarded as a *bona fide* purchaser in any event, and entitled to protection as such, having only credited his account against Doctor Land with the purchase price of the corn and paid nothing in fact of value therefor. *Ames Iron Works* v. *Kalamazoo Pulley Co.,* 63 Ark. 87; *Sheeks-Stephens Store Co.* v. *Richardson,* 76 Ark. 282.

The fact that appellee mixed other corn with that of appellant before the suit was brought can make no difference in his right to recover, and it was also shown that all the corn was virtually of the same kind, quality and value. *Russ Land & Lbr. Co.* v. *Isom,* 70 Ark. 105; Cobby on Replevin, § § 399, 400.

Appellant was entitled to a judgment for the return of the corn or $75, the cash value of it and the court erred in directing a verdict against him. The judgment is reversed and the cause remanded for a new trial.

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## Southern Cotton Oil Company *v.* Napoleon Hill Cotton Company.

Opinion delivered June 30, 1913.

1. Subrogation—discharge of encumbrance—volunteer.—A. took a mortgage on the property of B. and advanced B. money with the express understanding that B. discharge certain prior mortgages on the property, and that A. have a first lien on the property. B. discharged the prior encumbrances. *Held,* A. was subrogated to the rights of the prior mortgagees, and not being a volunteer, was entitled to a first lien on the property as against a judgment-creditor, of whom A. had no knowledge, and was not negligent in not discovering, due to improper indexing of the judgment. (Page 558.)

2. Subrogation—doctrine of.—The doctrine of subrogation is an equitable one, having for its basis the doing of complete and perfect justice between the parties, without regard to form, and its purpose and object is the prevention of injustice. (Page 558.)

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

STATEMENT BY THE COURT.

Appellant brought suit for subrogation to the lien of certain mortgagees whose mortgage debts were paid off by the money loaned by it for the purpose under the agreement that it would be given a first mortgage lien upon the property. J. U. Martin testified that on December 31, 1908, he gave a mortgage upon the lands and the gin situate thereon to Hugh Wright for sixteen hundred dollars, and on April 6, 1909, another on the same property to G. E. Yeatman for eight hundred dollars. On the 23d of April, 1909, the appellee company recovered a judgment against him in the Independence Circuit Court, where the land was situated, which constituted a lien thereon. Martin applied to the Southern Cotton Oil Company to borrow money to pay off the two prior mortgages upon the land and gin, and on the 4th of February, 1910, borrowed from it $2,200, giving a mortgage upon the property to secure same. With this money he paid off both of said mortgage debts, and the mortgages securing them were satisfied of record. There was no agreement that the lien of the mortgages should be kept alive, but Martin told appellee that the money was to be used to pay them off, and that the mortgage securing its payment would be a first lien upon the land; that when he got the money he would pay off the other two, and the title would be cleared up. It was his intention to make it a first lien, and the cotton oil company understood that there was no other encumbrances against the land after the payment of said mortgages prior to its own; that it had a first lien by reason of its mortgage, as was intended to be given it upon the loan being made. The cotton oil company had no knowledge in fact of appellee's judgment lien against the property at the time it made the loan and took its security. Its representative, who agreed to make the loan, said, "I didn't know there was a judgment against it; I agreed to advance him the $2,200, and understood that the record would be cleared so that our mort-

gage would be first, and that there wouldn't be anything else against the property in any way; I wouldn't have advanced the money under any other conditions and the advances being on the condition that our mortgage would be first; I advanced it with the understanding that Martin was to have the existing mortgages satisfied, and give me a mortgage which I considered would be a first lien." The index to the record of the judgment only showed a judgment against W. R. Rice, *et al.* The chancery court found that there was no agreement express or implied between appellant, Martin, or the older mortgagees that it should be subrogated to their rights under their mortgages, and that it agreed to loan Martin the $2,200, and to take a mortgage on the property, believing at the time that it was getting a first lien thereon, and from said loan the debts held by Ware and Yeatman should be paid and the mortgages satisfied.

The complaint was dismissed for want of equity, and from the decree appellants appeal.

*Jno. W. & Jos. M. Stayton,* for appellant.

1. Under the circumstances, the doctrine of conventional or equitable assignment applies, and appellant is invested with the lien of the mortgages satisfied to the extent it discharged the prior liens. 44 Ark. 507; 3 Pomeroy, Eq. Jur., § 112; 39 Ark. 542; 44 *Id.* 506; 81 *Id.* 257. No express agreement is necessary as the courts will infer an agreement from the circumstances. 137 Fed. 967; 111 Fed. 652; 101 *Id.* 159.

2. Where the debtor made an agreement with a person advancing money to pay off an encumbrance, that he should have a first lien, and the money was so used, the party advancing it is subrogated to all rights of the creditor whose debt has been discharged. 38 S. E. 382; 58 Oh. St. 443; 49 Minn. 386; 93 N. Y. 225; 77 Ind. 241; 48 Mich. 238; 35 Kan. 295; 100 Ill. 281; 58 Oh. St. 86; 16 Utah 111; 139 Ind. 325; 128 Iowa 1; 89 Ill. 199; 84 Me. 291; 36 Kan. 680; 130 Ind. 288; 56 Kan. 750; 52 Mo. App. 474.

3. The entry of the clerk was not constructive notice. 1 Purd. Dig., 825, p. 16; 15 Pa. 177; 1 L. R. A. 38; 74 Atl. 550; 64 *Id.* 526; 33 Hun. 82; 58 *Id.* 608.

*George B. Rose* and *Ernest Neill,* for appellee.

1. This case is controlled by *Cohn* v. *Hoffman,* 50 Ark. 376; 89 Ark. 151; 44 *Id.* 504; 80 *Id.* 197.

2. As to the defect in indexing and misprisions of officers, the rule in this State is settled by *Petray* v. *Howell,* 20 Ark. 615; 43 Ark. 144; 59 *Id.* 280.

Kirby, J., (after stating the facts). It is not contended that there was any express agreement between Martin and appellant that it should be subrogated to the rights of the prior mortgagees upon the payment of their debts out of the money which it loaned for that purpose, but, it is insisted that since it made the loan with the expressed understanding and agreement that its security upon the property therefor should constitute a first lien, the other mortgage debts having been paid off with its money, and that it is entitled to subrogation to the rights of said mortgagees as against the judgment lien of appellee, of which it was ignorant when it made the loan and took its security. It was not a volunteer in the payment of these other mortgage debts, the loan having been negotiated from it by the mortgage debtor for the express purpose of paying them. "One who pays a debt at the instance of a debtor is not a volunteer." *Rodman* v. *Sanders,* 44 Ark. 504.

The doctrine of subrogation is an equitable one, having for its basis the doing of complete and perfect justice between the parties without regard to form, and its purpose and object is the prevention of injustice. Cyc. also says, "And generally, where it is equitable that a person, not a mere stranger, intermeddler, or volunteer, furnishing money to pay a debt, should be substituted for or in the place of the creditor, such person will be so substituted." 37 Cyc. 371.

In *Chaffe & Bro.* v. *Oliver,* 39 Ark. 542, this court said: "Subrogation, in its literal and equitable significance, is the demanding of something under the right of

another, to which right the claimant is entitled for the purposes of justice to be substituted in place of the original holder. Its phases are various, but it preserves its characteristic features throughout. It is the machinery by which the equity of one man is worked out through the legal rights of another. It rests upon the maxim that no one shall be enriched by another's loss, and may be invoked wherever justice and good conscience demand its application in opposition to the technical rules of law, which liberate securities with the extinguishment of the original debt. This equity arises when one not primarily bound to pay a debt, or remove an incumbrance, nevertheless does so; either from his legal obligation, as in case of a surety, or to protect his own secondary right; or upon the request of the original debtor, and upon the faith that, as against the debtor, the person paying will have the same sureties for reimbursement as the creditor had for payment. And this equity need not rest upon any formal contract or written instrument. Like the vendor's lien for purchase money, it is a creation of a court of equity from the circumstances." The theory of equitable assignment, as laid down by Pomeroy is: "In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor, primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection. The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his own benefit; such a person is in no true sense a mere stranger and volunteer." Pomeroy, Equity Juris., vol. 3, § 1212.

In *Capen* v. *Garrison,* 193 Mo. 335, 92 S. W. 368, 5 L.

R. A. (N. S.) 838, the court said: "Equity will not ingraft this doctrine on the transaction in the face of a contract that negatives the idea of subrogation. In other words, the contract may be silent on the subject, yet not inconsistent with the idea of subrogation; or, on the other hand, it may be silent on the subject, yet its terms expressly or by implication forbid the application of the doctrine. So it may be said that equity may apply the doctrine, although the contract does not either expressly, or by legal implication, call for it; but it will not apply if the contract either expressly or by legal implication forbids it. The parties may not have had subrogation in their minds at all when they made the contract; but that fact alone would not control in a question of application of the doctrine. Equity will apply it, though the parties may never have thought of it, if it is not inconsistent with the contract or in violation of any one's legal rights, and if justice demands it. * * * The usual application of this principle occurs where a person, at the request of the debtor, pays the mortgage debt, or where one interested in the property pays an encumbrance to protect his own interest, or where he stands in the relation of surety to the debt." It is undisputed that both the mortgagor, Martin, and the mortgagee, appellants, understood when the mortgage was executed that the debt secured by the two prior mortgages were to be paid with the money advanced on this mortgage, and that it would be a first lien against the property for the money so advanced. It was not agreed, and it was not the intention of the parties that said other mortgages should be assigned to appellee upon the payment of the debts secured by them with money advanced by it, it is true, but it would have had the right to insist upon such assignment, and since its security failed to constitute a first lien because of the judgment of appellee, of which appellant was ignorant at the time of taking its mortgage, we see no reason why equity should not treat it as an assignee of the first mortgages discharged with the money advanced by it and under its doctrine of equitable assignment and effec-

tuate the agreement with the lender that its security should be a first lien. It had the right after its mortgage was made to apply the money advanced in payment of the other mortgages and take an assignment thereof to protect itself, and in holding that appellant became the equitable owner of said mortgages upon their payment with the money so advanced by it, and in applying the doctrine of subrogation the appellee company is in no worse position than it would have been if said mortgages had not been paid and no injustice is done it, for it can not complain that the subrogation makes its position less favorable than it would have been if appellant company had not made the loan and advanced the money to pay off said mortgages. It can, by a proper procedure for the payee to have the credit or satisfaction of the judgment set aside, if it has been entered, and the said judgment will continue and remain a binding obligation against the judgment-debtor constituting a lien against his property as though no such credit or satisfaction was entered. Having made the payment, it was entitled to the benefit of the doctrine of subrogation, and became the assignee of the claims paid, and not being a volunteer or stranger, it is immaterial that a release instead of an assignment was made. No rights of innocent third persons having intervened the release does not prevent the person making the payment or furnishing the money therefor from becoming the equitable assignee of the claims paid. *Sidener* v. *Parey,* 77 Ind. 241;*Loan Assn.* v. *Sparks,* 111 Fed. 652; *Rachel* v. *Smith,* 101 Fed. 159; *Wilkins* v. *Gibson,* 38 S. E. 382. See also 5 L. R. A. (N. S.) 3 div. case-note to *Capen* v. *Garrison,* p. 845. Appellees insist that the case should be affirmed as controlled by the decision in *Cohn* v. *Hoffman,* 50 Ark. 108. In that case a person furnished the money to pay the remaining note due for purchase money of the land, and there was no agreement nor understanding that he was to succeed to the vendor's lien, and no assignment of the note was taken by him. Nor was there any element of mistake therein as in this case, and the court said: "No circumstance connected with

the transaction manifested an intention to keep the lien alive for his protection." Here the parties expressly agreed that the appellant, mortgagee, was to have a first lien upon the premises, and while it is true they thought that the record of its mortgage and the payment of the debt secured by the two prior mortgages and their release would effectuate that purpose; it failed to do so because of the lien of the judgment of appellee intervening, of which appellant was ignorant and should not be charged with negligence in failing to discover it since an examination of the index to the record of judgments would not have disclosed it.

It follows from the principles announced that under the doctrine of equitable assignment and subrogation, appellant, the Southern Cotton Oil Company, was entitled to subrogation to the rights of the prior mortgages to the amount of their claims paid by the money advanced by it, and to the satisfaction therefor out of the property prior to the payment of the lien of appellee, which must be postponed to such payment. The decree is reversed and the cause remanded with directions to enter a decree in accordance with this opinion, subrogating appellant to the right to foreclose liens against said property for the amount so paid the prior mortgagees; and, if the same is not paid, that the property shall be sold and that amount of the proceeds thereof paid to said The Southern Cotton Oil Company free from the lien of the judgment.

HART and SMITH, JJ., dissent.

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ROBERTS v. CHATWIN.

Opinion delivered June 23, 1913.

1. CORPORATIONS—FOREIGN CORPORATIONS—REQUIREMENTS FOR DOING BUSINESS IN STATE—REPEAL OF FORMER STATUTES.—The act of May 13, 1907, Acts of 1907, p. 744, known as the Wingo act, prescribes a method different from the existing law for foreign corporations to enter the State for the purpose of doing business therein, and the act being a complete revision of all former laws, operates as a repeal of all prior laws on the subject. (Page 566.)

2. STATUTES—PARTIAL INVALIDITY—FOREIGN CORPORATIONS.—While a part of the act of May 13, 1907, p. 744, is void, insofar as it attempts to impose upon a foreign corporation, as a prerequisite to the right to do intrastate business in this State, the payment of fees based upon the whole of its capital stock, the portion of the act relating to acts required of foreign corporations to be done, in order to do business in the State, is valid. (Page 567.)

3. CONTRACTS—CONSIDERATION.—Where A. by contract gave B. the right to use a certain piece of property and a spur track thereon, when the railroad which controlled the spur withdrew the right to the use of the spur track, such withdrawal can not be said to constitute a failure of consideration, as B. still retains the right to use the property, which is a valuable consideration. (Page 569.)

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

*John W. Newman,* for appellant.

1. A foreign corporation engaged in business in this State can make no contract, nor bring suit on any contract made in the State until it has complied with the statute. Kirby's Dig., § § 832, 833; 77 Ark. 205. The assignee of a contract made by such a corporation without having complied with the law, stands in no better attitude than the corporation itself.

2. The use of the spur track was a vital part of the contract. Without it, appellant could do nothing. The obligations of the contract were mutual, and the deprivation of the use of the spur track releases appellant from liability. 65 Ark. 320, 324; 57 Ill. App. 659; 41 Ill. 470.

*Terry, Downie & Streepey,* for appellees.

1. It is not necessary to file any of the papers in the county clerk's office, the statutes relied on by appellant having been repealed by the Wingo act, by implication. Acts 1907, p. 744, § § 1, 2; 82 Ark. 302-306.

The act is clearly separable. 54 L. Ed. (U. S.) 423, 430.

2. The evidence sustains the verdict. 90 Ark. 512, 514; 96 Ark. 606, 608.

3. If the recovery by the intervener is proper, appellees are entitled to recover that amount from the appellant, under the terms of the contract sued on.

*Coleman & Lewis,* for intervener.

1. If the contracts were made in Louisiana, the domicile of the Chatwin Bros. Rip-Rap & Contracting Company, and there is no showing to the contrary, they were valid, whether the company complied with the laws of Arkansas or not, and are enforceable here. 95 Ark. 13. But, if the contract was made in this State and the statute not complied with, the corporation having assigned its contract with appellant to A. C. Chatwin and Samuel Chatwin, there is nothing in our statute to prevent them from bringing this suit. The statute applies to corporations, not individuals. 90 Pac. (Kan.) 765-6. 77 Ark. 205.

2. Appellant received all the rights and privileges called for under his contract. As to the use of the spur track, that was "subject to the rules and regulations of the St. Louis, Iron Mountain & Southern Railway Company."

McCULLOCH, C. J. A written contract was entered into on February 12, 1909, between the Big Rock Stone & Construction Company, a domestic corporation, and Chatwin Bros. Rip-Rap & Contracting Company, a foreign corporation, reciting that the former owned lands and was lessee of certain other lands fronting on the Arkansas River in Pulaski County, Arkansas, and that for a certain consideration named in the contract, it gave to the last-named corporation "the right to take sand from the Arkansas River and along and in front of the land embraced in the leases recited therein, and the exclusive right to load and store same at the point where the present sand plant is located, and at a point above the rock crusher." The contract also gave the last-named corporation "the right of ingress and egress into and over said land during the period covered by this contract," and "the right to carry on a sand business at the point where the sand plant is now located on said premises." The contract also contains the following clause:

"4th. The party of the second part shall have the right to use the spur tracks along the river bank for loading its cars, subject to the rules and regulations of the

St. Louis, Iron Mountain & Southern Railway Company, but in so doing, it shall not interfere with the loading, unloading, or moving of cars used by the party of the first part for quarrying or shipping its rock."

The consideration named in the contract was that the lessee should pay to the lessor the sum of $200 per annum, and that it should deliver to the lessor certain quantities of sand per month at specified prices. The contract was to continue in force from the date of its execution up to September 23, 1912, unless sooner terminated by agreement of parties.

The lessee, said Chatwin Bros. Rip-Rap & Contracting Company, did not take any steps in the performance of the contract, but by written contract entered into with appellant, Mord Roberts, on February 15, 1909, it assigned to appellant said contract with the Big Rock Stone & Construction Company in consideration of the undertaking on appellant's part to perform said contract and to pay to said Chatwin Bros Rip-Rap & Contracting Company certain sums per cubic yard for sand and gravel delivered under the contract with the Big Rock Stone & Construction Company, etc.

Appellant proceeded in the performance of the contract and delivered sand pursuant to the terms thereof, but in July, 1910, ceased performance of the contract.

On June 21, 1911, Chatwin Bros. Rip-Rap & Contracting Company assigned all its interest in the contract with appellant to appellees, A. G. Chatwin and Samuel Chatwin, and the latter instituted this action against appellant in the circuit court of Pulaski County to recover certain sums of money alleged to be due under the terms of the contract.

The Big Rock Stone & Construction Company intervened in the action, asserting a claim for the amount due it under the contract, and the cause was tried before the court sitting as a jury upon the claim of appellees, A. G. Chatwin and Samuel Chatwin, as plaintiffs, and the Big Rock Stone & Construction Company as intervener.

The court found from the testimony that appellant

was indebted to the plaintiffs in the sum of $834.58, and that the intervener was entitled to recover the sum of $364.52 from the plaintiffs under the contract. Therefore, judgment was rendered in favor of the plaintiffs for said sum of $834.58, and of that sum it was adjudged that the intervener recover said sum of $364.52. An appeal has been prosecuted from that judgment.

The first point made is, that the contract was void because the Chatwin Bros. Rip-Rap & Contracting Company was a foreign corporation which had not complied with the statute of this State, authorizing it to do business here at the time the contract was entered into.

The position of counsel for appellant is based upon the contention that the act of May 23, 1901 (Kirby's Digest, § § 832, 833), which required foreign corporations, before doing business in the State, to file, both with the Secretary of State and with the county clerk of the county where business was to be transacted, a copy of its articles of incorporation, was then in force, and that that feature of the statute was not complied with.

The General Assembly of 1907 enacted a statute, approved May 13, 1907, known as the Wingo act, which prescribed a different method for foreign corporations to enter the State for the purpose of doing business, and, among other things, provided that the articles of incorporation should be filed only with the Secretary of State.

This act was a complete revision of the whole subject, and, if valid, operated as a repeal of all of the prior acts on the subject. *Western Union Telegraph Company* v. *State,* 82 Ark. 302.

The foreign corporation hereinbefore named complied with the Wingo act before it entered into the aforesaid contract with the Big Rock Stone & Construction Company, and before it attempted to do any business in this State, so far as the record in this case shows.

It is insisted, however, that the Supreme Court of the United States, in the case of *Ludwig* v. *Western Union Telegraph Company,* 216 U. S. 146, declared the Wingo act to be unconstitutional and void, and counsel for ap-

pellant argues that the latter act did not, therefore, repeal the former statute on the subject.

It is true that the Supreme Court of the United States held, in the case mentioned above, that the Wingo act was unconstitutional and void insofar as it attempted to impose upon a foreign corporation, as a prerequisite to its right to do intrastate business in this State, the payment of fees based upon the whole of its capital stock.

It does not follow from this that the whole act is void. Its validity was recognized by this court in the case of *London & Lancashire Fire Insurance Co.* v. *Ludwig,* 86 Ark. 581.

The first section of the Wingo act prescribed a new method for a foreign corporation to be admitted into the State by filing with the Secretary of State a copy of its articles of incorporation, etc., instead, as under the former statute, of filing both with the Secretary of State and the county clerk of the counties wherein business was to be transacted. In a subsequent section of the act a schedule of fees was prescribed, and this is the part of the act that the Supreme Court of the United States dealt with exclusively in passing on the question of the right of the State to impose fees based upon the whole of the capital stock of a foreign corporation.

Our conclusion is that the first section of the Wingo act is valid, and that a compliance with it authorizes a foreign corporation to make contracts in the State, and to bring suit in the courts of the State to enforce them.

Even under the former statute, the contract was not void. *Woolfort* v. *Dixie Cotton Oil Co.,* 77 Ark. 205.

This suit was not brought by the foreign corporation itself, and it is contended on behalf of appellees that, even if the prior statute was in force, as the contract had been assigned to appellees, A. G. and Samuel Chatwin, they have the right to maintain suit thereon. Inasmuch, however, as we are holding that the Wingo act, the terms of which the corporation complied with, is valid and was in force at the time the contract was entered into, it is unnecessary to discuss the question of the right of ap-

pellees to maintain this suit, even if tested by the prior statute.

This disposes of the question raised as to the right to maintain the suit.

It is conceded by counsel for appellant that the judgment is correct to the extent that appellees were permitted to recover the sum of $402.89, which was for liability accrued up to the time that appellant ceased performance of the contract; but it is contended that the judgment for the balance of $431.69 is not sustained by the testimony.

This contention is based upon section 4 of the original contract with the Big Rock Stone & Construction Company, which provides that the lessee "shall have the right to use the spur tracks along the river bank for loading its cars, subject to the rules and regulations of the St. Louis, Iron Mountain & Southern Railway Company."

The Big Rock Stone & Construction Company used a spur track running from the main line of the railway up to its rock crushing plant, and it also had a sand plant on this spur track with access to the river. It used the spur track for loading rock from the crusher and sand from this plant. Subsequently the railway company made a change in the track running to the plant of the Big Rock Stone & Construction Company, and after this change it discontinued the use of the main spur for loading sand at the sand plant, and refused to permit that to be done any longer. Appellant was, however, promised another spur for loading purposes if he would procure the right-of-way therefor.

It is insisted in this behalf that the contract was conditioned upon his right under section 4 to use this spur track, and that the whole consideration failed when his right to use this track was withdrawn.

We do not think, however, that that contention is sound, for a substantial privilege was granted to him aside from the use of this track, and his right to use it was, by express terms, made "subject to the rules and

regulations of the St. Louis, Iron Mountain & Southern Railway Company." The fact that the railway company saw fit to change its plans and withdraw the privilege of using this particular track for loading purposes did not absolve appellant from the performance of the contract.

Our conclusion is, therefore, that appellant was liable for the amount adjudged by the court, or, at least, that the evidence was sufficient to warrant the finding of the court as to liability to that extent.

The question of the right of the parties to contract with reference to taking sand from the bed of the Arkansas River is not presented, and we do not attempt to decide that question. Other valuable rights are conferred by this contract which were enjoyed by appellant, and the question of the right to take sand from the bed of the river has not been raised.

The judgment of the circuit court is therefore affirmed.

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## CAMPBELL v. SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY.

Opinion delivered June 30, 1913.

1. VENDOR AND PURCHASER—RIGHT-OF-WAY OVER LAND—UNRECORDED DEED—NOTICE.—Where the vendor of land had deeded a right-of-way over his land to a railroad, but the deed had not been recorded, *held*, the construction and occupancy of a right-of-way over said land by a railroad was sufficient to put a purchaser of the land on notice of the extent of the railroad's right-of-way. (Page 572.)
2. RAILROADS—USE OF RIGHT-OF-WAY—OBSTRUCTIONS—DAMAGES.—A land owner whose land adjoins the right-of-way of a railroad company, can not claim damages for obstructions upon the land which the railroad company had the right to occupy, and the land owner can not recover damages from a telephone company for obstruction to the use of his land, by reason of poles, erected on the right-of-way of a railroad company. (Page 572.)
3. RAILROADS—USE OF RIGHT-OF-WAY.—So long as a railroad company occupies any portion of its right-of-way, it has the exclusive use and control of the same, coextensive with the boundary described in the deed. (Page 573.)

4. TELEPHONE COMPANIES—LOCATION OF POLES—DAMAGES.—Nominal damages only will be awarded when three telegraph poles of defendant are on plaintiff's land, but close to the boundary line, and when defendant has been ordered to remove the same. (Page 573.)

5. COSTS—TELEGRAPH COMPANIES—ACTION FOR OBSTRUCTING USE OF LAND.—In an action against a telegraph company by a land owner for obstructing the use of the latter's land, it is proper for the chancellor to separate the costs of the litigation and tax the same against the respective parties according to the justice of the case. (Page 574.)

6. APPEAL AND ERROR—NOMINAL DAMAGES—REVERSAL—COSTS—EQUITY RULE.—In an action at law, on appeal to the Supreme Court, when nominal damages should have been recovered, the judgment will be reversed and judgment for costs rendered in the Supreme Court for the appellant, but the rule does not apply in equity, when the Supreme Court, as well as the chancellor, may exercise discretion in awarding costs. (Page 574.)

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

*Jones & Campbell,* for appellant.

1. The allegation that the Patterson Telephone Company is the one responsible is a pure conclusion of law, and demurrable. 38 Ark. 519; 43 *Id.* 296; 72 *Id.* 478.

2. It is not averred that seven years adverse possession had elapsed before suit. 73 Ark. 8. Nor that adverse possession was under color of title. 75 Ark. 593-5.

3. An offer to remove the poles is no defense to a suit for the use of land. 7 Ark. 405; 10 *Id.* 592; 11 *Id.* 442.

4. The motion to elect should have been sustained. The pleadings are repugnant and inconsistent. 13 Ark. 488.

5. The decree is not supported by the evidence, and is against the preponderance of the testimony. 101 Ark. 493.

6. Plaintiff's right to damages is plain. 51 Ark. 235; 97 *Id.* 242.

*Walter J. Terry* and *J. W. & J. M. Stayton,* for appellee.

1. It was the duty of the owner to take notice of the right by which the company took possession of the land. 34 Ark. 391; 37 *Id.* 195; 47 *Id.* 533; 41 *Id.* 173; 33 *Id.* 465.

2. At most only nominal damages were recoverable. 74 Ark. 358. In fact, *none* were proven.

3. The finding of the chancellor will not be disturbed unless clearly against the preponderance of the evidence. 101 Ark. 503.

McCULLOCH, C. J. The plaintiff, Anna B. Campbell, is the owner of a quarter section of farm land located near the town or village of Tupelo, in Jackson County, Arkansas. She purchased the same from one J. M. Jones in the year 1900. Prior to that time, in the year 1885, the plaintiff's grantor had executed to the White & Black River Valley Railroad Company a deed conveying a right-of-way fifty feet in width through said tract of land running twenty-five feet each way from the center of the railroad track. The railroad was constructed by said railroad corporation along the center of the right-of-way, and has been occupied as such to the present time, said railroad property, including the roadbed, right-of-way, etc., having passed by mesne conveyances to, and is now owned and operated by, the Chicago, Rock Island & Pacific Railway Company.

The abutting land owners, including the plaintiff, have continued, without objection from the company, to cultivate the lands up to or near the roadbed.

During the year 1903, the Patterson Telephone Company constructed a telephone line, parallel with said railroad, to the city of Newport, Ark., and in doing so, crossed this tract of land owned by the plaintiff.

The court, on the hearing of the present cause, found from the proof that there were ten of the poles along the front of plaintiff's land, all of which were upon the right-of-way of the railroad company except three, which were just off the right-of-way and a few feet on the plaintiff's land.

The telephone line had been operated along there, as originally constructed, up to the date of the trial of this cause, and no compensation has been rendered to plaintiff for right-of-way across her land.

The Patterson Telephone Company sold out to the Southwestern Telegraph & Telephone Company, and in November, 1910, the plaintiff instituted this action in the chancery court of Jackson County against the latter to recover damages alleged to have been sustained in the sum of $1,000 by reason of the maintenance of said telephone poles over and along plaintiff's land, and to have a lien declared on the telephone line for the amount of damages recovered.

The Southwestern Telegraph & Telephone Company filed an answer, and also a cross complaint, asking that the Patterson Telephone Company, its grantor, be made a party to the action, which was done, and an answer was filed by that corporation.

On final hearing of the cause, the court found from the testimony that only three of the poles were on plaintiff's land, the others being on the right-of-way of the railroad company; that the said three poles were placed on plaintiff's land by mistake, the intention being to follow the right-of-way of the railroad company; that the defendants had offered to remove said three poles, and the court rendered a decree allowing the said Southwestern Telegraph & Telephone Company sixty days within which to remove the telephone poles from plaintiff's land, and directed the defendants to remove them within that time. The decree also was that plaintiff take nothing by the suit, and that the costs of the case be divided so that the plaintiff pay the costs incurred by her, and the defendants to pay their own costs. The plaintiff has prosecuted an appeal from that decree.

The evidence is sufficient to sustain the finding of the chancellor that only three of the telephone poles were located on plaintiff's land, the others being on the right-of-way of the railroad company.

Plaintiff's husband and agent testified that when he

purchased the land for plaintiff he did not know the width of the right-of-way, and was, therefore, not advised that the railroad company had a right-of-way to the extent of twenty-five feet on each side from the center of the track.

The right-of-way deed was not placed of record until after J. M. Jones conveyed the quarter section of land to the plaintiff; but the railroad had been constructed and the company's occupancy of the roadbed was sufficient to put all persons on inquiry as to the extent of its right-of-way. Plaintiff, when she purchased the land, was chargeable with notice of the extent of the railroad company's rights.

The question whether the railroad company had the right to grant a right-of-way to the telephone company does not arise, for the plaintiff's occupancy up to the edge of the roadbed was a permissive one, and she can not claim damages for obstructions upon the land which the railroad company had the right to occupy. So long as the railroad company occupied any portion of its right-of-way it had the exclusive use and right of control coextensive with the boundary described in its deed. *Ritter* v. *Thompson,* 102 Ark. 442.

Plaintiff can not, therefore, recover damages for obstruction to the use of land embraced in the right-of-way.

The three telephone poles on plaintiff's land were near the outer line of the right-of-way, and the evidence does not establish more than nominal damages to the plaintiff. The plaintiff directed all of her proof to establishing the amount of damages sustained by reason of ten poles running through cultivated land and the effect that the presence of the poles and wires would have upon town lots into which she expected to subdivide the land. The testimony of the witnesses which she introduced tended to show substantial damages upon that theory; but their testimony is without any force in establishing damages on account of three of the poles near the line of the right-of-way.

We are, therefore, of the opinion that the court was correct in refusing to assess any damages on account of the presence of the three poles which were ordered to be removed within sixty days.

The chancellor had the power to separate the costs of the litigation and tax the same against the respective parties according to the justice of the case; and it does not appear that there was an abuse of discretion in this case in so dividing the costs. *City Electric Street Railway Co.* v. *First National Bank,* 65 Ark. 543.

The plaintiff was entitled to recover nominal damages; but this court will not remand the cause for the recovery of nominal damages. *Crutcher* v. *Choctaw Oklahoma & Gulf Rd. Co.,* 74 Ark. 358.

The rule in an action at law is, that, on appeal to this court, where nominal damages should have been recovered, the judgment will be reversed and judgment for costs rendered here in favor of appellant; but the rule is otherwise in equity, where this court, as well as the chancellor, may exercise discretion in awarding costs. The decree is, therefore, affirmed.

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## EDWARDS v. WALLACE.

Opinion delivered July 7, 1913.

1. ACTIONS—RIGHT TO TRANSFER CAUSE—WAIVER.—When plaintiff sues defendant at law, and plaintiff's remedy is in equity, defendant waives the point by not moving to transfer. (Page 575.)
2. EVIDENCE—CONFLICT—VERDICT.—When there is a conflict in the evidence, it is settled by the verdict of the jury. (Page 575.)
3. JUDGMENT—RES JUDICATA.—When the undisputed evidence shows that the claim asserted by the plaintiff was adjudicated in a former action between the parties, it can not be again adjudicated in another action. (Page 578.)

Appeal from Garland Circuit Court; *Calvin T. Cotham,* Judge; reversed.

*A. Curl,* for appellant.

*Appellee, pro se.*

McCULLOCH, C. J. The plaintiff, Rebecca E. Wallace, instituted this action in the circuit court of Garland County against the defendant, Arthur J. Edwards, to recover, upon open account for borrowed money, the sum of $1,057.50, and exhibited with her complaint various paid checks as evidence of the correctness of the items for the money loaned at various times. There were thirty-four checks, ranging in amount from $2 to $300, and aggregated the sum of $1,057.50, the amount sued for.

Defendant filed his answer, denying that he had borrowed money from the plaintiff or that he was indebted to her in any sum. He also pleaded, as a bar to the plaintiff's right of recovery, a former adjudication, in another case pending between these parties, of the same question involved in this case.

The trial before a jury resulted in a verdict and judgment in favor of the plaintiff for recovery of the sum of $500, and defendant appealed.

The plaintiff was the wife of the defendant at the time the alleged liability accrued, but the parties were divorced by decree of the chancery court before the commencement of this suit.

The question of plaintiff's right to sue at law has not been raised, and we need not determine whether it is proper for the plaintiff to sue at law. If her remedy was in equity, defendant waived the point by not moving to transfer.

There is a sharp conflict in the testimony as to whether or not the defendant borrowed the sums named, or any sums of money, from plaintiff. That issue must be treated as settled by the verdict of the jury.

We are of the opinion, however, that, according to the undisputed testimony, the defendant's plea of former adjudication should have been sustained.

Before the parties were divorced, the plaintiff sued the defendant in equity to cancel a deed which she had executed to him conveying certain interests in real estate, and to recover possession of an automobile, a diamond

ring, and certain articles of household furniture. The chancery court rendered a decree in plaintiff's favor in that case, granting the relief which she prayed, but decreed a lien in favor of the defendant for a certain amount of money alleged to have been paid by defendant to plaintiff for the conveyance. The court also allowed the plaintiff a credit of certain amount of money which she claimed to have loaned to defendant, or turned over to him to take care of.

The defendant in the present case introduced testimony establishing the fact beyond dispute that in the former litigation between them the plaintiff introduced testimony as to all of the checks upon which she relies for recovery, and the decree of the chancery court is brought into the record, and it shows conclusively that the court passed on the question of the plaintiff's right to recover anything on those checks or to assert them as a set-off against, or in extinguishment of, the defendant's right to recover the sum of money which he had paid for the price of the land. The decree in the former suit, after reciting the defendant's claim for reimbursement of the amount paid in consideration of the deed and the testimony with reference to the money paid by plaintiff to defendant upon checks involved in that case and in this, reads as follows:

"The evidence fails to show an actual promise on the part of the defendant to repay each and all of them (the amounts represented by the checks) and the court is unable from the evidence and circumstances surrounding said payments to say, that some of these items were upon a contract to repay, and were not in the nature of advancement; * * * but do find that the plaintiff gave defendant on February 10, 1910, a check for $114, February 2, 1910, a check for $42, and February 28, 1910, a check for $75, making a total of $231, which she says was a part of the $800 and not being otherwise satisfactorily explained by defendant, * * * he should have a credit of $569 received by her from the defendant on account and as a consideration for same."

This part of the decree shows a distinct finding and adjudication by the court that the plaintiff is not entitled to assert a claim against the defendant for the amounts now set up in this suit. It is true the pleadings in the former suit are not set out in this record, but enough of the record of the former suit is brought into this record to show conclusively that the questions now presented were adjudicated in that case.

In the case of *Kraft* v. *Moore,* 76 Ark. 391, we said: "Where the issues in a former and a pending suit were not the same, and different relief was sought in the two suits, a plea of *res judicata* is unavailing."

And in *McCombs* v. *Wall,* 66 Ark. 336, the court said: "To render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear, by the record or by extrinsic evidence, that the particular matter sought to be concluded was raised and determined in the prior suit."

All of the issues in the former suit were not the same as those in this, but it does appear from the testimony adduced and the record that the question of the plaintiff's right to assert a claim against the defendant based upon the money drawn upon these checks was made an issue in that case.

In the case of *National Surety Co.* v. *Coates,* 83 Ark. 545, we quoted with approval the following statement of the law made by the Supreme Court of the United States in *Southern Pacific Ry. Co.* v. *U. S.,* 168 U. S. 1:

"A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

We also quoted with approval the language of that court in the case of *New Orleans* v. *Citizens' Bank,* 167 U. S. 371:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, where the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

Our conclusion is, as before stated, that, according to the undisputed evidence, the claim asserted by the plaintiff was adjudicated in the former action between the parties and that it can not be again adjudicated in this action. The judgment is, therefore, reversed and the cause dismissed.

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## F. KIECH MANUFACTURING COMPANY v. HOPKINS.

Opinion delivered June 16, 1913.

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—When plaintiff was killed in a stave mill by being struck on the head by a bolt being thrown after coming in contact with the saw, the evidence *held* sufficient to support a verdict against the defendant. (Page 589.)
2. APPEAL AND ERROR—VERDICT—REVIEW.—Where a verdict is based upon the testimony of the witnesses for appellee, rather than those for appellant, the verdict will not be disturbed on appeal, although it may seem to the Supreme Court to be against the decided preponderence of the evidence. (Page 591.)
3. EVIDENCE—OPINION OF WITNESS—EXPERT WITNESS.—The opinion of a witness that various imprints made on a bolt in a stave mill looked as though they were made by the same instruments, was properly admitted in evidence when the witness was shown to possess knowledge and had such familiarity with the machinery of the stave mill as to render him an expert. (Page 591.)
4. MASTER AND SERVANT—INJURY TO SERVANT—"DUE CARE."—In an action for unlawful killing of a servant, on the question of the exercise by deceased of due care, the court charged the jury, "By due care is meant that degree of care which a person of ordinary prudence and intelligence would ordinarily exercise under similar conditions." *Held*, the instruction was correct, as simply defining the term "due care," so that the jury might have a proper conception of what was required of the deceased servant. (Page 592.)

5. MASTER AND SERVANT—DEATH OF SERVANT—NEGLIGENCE—INSTRUCTIONS.—In an action against a master for the wrongful killing of a servant, an instruction was requested by defendant as follows: "An employee in the exercise of his duties in connection with other fellow-servants, will not render the principal liable for an injury resulting to another employee, unless it is apparent to the servant in exercising his duty that his fellow servant is in danger, or that the performance of an act in a certain way will probably result in an injury to him, and that he must be aware of the fact at the time, or a person of ordinary prudence should be aware of the fact that an injury would result to his fellow-servant," *held*, properly refused. (Page 593.)

6. TRIAL—ARGUMENT OF COUNSEL—CONDUCT OF TRIAL COURT—EXCEPTIONS—DUTY OF COUNSEL.—While it is the duty of the court to correct the prejudicial effect of improper argument of counsel, it is also the duty of the party aggrieved to except to the failure of the court to remove the prejudicial effect of the improper argument. (Page 594.)

7. TRIAL—ARGUMENT OF COUNSEL—DUTY TO EXCEPT.—Where a party fails to except to the action of the court in failing to remove the prejudice of improper remarks of counsel, he will be deemed to have waived the error. (Page 594.)

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

STATEMENT BY THE COURT.

On the 19th day of September, 1911, James A. Hopkins was in the employ of appellant, as carriage rider, at its stave mill in Craighead County, Arkansas. He was killed while in the discharge of his duty, and the appellee, his administratrix, instituted this suit against appellant for damages, alleging among other things:

That it was the duty of Hopkins to place stave bolts upon the carriage and firmly secure the same thereon, and that it was the duty of another employee, the sawyer, to operate a lever, by the operation of which, the carriage upon which Hopkins was performing his duties, would move forward and backward. When the carriage was moved forward, the bolt would come in contact with the saw and be sawed in two pieces and after the carriage passed the saw it was the duty of the sawyer to stop the carriage and keep it stationary, until another employee removed the parts of the bolts; that on the

occasion of the injury to Hopkins the sawyer stopped the carriage after it passed the saw, but instead of permitting it to remain still until the other employee had removed the bolt and while the bolt was upon the carriage, the sawyer carelessly moved the lever, so as to cause the carriage to run backwards; that thereby the bolt was again brought in contact with the saw, which was running at great speed; that the saw threw the bolt with great force against Hopkins, killing him.

The appellant answered, admitting that it was the duty of Hopkins to place the bolts upon the carriage and to firmly secure and fasten them with dogs, and alleged that it was his further duty to turn a ratchet wheel to move the bolt in front of a circular saw. It alleged that on the occasion when Hopkins was killed the bolt had been sawed in two pieces and that Hopkins released the dogs and failed to turn the ratchet wheel so as to remove the bolt away from contact with the saw, and thereby the bolt dropped in between the carriage and saw and against the saw, and that the speed with which the saw was running caused the bolt to fly back and strike the deceased, resulting in the injury complained of.

The answer denied the allegation of negligence set up in the complaint, and alleged that the death of Hopkins resulted from his own negligence. There was exhibited in the evidence a model purporting to show the machinery about which Hopkins was working when he was injured. The stave bolt that was being sawed at the time was also in evidence. The bolt was about thirty-two (32) inches long. The saw was about sixty inches in diameter. It was provided with a divider at the heel or the rear end, six (6) inches wide, thirteen (13) or fourteen (14) inches high, one-quarter (¼) of an inch thick and about one and three-quarters (1¾) inches from the heel of the saw.

Appellant contended, and introduced proof, tending to show that Hopkins failed to securely fasten the dogs and after the bolt had struck the saw and had sawed a kerf of a few inches, the sawyer discovered that the bolt was not securely fastened; that he then ran the carriage

back and changed the ends of the bolt; that Hopkins then again, by the use of the lever, automatically fastened the dogs into the bolt; that the sawyer then by the use of the lever, sawed the bolt in two; that before the front end of the bolt reached the rear end of the saw, Hopkins released the dogs from the bolt without removing the bolt back from the saw by the use of the ratchet wheel under his control, and that the saw thus came in contact with the bolt and the friction of the rapidly-revolving saw with the bolt threw it back against Hopkins, killing him. Several witnesses testified on behalf of appellant that the first dogging of the bolt was defective, and that after sawing the kerf in one end of the bolt, the defect was discovered and the carriage was run back and the bolt changed ends, when it was sawed through. Appellant contends that this testimony was undisputed and that it shows that the gash or kerf of a few inches in the bolt head was made by the front of the saw. One witness on behalf of the appellee testified, in part, as follows:

Q. After this bolt was dogged and run up to the saw, did anything occur—did they stop or back away from the saw or change ends with it, or anything of that kind?

A. No, sir; not that I saw.

This witness further testified:

"I was standing three or four feet from Mr. Sullivan (sawyer). I was helping because they were in a hurry and wanted to get certain work done before quitting time. I had no other duty to perform than to lay a block from the skidway over to the carriage. There was nothing to attract my attention or hinder me from seeing Sullivan change ends with the block if he had done it. I did not see him do it."

Appellant further contends that the physical facts show that the gash or saw kerf of a few inches in the head of the block must have been made by the front of the saw, and that an examination of this kerf shows that it was in a straight line, paralleling the surface of the

bolt. There was testimony tending to show that the saw was running at the rate of eight thousand, one hundred (8,100) feet per minute, and appellant contends that it would have been impossible for the heel of the saw, running at that rate of speed, to have cut a gash or kerf on a straight line, paralleling the surface of the bolt, and several witnesses testified on behalf of appellant to this effect. One witness stated that when the bolt was run back on the carriage it would strike the divider and either break it or throw the carriage off of the track. It could get in at the back end of the saw by getting almost across the saw kerf. Then the saw would throw the bolt up. It would not cut a saw kerf like the one in the bolt, but would tear off a corner of the bolt. Another witness said that the cut in the ragged end of the bolt could not have been made with the heel by it coming back toward it with the divider there. Nothing could have held it down to the saw to make that kerf and then it could not have been parallel with the length of the bolt as it is. If it came back in the back end of the saw, the kerf would have been reversed. The kerf could not have been made on the line like it is. It would not have been parallel and straight as this kerf is. One of these witnesses on cross examination stated that "he was at Nettleton when the court, jury and attorneys were there and the measurements were being made and the saw rig run. The same bolt was in evidence over there. While the saw was standing still he saw some one, in the presence of the jurors, take hold of the bolt and put it down into the carriage and shove the back end of it into the gash. The saw teeth came into the bottom. It came nearly across the carriage. It did not set up to the saw." Witness saw the experiment made. He was foreman at the mill.

The record shows that the jurors were permitted to saw off a portion of the ragged end of the bolt, revealing the marks of the saw on the saw kerf.

On behalf of the appellee, a witness testified that "he saw the bolt that struck Hopkins, when it went up to the saw. He saw the kerf after the saw went through

the bolt, cutting it into two pieces." He stated that "the bolt went past the saw that far" (indicating). Witness was asked what became of the bolt, and stated that "he saw the off-bearer reach for it, but did not know whether he took hold of it or not. He did not see the bolt when it came back and hit Mr. Hopkins." Witness said "he did not know how far the bolt went back." He said "it passed the saw or the divider. He did not know whether it was undogged or not. Didn't know whether it passed the divider or not."

On the other hand, a witness on behalf of the appellant, who was present, testified that "the injury resulted by reason of Hopkins releasing the bolt with his lever. It dropped down between the saw and flew back and hit him. The end of the bolt got within about eight inches of the rear end of the saw and it was undogged."

There was testimony on behalf of appellant to the effect that the bolt did not remain long enough after it dropped against the saw for the surface of the bolt to burn and become black.

A witness on behalf of the appellee, who thoroughly understood the method of operating the carriage and saw and who had worked at this plant at different times for more than nine years, testified that "the carriage should be run far enough to let the bolt go past the divider a few inches. Then the off-bearer takes it off the carriage. The ratchet man should release the dog when the off-bearer takes hold of the bolt. The carriage should be moved back a little—about four inches—as soon as the block is sawed to clear the divider. After the block is sawed the carriage is supposed to stop at the place for the off-bearer to take the block off. Then the sawyer runs the carriage back for another bolt. When the bolt is sawed and run past the divider and the ratchet man, using his lever, undertakes to release the bolt, it usually releases it at the same time at both ends. Sometimes there will be a sharp corner in the dog that will catch the bolt. It is not often that the teeth come out at one end and stay in at the other end, when the

ratchet man undertakes to release the bolt. It would happen at least once in a day. When the hind end of the bolt is released from the dogs and the front end remains fastened, if the carriage is rolled back it will put the hind end of the bolt diagonally across. If the bolt had been put on the carriage and it was not dogged right and they went to reset it, it would be proper for the block setter to turn the dogs loose and the head sawyer would roll it over a little bit." Witness had never seen any one change ends with the bolt. Witness saw two sets of dog marks in the ends of the bolt. The teeth in the plain or square end of the bolt looked to be the same to witness—the same distance apart between them. At the other end—the ragged end—the dog marks were about a half inch apart. This witness further testified that "if the bolt was sawed in two and the carriage was run back so that the bolt stopped along even with the saw, and if the saw was running against it with any pressure, that it would leave a black place on the surface of the bolt. If it stayed there long enough, it would heat the saw in a very short time. If a bolt had run through the saw and over at the proper place to take the bolt off of the carriage, there would be no way for the bolt to come in contact with the saw, without the movement of the lever used by the head sawyer." Witness further testified that "the machine was a little tricky. They had to watch it to keep it from running away. It was easy on the lever and the lever would fall over and throw the friction together if the sawyer was not very watchful of it."

Another witness testified that "he saw a bolt fall over the table on the right-hand side. If the bolt were on the back side, it would remain until another block pushed it off; if on the front side, it would be removed. There was no pressure between the outer edge of the bolt and the saw."

One of the witnesses on behalf of the appellee, who had worked at the machine a little over nine years, was given the bolt in the presence of the jury and asked to

examine the saw marks in the gash or kerf in the ragged end and to say whether or not they were such that the saw teeth from the back side of the saw could have made. Witness, over the objection of appellant, answered that he believed that could have been done.

There was testimony on behalf of the appellee tending to impeach the witnesses who testified on behalf of the appellant, as to the manner in which the injury was produced, by showing that these witnesses had made contradictory statements.

Among other instructions, the court gave the following, numbered "7:"

"By due care is meant that degree of care which a person of ordinary prudence and intelligence would ordinarily exercise under similar conditions."

Appellant objected to the giving of the instruction and asked the court to modify same as follows:

"An employee in the exercise of his duties, in connection with other fellow-servants, will not render the principal liable for an injury resulting to another employee, unless it is apparent to the servant in exercising his duty that his fellow-servant is in danger or that the performance of an act in a certain way will probably result in an injury to him, and that he must be aware of the fact at the time, or a person of ordinary prudence should be aware of the fact that an injury would result to his fellow-servant."

The court refused to make the modification and the appellant duly excepted to the ruling of the court in giving the instruction and in refusing to modify the same as requested.

In his closing argument to the jury, counsel for the appellee used the following language:

"Gentlemen: Do you know how fast this wheel is running? They tell us that it was going 450 revolutions per minute. That means the outer edge of this saw was going 8,100 feet per minute or more than one and one-half (1½) miles per minute or more than ninety-two (92) miles per hour or more than two thousand, two hun-

dred (2,200) miles per day. We could eat breakfast in Jonesboro Monday morning, go around the earth at that rate of speed and be back to dinner in Hatchie Coon, Thursday noon. At that rate of speed, if this gang of witnesses would leave this earth Monday morning about 4 o'clock they would land in hell Wednesday before sunup."

Upon objection being made to the argument by counsel for appellant, counsel for appellee stated that "he would take it back," and the court told the jury that the argument was improper. There were no exceptions to the ruling of the court.

Counsel for the appellee, in his closing argument, further stated to the jury as follows:

"Mr. Ellis is an old man. I am not going to criticise him; but when I refrain from doing so, I am showing him much more consideration and mercy than did the men who corrupted him and brought him here to pollute this court's fountain of justice."

Counsel objected to the argument, on the ground that it was improper and the court made no ruling. No exceptions were saved for the failure of the court to make a ruling upon this argument.

From a judgment in favor of the appellee, this appeal has been duly prosecuted.

*Hawthorne & Hawthorne,* for appellant.

1. The finding of a jury is conclusive only where there is legally sufficient evidence to support it; but where the verdict is based upon evidence which is irrational, and contrary alike to known physical facts and human knowledge and experience, it will not be sustained. 79 Ark. 606; 119 S. W. 328; 60 Pac. 907; 96 S. W. 1045; 24 So. 771; 52 N. W. 119; 84 N. W. 36; 33 S. W. 428; 86 N. W. 178; 71 N. W. 434; 124 Ill. App. 89; 22 Fed. 905, 910.

2. The opinion evidence of witnesses Cochran and Hopkins was an invasion of the province of the jury, was incompetent and prejudicial. 97 Ark. 180; 85 Ark. 496; 82 Ark. 215; 78 Ark. 55; 56 Ark. 612; 65 Ark. 98; 62 Ark. 70; 36 Ia. 472; 41 S. W. 445; 92 Mo. App. 221.

3. The seventh instruction should have been modified as requested by appellant. 147 S. W. 86.

4. The cause should be reversed for prejudicial language of plaintiff's counsel in his closing argument. The court failed to rule on appellant's objections, and failed to admonish the jury that it was improper. 65 Ark. 635; 61 Ark. 136; 95 Ark. 233; 87 Ark. 461; 89 Ark. 58; 81 Ark. 31; 71 Ark. 415; 75 Ark. 577.

*Lamb & Caraway,* for appellee.

1. The evidence sustains the verdict.

2. There was no error in admitting any of the testimony given by Cochrane or Hopkins. 95 Ark. 284, 290; 87 Ark. 443; 77 Ark. 434, 436; 104 S. W. 77, 84; 147 S. W. 852, 857; 84 N. W. 657, 658; 94 Fed. 329, 331; 68 N. W. 605, 68 Fed. 1, 5; 107 S. W. 374, 378; 61 N. W. 912,; 81 N. W. 518, 520.

3. There was nothing prejudicial in the argument of counsel. 74 Ark. 256; 98 Ark. 83, 85; 96 Ark. 87, 92; 90 Ark. 398, 406; 91 Ark. 93; *Id.* 576; 100 Ark. 107, 121; *Id.* 218, 225; *Id.* 232, 238; 73 N. E. 780, 786.

4. The court was right in refusing to modify instruction 7. The instruction as given merely defined "due care" referred to in instruction 6. The doctrine of discovered peril invoked by the proposed modification had no application. Acts 1907, page 162.

WOOD, J., (after stating the facts). On examination of the bolt and the model of the machinery about which Hopkins was working when he was killed, we are convinced that the saw kerf in the ragged end of the bolt was made by the front end of the saw, as contended by appellant, and as stated by the witnesses who testified affirmatively to that fact. The kerf shows that it was on a parallel line with the length of the bolt and the marks of the saw teeth as revealed on the inside of the kerf, so far as they are distinctly visible, show conclusively to our minds that it would have been impossible for the kerf to have been made by the heel of the saw. These saw teeth marks, a few inches on the inside of the saw kerf, indicate unmistakably the direction in

which the saw was moving, and they show that the bolt must have approached it from the front end of the saw. If the bolt had approached the heel of the saw, as contended by appellee, the marks of the saw teeth must have been in the opposite direction from what they appear to be. And the kerf, had the bolt approached the heel of the saw, could not have been straight and on a parallel line with the length of the bolt and could not have cut as far into the end of the bolt as the saw kerf shows. Witnesses testify that the bolt would have been thrown up and away from the saw and that there could not have been force enough to have held it to the heel of the saw, in order to have made the kerf as it appears. Witnesses testify that if the rear dog was released and the rear end of the bolt dropped down and brought back against the saw moving in the direction in which it was going, and with the rapidity it was moving, it would have been impossible to have made the kerf on a line straight or parallel with the length of the bolt. This accords with our view of the physical facts, as shown by the appearance of the kerf in the bolt and the manner of operating the machinery, as testified to by the witnesses and shown by the models as exhibited in the evidence and brought into this record and used in the oral argument.

So, if the liability of the appellant depended upon whether or not the kerf in the bolt was made by the front or the heel of the saw, we would sustain the contention of the appellant on that point, notwithstanding the testimony of the appellee tending to show that the sawyer did not change the ends of the bolt, and notwithstanding the testimony of a witness to the effect that he thought it could have been done in the manner urged by the counsel for the appellee, and notwithstanding the jurors visited the mill plant and viewed the saw slipped into the kerf on the bolt from the heel of the saw. If recovery depended on whether the kerf was made by the front or the heel of the saw, then all of this testimony would come within the rule of *Waters-Pierce Oil Company* v. *Knisel,* 79 Ark. 608, and other cases cited and

relied on in appellant's brief. But because the kerf was not cut by the heel of the saw, it by no means follows that the undisputed evidence and the physical facts show that Hopkins' death was caused in the manner contended for by the learned counsel of appellant.

The complaint alleges that while the bolt was upon the carriage the sawyer carelessly moved the lever, so as to cause the carriage to run backward and thereby brought the bolt again in contact with the saw, which was running at a great speed, and threw same with great force against appellee's intestate.

The evidence is set forth somewhat at length in the statement and there is some testimony to warrant the jury in finding that the death of Hopkins was caused in the manner alleged in the complaint. It was shown that there was a defect in the lever of the carriage and that unless the sawyer was careful in handling it, the carriage would run away. There is no dispute that Hopkins was killed by the bolt striking him on the head. There was testimony to warrant the jury in finding that the bolt passed through the saw. One witness testified positively to this effect. It was within the province of the jury to believe this testimony, although the decided preponderance of the evidence may show to the contrary. If the bolt passed the heel of the saw, the only possible way in which the death of Hopkins could have resulted under the evidence, was as alleged in the complaint. That it did so result is not contrary to the physical facts. Although the kerf in the bolt was made by the front of the saw, and although the sawyer after this changed the ends of the bolt and passed the bolt through the saw with the smooth end in front, still if he carelessly caused the carriage to move back, after the block had passed through, but before it was entirely released from the dogs, causing the rear end of the bolt to move toward the saw, the bolt might have been caught by the saw teeth in the edge of the kerf and in the splintered and jagged end thereof and been hurled against Hopkins.

On examination, after sawing off the end of the block

and exposing the inside of the kerf to view, the jury might have come to the conclusion that the saw teeth caught between the edges of the kerf at the splintered and ragged end of the block and were thereby fastened long enough to throw the block over against Hopkins. While the upper end of the kerf is comparatively smooth and shows plainly the saw teeth and the direction in which the saw was moving when the imprint of the saw teeth was made, the lower end of the kerf or that next to the carriage, was more or less frazzled, with the fibers of the wood broken down on the inside of the kerf, and there are indentations or marks on the inside of this kerf, indicating where the saw teeth had been and showing by the splintered condition of the sides of the kerf, that the saw teeth might have fastened in the wood. After sawing off the piece of the end showing the inside of the kerf, the jury concluded that the testimony showing that the bolt passed the heel of the saw, was true and that the carriage was moved back by the sawyer and the bolt thus brought in contact with the heel of the saw, fastening the teeth of same in the kerf of the ragged end of the bolt and hurling it over against Hopkins, according to the theory of the appellee. We are of the opinion that this explanation and theory as to how the injury was produced, is not contrary to the physical facts. The witness who testified that the bolt went past the saw also testified that he saw the off-bearer reach for it but did not know whether he took hold of it or not. This testimony was believed by the jury and it tended to show that the bolt did pass the end of the saw, for it would be unreasonable to conclude that the off-bearer would reach for the bolt before the same had passed the saw. Especially would it be foolhardy for him to have exposed himself to the danger of doing so, if the front end of the bolt was still some eight inches from the rear end of the saw, as one of the witnesses for the appellant testified it was.

The theory of appellant was, that after the saw passed through the bolt, but before the front end of it

reached the rear end of the saw, Hopkins released the dog without moving the bolt back from the saw by the use of the ratchet wheel, and that the saw thus came in contact with the bolt, and the friction thereby created threw the bolt over against Hopkins. But the testimony of the witness on behalf of the appellee, showing that the entire bolt passed through the saw and that the rear end of the bolt passed the heel of the saw, and tending to show that the off-bearer reached for the bolt, is in direct conflict with appellant's theory and contention.

It was wholly within the province of the jury to believe and accept the testimony of the witness for the appellee and to disbelieve and reject the testimony of the witnesses for the appellant, and we will not disturb their verdict, although it may seem to us to be contrary to the decided preponderance of the evidence. See *St. Louis & S. F. Rd. Co.* v. *Kilpatrick,* 67 Ark. 47.

Second. The appellant objected to the testimony of certain witnesses on the ground that it was opinion evidence and that the testimony was not competent. Several of the witnesses for the appellant had testified that the sawyer changed the ends of the bolt, which injured the appellee's intestate. One witness on behalf of appellee was permitted to testify, over the objection of appellant, that he had never changed the ends of a bolt. Witnesses further testified on behalf of the appellee to the effect that they had examined the bolt and that the imprint of the dog teeth on the plain or square end of the bolt looked to be the same, and there were other expressions of opinion of certain witnesses on some phases of the case to which objection was made. We have examined these and are of the opinion that there was no prejudicial error in the ruling of the court in permitting this testimony and in not excluding the same from the jury. It was shown from the length of time the witnesses had been employed by mill plants of the kind under consideration and their familiarity with such machinery, that they were experts. Their opinion related to the subject-matter with which the jury were not sup-

posed to be so familiar as they. The testimony, therefore, was competent. *Dardanelle, P. B. & T. Co.* v. *Croom,* 95 Ark. 284-290. See also *Kansas City So. Ry. Co.* v. *Henrie,* 87 Ark. 443; *St. Louis, I. M. & S. Ry. Co.* v. *Dawson,* 77 Ark. 434.

Third. The court did not err in refusing to modify instruction No. 7. That instruction was but a continuation of instruction No. 6, which was as follows:

"If you find from the preponderance of the evidence that Sullivan, the sawyer, at the carriage where deceased worked, was negligent, as that term has been defined, in the performance of any duty which he owed to deceased, and that the injuries sustained by deceased resulted from such negligence on the part of Sullivan, and that at the time of being injured, deceased was in the exercise of due care for his own safety, your verdict will be for the plaintiff."

The court had also used the term in the first instruction in connection with the duty of the deceased, to exercise "due care" for his own safety. The effect of instruction No. 6 was to tell the jury that, even though the sawyer was negligent and that such negligence resulted in the death of Hopkins, still appellee could not recover unless Hopkins was in the exercise of "due care" for his own safety. Having used the term "due care" in connection with the duties of Hopkins in the sixth instruction, the court in its instruction No. 7 was simply defining what the term "due care" meant, so that the jury might have a proper conception of what was required of Hopkins, as a condition precedent to the recovery by the appellee. The term was not used in defining the duty of the sawyer, the employee of appellant, whose negligence was alleged to have been the cause of the injury. The court had correctly defined "negligence" in other instructions. It will therefore be seen at a glance that the modification was not at all germane to the subject-matter of the instruction which the appellant requested to be modified. As a modification to instruction No. 7 it was entirely a misfit and the court did not err in refusing it because of that fact.

A modification to an instruction should pertain to the subject-matter which the instruction itself contains. If the appellant desired such an instruction it should have presented it as a separate and independent prayer or in connection with some prayer in which the court was defining the duty of the employee, whose negligence was alleged to have caused the injury complained of. But the requested modification, even if presented as an independent prayer for instruction, was not the law and therefore the court did not err in refusing it. It was not necessary in order to make the company liable that Sullivan, the sawyer, should actually know that his fellow-servant, Hopkins, was in danger. It was sufficient, if the sawyer, in the exercise of ordinary care in the performance of his duties as an employee, could or should have known that his act in reversing the carriage might result in the injury to his fellow-servant. A corporation can only act through its servants and agents, and those through whom it acts must exercise ordinary care in the discharge of their duties, to avoid an injury to fellow-servants, that by the exercise of such care, could and should have been reasonably anticipated and avoided. The effect of the requested modification was to tell the jury that appellant was not liable unless Sullivan had discovered the peril of Hopkins before running the saw carriage containing the bolt back to the saw. If this were the law, the master would not be liable for an injury to his servant unless such injury was caused by the wilful or gross negligence of the employee causing the injury. Sullivan being in control of the movements of the carriage and knowing the positions of the respective fellow-employees working with him and the consequences likely to result to them from his failure to exercise ordinary care in the performance of his own duties, would render his master liable for an injury resulting to a fellow-employee by reason of such failure. Act 69, Acts of Ark. 1907, p. 163; see *Aluminum Co.* v. *Ramsey,* 89 Ark. 522.

Fourth. The record presents no question for review concerning the alleged improper remarks of counsel. If the remarks of counsel were improper, they were not, to say the least, so flagrant as to be prejudicial at all events. While it is the duty of the court on its own motion to make such rulings as may be necessary to correct the prejudicial effect of any improper argument (*Vaughn* v. *State,* 58 Ark. 353), it is also the duty of the party affected by any improper argument to except to the failure of the court to take the necessary steps to remove any prejudicial effect of such argument. Unless the party affected excepts to the failure on the part of the court to remove, or to attempt to remove, the prejudice of the improper argument, he will be deemed to have waived any error predicated thereon. *Meisenheimer* v. *State,* 73 Ark. 407; *Southwestern Tel. & Tel. Co.* v. *Abeles,* 94 Ark. 254.

Affirmed.

SMITH, J., disqualified and not participating.

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## VALENTINE v. STATE.

Opinion delivered July 7, 1913.

1. APPEAL—CONTINUANCE—DISCRETION OF COURT.—The action of the trial court in the exercise of its discretion in overruling a motion for a continuance, will not be disturbed when the motion was asked on the ground that a witness was absent, and it appears that the witness was absent from the State, or his whereabouts were unknown. (Page 598.)

2. WITNESSES—EXCLUSION FROM COURT ROOM—DISCRETION OF THE COURT.—The matter of excluding witnesses from the court room while they are not on examination is within the sound discretion of the court, and will not be reviewed when no abuse of discretion is shown. (Page 600.)

3. WITNESSES—EXCLUSION FROM COURT ROOM—ADMONITION.—When witnesses are put upder the rule it is customary and better practice to instruct them not to talk to each other about the case, but it is entirely within the discretion of the trial judge as to whether such instructions are necessary to the ends of justice; and when such instructions are not given to the witnesses, it must be presumed, in the absence of a showing to the contrary, that it was not

necessary in order to secure to the appellant a fair and impartial trial. (Page 600.)

4. TRIAL—CONDUCT OF TRIAL—REMARK OF JUDGE.—In a trial for homicide, a witness was asked if deceased drank. The question was objected to, and the court said, "It is a violation of the law to kill a drunken man." *Held*, the remark will be presumed to have been made to counsel and not to the jury, and that it was not an expression of the court's opinion. (Page 601.)

5. TRIAL—ARGUMENT OF COUNSEL.—Remarks of prosecuting attorney in his argument, that defendant was guilty of the highest crime known to the law, and that it was the duty of the jury to so find, *held*, to be proper argument. (Page 602.)

6. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.—A requested instruction that, although defendant went to a house where he knew deceased to be, and that deceased would probably attack defendant, that if, in the encounter, defendant acted in self-defense, he must be acquitted, was properly refused, being opposed to the rule that one must do everything possible to avoid a killing. (Page 602.)

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

STATEMENT BY THE COURT.

On or about February 10, 1913, the appellant killed one Vernon Neely in Jackson County, Arkansas, at the home of Mollie Mays, about 9:30 o'clock in the evening. Vernon Neely arrived at Newport about 4 o'clock on the day of the killing. He went to Newport on the local train, and was accompanied by two other negroes, Hardley Taylor and Efford Allison. They came to Newport from Beebe. After they got to Newport they went to one of the saloons and drank some beer together. After this, and about the hour above stated, appellant went to the home of Mollie Mays and into the room where Vernon Neely and some other negroes were congregated. The testimony shows that he punched Allison in the side with his gun, which was a twelve-gauge, single-barrel shotgun, and caused him to move out of his way. The deceased turned his head to see who had come into the room, and was shot underneath his right nostril and instantly killed.

The testimony tends to show that Neely made no hostile demonstration whatever toward the appellant. Allison attempted to knock the gun up, and thus prevent

appellant from shooting Neely, but the gun fired before he struck it.

There was testimony on behalf of appellant tending to prove that the deceased had been making threats against him because of the fact that appellant had been keeping company with one Ophelia Mays, a former sweetheart of the deceased. These threats were communicated to the appellant, and were to the effect that Neely had come to Newport to kill him.

There was testimony tending to show that defendant went into the house in question, not knowing that deceased was in there; that deceased slapped the girl claimed to be his sweetheart, looked at appellant and started at him with a quick motion, drawing a knife; that appellant then presented the gun, and that the gun was knocked up by Efford Allison, and discharged.

The above is substantially the testimony on behalf of the State and of the appellant upon which the appellant was tried on an indictment charging him with murder in the first degree, and convicted of murder in the second degree, and sentenced to twenty-one years in the penitentiary.

*Appellant, pro se.*

1. The court erred in denying appellant's motion to vacate the order reciting waiver of arraignment, plea, etc., on the ground that he was not at the time represented by counsel, did not authorize a waiver of arraignment, and did not understand the effect thereof, etc. 84 Ark. 100.

2. In overruling appellant's motion for a continuance, the court abused its discretion, because, (1) appellant used all diligence that could be expected of him under the circumstances to procure the attendance of the witness, Roddy; (2) his testimony was vital to appellant's defense, and would probably have secured an acquittal, and (3) his attendance could have been procured had the case been continued. 100 Ark. 301; 99 Ark. 394.

3. The court ought, on its own motion, to have in-

structed the witnesses not to talk about the case among themselves, and it was an error when his attention was called to this omission by motion to refuse to so instruct the witnesses.

4. It was competent to inquire of the witness, Taylor, if Neely drank or was drinking, the defendant having the right to show by testimony that deceased was drinking shortly before the fatal rencounter; and it was error for the court to remark, on the State's objection to the question that, "It is a violation of the law to kill a drunken man." If the remark was intended as a declaration of law, it was incomplete, for it is not a violation of law to kill a drunken man in necessary self-defense.

The remark was in fact a declaration by the court upon the weight of the evidence, and that the defendant was guilty. Art. 7, § 23, Const.; 99 Ark. 558; 43 Ark. 73.

5. Instruction 7, requested by appellant, should have been given.

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

1. It was not error to overrule the motion to vacate the order reciting the waiver of arraignment, plea, etc. The order itself is conclusive here. 87 Ark. 50, 52. No prejudice is shown, and without it appellant will not be heard to complain. 55 Ark. 342, 18 S. W. 239; 72 Ark. 145, 151.

2. The motion for continuance was also a matter within the sound discretion of the trial court, which will not be controlled except in case of manifest abuse. In this case the court found that the witness was not in the jurisdiction of the court. 100 Ark. 301.

3. There was no error in not instructing the witnesses not to talk about the case. 101 Ark. 155; 93 Ark. 316; 32 Ark. 207, 209.

4. The court's remark to the effect that it is a violation of law to kill a drunken man, was addressed to counsel for appellant and the prosecuting attorney, and

was in no sense an expression of opinion as to the guilt of the accused, but was its reason for excluding any further testimony along the line appellant was examining the witness. 2 Ark. 512, 575.

5. Instruction 7, requested by appellant, was properly refused. A trial court is not required to repeat its instructions.

WOOD, J., (after stating the facts). Appellant filed a motion to vacate the order of court reciting waiver of arraignment and the entry of a plea, and the order setting the case for trial on a certain day, alleging that the appellant had no counsel to represent him at the time, and that he was therefore ignorant of the effect of the waiver of arraignment and the purported entry of the plea, and the setting of the case for hearing, etc.

The record recites that, "On this day comes the State of Arkansas, by her attorney, C. M. Erwin, and comes said defendant in his own proper person, in custody of the sheriff of Jackson County, and by his attorneys, Phillips, Hillhouse and Boyce."

The record itself refutes the motion of the appellant. There is no sufficient showing to impeach the recitals of the record. Moreover, appellant is not shown to have been prejudiced by the matters set up in the motion, even if they were true. The matters complained of are matters proper to be shown in the record entries. The court did not err in overruling the motion to vacate.

The appellant moved to continue the case on account of the absence of witness, Will Roddy, alleging that Roddy was present at the time Neely was killed, and would swear that Neely was advancing upon appellant in a threatening manner with a knife drawn. Appellant alleged that he had used due diligence to procure the attendance of the witness, and that the witness was not absent by the consent, procurement or connivance of appellant; that the witness was within the jurisdiction of the court, and that appellant could procure his attendance at the next term.

Appellant sets up, in addition to the formal grounds for a continuance, that he could not procure counsel to represent him, and that the counsel who did represent him were appointed by the court, and that they did not understand that they were to have the full responsibility of representing the defendant until Monday, February 24, 1913, and that the cause was set down for trial on February 25, 1913, that his attorneys, therefore, had not had sufficient time to prepare for his defense; that they had not had time to subpoena witnesses, nor to consult with the witnesses, nor to consult with the defendant with reference to his trial in time to have the witnesses present that were necessary to his defense.

When the motion for a continuance was filed, with its supporting affidavits, the court postponed the trial until March 5, 1913. The appellant then renewed the motion for a continuance, setting up substantially the same facts shown in his first motion.

The sheriff, who had a subpoena for the absent witness, Will Roddy, testified that he had made an effort to serve him, and he had learned from his deputies and others that he was out of the State. He said he had used due diligence in trying to locate him ever since he had had the subpoena; that he didn't go to the home of Will Roddy in Newport, nor to his usual place of abode, and didn't know that Will Roddy was out of the State, but to the best of his knowledge, he knew that he was not in Jackson County. Other witnesses testified that they were told by Will Roddy, after the killing, that he was going to Missouri.

The court overruled the original motion for a continuance, and postponed the trial to another day in the term, and when the case was called on the day appointed, appellant filed a supplemental motion, as we have stated, and offered to introduce the testimony of Will Roddy's wife to the effect that she had recently heard from Roddy, and that she was expecting him home soon; and appellant alleged that he had sent several telegrams to Roddy at different places, and had received information that he

was working on the railroad at Malden, Missouri, and appellant exhibited a telegram showing that the gang with whom Roddy was supposed to be working had gone south from Malden, Mo., and that Malden was just north of the Arkansas State line, and contended that, therefore, Roddy was now within the jurisdiction of the court. The court declined to hear the testimony, and overruled the motion.

It was within the discretion of the court to overrule the motion for a continuance upon the showing made. The court doubtless concluded that there was no certainty of procuring the attendance of the witness at the next term of the court for the reason that said witness was beyond the jurisdiction of the court.

The testimony was sufficient to warrant the court in finding that witness, Roddy, was in Missouri, or that his whereabouts were unknown, and that there was no reasonable certainty of procuring his attendance if the case were postponed. The court heard the evidence, and we can not say that he abused his discretion in overruling the motion for a continuance.

The court did not err in refusing to instruct the witnesses not to talk about the case among themselves while in the witness room. The matter of excluding witnesses from the court room while they are not on examination is within the sound discretion of the court, and will not be reviewed when no abuse of discretion is shown. *Marshall* v. *State,* 101 Ark. 155. When witnesses are put under the rule, it is customary and the better practice to instruct them not to talk to each other about the case, but it is entirely within the discretion of the trial judge having supervision of the matter and knowledge of the witnesses and their surroundings as to whether such instructions are necessary to the ends of justice; and where such instructions are not given the witneses we must presume, in the absence of a showing to the contrary, that it was not necessary in order to secure to the appellant a fair and impartial trial. There is nothing in the record to

show that the substantial rights of the appellant were prejudiced by the court's ruling in this respect.

During the taking of the testimony, a witness was asked the following by defendant's counsel, on cross examination, concerning the deceased: "Did Neely drink?" The question was objected to by counsel for the State, and the court remarked: "It is a violation of the law to kill a drunken man." Appellant excepted to the remark of the court. The examination of the witness was then continued as follows: "Q. Neely drank, didn't he? Did he drink? A. Yes, sir; he drank a glass of beer."

The remark of the court was made while the defendant was endeavoring to ascertain whether or not the deceased, on the night of the fatal rencounter, was drinking. We think, in the absence of a showing in the record that the remark of the court was addressed to the jury, that it must be considered as a remark made to counsel, giving his reasons for allowing the question rather than as expressing his opinion upon any question of fact. The court permitted the question to be answered, and therefore permitted the fact to be elicited which appellant was seeking to prove, and the incidental remark of the court during the examination of the witness, addressed to counsel, was not an expression of his opinion upon any fact proved, and could not have been considered by the jury as an opinion of the court as to the guilt of the appellant. If appellant conceived that the remark was made as an expression of the opinion of the court as a proposition of law, he should have asked the court to instruct the jury not to consider the remark as an expression of his opinion upon the weight of the evidence, and if the court had refused, then appellant would have been in an attitude to complain. But, as we view the remark, it was not intended by the court to be, and could not have been considered by the jury as an expression of an opinion of the court upon any question of fact in the case. There was no evidence that the deceased was a drunken man, and the fact that appellant desired to show was shown by the

question and answer, *i. e.,* that Neely did take a drink the night he was killed.

We have examined the objections made to the remarks of the prosecuting attorney in his closing argument to the jury, and it is unnecessary to set them out in the opinion. It is sufficient to say of these that they were but the expressions of the opinion of counsel on behalf of the State that the appellant, under the circumstances shown in evidence, was guilty of the highest crime known to the law, and that it was the duty of the jury to so find by their verdict. These remarks were clearly within the bounds of legitimate argument. *Leonard* v. *State,* 106 Ark. 449; *James* v. *State,* 94 Ark. 514.

The appellant objected to the refusal of the court to give his prayer for instruction No. 7, which is as follows:

"If Neely, at the time Valentine fired the fatal shot, was making a demonstration, as if to draw a weapon to be used against Valentine, under such circumstances as made it reasonable for him to believe as such circumstances appeared to him, that he was in imminent danger of losing his life or receiving great bodily harm, and he, Valentine, while acting in good faith, and under such belief, fired the fatal shot to protect himself, he is not guilty of any crime. And this would be true, although you might believe from the evidence that at the time Valentine went into the house in question, he knew that he would likely meet Neely there, and that Neely would likely make an attack upon him."

All that part of the prayer except the last sentence was fully covered by correct instructions on the law of self-defense which the court gave. The last part of the instruction was not a correct statement of the law, and was calculated to confuse and mislead the jury. Before one will be justified in killing his adversary in self-defense, he must do everything in his power consistent with his safety to avoid the danger and avert the necessity of the killing. The latter part of the prayer might well be construed as in conflict with this wise provision of the law.

Other questions are presented in appellant's brief, but we do not deem them of sufficient importance to require discussion. The record is free from error prejudicial to appellant, and the judgment is therefore affirmed.

# APPENDIX

## I.

## TRIBUTE OF RESPECT TO

## HON. JAMES B. WOOD

JAMES B. WOOD has passed to "that bourne from whence no traveler returns." He was born in Drew County and spent the early years of his life in Ashley County, Arkansas. In 1875, at the age of twenty-four years, and shortly after his admission to the bar, he located in Hot Springs, where he lived continuously thereafter. His first law partner was Col. George W. Murphy. This partnership continued until the election of Mr. Wood to the office of prosecuting attorney of the district. He served the people in that capacity for four years, and was promoted to the circuit bench, where he rendered conspicuous and distinguished service for eight years, retiring voluntarily at a time when he could have been re-elected without opposition. On retiring from the bench, he formed a partnership with Col. Jethro P. Henderson, which firm continued until its dissolution was caused by the election of Colonel Henderson to the office of chancery judge, and the election of Judge Wood to the office of prosecuting attorney. The firm of Wood & Henderson became widely known as one of the strongest legal firms in the State.

Judge Wood was a striking character. He was possessed of undaunted physical courage, so generally found to attend upon a character of absolute moral integrity, demonstrating that "the honest man feareth nothing." He was thorough in all he undertook, superficial in nothing. His life and example were ever on the side of morality, and he cast his great influence always on the side of obedience to the law of the land, and right living on the part of the individual. What he preached, he also practiced. Indeed, he preached but little, except that his daily life was a moral sermon.

He was a man of many and true friendships, but of few intimacies. Self-reliant, conscious of his power, trusting fully his own judgment, he never sought or required advice, but reached his own conclusions which he was ever well able to defend.

He was a profound lawyer, and brought to his great legal research the support of intimate knowledge of the classics, and close acquaintance with the best intellects known to literature. He was thorough

in the preparation of his cases, careful and accurate in their presentation, and paid strict attention to all details. It followed that he was a successful advocate in a marked degree. And, while this is true, still he was at his best as a trial judge. There he approached the ideal. Dignified, courteous and kind in his relations with lawyers, litigants and officials, he possessed that rare but indefinable power termed "executive ability." Without display or bluster, or unseemly assertion of authority, the business of his court moved smoothly and with the dignity and decorum becoming to a court of justice. His bearing commanded the respect that was due him, and it was always accorded without having to be required. Not once did he have a serious conflict with any member of the bar, or have to resort to the power of his position to require the outward forms of respect that were his due. He was patient in hearing argument, and never seemed disposed to exploit or exhibit his superior legal learning over the advocate, but, having once listened, his decisions followed promptly and clearly.

As a man, he was uncompromising with evil, and unyielding in his demand for obedience to, and respect for, the law. His convictions were firm and always clearly comprehended, and his attitude toward all public issues never a matter of uncertainty to any one. When associates wearied or were diverted to other lines, he parted from them regretfully, but never was his own course influenced thereby or deflected from the pathway he had chosen. He was the very best of citizens, and this community will be better during untold time, for his example and influence.

He was loyal in every respect, dependable in all things. He was a high-minded, just, noble gentleman.

With the confidence flowing from the knowledge of having done a man's part in the Almighty's complete plans, he faced judgment unafraid.

*Be It Resolved by the Garland County Bar Association:*

That in the death of James B. Wood, our Association has lost one of its most honored members; the Bar has been deprived of one of its worthiest and ablest associates; the community of its leading and most useful citizen.

*Resolved, further:*

That we tender to the members of his family our respectful sympathy, and we take comfort in their ability to derive a joy, e'en though it be a melancholy one, in contemplating the life's work of their honored husband and father.

*Resolved, further:*

That the Secretary of this Association deliver a copy of these resolutions to the family of our late friend and brother, and that suit-

able committees be appointed to present same to the several courts of which he was such a worthy and conspicuous member.

W. H. MARTIN,
A. CURL,
ELIAS W. RECTOR,
Z. W. LAKEMAN,
*Committee.*

Adopted by the Garland County Bar Association, Monday, June 9, 1913.

CHAS. C. SPARKS,
*Secretary.*

## II.

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Calhoun County Bank *v.* Sellers; appeal from Calhoun Chancery Court; C. L. Poole, Special Chancellor; reversed April 28, 1913, *per* Wood, J.

Rottner *v.* State; appeal from Yell Circuit Court, Danville District; Hugh Basham, Judge; affirmed May 5, 1913, *per* Wood, J.

Leslie *v.* O'Neill; appeal from Garland Chancery Court; Jethro P. Henderson, Chancellor; affirmed May 5, 1913; *per* Hart, J.

Cazort *v.* Fort Smith and Van Buren District; appeal from Crawford Circuit Court; Jeptha H. Evans, Judge; affirmed May 19, 1913; *per* McCulloch, C. J.

Dalton *v.* Gregory; appeal from Randolph Circuit Court; John W. Meeks, Judge; affirmed June 23, 1913; *per* McCulloch, C. J.

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## CASES DISPOSED OF ON MOTION.

Chicago, Rock Island & Pacific Railway Company *v.* Mrs. Mollie Taylor; Lonoke Circuit Court; Eugene Lankford, Judge; affirmed by consent May 5, 1913; *per curiam.*

W. K. Bass *v.* The State of Arkansas; Boone Circuit Court; George W. Reed, Judge; reversed and dismissed on confession of error by the Attorney General May 5, 1913; *per curiam.*

W. D. Younger *et al.*, Executors of the Estate of Sam Younger, Deceased, *v.* J. P. Falconer, Administrator of the Estate of J. T. Younger, Deceased; Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; reversed and remanded on appellee's confession of error May 19, 1913; *per curiam.*

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The State of Arkansas *v.* Henry Hitcher; Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; appeal dismissed on the Attorney General's motion May 19, 1913; *per curiam.*

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R. R. Prioleau *et al. v.* R. L. Thompson *et al.*, as Board of Election Commissioners of Pulaski County; Pulaski Circuit Court, Second Division; Guy Fulk, Judge; appeal dismissed June 16, 1913, for reason stated above; *per curiam.*

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