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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

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

Associate Justice Kirby took no part in the decisions of the cases reported in this volume prior to June 1, 1914.

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

WEIGEL *v.* MCCLOSKEY.

Opinion delivered April 27, 1914.

1. ACTIONS—MISJOINDER—PREJUDICE.—It is error to require plaintiff to elect to proceed upon one of two causes of action set out in his complaint, when, if the two actions had been brought separately, they could have been consolidated under Act No. 339, Acts 1905, p 798. (Page 6.)
2. DAMAGES—BASIS OF FINDING—EVIDENCE.—While it is better practice to tell the jury that their finding as to damages must be based on the evidence in the case, yet when it is plain from the charge of the court as a whole that the jury were told that their findings must be based on the evidence in the case, the jury could not be misled nor feel authorized to make a finding that was not based upon the evidence, because some separate or particular instruction omitted this precaution. (Page 6.)
3. PARDON—WHEN EFFECTIVE.—A pardon is effective upon delivery and acceptance. (Page 7.)
4. COUNTY CONVICTS—PARDON—DUTY TO RELEASE—SCOPE OF AUTHORITY OF WARDEN.—Where county convicts were leased by the county to defendant, and defendant placed them in charge of a warden, when a pardon for a certain prisoner is presented to the warden, it is within the scope of his authority to have examined the records and see if there were other commitments under which defendant was held, or to have discharged the defendant at once. (Page 7.)
5. PARDON—RIGHT OF PRISONER TO FREEDOM—FALSE IMPRISONMENT.—A prisoner who has been pardoned by the Governor is immediately entitled to his freedom, and when the same was denied a prisoner by the lessee of county convicts, the prisoner whose liberty is so restrained may maintain an action for false imprisonment against the said lessee. (Page 8.)
6. COUNTY CONVICTS—LEASED CONVICTS—MISTREATMENT.—A county convict who has been leased to appellant may recover damages from the latter for causing a "spur" to be fixed to his leg, and causing physical injury to the convict thereby. (Page 8.)

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

STATEMENT BY THE COURT.

C. E. McCloskey instituted this action against E. N. Weigel to recover damages for false imprisonment. His complaint also alleges that during the time of his imprisonment he was unlawfully and wrongfully forced to wear upon his leg an iron shackle, commonly known as a "spur," which was very painful, and caused a sore on his leg. The facts are as follows:

The plaintiff, McCloskey, was convicted before a justice of the peace in Pulaski County of two offenses, his fine being fixed in one case at the sum of one dollar, and in the other in the sum of fifty dollars. The defendant, Weigel, at the time had leased the county convicts from the county court, and was working them under his lease. Under the rules adopted by the county court for working county prisoners, the contractor had the right to put fetters, or shackles, upon any prisoner who improperly refused to work or attempted to escape. One of the rules provided that the contractor should use all reasonable means to prevent a convict from escaping. Another one provided that a contractor should appoint a warden and deputy warden, but that before said appointment became effective such appointment must be approved by the county court. After his conviction on the 10th day of June, 1908, the plaintiff was turned over to the defendant to work out his fine and costs. W. H. Rankin applied to the Governor for a pardon for the plaintiff, and the pardon was issued on the 24th day of June, 1908, and delivered to Rankin. Rankin carried the pardon out to the place where the plaintiff, with the other county prisoners, was worked by the defendant. The defendant was not present, and Rankin delivered the pardon to John Harden, who was the warden in charge of the convicts. Harden had been appointed by the defendant, and his appointment had been approved by the county court. The warden refused to turn the

plaintiff loose, saying that he had no authority to do so and that the pardon would have to be delivered to the defendant. Rankin testifies that he left the pardon with the warden and attempted to get in communication with the defendant over the telephone, but was unable to do so. On the other hand, the warden denied that Rankin left the pardon with him. The defendant lived about three miles from the camp where the convicts were worked and kept his books at his residence. He states that when he returned home that evening his wife delivered the pardon to him; that he immediately examined his books to see if there were any commitments against the plaintiff other than those named in the pardon, and that when he found there were not he immediately sent a messenger with the pardon to the camp with instructions to the warden to liberate the plaintiff. The pardon, according to the testimony of Rankin, was delivered to the warden at about 2 o'clock in the afternoon. The warden continued to work the plaintiff until about 4:30 o'clock, at which time the shackles were ordered to be cut off his leg, and this was done. The plaintiff, however, was detained in custody until 7 or 8 o'clock in the evening, this being the time that the warden received instructions from the defendant to liberate the plaintiff. The plaintiff testified that he made no effort whatever to escape while he was a prisoner in charge of the defendant, and that the iron spur was placed upon him the first day he was delivered into the custody of the defendant and remained there, both day and night, until he was liberated. He says that he suffered pain on account of the spur being on his leg, and that it caused a sore place to form there. The defendant testified that he was informed by the officers, before the plaintiff was delivered to him, that the plaintiff had a bad reputation and was likely to escape unless precautions were taken to prevent him; that in order to prevent his escape he placed the iron spur on his leg.

Other facts will be referred to in the opinion. The jury returned a verdict for the plaintiff for one thousand dollars for false imprisonment and a separate verdict for one hundred dollars for placing and keeping the iron spur on the plaintiff's leg. Judgment was rendered upon the verdict in each cause of action, and the defendant has appealed.

James A. Comer, for appellant.

1. The court's instruction on the measure of damages errs in directing the jury to assess the damages at such sum as "you *think,* in your *judgment,* will compensate him for the injuries he has sustained," thereby permitting them to assess the amount, not from the evidence adduced, but from their own judgment, independent of the facts proved. 87 Ark. 126.

2. Appellant could properly be held liable for detention of appellee only after he received the pardon. The time intervening between the reception of the pardon and appellee's release was less than one hour, and there is no proof of malice or oppression of appellee during that time. The verdict, it is patent, was excessive.

3. It is provided by rule 5, adopted by the county prison board, that "the contractor shall use all reasonable means to prevent a convict from escaping, and for the purpose of recapturing him." The facts in this case show that the placing of the iron spur on the leg of the plaintiff was a reasonable precaution adopted under the above rule to prevent his escape. 42 Minn. 129; 23 Fed. 987. The cause of action stated in the second count of the complaint can not be maintained against appellant alone, but should have been brought upon the bond of the contractor. Kirby's Dig., § § 1081, 1084.

The question whether the spur was wrongfully placed on appellee, was not a question of fact for the jury, but one of law for the determination of the court. 20 Ark. 590; 67 Ark. 533; 75 Ark. 58; 115 Mich. 50; 80 N. Y. Supp. 991.

John F. Clifford, for appellee.

1. On the first count, the only defense attempted was justification. Weigel was responsible, not on account of any evil motive or negligence. He held appellee, or ordered him to be held, at his peril. Hale on Torts (1896 ed.), Hornbook Series, 244; 19 Cyc. 319; 33 Ark. 320. The evidence shows that appellee was held because there might have been other charges or warrants against him. If there were none, appellant, acting at his peril, was liable. 71 Ark. 241, and authorities cited; 2 Am. & Eng. Enc. of L., 884-889; 3 Cyc. 885-889; 19 Cyc. 319; Hale on Torts, 248. The imprisonment after the pardon being admitted, and appellants' attempted justification falling short of a real defense, a peremptory instruction was proper. The reasonableness of the detention was a question of law for the court. 12 Am. & Eng. Enc. of L. 748.

2. The answer raised no affirmative defense to the second count of the complaint.

The rule 5 of the prison board, relied on by appellant, must be considered in connection with the other rules adopted by that board. In view of the severe provisions of rule 3, somewhat modified by rule 4, a proper construction of the rules taken together appears to be that actual punishment is contemplated when *deserved,* and that unruly prisoners shall be fettered or whipped only when they refuse to work or *attempt to escape.* Rule 5 is a general rule for the government and safety of the whole convict camp, and the giving of express authority in rule 3 to fetter and whip, and the use of only the words, "any reasonable means," to prevent escape, etc., in rule 5, indicates an intention to withhold from the contractor the right to use shackles under rule 5. Black on Interpretation of Laws, 146; 26 Am. & Eng. Enc. of L. 604; 20 Ark. 420.

Under the circumstances of the case, it was a question for the jury whether or not the shackling of appellee was reasonable. 44 Ark. 130.

3. The objection to the court's instruction on the measure of damages was one of form, which should have been raised by specific objection. 70 Ark. 563; 93 Ark. 209; 65 Ark. 255; 98 Ark. 92.

HART, J., (after stating the facts). Counsel for defendant made a motion to compel plaintiff to elect upon which cause of action he would proceed to trial, and assigns as error the action of the court in refusing to require plaintiff to make such election. An act of the General Assembly of 1905 provides, in effect, that when causes of a like nature, or relative to the same question, are pending in any circuit court in this State, the court may consolidate said causes when it appears reasonable to do so. Acts of 1905, page 798. If separate actions had been brought, we think the court could have consolidated them under this statute. Therefore, no prejudice could have resulted to the defendant by the court refusing to require plaintiff to elect upon which cause of action he would proceed. See *Mahoney* v. *Roberts,* 86 Ark. 130; *Ashford* v. *Richardson,* 88 Ark. 124; *Western Union Tel. Co.* v. *Shofner,* 87 Ark. 303.

It is next contended by counsel for defendant that the court erred in giving instructions on the measure of damages. He claims that the error consists in the court not telling the jury, in specific terms, that their finding as to the amount of damages must be based on the evidence, and insists that the instructions left it to the jury to find for the plaintiff in any amount that, in their judgment, should be proper. We have condemned instructions similar to the one now under consideration in several cases. See *St. Louis, I. M. & S. Ry. Co.* v. *Steed,* 105 Ark. 205; *St. Louis, I. M. & S. Ry. Co.* v. *Dallas,* 93 Ark. 209. However, we have never held that such an instruction is reversible error. In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Hydrick,* 109 Ark. 231, 160 S. W. 196, the court said:

"While it is always better form, and the better practice, for the court to tell the jury that its findings on every issue of fact in the case must be based upon the

evidence, yet where it is plain from the charge of the court, taken as a whole, that the jury were told that their findings must be based upon the evidence, the jury could not be misled nor feel authorized to make a finding that was not based upon the evidence because some separate or particular instruction omitted this precaution. The jury were sworn, in the first instance, to try the case and a true verdict render according to the law and evidence. Kirby's Digest, § 4530. That being true, it is not likely that any man of sufficient intelligence to be a competent juror would feel authorized to wander beyond the evidence to find matters upon which to predicate his findings in the case. The conscientious juror would necessarily feel restrained by his oath to base his findings upon the evidence."

It is also insisted by counsel for defendant that the verdict of the jury on the cause of action for false imprisonment is excessive; and in this contention we think he is correct. A pardon is effective upon delivery and acceptance. See *Redd* v. *State,* 65 Ark. 485; *Hunt,* Ex parte, 10 Ark. 284. The plaintiff was lawfully in the custody of the defendant as lessee of the county prisoners under a contract made by him with the county court. While this is true, when the time for which a convict has been sentenced has expired, or when he has been pardoned by the Governor, he is in law no longer a convict, and can not be held as such. The defendant himself did not remain with the convicts and have direct charge of them. He delegated that authority to a warden who was appointed by him with the approval of the county court. It was the duty of Rankin, who procured the pardon for the plaintiff, to deliver the pardon first to the warden in order that he might examine it and see that it was issued by the Governor and ascertain that it was what it purported to be. It was then the duty of the warden to cease working the plaintiff. It is insisted by counsel for defendant that he should have had a reasonable time to have examined his records in order to ascertain whether or not the plaintiff had been pardoned

for all offenses for which commitments had been delivered to him. This is true; but the warden refused to release the plaintiff solely on the ground that he did not have authority to do so. He told the person who had the pardon that the defendant alone reserved the right to discharge the plaintiff. The defendant having delegated to the warden the authority to have charge of the persons worked by him, it was within the scope of the authority of the warden to have examined the records himself and have determined whether there were other commitments under which the plaintiff might be held. It was his duty to have made such an examination, or caused it to have been made at once, or to have discharged the prisoner. A prisoner who has been pardoned by the Governor is entitled to his freedom, and to deprive him of it is unlawful. Therefore, the plaintiff was entitled to a judgment for some amount. As above stated, he was in legal custody of the defendant, and he had suffered all the humiliation it was possible for him to suffer solely on account of being a prisoner. The undisputed evidence shows that the illegal detention of the plaintiff by the defendant was not wilful. No indignities were offered to the plaintiff by the defendant, or his servants, after the pardon had been presented to the warden. It is true he was required to work for about two hours and a half thereafter; but this was done under a misapprehension of the law on the part of the warden who had the legal custody of the plaintiff. Under these circumstances, we think that a judgment for $25 would have been sufficient compensation for the jury to have awarded, and a judgment for that amount will be affirmed.

We find no error in the record on the cause of action for compelling the plaintiff to wear a spur, and the judgment on that count will be affirmed.

WESTERN UNION TELEGRAPH COMPANY v. FLANNAGAN.

Opinion delivered April 27, 1914.

1. TELEGRAPH AND TELEPHONE COMPANIES—COMMON CARRIERS.—Telegraph and telephone companies are common carriers of news. (Page 12.)
2. TELEGRAPH COMPANIES—CONNECTING COMPANIES—ACCEPTANCE OF MESSAGE.—A telegraph company which accepts and undertakes to deliver a message received from a connecting company, is liable to the sender of the message for a breach of the contract between the parties. (Page 12.)
3. TELEGRAPH COMPANIES—RECOVERY FOR MENTAL ANGUISH—CONFLICT OF LAWS.—Where a telegraphic message was sent from this State where damages for mental anguish are recoverable, to be delivered in another State, where such damages are not recoverable, and the telegraph company duly transmitted the message, but negligently failed to deliver it to the addressee, either the addrssee or the sender may, in an action in this State, recover such damages for mental anguish as they may establish. (Page 12.)
4. TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—PROBABILITY OF DAMAGE.—A telegraph message addressed to a male person, and signed by a female, and reading, "Leave here in the morning; arrive Kansas City Saturday. Meet me. (Signed) Maude," *held*, sufficient to put defendant company on notice that damages would probably follow the failure of the company to deliver the same to the addressee. (Page 13.)
5. TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—MENTAL ANGUISH.—Mental suffering, to warrant a recovery, must be real, and there can be no recovery for imaginary situations or conditions of anxiety caused thereby; it must be a higher degree of suffering than arises simply from annoyance, disappointment, vexation or regret. (Page 14.)
6. TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—MENTAL ANGUISH—LIABILITY.—Plaintiff sent a message to her husband in a distant city that she would arrive, and to meet her at a certain time. The company negligently failed to deliver the message. *Held*, under the facts, plaintiff was entitled to a recovery for mental anguish suffered. (Page 14.)

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

STATEMENT BY THE COURT.

Mrs. Maude Flannagan instituted this action against the Western Union Telegraph Company to recover dam-

ages for mental anguish on account of the negligent failure of the latter to deliver a telegram sent by her. The facts are as follows:

The plaintiff delivered to the telegraph operator of the Memphis, Dallas & Gulf Railway Company, which operates a telegraph line from Murfreesboro, Arkansas, to Ashdown, Arkansas, the following message:

"Murfreesboro, Ark., April 17, 1913.

"T. H. Flannagan, Care Western Union Telegraph Company, Kansas City, Mo.:

"Leave here in the morning. Arrive Kansas City Saturday morning. Meet me.

(Signed) "Maude."

The operator at once transmitted the message to Ashdown, and the operator there forwarded the message at once to Kansas City; but, according to the testimony of the plaintiff, it was never delivered to her husband to whom it was addressed. On the other hand, evidence was introduced by the defendant tending to show that it delivered the message at the address to which it had been directed by the husband of plaintiff. The plaintiff left Murfreesboro on Friday morning and arrived at Kansas City on Saturday morning at 7:30 o'clock, the 19th inst. T. H. Flannagan not having received the telegram, did not meet her at the station as requested. The plaintiff waited around the station for him until about 9 o'clock in the morning, and then went up to the office of the defendant at the station to inquire about the delivery of the message. She was informed that no such message had been received by the defendant. She was not acquainted with any one in Kansas City, but had the address of the company for which her husband was working. She went to its office and was informed by the manager that a man of that name was working there, and that he thought he was staying at Ninth and Cherry Streets in Kansas City. Plaintiff went and inquired in that neighborhood for her husband, but failed to find him. She then returned to his employer's office, and the manager asked her if she had any money with which to

go to a hotel. She replied that she had not, and he then provided her a place at which to stay until her husband returned. She went to the place provided, and stayed there until the following Monday, when her husband returned to the city. Plaintiff at the time was in a delicate condition, and gave birth to a child on July 28 following. She continued her efforts to locate her husband from the time she arrived at Kansas City until he came to her on the following Monday morning.

Other evidence will be referred to in the opinion. The jury returned a verdict for plaintiff in the sum of one thousand dollars, and the defendant has appealed.

Geo. H. Fearons, W. C. Rodgers and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. There was nothing to put defendant on notice of mental anguish. 90 Ark. 268; 79 *Id.* 33; 103 *Id.* 163.

2. In Missouri there can be no recovery for mental anguish. If there was any negligence it was in Missouri. 93 Ark. 415; 77 *Id.* 531; 79 *Id.* 448; 92 *Id.* 219; 74 *Id.* 9.

3. There is no evidence of mental anguish. 96 Ark. 218.

4. The verdict is excessive. 85 Ark. 263.

W. T. Kidd and *W. P. Feazell,* for appellee.

1. The wording of the message was sufficient to put defendant on notice. 29 Cyc. 495-2; 136 N. C. 489; 103 Am. St. 955; 56 S. W. 237; 70 Am. St. 105.

2. A recovery can be had when the contract was made in this State, even if none can be had in the State to which the message was sent. 156 S. W. 836; 92 Ark. 122; 93 *Id.* 515; 94 *Id.* 86; 137 Am. St. 914.

3. The verdict is not excessive. 84 Ark. 457; 82 *Id.* 526; 100 *Id.* 1.

HART, J., (after stating the facts). It is insisted by counsel for defendant that if the defendant was guilty of any negligence it was in the State of Missouri, and that in that State there can be no recovery for mental anguish for the negligent failure to deliver a telegram. They insist that there was no privity of contract between

the defendant and plaintiff, and that it is not liable in this action.

Telegraph and telephone companies are instruments of commerce, and are common carriers of news. *Southwestern Telegraph & Telephone Co.* v. *Danaher,* 102 Ark. 547. The telegram in question was delivered by the plaintiff for transmission to the agent of the Memphis, Dallas & Gulf Railroad Company, which operated a telegraph line from Murfreesboro, Arkansas, to Ashdown, Arkansas. The plaintiff did not have the money at the time to pay for the message, but the agent received it and agreed to send it, with the promise that the money should be paid on the following day. The price of the message was paid to the operator on the next day, as had been agreed upon. The operator transmitted the message from Murfreesboro to Ashdown, and the agent of the railway company at Ashdown, who was also the agent of the defendant company, received the message and transmitted it over the wires of the defendant company to Kansas City. The defendant, therefore, accepted the message under the contract made with the Memphis, Dallas & Gulf Railroad Company at Murfreesboro, and undertook to transmit it as a connecting carrier to the point of destination. Therefore, it accepted the benefits of the contract made with the initial carrier and could avail itself of any of the provisions contained in the contract, and was also liable for a breach thereof.

In the case of the *Western Union Telegraph Company* v. *Griffin,* 92 Ark. 219, the court held:

"Where a telegraphic message was sent from this State, where damages for mental anguish are recoverable, to be delivered in another State, where such damages are not recoverable, and the telegraph company duly transmitted the message, but negligently failed to deliver it to the addressee, either the sender or the addressee may, in an action in this State, recover such damages for mental anguish as they may establish."

It is next contended by counsel for defendant that there was nothing in the message that would put the de-

fendant on notice that appellee might suffer mental anguish if it was not delivered. The message on its face carried notice that its sender was a female, and that it was addressed to a male person. The message also suggested that a near relationship existed between the parties; that there was a good reason for plaintiff being met at the station, and that damages might naturally and reasonably follow as a result of its negligent failure to deliver the message. See *Western Union Telegraph Company* v. *Archie,* 92 Ark. 59.

It is next contended by counsel for defendant that there can be no recovery for mental anguish under the facts of this case. Under our statute damages may be recovered for mental anguish suffered in consequence of the negligence of a telegraph company. Messages, the failure to deliver which gives rise to mental anguish, are usually those which relate to sickness, death or funeral of a near relative. In some cases, however, a recovery has been allowed where no question of sickness or death was involved. We have uniformly held, however, that the mental suffering must be real, and that there can be no recovery for imaginary situations or conditions of anxiety caused thereby; in other words, that mental anguish indicates a higher degree of suffering than arises simply from annoyance, disappointment, vexation, or regret. In the case of the *Western Union Telegraph Company* v. *Hanley,* 85 Ark. 263, a recovery was allowed. In that case the plaintiff arrived at a deserted railway station at midnight. The public hack was full, so that she could not secure a seat therein, and she had to remain at the depot about three-quarters of an hour before she could proceed to her destination. In the subsequent case of *Western Union Telegraph Company* v. *Archie, supra,* we held that there could be no recovery, and undertook to distinguish between the facts in that case and those in the Hanley case. We said that in the Hanley case the mental anguish of the plaintiff consisted in what might have happened to a defenseless woman in the middle of the night in a strange place; that the very fact that she

arrived at that time of night, unattended, and with no one to meet her, might have caused her to be insulted or to suffer a worse injury. In the Archie case the plaintiff, who was also a woman, only remained at the station ten or fifteen minutes. She met a friend within two or three blocks after she left the station, and was immediately conducted to the home of a relative where she was going to visit. She arrived in the daytime, and there was nothing in her situation to cause her mental suffering. At most, she was only subject to annoyance or disappointment at not having been met by her relatives. In the instant case it is true that the plaintiff arrived at the station in the daytime, but she was unattended and unacquainted with any one at that place, except her husband. She was unaccustomed to the ways of a large city, and had no money whatever. She had never been in the city before, and knew no one there except her husband. She waited for him at the station for two hours. Then she went to the address of his employers, and the manager informed her that a man named Flannagan worked for the company, and that he thought he was staying at a place at Ninth and Cherry Streets. He did not offer her any further assistance or even ask her if she needed any. The plaintiff was too embarrassed to ask any further aid; but went to the address given in search of her husband. She failed to find him in that locality and returned to the office. While trying to find her husband, her helplessness and need of protection would doubtless be apparent to any designing person. The fact that she was alone, a stranger and unaccustomed to the ways of a large city, and in search of her husband placed her in a situation where it was not unlikely that she might be subject to insult and perhaps injury. The danger that might result to her from her situation and condition, under the circumstances was not wholly imaginary but her mental suffering for the time was real.

We think, however, as contended by counsel for defendant, that the damages recovered are excessive. When she returned to the office where her husband

worked, and it came time to close the office for the day, the manager provided a place for her to stay until her husband's return and sent her there. Thereafter she suffered no mental anguish within the legal meaning of the term. Under all the facts and circumstances adduced in evidence, we think the sum of one hundred dollars would have been sufficient compensation for mental anguish suffered by the plaintiff, and a judgment for that amount will be affirmed.

BRICKEY v. CONTINENTAL GIN COMPANY.

Opinion delivered April 27, 1914.

1. EVIDENCE—CONTRACTS—SUBSEQUENT PAROL AGREEMENT.—No rule of evidence is violated by allowing proof of a subsequent parol agreement changing the terms of a prior written contract. (Page 19.)
2. ACTIONS—PREMATURENESS—ABATEMENT.—Where A. and B. entered into an agreement whereby B. was to insure certain premises, and in the event of his failure to do so, A. was given a right of action against him, *held*, an action by A. against B. under the contract would abate, if a subsequent contract between the parties provided that A. maintain the said insurance. (Page 19.)
3. CONTRACTS—ORAL CONTRACTS—STATUTE OF FRAUDS.—An oral contract to place fire insurance on a building and maintain the same for a period of over a year, is an agreement to take out insurance immediately, and therefore not within the statute of frauds. (Page 19.)

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

STATEMENT BY THE COURT.

Appellee was the plaintiff below, and alleged in its complaint, which was filed on October 10, 1913, that it had sold the defendants a gin outfit for the sum of $1,572, of which $524.04 had been paid in cash; the balance to be paid according to the terms of certain notes, made a part of the contract of sale, due and payable November 15, 1913, and November 15, 1914, respectively; that the defendants agreed to insure the property in ten days after its arrival in some good and reliable insurance

company in the sum of $1,000, and to continue the insurance without cost to the plaintiff, as its interest might appear. That the contract of sale provided that upon failure to pay any of the said notes upon maturity, or the failure to keep any of the terms of the agreement contained in the contract, that all the deferred payments should at once become due and payable. It was alleged that the defendants failed to insure said property within ten days after its arrival as provided, and it was thereafter totally destroyed by fire, and that by reason of the failure to insure said property said notes had become due and judgment was asked for the amount of them.

The contract contained the following provisions:

"If the undersigned fails to pay any of the said notes when due, or fails to make any payments, as herein required, or fails to keep any of the terms of the agreement herein contained, then all of said notes or deferred payments shall at once become due and payable. And the undersigned agrees to pay all cost and damages sustained, and such cost including an attorney's fee." And also the following further provision: "On failure to pay the taxes or to keep such property insured as provided herein, then you, at your option, may pay such taxes and insure the property, and charge the same to the undersigned, who agrees to pay the same with 8 per cent interest per annum."

The defendants answered, admitting the execution of the contract and of the notes, but alleged that subsequent to the execution of the notes and contract there was entered into an oral agreement by which the plaintiff agreed to carry the insurance upon the property and thereby waived this provision of the contract and released the defendants therefrom, and that because of said agreement the notes sued on had not matured and the suit was prematurely brought. They also filed a counter-claim arising out of said agreement upon the part of the plaintiff to insure the property and its failure so to do, and judgment was asked in the sum of $1,000 because of this failure. The plaintiff filed a demurrer to

so much of the defendant's answer as set up a subsequent oral agreement. A reply to the counter-claim was also filed, in which the subsequent agreement on the part of the plaintiff to insure the property was denied, and it was alleged that if any of its agents had made such a contract, they were without authority and the agreement was void on that account; and moreover it alleged the subsequent agreement was void as having been made without consideration, and that the original contract having been reduced to writing, as required by the statute of frauds, it could not be subsequently altered or changed by parol, and that if any such contract had been made, it was void under the statute of frauds, which was specially pleaded.

There was no motion to make the counter-claim more definite or certain, and upon the hearing the court sustained the demurrer and the defendants stood upon their answer and counter-claim, and excepted to the action of the court in dismissing them, and have duly appealed to this court.

W. P. Strait and *Mehaffy, Reid & Mehaffy,* for appellant.

1. The demurrer was properly sustained. Proof of a parol agreement violated no rule of evidence. 27 Ark. 310; Wigmore on Evidence, Vol. 4, § 2441; Elliott on Evidence, Vol. 1, § 581; 85 Ark. 605.

2. The agreement pleaded in no way varies or contradicts the terms of the written contract. Any collateral "parol agreement may be proved," provided it does not change the terms of the written contract. Am. & Eng. Enc. Law, Vol 21, pp. 1095-6; 27 Ark. 510. Evidence offered to explain how a contract is to be carried out is admissible. 1 Utah 305; 67 S. W. 303; 58 N. E. 133; 61 N. E. 1129; 111 Ill. App. 460; 62 Atl. 797.

3. It is not sufficient to simply allege that the contract or agreement is void, but the fact must be set out. Enc. of Plead. & Prac., Vol. 9, § 714, and note.

4. The provisions of the contract which come within the statute of frauds have been performed. 71 Ark. 326.

The remainder of the contract can be enforced. 91 Ark. 149; 71 *Id.* 326.

5. Contracts of insurance are not within the statute of frauds, and if otherwise valid may be entered into by oral agreement. 63 Ark. 204; 67 *Id.* 439. The contract was with the vendor and could be waived. 53 Ark. 223; 52 *Id.* 11.

J. F. Sellers, for appellee.

1. The subsequent oral agreement is void. 54 Ark. 525; 24 *Id.* 269; 32 *Id.* 327; 50 *Id.* 261. The answer stated a mere conclusion. 64 Ark. 46; 43 *Id.* 296; 31 *Id.* 728.

2. It was void for uncertainty. 161 S. W. 168.

3. It was against the statute of frauds and void. Kirby's Dig., § 3654, clause 6; 46 Ark. 84.

4. The demurrer is proper where a contract is required by the statute to be in writing and the pleading shows it to be oral. 96 S. W. 716; 45 N. Y. S. 997; 86 Pac. 425; 9 So. 164; 56 N. W. 1019; 10 So. 757; 175 Fed. 756; 31 Ark. 728; 118 S. W. 298.

5. The contract could only be rescinded in writing. 4 Ark. 286; 9 *Id.* 488; 12 *Id.* 148; 85 Fed. 193; 69 N. E. 269; 61 S. W. 644; 70 S. W. 1094.

SMITH, J., (after stating the facts). This suit was brought upon the theory that the notes had matured and become payable because of appellants' failure to insure the property, as required by the contract of sale.

Appellants alleged that the suit had been prematurely brought because of the subsequent agreement, by the terms of which appellee agreed to insure the property. The effect of such agreement, if valid, would be to abate the suit on the notes for the reason that it was prematurely brought. Appellees' failure to insure the property would not make the notes due and payable, before they would otherwise become due, if they had been relieved of that obligation by a subsequent parol agreement, by which the insurance should be taken out and paid for by the gin company.

We think the court erred in sustaining the demurrer to the answer. In the case of *Von Berg* v. *Goodman,* 85

Ark. 605, it was said: "No rule is violated by allowing proof of a subsequent parol agreement changing the terms of a prior written contract." The original contract gave appellee the right to insure the property in the event the appellants failed to do so, and to charge the costs thereof to appellants, together with interest at the rate of 8 per cent per annum.

The answer presents a question of fact, and if it be true that this subsequent agreement was entered into, then this suit must abate as having been prematurely brought. *Rodgers* v. *Wise,* 106 Ark. 310; *Hickey* v. *Thompson,* 52 Ark. 234.

Appellee insists that the parol agreement is void under the statute of frauds because the contract of sale was made April 25, 1913, and the last note would not fall due until November 15, 1914, and that the suit itself was begun more than a year before the maturity of the last note, and that therefore the period for which the insurance was to be carried was more than one year. But while the contract of insurance would have continued for more than a year, the agreement to take out the insurance was one to be performed immediately, and the statute of frauds has no application. *Meyer* v. *Roberts,* 46 Ark. 80.

The judgment will therefore be reversed, and the cause remanded with directions to overrule the demurrer.

COST v. SHINAULT.

Opinion delivered April 27, 1914.

SCHOOLHOUSES—RIGHT OF DIRECTORS TO LEASE BUILDING FOR OTHER PURPOSES.—School directors who have the custody and control of public school buildings may permit the use of the building for other purposes, provided the use of the building as a schoolhouse is not in any way interfered with.

Appeal from Lawrence Chancery Court; *George T. Humphries,* Chancellor; affirmed.

W. A. Cunningham, for appellants.

1. School directors have no right to lease a school building for any other than school purposes. Kirby's Digest, § 7643; 35 Cyc. 943; 22 Am. Rep. 268; 32 So. 961; 37 Atl. 853; 73 Pac. 509; 69 Ark. 204.

2. Taxpayers may enjoin such lease for other purposes. 69 Ark. 204; 73 Pac. 509; 15 Kan. 259; 22 Am. Rep. 268.

W. E. Beloate, for appellees.

1. The directors had the power to make the lease. Kirby's Digest, § § 7613, 7614; 95 Ark. 26.

2. The contract was good for the district. 69 Ark. 204.

SMITH, J. Appellants were plaintiffs below, and alleged the following facts in their complaint: That they were citizens and taxpayers of School District No. 64 of Lawrence County, Arkansas, and interested in the educational interests of that district, and that appellees, who were defendants below, were school directors of said district, and as such had control of the schoolhouse and grounds, and that school was being taught in the school building, all of which was needed for the accommodation of the children attending school. That the said directors, notwithstanding that fact, are about to lease a part of said building to the Independent Order of Odd Fellows, as a lodge hall, and are about to cause said building to be remodeled without right or authority from the voters of said district, by causing the stairway to be moved and other changes to be made, and that if such changes are made it will entirely unfit the building for the use for which it was originally designed, and will make the same totally unfit for use as a school building.

That the use of said building as a lodge room is entirely inconsistent with its use as a school, and will interfere with the use and enjoyment of the other rooms of the building as school rooms, and will cause great and irreparable injury to the public and interfere with the educational interests of said district.

Plaintiffs prayed that said directors and all other persons be forever enjoined from changing or altering

said building in any way, without first submitting the plans thereof to the voters of said district, and that said directors be enjoined from leasing any part of the building to any person, for any purpose whatever, except for the conduct of schools.

The answer denied that the directors were about to make any change in the building, which was detrimental to it, or any contract or lease with reference to the use of the building, which would in any way interfere with the school being taught therein.

There was offered in evidence a contract dated December 27, 1911, made between representatives of the local Odd Fellows Lodge and the directors of the district, under the terms of which for the consideration of $50, to be paid on or before October 1, 1912, the directors rented to said lodge the upper part, or second story, of the school building for the use of said lodge, for a term of one year from January 1, 1912, with an option to renew said lease for a period of five years. The school district, however, reserved the right to use the building for school exhibitions and entertainments of its own.

At the annual school election in May, 1912, the directors caused the question of the ratification of this lease to be submitted to the electors voting at that election, and it was ratified by a vote of nineteen for, and one against.

It appears that the revenues of the district had been insufficient to provide the necessary funds for school purposes, and subscription lists had been circulated upon which private contributions were asked for school purposes. The evidence was conflicting as to the interference with the school on account of this lease, and of the damage to the building in adapting it to the uses of the Odd Fellows. But the court found the fact to be that no damage was occasioned to the said school building by reason of the changes made in the building by the Odd Fellows Lodge, and that no interference had resulted, or would result, to the school being taught, or that would thereafter be taught in said building, by reason of the upper story thereof being used as a lodge room, and that the

plaintiffs' complaint should be dismissed for want of equity.

We think this finding was not contrary to the preponderance of the evidence.

Appellants cite us to section 7643, of Kirby's Digest, which provides that directors may permit a private school to be taught in the district schoolhouse during such time as the said house is not occupied by a public school, unless they be otherwise directed by a majority of the legal voters of the district, and contend that the express granting of power for this purpose is in effect a denial of power to let it for any other purpose. But we do not agree with that contention. Section 7614, of Kirby's Digest, provides that the directors shall have charge of the school affairs and the school educational interests of their district, and shall have the care and custody of the schoolhouses and grounds and property of the district, and shall carefully preserve same, and gives to them authority to purchase or lease a schoolhouse site and to rent, purchase or build a schoolhouse with the funds of the district. And this section vests them with the duty and discretion of making the most advantageous arrangements possible, within the powers conferred, for the interest of the district. In the case of *Boyd* v. *Mitchell,* 69 Ark. 202, this section was construed to give school directors the right to prohibit the use of a school building for religious worship, where it was shown the building and contents were being injured, notwithstanding the land on which the school building was situated was conveyed to trustees for the purpose of religious worship, and was by them conveyed to the school directors for the same purpose, and the building was erected in part by subscriptions, with the understanding that it was to be so used under the charge of the directors. The court pretermitted any discussion of the power of the directors to make any arrangement to build a house to be used as a schoolhouse, and also as a church or as a place for re-

ligious worship, as it found, under the facts in that case, that the schoolhouse was, when built, to be under the control of the directors of the school district and the property of said district, and after so finding the facts to be, it was there said: "If it was to be under their control, in contemplation of law it was within their province, and was, perhaps, in strictness, their duty, not to allow it used for purposes other than school purposes. It seems that this is apparent. They have no power beyond those expressly granted or arising by necessary implication." The court found in that case that the schoolhouse was being damaged by the use which was being made of the building, and that the directors in the exercise of their power of control, and their duty to preserve the property of the district, had the right to prohibit the use of the schoolhouse for religious purposes, and that this was true notwithstanding the individual contributions which had been made, and which were used in erecting the schoolhouse, upon the understanding that the house was to be used as a schoolhouse and for religious worship.

So here, we should not hesitate to hold that the contract was void, if its performance interfered with the school. But the chancellor has expressly found that such was not the case. The electors of that district, who were the patrons of that school, voted for the ratification of the contract, and in their depositions made it appear, by a preponderance of the evidence, that the schools were not being interfered with nor the building damaged. Upon the contrary, the revenues of the district were being supplemented by the annual rental in the sum of $50, and under the circumstances we think the contract was not an unlawful one, nor void as being against public policy. Of course, the district could not divert its funds for the purpose of building or providing lodge rooms for any association or society, however benevolent its purposes might be, neither would the directors have the right to make any contract which authorized the use of the school property in a manner which interfered with the schools. But as has been stated, that was not done in this case.

It is a matter of common knowledge that many *quasi*-public uses are made of the rural school buildings of the State. We do not believe it was the purpose of the Legislature in granting express authority for private schools to be taught in the public school building, to exclude other uses where such uses do not interfere with the schools nor injure the buildings.

We think the decree of the chancellor is correct, and it is affirmed.

PEARSON v. QUINN.

Opinion delivered April 27, 1914.

APPEAL—WHERE COSTS IS ONLY ISSUE.—Where there is nothing to be determined on an appeal to the Supreme Court but the question of liability for the costs of the litigation, the appeal will be dismissed.

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

STATEMENT BY THE COURT.

This litigation involved a petition for the revocation of an order made by the county court of Miller County, which prohibited the sale of intoxicating liquors within three miles of the main public school building situated on block 34 of the city of Texarkana, Arkansas, as per the original plat of said city. The prayer of this petition was granted by the county court, and upon an appeal to the circuit court, where the case was heard *de novo*, numerous findings of fact were requested, but the court made findings, the effect of which was to declare that the petition for the repeal of the original prohibitory order contained a majority of the adult inhabitants residing within three miles of the said schoolhouse, and an order was entered annulling the prohibitory order; the judgment of the court below being rendered on the 21st day of December, 1912. Time was asked and given for the preparation of a bill of exceptions, and on the 18th day of March, 1913, the judge approved the bill of exceptions

prepared in this case. The motion for a new trial alleged various errors as grounds for granting a new trial, and these have been discussed in the briefs which have been filed.

The effect of the judgment of the court below was to make it lawful and permissible for the county judge of that county to grant license to sell intoxicating liquors if he saw proper to do so. But on February 7, 1913, the General Assembly, by an act approved on that date, and which is found at page 116 of the Acts of 1913, enacted a law which prohibited the sale or giving away of any intoxicating liquor within ten miles of the said public school building.

John A. Cook, for appellant.

James D. Head, for appellee.

SMITH, J., (after stating the facts). The decision of this court can not give any relief to the original petitioners, who are the appellees in this cause, insofar as authorizing the sale of liquors is concerned. Neither will appellants secure any relief, if the judgment of the court below should be reversed, except that they would thereby escape the payment of costs, and as no result can follow the decision of this cause, except the determination of the question of liability for the costs of the litigation, we will decline to entertain this appeal.

In the case of *Wilson* v. *Thompson,* 56 Ark. 110, in an opinion by Chief Justice COCKRILL, it was said: "The circuit court erred in its judgment. The order for prohibition was made in January, 1890, and has expired by limitation of law. The appeal is therefore fruitless. For that reason the practice would have justified a dismissal, without going into the question presented by the record. The costs only are now involved, but it was not for that reason that we have felt called upon to determine the cause, for costs are only an incident of litigation, and can not be made the object of appeal any more than of the litigation. But the cause was of practical importance, and the appellants prosecuted the appeal without delay.

Having gone into the subject of the litigation, and found that the judgment was erroneous, the appellants are entitled to their costs in both courts." It appears that notwithstanding the appellants were there adjudged to be entitled to their costs, the appeal was not entertained for the purpose of determining that question; but upon the contrary, it was expressly stated that the appeal would not be entertained and the question there involved was decided because of the public interest of the question involved. Here there is no question of public interest, because the action of the Legislature in passing the special act makes any action which the court may take unimportant to any litigant, except to determine liability for costs.

In the case of *Commissioners of Vance County* v. *Gill,* 126 N. C. 86, it was said: "The court will not go through the record merely to decide who would have won, if the cause of action had not died pending appeal; that it will not decide the merits of a controversy which no longer exists, merely to determine who shall pay the costs. *Herring* v. *Pugh,* 125 N. C. 437, and numerous cases there cited." In the case of *Herring* v. *Pugh,* cited in the last mentioned case, the court announced the conditions under which it would review and decide the merits of a cause which had been settled, or the subject-matter of which had been destroyed since the judgment below, and where the decision on appeal would merely decide who should pay the costs, and it was there said: "On the appeal in the main action, the judgment adverse to the defendant has been affirmed, and, the cause of action having thus been terminated, an adjudication upon the merits in this appeal would simply decide an abstract proposition of law, since judgment in this appeal could now have no possible effect but to determine who should pay the costs. The court has repeatedly held that this will not be done. *Wikel* v. *Commissioners,* 120 N. C. 451; *Russell* v. *Campbell,* 112 N. C. 404; *Pritchard* v. *Baxter,* 108 N. C. 129; *Hasty* v. *Funderburk,* 89 N. C. 93; *State* v. *Railroad,* 74 N. C. 287; *Futrell* v. *Deans,* 116 N. C. 38;

Elliott v. *Tyson, Ib.* 184. The exceptions to the general rule that this court will not decide upon a mere question of costs, are (1) where the very question at issue is the legality of a particular item of costs (*Elliott* v. *Tyson,* 117 N. C. 114; *Blount* v. *Simmons,* 120 N. C. 19), or, (2) the liability of a prosecutor for costs in a criminal action (*State* v. *Byrd,* 93 N. C. 624), or, (3) taking the case below, as properly decided, whether the costs of that court were adjudicated against the proper party. *State* v. *Horne,* 119 N. C. 853."

In the case of *Cobb* v. *Hammock,* 82 Ark. 584, the county court made an excessive allowance to the county judge on account of salary, and certain citizens appealed from that order. On appeal the circuit judge refused to set aside the allowance, for the reason that at the time the cause was heard in the circuit court a full quarter had expired, and the county judge was then entitled to all the salary for the quarter for which the salary had been allowed. Upon appeal to this court it was said that the judgment of the circuit court would not have been disturbed, had that court adjudged only the right to the salary; but it erroneously rendered judgment against the citizens for the costs of the appeal from the county court. That case was reversed because, as was there said, the citizens had the right to appeal to the circuit court from an erroneous order of the county court, and therefore the penalty of paying the costs of appeal should not have been visited upon them, because the error in the order appealed from had afterward become harmless.

In other words that was a case properly decided by the court below, but the costs were not adjudged against the proper party, and that action of the court fell within the third exception in the North Carolina case, cited above.

For the reasons stated the appeal will be dismissed.

PINSON v. COBB.

Opinion delivered May 4, 1914.

BILLS AND NOTES—INNOCENT PURCHASER FOR VALUE—BURDEN OF PROOF.—Where appellant brought suit on a note, and defendant plead that appellant was not a *bona fide* purchaser for value, the burden is on appellant to show himself a purchaser for a substantial consideration, and when once established, the burden is then on defendant to show that appellant had notice of defenses, and proof of a mere suspicion is not sufficient.

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

Gaughan & Sifford and *E. O. Mahoney,* for appellant.

1. Appellant paid a good and valid consideration for the note.

One who takes a negotiable instrument in payment of a past due obligation of the payee, is an innocent purchaser for value. 1 Daniels, Neg. Inst., 636; 13 Ark. 150.

2. Threats of a civil suit do not constitute coercion. 109 La. 13; 155 Mass. 233; 76 Minn. 257; 71 Fed. 58.

Terry, Downie & Streepey, for appellees.

1. Pinson was not an innocent purchaser for value before maturity.

2. The note was without consideration.

McCULLOCH, C. J. Appellant, W. J. Pinson, instituted this action in the circuit court of Pulaski County against appellees, J. D. Cobb, Ben Cox, W. N. Morris and G. W. Fair, to recover the amount of a promissory note in the sum of $5,000 executed by appellees to one S. R. Morgan and assigned to appellant by Morgan for a valuable consideration.

Appellees answered, admitted that they executed the note in suit, but alleged that Morgan obtained it from them by fraud and coercion, and that appellant was not an innocent purchaser without notice of the facts upon which the defense against payment is based. It is alleged in the answer that appellees and Morgan were stockholders in the People's Life Insurance Company of Little Rock, Morgan having subscribed for a certain amount of stock, and paid for the same in part by deliv-

ering eleven first mortgage bonds of the El Dorado Light & Power Company, of the par value of $1,000 each; that subsequently, Morgan conspired with one Craig, who was secretary of the company, and procured the redelivery to himself of said bonds; that the possession of said bonds in the hands of the officers of the company was necessary in order to make a proper showing to the Insurance Commissioner to obtain his certificate and, in order to secure from Morgan the return of said bonds to the proper officers of the insurance company, they (appellees) were compelled by Morgan to execute two notes, the one in suit for $5,000, and the other for $5,540, and that there was no valid consideration for the execution of the notes.

Appellees moved to transfer the cause to the chancery court, and the cause was transferred by consent of all parties.

We will not enter into a discussion of the question whether the allegations of the answer and the proof adduced in support thereof constituted a defense to the note while the same remained in the hands of the original holder, for we are of the opinion that the evidence establishes the fact that appellant Pinson was a *bona fide* holder for value without notice of any infirmity, and the defense can not be sustained as against his right to recover. Pinson and Morgan both resided in El Dorado, Arkansas, and appellees resided in and about Little Rock. Pinson and Morgan both testified that before the maturity of the note Morgan sold it to Pinson and received, in consideration of the sale, shares of stock in the American Bank & Trust Company of El Dorado, of the par value of $1,000, and stock in the El Dorado Light & Water Company, of the par value of $1,000, and the surrender of Morgan's note for $2,000 held by Pinson, leaving a balance of $1,000, which Pinson held as a credit in favor of Morgan and subsequently paid it down to a balance of $450 due at the time of the trial of this case. Pinson also testified that he had no notice of any defense to the note or any circumstances sufficient to put him upon inquiry.

In other words, he testified that he purchased the note in good faith and paid for it as above stated, and had no knowledge or intimation that the validity of the note would be contested. He stated that he was not acquainted with any of the makers of the note except Mr. Cox; but from what he had heard of Cox and from the statements of Morgan, he became satisfied that the note was good, and he purchased it.

There is no testimony whatever tending to show that Pinson's statements as to his purchase of the note and as to the good faith of the transaction are not true.

The only thing relied on to impeach the good faith of the transaction is that Pinson and Morgan lived in the same town, that they were distantly related by marriage, and had formerly been connected with a bank at the same time.

It is an undisputed fact in the case that Pinson paid a valuable consideration for the note, and that the consideration was substantially adequate. There is nothing whatever to dispute that fact, and it is supported by the uncontradicted testimony of Pinson and Morgan. The burden of proof was on appellant to establish that fact, but when once established the burden shifted to appellees to show that Pinson had notice of the facts which constituted the defense. Appellees have, as before stated, adduced no proof except a mere suspicion, from the relations between the parties, that Pinson might have known that there was something wrong with the note. The relations between Pinson and Morgan were not such as would warrant an inference of such intimacy as would throw a cloud upon transactions between them.

We need not go so far as to say that the testimony was not sufficient to have warranted a jury in a trial at law in finding in favor of appellees on that issue, but this being a chancery case, and is heard here *de novo*, we are of the opinion that the chancellor's finding is not supported by the preponderance of the testimony. The decree is therefore reversed and judgment will be entered here in appellant's favor for the amount of the note, interest and protest fees as set forth in the complaint.

THE ALUMINUM COOKING UTENSIL COMPANY *v.* CHASTAIN.

Opinion delivered May 4, 1914.

GUARANTY—LIMITED LIABILITY AS TO TIME.—Where no time limit is fixed by a contract of guaranty, and nothing in the instrument indicates a continuing of the undertaking, the presumption is in favor of a limited liability as to time.

Appeal from Jackson Circuit Court; *R. E. Jeffery,* Judge; affirmed in part and reversed in part.

James H. Johnston and *Ira J. Mack,* for appellant.

1. The statements of the accounts sued on and made a part of the complaint having been duly verified, and appellees having failed to deny the correctness of the same under oath, appellant was entitled to judgment under the statute. Kirby's Dig., § 3151.

The verdict of the jury is wholly without evidence to support it.

2. The liability of T. B. and C. H. Chastain under the obligation signed by them is primary and direct, an unqualified promise to pay for all goods ordered by I. W. Chastain, and not paid for by him. It is rather an original undertaking of a contract of suretyship, than a strict or collateral guaranty. Pingrey, Suretyship and Guaranty (2 ed.), § § 2-4; *Id.,* § 348; *Id.,* § 355; 59 Ark. 86; 71 Ark. 585-588; 105 Ark. 443. It was not limited as to time, but as to amount, and shows it was intended to cover a course of future dealings, and was, therefore, a continuing suretyship or guaranty. 74 Ark. 241-246; 20 Cyc. 1439, 1440, and cases cited.

Jones & Campbell, for appellees.

The guaranty was in force only during the existence of the contract under which I. W. Chastain was then working, and could not be construed to continue over succeeding years and cover different contracts.

McCULLOCH, C. J. Appellant is a Pennsylvania corporation, doing business at New Kensington, in that State, and at East St. Louis, in Illinois, and instituted this action in the circuit court of Jackson County to re-

cover the amount alleged to be due on account for goods sold under contract to appellee I. W. Chastain. Appellees T. B. Chastain and C. H. Chastain are also sued as alleged guarantors of the account. The case was tried before a jury and resulted in a verdict in favor of appellees.

The suit is upon two accounts, namely, one for a balance of $135.26 on an account for goods shipped from New Kensington, and the other for the sum of $308.31, balance on an account for goods shipped from East St. Louis. Separate accounts are exhibited with the complaint. The first account named above covers shipments beginning February 1, 1911, and ending May 11, of the same year; and the second account covers shipments from May 25, 1911, to May 24, 1912.

The undisputed evidence shows that in May, 1911, the dealings between appellant and appellee I. W. Chastain were transferred to the East St. Louis office, but the account for balance due was not transferred.

The appellees answered, denying that there was any balance due on the accounts, and pleaded payment in full of the accounts for goods shipped.

The answers of T. B. Chastain and C. H. Chastain contained a denial that the contract of guaranty entered into by them constituted a continuing one, or that it covered the accounts sued on.

The answers of all the appellees also set forth other defenses unnecessary to mention at this time.

In the trial of the case the court eliminated all defenses set forth by appellees except the question of payment of the accounts, and submitted that question to the jury.

It is earnestly insisted by counsel for appellant that there is no testimony of a substantial character sufficient to sustain the finding that the accounts were paid. They insist that the only statement in the testimony of appellee I. W. Chastain, who was the only witness that testified on his side concerning the payment of the accounts, is a general one, which amounts only to a statement of a

conclusion, and is insufficient to sustain the verdict that the accounts were paid.

There were two accounts exhibited, as above stated, one covering shipments from the New Kensington establishment, and the other from the East St. Louis branch, and an examination of the testimony of appellee I. W. Chastain discloses the fact that his testimony relates entirely to the East St. Louis account. Even as to that account his statements about payment are very vague and far from satisfactory; but we have concluded that his testimony as to that account is sufficient to warrant the jury in finding that the whole of that account was paid. We can not, at least, say that there is no substantial testimony to that effect.

We find, however, that there is an entire absence of any testimony which would tend to sustain the finding that the balance due on the New Kensington account has been paid. Appellee I. W. Chastain does not refer to that account in his testimony, and appellant adduced testimony, which is undisputed, that the items were correct and that the balance set forth in the account was unpaid. Our conclusion, therefore, is that the jury were not warranted in finding for the defendant on that part of the account, and as appellees had an opportunity to fully develop their case, our conclusion calls for a judgment in favor of appellant for the amount of that balance.

This brings up the question of the correctness of the court's ruling in holding that the contract of guaranty executed by appellees T. B. and C. B. Chastain was a continuing one. I. W. Chastain was a salesman for appellant under written contract, which specified the territory and the terms. The contract specified the beginning and end of the period of the contract. It also provided that the salesman should be personally responsible for the payment of all goods included in orders sent in by him, and permitted the salesman, at the end of his canvass under the contract, to return to appellant accounts amounting in the aggregate to not more than twenty dollars, and that the latter would relieve the salesman from

responsibility for payment of the same by the purchasers. It also provided that the salesman should, within one month after the termination of the contract, send his order books and list of customers into appellant's office. At the time the contract of guaranty was entered into, I. W. Chastain was working under a contract covering the period from January 3, 1910, to July 15, 1910. The contract of guaranty, in the form of a letter signed by the two guarantors, reads as follows:

"In consideration of your having taken into your employ I. W. Chastain, Stuttgart, Arkansas, I hereby guarantee his account and agree to pay for all goods ordered of you and not paid for by him, my liability not to exceed five hundred dollars."

New contracts were entered into between I. W. Chastain and appellant from time to time, the next contract covering the period from December 12, 1910, to December 31, 1911.

It will be seen from the foregoing statement that none of the accounts accrued under the contract of employment in existence at the time of the execution of the guaranty, the whole of the account having been incurred during the period covered by the next contract, which was a renewal of the one then in existence.

There was no renewal of the contract of guaranty, and the question which arises is whether or not the contract continued during the whole period of the renewal contracts of employment.

It is clear from the language of the contract that it operated as a guaranty for the amount of $500, and continued as such guaranty up to that amount for the period it was intended to cover. The language of the contract does not specify in express terms the period the same was to cover, but it is evident therefrom that it related to the contract of employment then in existence.

The subsequent contracts were not strictly renewals, because they covered different periods of time and different territories.

In *First National Bank* v. *Waddell,* 74 Ark. 241, we quoted with approval the following language of the New York court:

"Where, by the terms of the guaranty, it is evident the object is to give a standing credit to the principal, to be used from time to time, either indefinitely or until a certain period, there the liability is continuing; but where no time is fixed, and nothing in the instrument indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time, whether the amount is limited or not. *Fellows* v. *Prentiss,* 3 Den. 512."

The principle there announced is, we think, the correct one, and it controls in this case. There being no specified time, the presumption is against an indefinite continuance. There is, as said by Mr. Brandt in his work on Suretyship and Guaranty, no general rule for determining whether the guaranty is a continuing one or not, each case depending upon the particular language used in the contract.

We think that a fair interpretation of the contract involved in this action limits its application, so far as concerns the time, to the contract of employment then in existence between appellant and I. W. Chastain. The contract recited the fact of appellant having taken I. W. Chastain into employment, and this necessarily referred to the contract of employment then in existence, the term of which ended at a certain time by express stipulation specified in the contract. It would require stronger language to make the guaranty applicable to another contract of employment covering a different period of time and different territory for its operation.

We are, therefore, of the opinion that the court was in error in holding that the contract of guaranty covered the accounts in suit, and there should have been a peremptory instruction in favor of the guarantors on that issue.

Without discussing the other defenses set forth, we deem it sufficient to say that the court was correct in holding that they were untenable.

The judgment, so far as it exonerates the guarantors from liability, is affirmed, but the judgment in favor of appellee I. W. Chastain is reversed and judgment against him will be rendered here in favor of appellant for the amount of the New Kensington account, $135.26, with interest from the average date of maturity, which is May 1, 1911. It is so ordered.

USSERY v. USSERY.

Opinion delivered May 4, 1914.

1. TRUSTS—EXPRESS TRUSTS—PAROL EVIDENCE TO ESTABLISH.—An agreement which constitutes an express trust can not be engrafted by parol testimony upon a written deed of conveyance. (Page 39.)
2. TRUSTS—CONSTRUCTIVE TRUSTS—WRONGFUL ACTS—EQUITY JURISDICTION.—Where the legal title to property is obtained in such a way that it would be unconscionable for the holder thereof to retain and enjoy the beneficial interest, equity will impress a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, and equity has jurisdiction to reach the property, until it passes into the hands of a purchaser for value without notice. (Page 39.)
3. TRUSTS EX MALEFICIO—POSITIVE FRAUD—STATUTE OF FRAUDS.—In order to raise a trust *ex maleficio* in land, the holder of the same must have acquired it with some element of positive fraud, and a mere parol promise is insufficient, as the statute of frauds would apply. (Page 40.)

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

A. Curl, for appellants.

An express trust can only be created in writing. 3 Pomeroy's Equity (3 ed.), § 1006; 26 Ark. 240-429; 8 Words & Phrases, 7121, 7122.

There is nothing in the relation of the parties that would authorize the inference that a trust was intended, or from which it could be implied. Appellee is a stranger in blood to Foster, who caused the deed to be made to her husband, and there was no privity of contract or

blood between her and Robins, the grantor therein. 39 Cyc. 24, 25.

Parol evidence of a constructive trust must not only be clear and satisfactory, but also of so positive a character as to leave no doubt of the fact. 75 Ark. 446; 105 Ark. 318.

M. S. Cobb, for appellee.

The evidence clearly establishes a resulting trust. 39 Cyc. 26; 152 Ala. 375; 121 S. W. 1002; 176 Atl. 164. Such a trust may be proved by parol. 40 Ark. 62. Resulting trusts are expressly excluded from the operation of the statute of frauds. Kirby's Dig., § 3667; 70 Ark. 145; 61 Ark. 575; 73 Ark. 310; 100 Ark. 361.

McCULLOCH, C. J. This is an action instituted on March 7, 1913, in the chancery court of Garland County by Stella Ussery against her husband, J. M. Ussery, to enforce an alleged trust in her favor under a deed executed by one Robbins to said J. M. Ussery, dated November 27, 1908, conveying a tract of eighty acres of land situated in Garland County.

Defendant J. M. Ussery executed to his codefendant Curl a deed, conveying the land in controversy, about the time of the institution of this action, and the latter was also made a party defendant.

The answer contains a denial of all the allegations of the complaint with respect to the consideration for the deed from Robbins to J. M. Ussery, and alleges that Ussery paid a valuable consideration for said conveyance.

The allegations of the complaint are that on the date mentioned plaintiff's stepfather, Charles Foster, purchased the land in controversy from Robbins and caused the deed of conveyance to be executed by Robbins to plaintiff's husband, J. M. Ussery; that Foster paid the consideration for the conveyance and that "he had the deed made to James Ussery, the defendant herein, to hold in trust for the sole use and benefit of plaintiff."

The allegations of the complaint are not sufficient to take the case out of the operation of the statute of frauds, for, at most, the alleged agreement constitutes an express trust, which can not be engrafted by parol testimony upon a written deed of conveyance. *Spradling* v. *Spradling,* 101 Ark. 451.

There was an attempt, however, to bring the case within the principles upon which a trust *ex maleficio* may be declared.

Plaintiff and defendant had been married many years before this transaction occurred, and had children, the issue of their marriage. They had up to that time lived together happily so far as this record reflects the facts. Plaintiff was in ill health, being subject to epileptic fits, and they lived in the neighborhood of their mother, who was the wife of Charles Foster, the purchaser of the land from Robbins.

Defendant J. M. Ussery testified that at the request of Foster he negotiated the purchase of a quarter-section of land from Robbins, of which the eighty acres in controversy was a part, and that in consideration of his services in negotiating the purchase at a very low price Foster agreed to have the eighty acres in controversy conveyed to him.

The chancellor found against defendant Ussery on that point, however, and we accept those findings as correct.

Foster testified that he purchased the quarter-section of land from Robbins, and, desiring to contribute something to the support of his stepdaughter and her children, he caused the conveyance of the eighty acres in controversy to be made to J. M. Ussery. He testified that there was no agreement with Ussery at all with reference to the land, that he voluntarily had the conveyance made to the latter "to help Stella and him raise their children. I always wanted to help Stella and her children all I could." He stated that J. M. Ussery was not even present when the deed was executed, but that he subsequently delivered it to Ussery.

Mrs. Foster testified that there was an understanding or agreement that defendant and his wife should move on the land and build a house and that she (witness) and Foster would move to an adjoining tract so that they could all be near each other.

The Usserys never moved on the land, and within less than a year after the execution of the deed defendant Ussery began to neglect his wife, and finally deserted her, leaving her in a helpless condition.

However reprehensible the conduct of Ussery was, we find nothing in the state of facts with reference to the execution of this conveyance which would warrant the court in declaring the existence of a trust *ex maleficio.*

The elements constituting that character of trust are stated by Mr. Pomeroy in language approved by this court, as follows:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrong-doer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrong-doer." 3 Pomeroy's Equity Jurisprudence, p. 2033; *Ammonette* v. *Black,* 73 Ark. 310; *Bragg* v. *Hart-*

ney, 92 Ark. 55; *Spradling* v. *Spradling, supra; LaCotts* v. *LaCotts,* 109 Ark. 335.

Foster, the purchaser of the land, testified that no agreement at all was made with Ussery and that the conveyance was entirely voluntary.

Mrs. Foster testified that there was an agreement or understanding that Ussery would move on the place and build a house; but, at most, that testimony, even if it be accepted as the facts of this case, only constituted a promise and violation thereof without any element of positive fraud. With respect to that state of facts we have said:

"There must, of course, in such cases be an element of positive fraud by means of which the legal title is wrongfully acquired, for, if there was only a mere parol promise, the statute of frauds would apply." *Ammonette* v. *Black, supra.*

We are, therefore, of the opinion that, when the testimony is viewed in the light most favorable to the plaintiff, it fails entirely to make a case which would warrant the declaration of a trust in her favor. The chancellor reached an erroneous conclusion in applying the law to the facts as found by him, and the decree is therefore reversed and the cause remanded with directions to dismiss the complaint for want of equity.

ROBERTSON *v.* DERRICK.

Opinion delivered May 4, 1914.

1. WORDS AND PHRASES—STATUTES—COUNTY JUDGE.—In section 2, Act 181, Special Acts 1911, which provides for the deposit of a certified check with the clerk of the county court, by bidders who desire to become county depositary, the word "court" held to mean "judge," with reference to the granting of an order as to publication. (Page 43.)
2. COUNTY DEPOSITARIES—DUTY OF COUNTY OFFICERS—MANDAMUS.—Act 181, Acts 1911, requiring the county judge or clerk to fix the amount of the bidder's deposit and ordering the publication of the notice, is mandatory, and the county judge and clerk may be compelled by mandamus to perform those duties. (Page 44.)

3. MANDAMUS—PUBLIC OFFICER—DISCRETION.—Where it is the duty of a county judge and clerk, under a statute, to perform certain ministerial acts, which do not require the exercise of a discretion, they may be compelled by mandamus to perform the acts. (Page 44.)

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

Roleson & McCulloch, for appellant.

The requirement of the statute that notice shall be given of an intention to receive bids is mandatory, and no discretion is allowed or contemplated; and while mandamus will not lie to control a court in the exercise of its discretion, it will lie to compel an officer to perform a ministerial or executive duty. Acts 1911, p. 272, § § 1 and 2; Kirby's Dig., § 5156; 33 Ark. 450.

Burke & Mann, Daggett & Daggett, S. H. Mann and *J. W. Story,* for appellee.

Mandamus will not lie to compel the performance of an act, until after a request has been made to perform that act. 26 Cyc. 193, and cases there cited; *Id.* 198.

All the requirements of the act are put in motion by the county court, to invoke the jurisdiction of which petition should have been filed. The presumption is that when legally called upon a court will perform its duty and act as the law requires. 34 Ark. 240; 36 Ark. 280; 101 Ark. 29. See also 124 S. W. 1100, 1109; 20 Fla. 547; The act calls for the exercise of discretion by the court, a power conferred upon it by the Constitution. Const., art. 7, § 28; 94 Ark. 311. See also 39 L. R. A. (N. S.) 810; 28 Ark. 34.

Roleson & McCulloch, for appellant in reply.

The statute imposes a public duty upon the county judge and county clerk. There was no necessity for a previous demand. 36 Ark. 276-284; 26 Cyc. 181; 79 N. E. 123-126; 13 Enc. Pl. & Pr. 618; 127 Ill. 613; 21 N. E. 187-190.

WOOD, J. The question presented by this appeal is whether or not mandamus will lie at the instance of a

citizen and taxpayer of Lee County to compel the county judge and the county clerk of that county to give the notice provided by and otherwise comply with Act 181, approved April 12, 1911, which provides, in part, as follows:

"Section 1. It shall be the duty of the county court of Craighead * * * and Lee counties, at the July, 1911, term thereof, and at the same term of court every two years thereafter to receive propositions from any bank, banker or trust company in said counties, that may desire to become the depositary of the public funds of said counties, including school funds. Notice of the intention to receive such propositions or bids shall be published by the clerk of said county for a period of not less than fifteen days before the commencement of said term, in some newspaper in said county."

"Sec. 2. Any such bank, banker or trust company, desiring to become such depositary, shall on or before the first day of said term of court file with the clerk of said court a sealed bid stating the rate of interest offered to be paid by such bidder for the two years next ensuing, upon the county funds, that may be deposited in pursuance to such bids. And said bid shall be accompanied by a certified check for not less than $250, and in such greater amount as the court shall order, to be stated in the advertisement heretofore required."

The provisions of the sections quoted are all of the act which it is necessary to set forth, as the other sections relate exclusively to things that are to be done after the notice is given. The sections must be construed together so as to make them harmonious and to effectuate the manifest purpose of the Legislature in passing the act.

The latter clause of the second section reads: "And said bids shall be accompanied by a certified check for not less than $250, and in such greater amount as the court shall order, to be stated in the advertisement heretofore required." The first section requires a notice to be published fifteen days before the commencement of

said term, etc. Taking these two sections together, it is apparent that the word *court* in the last clause of the second section has reference to the *judge,* for it would be impossible for the court, as a court, to order the publication of the notice fifteen days before the commencement of the term of court. Necessarily only the judge of the court could make the order for the publication required by the act. The court, as a court, could not make an order except when duly organized and in session, and as the act contemplates that the order for the publication shall be made before the court convenes, necessarily the word *court,* as used in the latter clause, towit, "the court shall order," etc., means the *judge.* The statute contemplates that the initial act shall be performed by the county judge in fixing the amount of the bidder's deposit and ordering the publication of the notice; but the statute itself fixes the minimum amount of the deposit at $250, and if the county judge fails to act in the premises, the duty is imposed on the clerk to publish the notice any way. These duties are imposed on each of those officers and they may be compelled by mandamus to perform them.

The provisions of the statute requiring the publication of the notice, in the manner and form prescribed therein, are mandatory. The publication of this notice, as provided, is merely a ministerial function, and it is the duty of the officers entrusted with its performance to act on their own motion in pursuance of the statute. All the duties of a discretionary and judicial character imposed upon the county court, come after the publication of the notice. The object of this notice is to give those desiring to become the depositary an opportunity to make their bids, and to procure the best bids obtainable for the county, and to notify bidders of the time propositions or bids will be received. The county judge and the county clerk have no discretion, therefore, as to whether or not they shall publish the notice required by the statute. As to what the court, as a court, may or may not do, or what it should or should not be required to do

after the publication is given as the statute prescribed, are not now before us for consideration. Judicial discretion, in those matters committed to the county court, will not be controlled by writ of mandamus, but even in those matters, where the court fails or refuses to act at all, it can be set in motion by mandamus.

The judge and the clerk, under the statute, must act by giving the notice, and their failure to act is tantamount to a refusal to perform a duty which is mandatory upon them, and their failure to act also shows conclusively their intention not to perform their duty.

The rule is correctly stated in *People* v. *Board of Supervisors,* 79 N. E. (Ill.) 123, as follows: "The general rule is that before applying for a mandamus an express demand should be made, and there should be a refusal to perform, either express or implied. In cases, however, where the duty sought to be enforced is of a public nature affecting the people at large, and there is no one especially empowered to demand its performance, there is no necessity for a demand and refusal. The law requiring the duty stands as a continuing demand." See also *People* v. *Board of Education,* 21 N. E. 187, and other cases cited in appellant's reply brief.

The rule and the exception is recognized in *Lee County* v. *Phillips County,* 36 Ark. 276, where we said: "The general rule is admitted to be that a demand is necessary. The exceptions sustained by some authorities are in cases where the law imposes a positive and well defined duty of a public nature upon public officers, affecting public interests. Then the law stands for a continuous demand, and it suffices to show a refusal."

It follows that the court erred in not ordering a writ of mandamus, and its judgment will therefore be reversed, and mandamus will issue here, directed against the appellees, commanding the judge to order and the clerk to publish the notice, and to further proceed as specified in the statute.

BURDETTE COOPERAGE COMPANY v. BUNTING.

Opinion delivered May 4, 1914.

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE QUESTION FOR JURY.—Where defendant's servant was injured and died as a result of the breaking of a guy wire and the falling of a derrick at which he was working, and there was evidence that defendant was negligent, the question should be submitted to the jury. (Page 48.)
2. MASTER AND SERVANT—INJURY TO SERVANT—CONCEALED DEFECTS—ASSUMPTION OF RISK.—A servant is not required to take notice of defects which are not obvious, nor ordinarily incident to his employment; and the servant does not assume the risk of the same. (Page 50.)
3. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—KNOWLEDGE OF MASTER.—Evidence that the employees of defendant knew that a derrick used by defendant was dangerous, is admissible for the purpose of showing that defendant knew, or might have known, by the exercise of reasonable diligence, that the instrumentality was defective and unsafe. (Page 51.)
4. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—EVIDENCE.—Where deceased was injured by the breaking of a guy wire supporting a derrick at which he was working, evidence that some of the wires composing the main guy wire, which broke and injured the deceased, were not inserted through the hole at the top of the mast pole, is competent, showing the guy wire to be worn and old, and therefore in a defective condition. (Page 52.)
5. TRIAL—IMPROPER QUESTION—PREJUDICE.—The prejudice arising from the asking of an improper question is removed by the action of the court in sustaining counsel's request to eliminate all reference to the subject-matter of the question from the case, and by a proper instruction by the court as to the law on the question raised. (Page 53.)

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

STATEMENT BY THE COURT.

The Burdette Cooperage Company, for the purpose of lifting, loading and otherwise handling logs at its plant, used a derrick, two of the principal parts consisting of a mast pole and a boom pole. The mast pole was forty-two feet long, and was intended to stand in a per-

pendicular position, and to be held in such position by guy wires, one end of which was fastened to trees, stumps, or what is known as "dead men," and the other end was attached to a wrought iron or steel cap or plate on the top end of the mast pole. The holes through which the guy wires were to pass near the rim of the cap were cut straight or square through, leaving sharp edges. The edges were not rounded out nor were they lined with rings or shields to prevent the wearing away of the galvanized iron guy wire. The guy wire was softer than the plate or cap through which it passed. The naked wire should not have been allowed to touch the edges of the holes of the cap through which it passed as the sharp edges of the iron would wear and cut away the strands of the guy wire.

The derrick, in its use, had become loose so that the mast pole would swing back and forth some eight or ten inches, and as it swung it would jerk on the cable or guy wires on the other side. The boom pole was fastened to the mast pole near the lower end and stood at an angle of about forty-five degrees and swung around as occasion required. The mast pole and the boom pole were equipped with pulleys, cables, guy wires and implements of machinery necessary to constitute a working derrick.

Fred Bunting, on the 22d day of July, 1912, was in the employ of the Burdette Cooperage Company as a common laborer, and on the above day he was temporarily engaged as a hooker. There were two hookers, whose duty it was to adjust the hooks to the ends of the logs. When these hooks were fastened into the ends of the logs a signal would be given, the engine would start and the drum would wind up the cable to which the logs were attached, and in this way the logs would be slowly lifted. While lifting a log in this way one of the guy wires broke, causing the derrick to fall, which resulted in the injury to Bunting, from which he died the following day. He was conscious and suffered great pain from the time of the injury until his death.

The derrick had been put up about a year before, and had fallen down by reason of a heavy pull made on it. It had been reconstructed about two weeks before the injury by the company's millwright.

The above are substantially the facts, giving the evidence its strongest probative force in favor of appellee.

The appellee, as administratrix, brought this suit to recover damages for the injury to and death of Fred Bunting, alleging that by reason of the careless and improper manner in which the guy wire was fastened to the cap it worked loosely therein, the hole being much larger than the guy wire and as a result it wore and ground away said wire; that the wires were old and rust-eaten, rotten and so worn and in such a weakened condition that while the log was being lifted one of them gave way, causing the derrick to fall, whereby Bunting was struck and injured and afterward died from the result of such injuries.

The appellant denied the allegations of negligence set up in the complaint and pleaded affirmatively that the death of Bunting was the result of an accident, and also set up contributory negligence and assumed risk. The cause was submitted to the jury. The appellant asked the court to direct a verdict in its favor after the evidence was adduced, which the court refused, and to which ruling appellant duly excepted. No objection is urged to any other rulings of the court in the giving or refusing of instructions. A verdict was returned in favor of the appellee in the sum of $1,000 damages for pain and suffering and in the sum of $4,000 for the pecuniary loss to appellee by reason of the death of her husband. Judgment was entered for the sum of $5,000, and this appeal has been duly prosecuted. Other facts stated in the opinion.

W. J. Lamb, H. T. Harrison and *T. D. Wynne,* for appellant.

1. The accident and injury were inevitable. Webb's Pollock on Torts, p. 161.

2. The court erred in refusing to direct a verdict for appellant. 86 Ark. 289; 105 U. S. 249; 69 Ark. 402; 55 Ark. 163; 91 Ark. 260; 16 Ark. 236; 15 Ark. 118; 87 Ark. 576; 76 Ark. 436.

3. Appellee assumed the risks of his employment. 90 Ark. 407; 82 Ark. 534.

4. The court erred in admitting certain testimony. Jones on Evidence, p. 375; 99 Ark. 489; 96 Ark. 171; 100 Ark. 107.

Gravette & Alexander and *J. T. Coston,* for appellee.

1. Instructions Nos. 1 and 2 were correct. 2 Labatt on Master & Servant, 813; 54 Ark. 299; 67 Ark. 8; 113 S. W. 359; 203 U. S. 473; 77 N. Y. 82; 83 Am. Rep. 574; 119 S. W. 675; 87 S. W. 397; 99 Fed. 51; 106 U. S. 702; 4 Thompson on Negligence, § 4858; 1 Labatt on Master & Servant, § 31; 3 N. E. 577, 578; 21 S. E. 347; 42 Pac. 344; 67 Fed. 885; 25 N. E. 915. The worn and weakened condition of the guy wire contributed to the injury. Where several causes concur to produce certain results, any of them may be termed "proximate." 2 Labatt, 813; 54 Ark. 299; 67 *Id.* 8; 113 S. W. 359; 87 S. W. 397, and cases *supra.*

2. Evidence of the reputation of the derrick among employees was competent. 3 Labatt, 1030; 43 Ill. 338; 71 *Id.* 294.

3. Improper testimony if not prejudicial is not reversible error. 32 Ark. 346; 20 *Id.* 234; 52 Conn. 285; 163 S. W. 172; 4 S. W. 701; 70 Fed. 364; 8 Ala. 820.

4. Deceased did not assume the risk. 141 S. W. 1178.

5. The evidence makes a case of gross negligence.

WOOD, J., (after stating the facts). 1. The court did not err in refusing to direct the jury to return a verdict in favor of the appellant. It was a question for the jury, under the evidence, as to whether or not the appellant had exercised ordinary care to provide its servant Bunting with reasonably safe appliances with which to perform the work in which he was engaged at the time of his injury. The testimony of appellant's millwright,

who constructed the derrick, was to the effect that he used the usual material in the construction of the same and constructed the same in the usual manner that such machinery was constructed. He stated that the holes through the cap to which the guy lines were fastened were round holes, drilled out for the purpose of passing the guy lines through; that he run the guy lines through the holes, bent them over, parted the ends and brought them back on the main line and made them fast; that they were all fastened in that way. This way of fastening them he considered safe. Sometimes they are fastened with clamps; sometimes with half-hitches. These different ways are all safe. He had put up several this way. The wires could be fastened in the manner indicated "so fast and close that they would break before they would let go."

But there was testimony on behalf of the appellee tending to show that the falling of the derrick was caused by the breaking of one of the large cables; that soon after the accident, probably that evening, certainly the next morning any way, before the derrick was moved off the skidway, the cable was examined to ascertain the condition of the ends of the wires where the same were broken. The cable was broken where the edges of the wrought iron holes in the cap cut into it. There had been some jerking back and forth. Some of the ends of the strands were bright and some were not. Some of them had the appearance of having been broken before the accident. Some of the ends had turned dark. Half of the ends of the strands were dark, indicating an old break.

There was testimony tending to show that all derricks will fall when their guy wires are worn and broken. A piece of the guy wire, showing the broken end, was exhibited and identified as the end of the guy wire where the same had broken at the time of the injury complained of.

There was testimony on behalf of the appellee tending to show that the mast pole was loose, playing back

and forth a distance of eight or ten inches, and allowing the same to jerk, and that the holes through the plate on top of the mast pole was left without covering, exposing the strands of the guy wires to the edges of the wrought iron or steel plate, thereby causing the guy wires to be cut in two and worn off.

Notwithstanding the testimony of appellant's millwright that he constructed the derrick in the usual manner, and that he considered it safe, the above testimony on behalf of the appellee made it a question for the jury to say as to whether or not the appellant had exercised ordinary care to furnish a safe derrick.

2. Appellant contends that the falling of the derrick was an inevitable accident. Bunting, at the time of his death, was hooking tongs in the end of a log. He was assisted by a fellow-employee at the other end of the log. These employees stood at the opposite ends of the log and each hooked the tongs in the end next to him. They fastened their hooks in each end of the log and a signal was given to the derrick operator to lift the log. He made two or three efforts to lift same, and raised the log between three and six feet from the ground. While the log was suspended in this position the hooks of Tardy, Bunting's fellow-employee, pulled out, causing his end to fall to the ground instantly, and the derrick fell at the same time the hooks pulled out. It is contended by the appellant that the jerk caused by this fall caused the derrick to give way by breaking the guy wire opposite the suspended hook at or near the top of the mast pole. But this does not show conclusively that the falling or the jerk was the result of an accident. It was a question for the jury as to whether or not appellant was negligent in failing to so construct the derrick that it would not fall when subjected to such strains as shown by the above testimony. The slipping of the tongs or hooks from the end of the log, thereby causing the same to fall and producing a sudden jerk or strain upon the guy wires the jury might have found was one of the incidents of work of that character, which appellant, in

the exercise of reasonable care, should have anticipated and should have exercised ordinary care to have counteracted. It was a question for the jury as to whether or not, if such care had been exercised in the construction of the derrick, the same would not have fallen, notwithstanding the slipping of the tongs and the sudden dropping of the end of the log. The jury might have found that the exercise of ordinary care upon the part of appellant to properly construct the derrick would have prevented the breaking of the guy wires and the falling of the mast pole, and the resultant injury to Bunting.

3. The mast pole was forty-two feet high, and the plate to which the guy wires were fastened was on top of the same. If the holes in this plate were defective, as the jury might have found, and if the guy wires, by reason of the sharp edges of these holes and the jerking of the mast pole, had been cut and worn so as to render them incapable of holding the mast pole under the strain to which it was subjected, these were not obvious defects and therefore Bunting was not required to take notice of them. The jury might have found that they were caused by the negligence of the appellant. Bunting, therefore did not assume the risk incident to such defects. They were not risks ordinarily incident to the employment in which he was engaged, but were caused by the negligence of the master, were unknown to the servant and he did not assume them. *Asher* v. *Byrnes,* 101 Ark. 197.

4. If the defective condition of the holes through the cap plate, and the weakened condition of the strands of the guy wires caused thereby, contributed to the injury, and this was the result of negligence on the part of the appellant, it would be liable, notwithstanding the slipping of the tongs from the end of the log may have also concurred in producing the result. Such being the case, the negligence of the company was but one of the co-operating causes of the injury, without which, as the jury might have found, same would not have occurred. See 2 Labatt on Master & Servant, 813; *Railway Co.* v.

Triplett, 54 Ark. 299; *Kansas City, F. S. & M. Rd. Co.* v. *Becker,* 67 Ark. 1-8; *Marcum* v. *Three States Lumber Co.,* 88 Ark. 28-37.

5. Over the objection of appellant, appellee was permitted to testify that her husband, Bunting, was good to his family; that he was interested in the education and training of appellee's little girl; that he wanted to raise the child right and give it a good education. On cross examination it developed that the child was the daughter of appellee by her first husband. Further on in the trial another witness was asked whether or not Bunting took an interest in the education and training of the little girl, whereupon counsel for appellant remarked, "If the court please, I think it has come to a place where all reference to the little girl should be eliminated entirely," and the record shows that the court "sustained" counsel in his remarks.

The court, in its instruction on the measure of damages, told the jury that if they found for the appellee they would assess her damages at such sum as they found "from the evidence would compensate her for the loss of contribution from him for her support through life." The rulings of the court in sustaining the remarks made by the counsel and the instructions given on the measure of damages were tantamount to removing from the jury the testimony concerning the disposition of Bunting toward appellee's child. If the admission of this testimony was erroneous (which we do not decide), the rulings of the court, as above indicated, were sufficient to remove all prejudice to appellant that might have otherwise been caused thereby. See *Bunyan* v. *Loftus et al.,* 57 N. W. 685-687.

6. A witness was asked the following question: "Do you know whether or not it was generally understood from that time on to when Mr. Bunting was killed, by the old employees there, as dangerous?" (that is, that the derrick was dangerous). The witness answered, "Yes, sir." Appellant then objected to the question and an-

swer and his objection was overruled. There was no prejudice to appellant in the ruling of the court. "Common knowledge of the servants themselves who have to handle the instrumentality in question that it is an improper one for the purposes for which it is furnished" is admissible, says Mr. Labatt, as tending to establish notice on the employer's part of the defective character of the machinery. "It is not competent to prove the ultimate fact that the instrumentality was actually an unsuitable one." 3 Labatt on Master & Servant, 1030. Such testimony is competent for the purpose of showing that appellant knew, or might have known, by the exercise of reasonable diligence, that the instrumentality was defective and unsafe. See *Railroad* v. *Shannon,* 43 Ill. 338; *Railroad* v. *Fredericks,* 71 Ill. 294. See *St. Louis, I. M. & S. Ry. Co.* v. *Morgart's Admx.,* 45 Ark. 318-27.

7. The appellant complains because the court overruled its motion to strike out the testimony of certain witnesses to the effect that part of the wires composing the main guy wire, which was broken, were not inserted through the hole in the cap on the top of the mast pole. Appellant urges that this testimony was not relevant to the allegations of the complaint.

The court instructed the jury that the evidence could only be considered by them in so far as it tended to establish the allegations of the complaint that the guy wires were old, rusty and rotten and caused to be worn loose. There was evidence tending to show that some of the strands of the guy wire were dark and rusty, indicating an old break. In view of the instructions of the court, there was no error in admitting the evidence, for it was competent as tending to prove that the guy wire was rusty, old and worn, and therefore in a weak and defective condition.

Finding no reversible error, the judgment is affirmed.

BONNER v. CROSS COUNTY RICE COMPANY.

Opinion delivered May 4, 1914.

TRUSTS—TITLE TAKEN IN NAME OF ONE PARTY—JOINT OWNERSHIP.—Where title to property is taken in the name of one party to a contract, whereby it was agreed that the property was to be disposed of under the joint direction of all the parties to the contract; *held*, all the parties to the agreement had a joint interest in the property, and the holder of the legal title held the same subject to a trust in favor of the other parties, and could not dispose of the same without their consent, according to the terms of the agreement.

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

STATEMENT BY THE COURT.

The Cross County Rice Company instituted this action in the chancery court under sections 649-660, inclusive, of Kirby's Digest, to confirm its title to certain lands in Cross County. A. W. Bonner and the assignee of C. L. Sharp were made parties defendant. The complaint alleges that the plaintiff claims title to the lands described in the complaint by virtue of a deed from F. D. Rolfe and wife. The deed is made an exhibit to the complaint, and the consideration therein recited is the sum of one dollar. The complaint further alleges that plaintiff is advised that the defendant, A. W. Bonner, and the assignee of C. L. Sharp set up some claim or interest in said land, or the profits on a sale of the same, under a contract made between S. D. Johnson, C. L. Sharp and A. W. Bonner. The contract is made an exhibit to the complaint, and is as follows:

"This agreement made and entered into by and between S. D. Johnson and A. W. Bonner, both of Lee County, Arkansas, and C. L. Sharp of Cross County, witnesseth, that the said parties have all been engaged in securing the purchase of certain tracts of land in Cross County, Ark., the same being paid for and owned by the said S. D. Johnson and the deeds made to him as shown by the records of Cross County, Ark., but with the understanding that said lands are to be handled and dis-

posed of in any way agreed upon between the parties hereto, and the net profits are to be divided equally between the said parties, the profits shall be construed as being the difference between the purchase price and sale price of said lands after deducting interest on the purchase price at the rate of 6 per cent per annum, from date of purchase to the date of sale, together with any taxes that may have been paid thereon.

"It is understood that this agreement applies to all lands now deeded to said S. D. Johnson in Cross County, Ark., and any other after-acquired lands in which the other two parties hereto were interested in securing the purchase, and the same was accepted by the said S. D. Johnson as satisfactory to him. It is also understood that each is to bear one-third of the expense incident to the purchase and sale of any lands under this agreement.

"In testimony whereof all the parties hereto have signed their names on this the 16th day of March, 1909.

"S. D. Johnson,
"A. W. Bonner,
"C. L. Sharp."

The instrument was duly acknowledged and filed for record. The complaint further alleges that all of said lands were, after due advertisement and notice, sold at public auction at the courthouse in the city of Wynne, to the highest bidder, for cash, and subject to a mortgage due to the Hartford Life Insurance Company, and that at said sale F. D. Rolfe became the purchaser, he being the highest bidder therefor; that as such purchaser he received a deed from the said Johnson and assumed to pay the mortgage to the Hartford Life Insurance Company; that he afterward conveyed said lands to the plaintiff, which assumed to pay said mortgage debt; that said C. L. Sharp and his assignee and A. W. Bonner were duly apprised and notified of the time, day and terms of said sale, and that after the same was made, each of said parties was tendered the amount due to him under the terms of the contract above referred to. The prayer of the complaint is that said Bonner and Sharp and his as-

signee be summoned as defendants in the cause; that the contract between Johnson, Sharp and Bonner, above referred to and set out, be cancelled as a cloud upon the title of the plaintiff, and that the title of the plaintiff to said lands be quieted and confirmed. Bonner filed an answer and cross-complaint. In his answer he admits the execution of the contract exhibited to the plaintiff's complaint, but denies that the lands purchased under said contract were ever advertised and sold at public auction in the city of Wynne to the highest bidder. He denies that F. D. Rolfe became the purchaser of said lands at public sale as the highest bidder thereof. He denies that he was ever notified of the time and terms of said alleged sale. In his cross-complaint he alleges that the lands set out in the plaintiff's complaint were purchased under the contract above referred to between Johnson, Sharp and himself. He alleges that said lands were purchased for the average price of not more than eight dollars per acre; that said lands have enhanced in value until the same are now worth the sum of thirty dollars per acre; that after said lands had enhanced in value the defendant, together with Johnson and Sharp, were at different times offered sums for said land that would have netted them a large profit, which said Johnson and Sharp refused to accept; that after said lands had enhanced in value, as aforesaid, the said Johnson and other persons agreed to form a corporation to take over said lands at a sum equal to the actual cost price, together with the interest; that pursuant to said fraudulent design, the said Johnson, without notice in any manner to this defendant and cross complainant, on the 11th day of July, 1912, executed to said F. D. Rolfe a quitclaim deed to the lands in controversy for a nominal consideration of one dollar; that the said Johnson, Rolfe and other members, who are stockholders of plaintiff corporation, were fully acquainted with, and had full knowledge of, the contract between this defendant and cross-complainant and the said Johnson; that nothing of value ever passed between them, the said Johnson and Rolfe, for said lands. The

prayer of the cross-complaint is that the lands be sold under an order of the court for a division of the proceeds under the terms of said contract, and that the defendant have judgment against S. D. Johnson for one-third of the value of said lands after deducting therefrom the cost price, together with taxes and interest, and that said judgment be declared a lien upon the land.

The chancellor sustained a demurrer to the answer and cross complaint of Bonner, and the same were dismissed for want of equity. The court then rendered a decree cancelling the written contract between Johnson, Bonner and Sharp, so far as it affected the plaintiff's title to the lands in controversy, and decreed that it be removed as a cloud upon the title of the plaintiff, and that the title to all the lands involved in this action be confirmed and quieted in the plaintiff.

S. Brundidge, for appellant.

1. The demurrer should have been overruled. The answer showed an interest in the land. Kirby's Dig., § 650; 11 Barb. 471-3; 85 Fed. 492; 120 Ind. 239, 21 N. E. 1090; 134 U. S. 316; 63 N. W. 771; 67 Cal. 483; 6 N. W. 897; 71 Ark. 214; 100 *Id.* 488; 68 *Id.* 430; 2 Pom., Eq. Jur. (3 ed.), § 918; 110 Pac. 705; 101 N. E. 63; 8 Wall. (U. S.) 202.

O. N. Killough and *T. E. Lines,* for appellee.

The instrument vests no title in appellant. Pom., Eq. Jur. (3 ed.), § 992; 67 Fed. 879. The demurrer was properly sustained.

HART, J., (after stating the facts). Counsel for plaintiff seek to uphold the decree of the chancellor upon the authority of *McCulloch* v. *Chatfield,* 67 Fed. 877. In that case, McCulloch, Chatfield, Allen and others entered into a written contract for the purchase and sale of certain lands. Under the terms of the contract, the title to the land to be purchased was placed in Chatfield, and he was to have the full and absolute control of the land and of the sale thereof, being only required to account for the proceeds of sale. After the land was sold and

the expenses paid, the proceeds of sale were to be divided between the respective parties in proportion to the amounts they had paid in. The court held that the agreement contemplated that the trustee appointed in it should hold the title to such land as might be acquired under the agreement, dispose of the same to the best advantage possible, and convey the same when sold by his individual deed. The only limitation placed upon his powers was that he should not sell any of the land for less than one dollar per acre without the consent of all parties in interest. Under these circumstances, the court said that the trust created by the agreement plainly belonged to that class of trusts where the beneficiaries acquired no estate in lands held by the trustee until after they are sold, when their rights attach to the proceeds of sale; that under the terms of the agreement, the title to the land acquired was taken in the name of the trustee for the express purpose of enabling him to sell it without let or hindrance and to divide the proceeds among those who might become interested in the speculation. Therefore, the court held that McCulloch was not entitled to a decree adjudging that he was the owner of an undivided interest in the property, as a decree of that nature would very likely interfere with the dominion over the property which the trustee was entitled to exercise so long as he acted in good faith and was guilty of no dereliction of duty. It may be noted that there was no allegation that the trustee had acted fraudulently in that case. It was not even charged or proved that he had been either negligent or inefficient in the discharge of his duties.

It is true in the case at bar the defendant, Bonner, did not expend any money in the purchase of the land, but only contributed his time, labor, skill and judgment in the purchase thereof. Under the terms of the agreement, the titles were all to be taken in the name of Johnson, who advanced the money to pay for the land, but hereafter the facts in the case at bar are essentially different from those in the case of *McCulloch* v. *Chatfield, supra.* In that case the duties and responsibilities of McCulloch ended when the title was taken in the name

of Chatfield, and Chatfield had the absolute power to dispose of the lands in any manner, and for whatever price he saw fit, so long as he acted in good faith. Here the contract provided that the lands were to be disposed of under the joint direction of all the parties to the contract. This gave Bonner something more than a mere interest in the profits after the lands were sold; it gave him an interest in the lands themselves. Johnson held the legal title, but he could not convey the lands without the consent of Bonner. In the case of *Seymour* v. *Freer*, 8 Wall. (U. S.) 202, the court said:

"A trust is where there are rights, titles and interests in property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion; but behind it lie beneficial rights and interests in the same property belonging to another. These rights, to the extent to which they exist, are a charge upon the property, and constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked. Interests in real estate, purely contingent, may be made the subject of contract and equitable cognizance, as between the proper parties."

We think the principles there announced control the present case. The object of the trust here was the sale of the property, and the parties to the agreement were to agree upon the manner of its disposition. This gave the parties to the agreement a joint interest in the property. Johnson held the legal title, but the rights of Bonner are as valid in equity as those of Johnson are at law. Bonner, in his cross complaint, alleges that Johnson sold the property without his consent at a price very much less than they had been previously offered for the lands, and for a less price than the lands were worth when sold; that the plaintiff corporation was formed by persons for the express purpose of buying the lands at the same price for which they were purchased under the agreement under consideration; that Johnson, Rolfe and the other incorporators had full knowledge of his rights and interest in the lands, and that said lands were purchased by

the corporation for the express purpose of defrauding him and of depriving him of his interest in the land. Under the allegations of his cross-complaint, the grantee took the title subject to the trust upon which Johnson held the property, and a court of equity will deal with it as if the title to the land still remained in Johnson. Therefore, we think the court erred in sustaining the demurrer to the defendant's answer and cross complaint, and for that error the decree will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

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

Opinion delivered May 4, 1914.

1. MASTER AND SERVANT—SAFE PLACE TO WORK.—A master must exercise ordinary care to provide his servants a reasonably safe place in which to work, and reasonably safe instruments with which to work. (Page 64.)
2. MASTER AND SERVANT—SAFE APPLIANCES AND PLACE TO WORK—TEST.—The test of a master's duty in furnishing appliances and a place to work is what a reasonably prudent person would have done in such a situation. (Page 64.)
3. MASTER AND SERVANT—DUTY TO SERVANT.—The duty imposed upon a master does not require him to use every possible precaution to avoid injury to his servants, but he is only required to use such reasonable precaution to prevent accidents as would have been adopted by prudent persons prior to the accident. (Page 64.)
4. RAILROADS—BLOWING WHISTLE—NEGLIGENCE.—The act of blowing a locomotive whistle more than eighty rods from a grade crossing, is not in itself an act of negligence. (Page 67.)
5. MASTER AND SERVANT—INJURY TO SERVANT—UNFORESEEN ACCIDENT.—Plaintiff, a locomotive engineer, was injured by the blowing of the whistle of another passing locomotive; *held*, the accident was outside the range of ordinary experience, and the master, in the exercise of ordinary care, was not bound to foresee and guard against it. (Page 67.)

Appeal from Grant Circuit Court; *W. H. Evans*, Judge; reversed and dismissed.

STATEMENT BY THE COURT.

H. A. Copeland instituted this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for personal injuries alleged to have been sustained by him while in the employment of the defendant company. The facts are as follows:

For a mile or more south of the station at Little Rock, Arkansas, the line of the defendant railway company runs through the corporate limits of the city and across certain of its streets. Some of the streets have overhead crossings and some cross the railroad on grades. The railroad company has double tracks for several miles south of the station. At Twelfth Street, where it crosses the railroad, there is an overhead crossing, commonly called a "viaduct." The overhead crossing is a bridge twenty-four feet above the track and about twenty feet wide. It has a steel approach and steel girders. The girders rest on concrete abutments on either side of the cut through which run the tracks of the railroad company. From the center of one track to the center of the other is thirteen and three-tenths feet, and from the inside rail of one track to the inside rail of the other track is eight and six-tenths feet. The cut is deepest at Twelfth Street, and begins to become more shallow at Tenth Street. On the 3d of January, 1913, the plaintiff was engineer on a work train, whose engine was headed north—that is, toward the station at Little Rock. He stopped the train with the engine right under the Twelfth Street viaduct, for the purpose of unloading some chat. The foreman in charge of the work train gave him a signal, and he stuck his head out of the cab window to see if the foreman got on the footboard. While in that position, a passenger train from the south, coming into Little Rock, passed on the other track. While the engine of the passenger train was passing the plaintiff's engine, the engineer on the passenger train was blowing his whistle. The plaintiff testified that he was only about five or six feet away from the whistle on the passenger, but that it was a little above his head; that

as soon as the sound struck his ears it sounded like somebody had hit him on the head, and that his ears commenced to roar and rattle from that instant; that for about a week it seemed like his head was full of water; that afterward there was a popping and cracking just like you hear in a telephone receiver, and that he finally became deaf in his left ear; that the hearing in his right ear is defective; that he can not see out of his left eye, and can not see to read out of his right eye. A physician who examined him testified that plaintiff was suffering from traumatic neurosis, and that he had a very severe form of it; that this might be caused by a severe shock or injury. Other witnesses for the plaintiff stated that the whistle was blown unusually loud on that morning. Physicians who examined plaintiff testified for the defendant that they had examined the plaintiff's left ear, and that it appeared to be entirely normal, and that the drum of the ear did not appear to be in any way injured. They also stated that his eyes did not appear to be injured. Other witnesses for defendant testified that the whistle which plaintiff alleges caused the injury was a standard passenger train whistle known as a "chime whistle;" such as is used on all first-class railroads in this and other States.

The physicians who testified in favor of the defendant stated they believed from the examination they had made of plaintiff, that his injuries were feigned, and stated that they had never known or heard of such an injury having been inflicted upon any one by the blowing of a whistle under the circumstances described by the plaintiff. Other evidence will be stated or referred to in the opinion. The jury returned a verdict for the plaintiff and the defendant has appealed.

E. B. Kinsworthy and *T. D. Crawford,* for appellant.

1. There was error in the court's charge in the giving and refusal of instructions. The general rule is that a master must exercise ordinary care to provide his servants a reasonably safe place in which, and reasonably safe instruments with which, to work. It was improper

to submit to the jury whether plaintiff was in a position of "apparent danger," and whether the engineer knew it. *Ry. Co.* v. *Kimbrell,* 40 A. L. R. .....; 98 Wis. 416; 80 Ark. 263; 90 *Id.* 145; 35 *Id.* 615.

2. Plaintiff assumed the risk. 90 Ark. 387.

3. It was the duty of appellant to blow the whistle. Kirby's Digest, § 6595.

4. A master is not bound to anticipate accidents resulting from physical defects of an employee. 3 Labatt, Master & Servant, § 1044, p. 2760; 104 Pac. 809; 64 Am. St. 538.

5. Knowledge is an element of master's liability. 44 Ark. 524; 3 Labatt, Master & Servant, § 2021, p. 2707; § 2025, p. 2716.

6. A master is not an insurer. 90 Ark. 149; 35 *Id.* 614; 80 *Id.* 263; 92 *Id.* 143; 3 Am. Rep. 144. There must be some neglect of duty. 83 Md. 269; 92 N. W. 890.

7. Negligence is not a matter to be judged after the accident. 3 Labatt, Master & Servant, § 1042; 133 N. Y. App. Div. 314.

8. Previous safe and successful operation of the instrumentality is conclusive. 3 Labatt, § 1036; 91 Cal. 48; 51 Hun. 519; 78 Mo. App. 39; 58 Am. Rep. 522; 115 N. Y. App. Div. 14; 18 L. R. A. (N. S.) 701; 61 Wis. 325; 184 Fed. 882; 60 Am. Rep. 433.

9. Master not liable for accidental injury. 1 White, Pers. Inj., § 33; 91 Ark. 260; 86 *Id.* 289; 92 *Id.* 138; 87 *Id.* 576; 97 *Id.* 576; 104 *Id.* 59; 97 *Id.* 160. As a corollary the master is only liable where the injury is the natural and probable consequence of the alleged wrongful or negligent act. 114 Mich. 512; 3 Labatt, § 1042.

10. Plaintiff assumed the risk of accidents. 1 White, Pers. Inj., § 357; 110 N. Y. App. Div. 208; 62 N. J. L. 540.

11. Appellant was guilty of contributory negligence. 90 Ark. 392; 41 Wash. 63.

Hoeppner & Young and *W. R. Donham,* for appellee.

1. It was a question for the jury whether or not plaintiff's position of danger was open and apparent

to the engineer. 64 Ark. 236; 69 *Id.* 619; 73 *Id.* 594. If so apparent, it was the duty of the engineer to abstain from giving the statutory signals. 77 Ark. 174; 89 *Id.* 270; 99 *Id.* 226.

2. If it is apparent that injury will result from blowing the whistle, it was the engineer's duty not to blow but to ring the bell. 53 S. W. 269; 77 *Id.* 174; 99 *Id.* 226.

3. It was not error to refuse to direct a verdict for defendant. 154 S. W. 203; 89 Ark. 154.

4. Upon the whole evidence the question of negligence, contributory negligence and assumed risk was properly submitted to the jury, and there is no prejudicial error.

HART, J., (after stating the facts). The general rule is that a master must exercise ordinary care to provide his servants a reasonably safe place in which, and reasonably safe instruments with which, to work. The test of a master's duty in furnishing appliances and a place to work is what a reasonably prudent person would have ordinarily done in such a situation. *Oak Leaf Mill Co.* v. *Littleton,* 105 Ark. 392. The duty of a master to exercise ordinary care to provide his servant a safe place to work requires that he shall anticipate all such dangers as will likely flow from the conditions of the place in which his servants work, and the appliances with which they are provided to work. But the master is not bound to foresee and provide against every possible accident. In other words, the duty imposed does not require the master to use every possible precaution to avoid injury to his servants, but he is only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. After an accident has occurred, it may be easy to see what would have prevented it, but that of itself does not prove, nor tend to prove, that reasonable or ordinary care would have anticipated and provided against it. Labatt's Master & Servant (2 ed), Vol. 3, § § 1042 and 1045. See, also, 26 Cyc. 1092, 1093; *Ultima Thule, A. & M. Rd. Co.* v. *Benton,* 86 Ark. 289; *St. Louis, K. & S. E. Rd. Co.* v. *Fultz,* 91 Ark. 260.

Tested by the above legal principles, is the plaintiff entitled to recover in this case? It may be said here that there is in this case no presumption created by statute to take the place of proof of negligence. The undisputed proof is that the whistle on the passenger engine, which plaintiff testified caused his injury, was a standard chime whistle, such as is used on all first-class railroads in this State, and such as is in general use on all first-class railroads in other States. It is true some of the witnesses for the plaintiff said that it was a louder whistle than the others in use on the defendant's engines, but they did not deny that it was a standard whistle and in general use by all first-class railroads. The court told the jury that, under the undisputed evidence that the whistle on the passenger engine was such a whistle as is used by careful and competent railroad companies, and that it was not negligence on the part of the railway company to use the whistle. There was no evidence tending to show that the engineer wantonly blew the whistle. That is to say, that he blew it for the purpose of scaring or annoying the plaintiff. Some of the witnesses for the plaintiff say that it was not necessary to blow the whistle at the place where plaintiff claims that he was injured. The Twelfth Street viaduct is two blocks from Tenth Street, which had a grade crossing. The passenger train was going in that direction. Kirby's Digest, § 6595, imposes upon railroads the duty of signaling for crossings. It provides that a bell be rung or a whistle blown at a distance of eighty rods from where the railroad crosses any road or street, and that the bell be kept ringing or the whistle blown until such road or street is crossed. Pursuant to this statute, the engineer blew the whistle to give warning of the approach of the train; and the act of blowing the whistle did not of itself constitute negligence. This brings us to the question of whether the situation of the parties made the blowing of the whistle an act of negligence. The plaintiff had stopped his engine under the viaduct and was leaning out of his cab window looking backward, when the whistle was blown. He says

the whistle on the passenger engine was a little above him, but was within about six feet of his ear when the engine passed. The plaintiff claims that the act of blowing the whistle as the train passed him caused him to lose the sense of hearing in his left ear, and the sense of sight in his left eye, and impaired his hearing and sight in his right ear and eye. If the plaintiff's testimony be true, his injury is a serious one, and it can be readily seen now how it could have been avoided; but it does not appear that any one anticipated it, or anything of that nature. Certainly, the plaintiff did not anticipate it. He was an engineer of experience. He knew the passenger train was running at a high rate of speed, and that the engineer on that train might at any moment see a person on the track which would render it necessary for him to blow the whistle as a warning of the approach of the train. Notwithstanding this, he exposed himself without hesitation to the risk, and this of itself is strong proof that he did not fear or expect that any injury could result to him. The engineer of the passenger train says he blew the whistle for the crossing, and that he had no cause to believe that the blowing of the whistle would injure any one. That he did not see the plaintiff; that he was looking ahead because he was approaching a crossing that might be a place of danger. That he had blown the whistle many times as he passed another engine on a sidetrack. That no one had said to him that the sounding of the whistle under such circumstances was likely to cause injury to sight or hearing. That he had been placed in similar situations, and had had his ears to tingle a little, but no bad effect was afterward apparent. The physicians who testified in behalf of the defendant stated that they had examined the drum in both of plaintiff's ears, and that they were in an absolutely normal condition. That the condition of the outer ear of plaintiff, which was affected, was normal. That they did not think the blowing of a whistle close to the ears of persons, which did not break the drum, could affect his sight. That it might affect his ear. That from an exam-

ination of his ears they did not think it possible for plaintiff to have been injured in the way he claims to have been injured, except from the fact that he is so injured. That they had no knowledge of such an injury having happened before. Other evidence for the defendant tends to show that no accident of this kind had ever happened before, on defendant's line of road, and that no such accident had ever been known to occur. The facts bring the case within the principle of a mere accident occurring unexpectedly, and almost unaccountably. The accident was exceptional in character, and was due to causes of such rare occurrence that the defendant in the exercise of ordinary or reasonable diligence, could not have anticipated that such an injury would likely result. Therefore, it was not required to foresee and provide against the happening of such an extraordinary accident. As said by Mr. Justice Cooley in the case of *Sjogren* v. *Hall,* 53 Mich. 274:

"So far as there is a duty resting upon the proprietor in any of the cases, it is a duty to guard against probable dangers; and it does not go to the extent of requiring him to render accidental injuries impossible."

Taking all of the facts into consideration as they existed at the time of the injury, we do not think the plaintiff showed that the defendant was negligent in failing to anticipate and provide against the occurrence of the injury. To hold otherwise, would be to disregard the well settled law upon the subject and to make the master an insurer of the safety of his servant. The accident was outside of the range of ordinary experience, and the defendant, in the exercise of ordinary care, was not bound to foresee and guard against it.

The case having been fully developed, the judgment will be reversed and the cause of action will be dismissed.

STATE v. KETCHUM.

Opinion delivered May 4, 1914.

1. CRIMINAL LAW—FORMER JEOPARDY.—A defendant is not in jeopardy, as the result of a prosecution which he has himself procured to be instituted, unless, as a result of the prosecution so instituted, the full measure of the punishment provided by law is assessed against the defendant, or where the penalty is an exact or fixed one. (Page 70.)
2. CRIMINAL LAW—FORMER JEOPARDY—PLEA OF FORMER ACQUITTAL.—Where a criminal prosecution has been had under Kirby's Digest, § § 2497-2502, of necessity defendant has plead guilty, and the statute contemplates the infliction of some punishment, and therefore a defendant in a prosecution under these sections, can not plead former acquittal in a later prosecution for the same offense. (Page 71.)

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

STATEMENT BY THE COURT.

Appellee was indicted for assault and battery, committed upon the person of one Emmett Luton, and at his trial filed a plea of former acquittal before one N. B. Henderson, a justice of the peace. The fight, out of which this prosecution grew, occurred on March 23, 1913, and appellee thereafter prepared a statement of the occurrence, swore to and filed it with the justice of the peace, and the said justice thereupon issued a warrant, and appellee was put under arrest, and on the 27th of March, 1913, the cause was heard by the justice of the peace, and the appellee was discharged. Appellee was the constable of the township where the fight occurred, and his father was one of the justices of the peace of that township, and there was a distant relationship between appellee and Mr. Henderson. This plea was submitted to a jury, and both justices of the peace gave testimony in support of it, and Mr. Henderson stated that appellee "plead guilty to his statement."

At this trial, the State asked the following instruction, which was refused: "If you believe from the evidence in this case that the alleged trial of the defendant

in the justice court was a collusive affair, or was done in bad faith, for the purpose of avoiding a trial on an indictment by the grand jury, and that said defendant was discharged without paying a fine, by reason of collusion, or in bad faith, then you are instructed that the law does not recognize his plea of former acquittal, as sufficient to avoid trial on the indictment returned by the grand jury."

The State filed a demurrer to the plea of former acquittal, and exceptions were saved to the court's action in overruling it. The jury returned a verdict of not guilty, and the State has appealed.

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

The State's demurrer to the plea of former acquittal should have been sustained. There was no attempt to comply with the statutes authorizing the submission of misdemeanor cases to justices of the peace. Kirby's Digest, § § 2497-2501.

J. C. Ross, for appellee.

After appellee prepared his statement and swore to it, a warrant was issued and he was put under arrest. Thereafter all parties, including the person with whom he had had the fight, appeared before the justice, and the case was tried on its merits. The justice had jurisdiction. Const. 1874, art. 7, § 40; Kirby's Digest, § 2083, subdiv. 5; 35 Ark. 327.

SMITH, J., (after stating the facts.) The instruction set out in the statement of facts is the law, and should be given in any case, where the evidence is sufficient to raise the issue of collusion. In the case of *State* v. *Caldwell,* 70 Ark. 74, it was said: "Bishop says: 'If one procures himself to be prosecuted for an offense which he has committed, thinking to get off with a slight punishment, and to bar any further prosecution carried on in good faith, if the proceeding is really managed by himself, either directly or through the agency of another, he is, while thus holding his fate in his own hand, in no

jeopardy. The plaintiff State is no party in fact, but only such in name; the judge indeed is imposed upon, yet in point of law adjudicates nothing. * * * The judgment is therefore a nullity, and is no bar to a real prosecution.' 1 Bishop, Cr. Law, p. 1010; *McFarland* v. *State,* 68 Wis. 400; *Watkins* v. *State,* 68 Ind. 427, 34 Am. Rep. 273, and numerous authorities there cited."

We think the demurrer should have been sustained and that the issue of former acquittal should not have been submitted to the jury. It appears from the quotation from the Caldwell case, *supra,* that one is not in jeopardy, as the result of a prosecution which he has himself procured to be instituted. Such is the rule as announced in the cases cited to support Mr. Bishop's statement of the law (subdiv. 3, of § 1010), unless as a result of the prosecution, so instituted, the full measure of the punishment provided by law is assessed against the defendant, or where the penalty is an exact and fixed one. Provision is made, however, under the statute by which any one who had committed an offense less than a felony, may plead guilty. Kirby's Digest, § § 2497-2502. These sections provide that any person who has committed a misdemeanor may submit a statement of the facts constituting a charge of said offense to a justice of the peace of the township in which the offense occurred, and the justice is then required to enter the substance of this statement on his docket, and to read the same to the offender, and enter his plea thereon, and if a plea of guilty is entered, the justice is then required to issue a warrant of arrest. Then, to ascertain the gravity of the offense, the justice is required to subpoena the person maltreated and such other witnesses as are necessary to give a clear understanding of the circumstances of the case; and, "said justice of the peace shall immediately after the examination of said witnesses render judgment against said offender, fixing and specifying the punishment of said offender and for all costs incurred, as in the procedure in other cases of misdemeanor." And such judgment is made a bar to another prosecution for the

same offense. The sections just cited were construed in the case of *Crowder* v. *State,* 69 Ark. 330, and it was there said: "In our view of it, these statutes were enacted for the purpose of preventing frauds upon the laws in the cases of misdemeanors, and are not restrictions upon the jurisdiction generally of justices of the peace to hear and determine cases less than felony, but rather are wholesome provisions, regulating the manner of entering pleas of guilty and restricting the validity of such pleas to the townships in which the offense is committed, and providing the necessary statements of the plea, and other matters of mere procedure named therein."

For one to avail himself of this statute he must comply with its terms, and when he has done so, he may plead the judgment of the court as a former conviction. These sections contemplate the infliction of some punishment and the rendition of judgment for the costs as an incident thereto. They do not contemplate the ordinary trial, as the defendant's plea of guilty is entered on the docket before the witnesses are subpoenaed and the evidence is heard to "ascertain the gravity of the offense." One can not, therefore, plead former acquittal as a result of a prosecution had under these sections.

Appellee can have no immunity from prosecution, under the indictment returned against him, because of the judgment of the justice of the peace. If the prosecution before the justice of the peace was not had under these sections, 2497-2502, Kirby's Digest, then the judgment is void because appellee himself instituted the prosecution, and the maximum punishment provided by law was not imposed.

The judgment will be reversed and the cause remanded with directions to the court to sustain the demurrer, and for a trial of the cause upon its merits, as no imprisonment can be imposed upon appellee as a part of the sentence, if he should be convicted.

LITTLE v. ARKANSAS NATIONAL BANK.

Opinion delivered May 4, 1914.

1. BILLS AND NOTES—INNOCENT PURCHASER FOR VALUE.—Before one can be held to be a *bona fide* and innocent holder of commercial paper, it must appear that the paper was acquired without notice or knowledge of defenses, or circumsatnces which would put the purchaser on inquiry that such defenses existed. (Page 75.)
2. BILLS AND NOTES—INNOCENT PURCHASER—DUTY TO MAKE INQUIRY.—The purchaser of negotiable paper is not required to investigate as to the consideration for which the paper was given, and he has the right to assume that the paper is the legal and valid obligation of the maker, unless he has notice or knowledge to the contrary. (Page 76.)
3. BILLS AND NOTES—INVALIDITY—DEFENSE AGAINST INNOCENT PURCHASER.—The defense of invalidity is available against an assignee of a note who purchased the note with notice of the facts concerning the consideration given therefor; but not against an innocent purchaser for value before maturity of a negotiable note. (Page 77.)

Appeal from Benton Circuit Court; *J. S. Maples,* Judge; affirmed.

Dick Rice and *Jeff R. Rice,* for appellants.

1. This case was here on former appeal. 152 S. W. 281. The bank was not an innocent purchaser for value. 103 S. W. 232; 1 Pac. 579; 108 S. W. 1068; 64 Am. St. 327. The burden was on the bank to show it was a purchaser for value without notice. The notes were mere wagering contracts. 8 Cyc. 236; 3 S. W. 805; 1 Daniel, Neg. Inst. (2 ed.), § 198; 126 S. W. 114; 111 *Id.* 888.

2. The evidence fails to show that plaintiff was a *bona fide* purchaser without notice. 130 S. W. 162; 95 *Id.* 145; 12 Atl. 223; 25 N. E. 281; 36 *Id.* 551.

3. The notes are void under our statute, and the court erred in its charge to the jury. Kirby's Dig., § 3690; 152 S. W. 281; 1 Daniel, Neg., Inst., 170; 6 Wend. 615; 97 S. W. 353; 55 Pac. 306; 21 Ga. 195.

B. R. Davidson, for appellee.

1. There is no error in the court's charge, and the evidence shows the bank was an innocent purchaser. Berman, Neg. Inst., p. 62, § 56.

2. The bank had no notice of any infirmity or defect. 7 Cyc. 943-4-5; 35 Ark. 146; 42 *Id.* 22; 61 *Id.* 81; 65 *Id.* 543; 69 *Id.* 140; 71 Fed. 489; 78 *Id.* 69; 81 Fed. 47.

3. On the former appeal it was held the notes were not void in the hands of an innocent purchaser. 105 Ark. 281; 52 *Id.* 473; 81 *Id.* 440; 77 Ark. 103.

SMITH, J. Upon the former appeal of this case, the appellant here being the appellant then, the following statement of facts was made, in the opinion then delivered:

"Appellants executed to one J. O. Gunter two negotiable promissory notes, each for the sum of $837.10, due and payable three and six months, respectively, after date, and Gunter assigned the notes to appellee, a banking corporation doing business in the city of Fayetteville, Arkansas. Appellee instituted this action to recover of appellants the amount of the two notes with interest. Appellants, for defense to the action, pleaded want of valid consideration for the execution of the notes sued on, alleging that Gunter was the soliciting agent for a certain life insurance company; that the notes were executed to him for the first annual premium on life insurance policies issued by said company on the lives of eighteen young men, the amount of the several policies of insurance to be payable on the death of the young men to Special School District of Rogers, Benton County, Arkansas; that neither the school district, nor any of these appellants, had an insurable interest in the lives of the men mentioned in the policies, and that said insurance contracts were void, and, consequently, the said notes given for premiums were without legal consideration. It is further alleged that appellee had full notice of the above stated facts when it purchased the notes from Gunter, and was therefore not an innocent purchaser for value."

The court below, on the former trial, struck out the allegations of the answer concerning the consideration for the notes, leaving in the answer only the allegations of payment of the notes by the school district, and, on that issue a verdict was returned in favor of the bank.

Upon the appeal from the judgment rendered upon that verdict it was held that the notes given for the insurance premium were invalid because the policies were wagering contracts, and as such against public policy.

Upon the remand of this case it was shown without dispute that the notes were executed for the consideration recited in the answer. The evidence upon the part of the bank, however, was to the effect that the notes were discounted at the rate of 8 per cent per annum, and the proceeds of the notes thus discounted were placed to the credit of the account of Gunter with the bank, and that Gunter at the time drew a small check against this deposit, and very soon afterward drew a check in favor of the insurance company for its portion of the premium, which was about 70 per cent of the face of the notes. Gunter testified that he advised the president of the bank what the consideration was, and that the bank had full knowledge of the transaction before the notes were purchased; but that statement was flatly contradicted, and the jury has seen fit to accept the statement of the president of the bank.

Appellants insist that a verdict should have been directed in their favor, and in support of this position they cite cases holding that when a bank simply discounts a note and credits the amount thereof to the endorser's account without paying to him any value for it, the transaction does not constitute the bank a purchaser for value of the note. This appears to be a correct statement of the law, but this issue does not appear to have been raised in the court below and no specific instruction to that effect was asked. Moreover, it appears to us it would have been abstract had it been given. There is a very close question of fact as to whether or not the officers of the bank knew what the consideration of the notes was before purchasing them; but there appears to be no real question that the bank paid full value for the notes, and that within a short time, and before the maturity of the notes, or either of them, Gunter drew checks against this deposit for the larger part of it, and all of it may have

been so withdrawn so far as the proof shows to the contrary. But, of course, the fact that it paid value for the notes would not entitle the bank to collect them from the maker, if it was not an innocent purchaser for value, before maturity. That question appears to have been fairly submitted to the jury, although an instruction numbered 5, asked by appellants, which might well have been given to the jury, was amended by striking out the latter part of it. Appellants strongly complain that the action of the court in not giving the fifth instruction as requested was error which calls for reversal of the case. The portion of the instruction stricken out was to the effect that the bank must have purchased the notes without notice or knowledge of their infirmity or of circumstances which would have put it upon inquiry, and which, if followed up, would have led to the knowledge of the facts. But the court gave the following instruction: "The court instructs the jury that before one can become a *bona fide* and innocent holder of commercial paper, it must appear that it was acquired without notice or knowledge of defenses, or circumstances which would put him on inquiry that such defenses existed." The instruction given embodied substantially the statement of law contained in the part of the fifth instruction which was stricken out, and we think no prejudice resulted to appellants on that account. Appellants complain of the action of the court in giving the following instruction:

"No. 2. I charge you that the notes sued on are commercial paper under the law and as such are transferrable by the payee, and when offered for sale by the payee before they are due, the party to whom that are offered is not required to investigate as to the consideration or for what the notes were given, and has a right to assume that they are legal and valid obligations of the parties executing the notes unless he has notice or knowledge to the contrary."

We think the instruction was not an improper one. In the case of *Winship* v. *Merchants Natl. Bank,* 42 Ark. 22, certain negotiable promissory notes were taken by ar

agent to himself for debts due his principal, and before their maturity they were transferred to a bank as security for advances made to the agent, the bank making the advances on them before maturity, in good faith, in the usual course of business and without notice of the principal's equity. The principal sued the bank for the amount of the notes, and in the opinion in that case it was said: "Counsel for appellants contends that the bank having received the notes merely by way of security for a debt, is not entitled to be protected as a *bona fide* holder. Our reply to this is, that the notes were in form negotiable; that they were transferred to the bank before maturity; that the bank received them in good faith and in the usual course of business, and is consequently unaffected by equities of which it had no knowledge. The facts that Camp was the payee of the notes, and that they were in his possession, were *prima facie* evidence that they were his property; and without notice to the contrary the bank had a right so to treat them, and was under no obligation to inquire whether they were held by him as agent or as owner." So here, if the bank had no knowledge or notice, it was under no duty to inquire what the consideration for the notes was. Other instructions told the jury that if the bank knew what the consideration was, or had notice of such circumstances as should have put it upon inquiry, that it was not an innocent purchaser, and there was no conflict between the instructions. This instruction numbered 2 only dealt with the right of a bank to purchase commercial paper where it has no notice, or knowledge, of any infirmity in it, and it correctly declares the law with reference to the purchase of such paper. This instruction does not undertake to deal with the question of the burden of proof and of the bank's duty to show that it was in fact an innocent purchaser.

Appellants further insist that a verdict should have been directed in their favor for the reason that the notes sued upon are void under section 3690, of Kirby's Digest,

and that whenever a statute declares a note or other contract void, they are, and must be so, in the hands of every holder. We need not discuss the application of that section of the Digest to the facts of this case for the reason that the law of this case, on that question, was settled in the opinion on the former appeal, where it was said: "The defense (of invalidity) is available against an assignee of a note who purchased with notice of the facts concerning the consideration; but not against an innocent purchaser for value before maturity of a negotiable note." *Clark* v. *Hershy,* 52 Ark. 473; *Rankin* v. *Schofield,* 81 Ark. 440. That this is the law of this case was recognized by appellants in the instruction given at their request and numbered 3, which reads as follows:

"No. 3. The court instructs the jury that the court means by the term 'insurable interest' to be such an interest arising from the relation of the party obtaining the insurance, either as a creditor of, or surety of, the assured, or from the ties of blood or marriage to him as will justify a reasonable advantage or benefit from the continuance of his life, and that in the absence of any ties of blood or marriage between the beneficiary in the life insurance policy and the person whose life is insured, or of some contractual relation between them by reason of which damage may result to the beneficiary from the death of the party whose life is insured, that such insurance policies and notes given for the premiums thereon are void except in the hands of an innocent purchaser for value before maturity without notice."

Other questions are presented in the briefs, but we find it unnecessary to discuss them. The case presents almost entirely a question of fact, and that question was submitted to the jury under instructions declaring the law, as we have here stated it to be, and the judgment is therefore affirmed.

AMERICAN REALTY COMPANY *v.* HISEY.

Opinion delivered May 11, 1914.

FRAUDULENT REPRESENTATIONS—EXCHANGE OF LANDS—To maintain an action for false and fraudulent representations as to land sold, the party complaining must prove that the fraud in some manner induced plaintiff to make the contract; that he was injured thereby; that he contracted upon the faith of the defendant's representations, and that he relied upon them, and had a right to rely upon them in the full belief of their truth.

Appeal from Cleburne Circuit Court; *George W. Reed,* Judge; affirmed.

Wood & Casey and *Mitchell & Thompson,* for appellant; *John Hickey,* of counsel.

1. In a civil case the jury are the judges of the facts, but never the judges of the law. An instruction leaving to the jury to decide questions of law is erroneous. 49 Cal. 56; 40 Ky. 105; 80 Md. 214; 30 Atl. 904; 1 Mo. 97; 15 *Id.* 63; 88 *Id.* 150; 26 Ill. 438, 440-2; 18 Ind. 291; 25 Ind. App. 538; 40 *Id.* 156, 163-5.

2. All questions of law are exclusively for the court. 73 Ind. 577-9; 18 *Id.* 291; 11 Enc. Pl. & Pr., 57-60; 120 Ind. 6; 16 Am. St. 298; 16 Ind. App. 504; 151 Ind. 343; 19 S. E. 492; 24 Tex. 538; 56 Fed. 810; 12 U. S. App. 490; 85 Ga. 638; 11 S. E. 1027; 95 Tenn. 413; 32 S. W. 307; 38 Cyc. 1528; 6 Ohio 65; 38 Ark. 334; 84 Ill. 446.

3. In order to recover, plaintiffs must show, (1) that they were defrauded by false and fraudulent misrepresentations; (2) that they relied on same; (3) that they had a right to rely upon same; (4) that they were injured. Cases *supra.*

M. E. Vinson, for appellee.

1. The instructions given cover the requirements prescribed by this court. 47 Ark. 148. But appellant can not complain since it did not ask the court to give an instruction covering their conclusion. 95 Ark. 593; 89 *Id.* 300; 104 *Id.* 322; 88 *Id.* 225; 102 *Id.* 588; 103 *Id.* 28.

2. It would have been error for the court to have singled out the testimony and told the jury that it showed,

or did not show, certain facts, would have been reversible error. 62 Ark. 286; 88 *Id.* 7; 103 *Id.* 21; 105 *Id.* 467.

3. The instructions as a whole cover the law fully. 100 Ark. 107; 97 *Id.* 358; 95 *Id.* 209; 93 *Id.* 316; 89 *Id.* 24; 85 *Id.* 179.

4. Appellant's objection was general. 100 Ark. 269; 99 *Id.* 226; 98 *Id.* 352.

McCULLOCH, C. J. This is an action instituted to recover damages on account of alleged deceit and fraudulent representations in the sale or exchange of lands.

Mattie D. Hisey, one of the plaintiffs, owned real estate in the city of Terre Haute, Indiana, and exchanged the same with defendant, American Realty Company, for two tracts of land in Cleburne County, each containing eighty acres. She alleges in her complaint that defendant's agent induced her to make the exchange through false and fraudulent representations as to the location, quality and value of the land. Her claim is, in brief, that she sent her husband to Cleburne County, Arkansas, with the agent of the defendant to inspect the land, and that, instead of showing her husband the tracts of land which were sold to her, he fraudulently showed him another tract and represented to him that it was the tract which was the subject of negotiations.

According to the testimony adduced by plaintiff, the tract pointed out to Hisey was covered with valuable timber and was suited for farming purposes, containing also a valuable spring of water which was useful in stock raising; whereas, the tract actually conveyed to Mrs. Hisey contained no merchantable timber at all, that it was unsuited for farming purposes, and had no spring on it at all.

The jury awarded damages to the plaintiff, and the defendant has prosecuted this appeal.

The only assignment of error pressed here is the ruling of the court in giving an instruction at the instance of plaintiff as follows:

"1. If you believe, from a fair preponderance of all the evidence in this case, that the defendant's agent

did falsely, fraudulently, knowingly and deceitfully make to the plaintiffs representations concerning the character, quality, condition and location of the lands conveyed by the defendant to the plaintiffs, which representations induced the plaintiffs to convey to defendant their houses and lots of land in the city of Terre Haute, in the State of Indiana, and that the plaintiffs were misled to their injury by such false and fraudulent representations, and that the relative position of the parties to this action was such that the plaintiffs were necessarily presumed to contract upon the faith reposed in the statements of the defendant's agents, and that the plaintiffs did rely upon the false and fraudulent statements of the defendant's agents, and did have a right to rely upon them in full faith of their truth, then your verdict must be for the plaintiffs, and the measure of damages will be the difference between the real value of the lands so conveyed to plaintiffs, as shown by the evidence, and what it would have been had the representations made concerning it been true."

The court also, on motion of defendant, gave the following instructions:

"1. You are instructed that in order for the plaintiff to recover in this case you must find that the plaintiff has proven by a preponderance of the testimony that the defendant used some fraudulent inducement in the land deal referred to, and that the plaintiff not only relied on the fraudulent representations, but that in so doing, the plaintiff was damaged."

"4. Before representations of the seller of real estate can amount to fraud, the one claiming to suffer by fraud must be presumed to contract upon the faith and trust reposed in the seller on account of the superior information and knowledge in respect to the subject of the contract."

"5. I instruct you, gentlemen of the jury, that one who has had an opportunity to inform himself concerning the subject-matter of a contract can not complain of being misled. And in this case, if you believe from all the evi-

dence that plaintiffs had a fair and reasonable opportunity to inform themselves as to the amount of timber on, and the value of, the lands in question, and did not so inform themselves, then they can not complain, and your verdict should be for the defendant."

This court, in the case of *Matlock* v. *Reppy,* 47 Ark. 148, laid down the principles of law applicable to this class of cases as follows (quoting from the syllabus):

"To maintain an action for damages for false and fraudulent representations as to land sold, the vendee must prove, (1) that the fraud related to some matter of inducement to the making of the contract; (2) that it wrought injury to him; (3) that the relative position of the parties was such, and their means of information such, that he must necessarily be presumed to have contracted upon the faith reposed in the statements of the vendor; and (4), that he did rely upon them, and had a right to rely upon them, in full belief of their truth."

Instruction No. 1, given by the court, was an attempt to follow that rule, and, so far as the law announced therein, it did adhere to the principles announced in *Matlock* v. *Reppy.*

It is insisted, however, that while the correct principles of law are announced, the instruction itself was erroneous because it placed upon the jury the duty of deciding questions of law, whereas the court should have stated hypothetically the circumstances under which the plaintiff would be presumed to have contracted upon the faith of the statements made by the defendant.

Conceding that the instruction is open to that objection, the defendant is not in an attitude to complain for the reason that its fourth instruction contained substantially the same language; and, besides that, this objection to the instruction should have been made specifically.

The same may be said of the objection to the other part of the instruction submitting to the jury for them to determine under what circumstances the plaintiff could rely upon the statements, instead of stating to the jury under what circumstances such reliance could be placed

upon the statements. There should have been a specific objection to the instruction, calling the court's attention to the criticism now made.

There is a serious conflict in the testimony, but we are of the opinion that there was enough testimony in support of the plaintiff's contention to warrant a submission of the issues to the jury. The judgment is therefore affirmed.

WILLIAMS v. FULKS.

Opinion delivered May 11, 1914.

1. APPEAL AND ERROR—INVITED ERROR.—In an action for damages for slander, defendant can not complain of the refusal of the court to permit postal cards to be read, where the cards were excluded upon defendant's request. (Page 84.)
2. SLANDER—EVIDENCE—ACTS AFTER THE SLANDER.—In an action for damages for slander, *held* evidence by plaintiff that she had received certain postal cards after defendant had spoken the slanderous words, is admissible, as showing that plaintiff suffered humiliation from the slander. (Page 85.)
3. SLANDER—EVIDENCE—GENERAL KNOWLEDGE OF THE SLANDER.—In an action for damages for slander, testimony of plaintiff's sister that a third person repeated the slanderous words to her is admissible, to show that the slander was generally known. (Page 85.)
4. SLANDER—EVIDENCE OF CONSEQUENCES.—In a suit for slander, it is competent for plaintiff to show that plaintiff failed to receive promotion in a lodge, which the jury may infer was due to defendant's slanderous words. (Page 85.)
5. SLANDER—GENERAL CIRCULATION—DAMAGES.—Evidence of the general circulation of slanderous words is competent as showing the extent of plaintiff's damages. (Page 85.)
6. SLANDER—WIFE'S SLANDER—LIABILITY OF HUSBAND.—A husband is liable for slanderous words spoken by his wife. *Jackson* v. *Williams*, 92 Ark. 486; *Williams* v. *Fulkes*, 103 Ark. 196. (Page 86.)

Appeal from Greene Circuit Court; *W. J. Driver*, Judge; affirmed.

M. P. Huddleston and *Robert E. Fisher*, for appellant.

Block & Kirsch and *T. A. Turner,* for appellee.

McCULLOCH, C. J. This is an action instituted by the appellee, Dora Jackson Fulks, against J. M. Williams and his wife, Nancy Williams, to recover damages on account of slanderous words alleged to have been spoken by defendant, Nancy Williams, concerning the plaintiff.

This is the third appeal. The first judgment was in favor of defendants, and, on appeal, that judgment was reversed and the cause remanded for a new trial. 92 Ark. 486. The second trial resulted in a judgment in favor of plaintiff, and, on appeal, that judgment was reversed and the cause remanded for a new trial. 103 Ark. 196.

The facts are fully set forth in the former opinions and need not be again rehearsed.

The words alleged to have been spoken were slanderous *per se*, and the law applicable to the case is fully settled on the former appeals.

In the last trial plaintiff recovered judgment in the sum of $1,000, and the defendants have prosecuted the appeal to this court.

The only assignments of error relate to rulings of the court in admitting testimony. There are several of these assignments, and they all relate to testimony which had bearing only on the question of the amount of damages, except one of the assignments, which related to testimony affecting the credibility of one of the witnesses.

After a careful examination of these assignments we are of the opinion that none of them constitute reversible error. It is unnecessary to discuss them all, as the principles affecting them are not unconnected.

One of the assignments is as to the ruling of the court in permitting the plaintiff to testify about certain postal cards which she had received through the mails subsequent to the utterance of the slander.

This occurred on re-direct examination, after counsel for defendants had subjected her to a searching cross-examination on all phases of the case, and particularly with reference to the amount of her injury by reason of

the slander. She was asked about the persons who knew of the slander and their character, and whether she had reason to think that the slanderous words were believed by people in the community. On re-direct examination, immediately following this part of the cross-examination, she was asked by counsel for plaintiff whether or not she had received postal cards through the mails (then handed to her), and what was her state of mind after she received them. Objection was made by defendant's counsel to the introduction of the postal cards, and the court sustained the objection, telling the jury at the time to disregard anything said in their hearing insofar as the cards were concerned, but that the degree of plaintiff's mental suffering being a matter at issue as affecting the damages she could be permitted to state that she received postal cards, and what the condition of her mind was at the time as the result of the slanderous words uttered by the defendant, Mrs. Williams. She was then permitted to state that she received postal cards, and that her heart was almost broken over the incident.

The defendants can not complain at the failure of the court to permit the postal cards to be read, because the cards were excluded upon their request. They objected to the plaintiff making any statement about the condition of her feeling at that time; but we are of the opinion that the testimony was not prejudicial when considered in the light in which the jury must have understood it. The whole purpose of it was to show what she believed, and that she was humiliated in consequence of a belief that the slander affected the minds of people in the community toward her. This testimony was merely introduced for the purpose of responding to the attempt of defendants to show that she did not suffer any humiliation from the slander because she did not believe it had any effect. After all, the manner in which the testimony was admitted made it relate to the plaintiff's own statement that she believed that the slanderous words were in some quarters accepted as true. It could only have affected the amount recovered, and we do not think that the

mention of the postal cards had any prejudicial effect upon the minds of the jury.

Another assignment relates to the testimony of plaintiff's sister about a friend of hers telling her of the use of the slanderous words by defendant, Mrs. Williams.

Now, there is much contrariety of opinion among the authorities on this subject as to effect of repetition of slanderous words by third persons, and whether the original slanderer is responsible therefor.

We need not go into that question here, for it is apparent that this assignment does not raise it, as the testimony of plaintiff's sister only had a tendency to show that the slander was generally known, and had been communicated to her by a third person. It was not such repetition of the slander as was calculated to augment the damages, and therefore could not be held to be prejudicial, even if it be held that under the law the defendant was not liable for damages resulting from the repetition of the slander by third persons.

Another assignment relates to testimony of plaintiff tending to show that she was a member of a certain lodge and was the next highest officer therein, and that about the time the slander was circulated, she was, without apparent cause, dropped out of line, and not promoted to the highest office.

We think that testimony was competent, for the jury might fairly have drawn the inference that her failure to attain the office was caused by the slanders circulated against her good name.

Other testimony adduced which has been objected to related to the circulation of the slander, or, rather, to evidence of the fact that it had been generally circulated in the community as the result of utterance of the slanderous words by defendant, Mrs. Williams; and we think it was competent for the purpose of showing the extent of the damages.

The question whether the defendants are responsible for damages resulting from mere repetition by other per-

sons is not properly raised in this case, and the court will not undertake to decide it.

Upon the whole we are unable to discover any prejudicial error in the record.

We have already decided that the defendant, J. M. Williams, is, under the law, liable for damages resulting from slanderous words spoken by his wife, and, however innocent he may be of any participation in the wrong, he can not escape the effect thereof.

The assessment of damages is assailed as being excessive; but after considering all the evidence in the case, we are unable to say that the jury were without warrant to fix it at the amount named.

Judgment affirmed.

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

Opinion delivered May 11, 1914.

RAILROADS—DEATH OF EMPLOYEE—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—Deceased, an employee of defendant railroad company, was brakeman on a caboose which was "kicked" down a sidetrack. The caboose collided with other cars and deceased received the injuries which resulted in his death; *held*, under the evidence there was no negligence on the part of defendant, as the caboose was not running at an excessive speed and the brakes were in perfect order, so that deceased might have applied them, and that other employees gave him signals to apply the brakes.

Appeal from Clark Circuit Court; *C. W. Smith*, Special Judge; reversed.

E. B. Kinsworthy, R. E. Wiley and *T. D. Crawford*, for appellant.

1. The first instruction was abstract.

2. The court erred in giving plaintiff's instruction No. 3. 201 Fed. 591. The Federal act governs. 229 U. S. 146; 229 *Id.* 156; 130 Pac. 897.

3. The court should have directed a verdict for defendant. There was no negligence. It was the universal

custom to make flying switches. 3 Labatt, Master & Servant, § 1126, p. 2986.

4. The employee assumed the risk. 1 White on Personal Injuries, § 357.

McRae & Tompkins, for appellee.

1. There is no error in the instructions. The action was not brought under the Federal statute. 223 U. S. 1; 149 Ia. 51; 223 U. S. 711; 229 *Id.* 114-121.

2. The rule as to flying switches was broken. 3 Labatt, Master & Servant, § 909; 10 Enc. Ev. 570.

McCULLOCH, C. J. This is an action instituted by the administratrix of the estate of one James Rodgers, deceased, against the St. Louis, Iron Mountain & Southern Railway Company to recover damages resulting to the estate and next of kin on account of the death of said James Rodgers, which is alleged to have been caused by the negligence of the defendant.

Rodgers was a rear brakeman running on one of defendant's freight trains on the Gurdon branch operated between Gurdon, Arkansas, and Ferriday, Louisiana. The train had come from El Dorado and reached Gurdon in the early part of the night. There are numerous tracks at Gurdon, one of which is a spur track called the brickyard spur, where it is customary to store cabooses. On the arrival of a freight train, the rules require that the caboose be run in on this spur track and stored there. This is usually done by throwing the caboose in on that track by a flying switch. There was a hand brake on the caboose operated from the cupola. This brake was frequently used while the train was in operation for the purpose of preventing the cars in the train from bunching when going down hill, and also for the purpose of controlling the caboose when it was disconnected from the other cars, such as when it was thrown on the sidetrack or spur to be stored. It was the duty of Rodgers, being the rear brakeman, to place himself in the cupola ofthe caboose when it was to be thrown in on the spur track, and to control the movement of the caboose after the engine cut loose from it. On this occasion, when the crew was

ready to make the flying switch, Rodgers went into the cupola of the caboose and gave the signal for the engineer to proceed to make the switch. The caboose was thrown in on the spur, but for some reason or other undisclosed in the evidence, the speed of the caboose was not checked or controlled, and it crashed into two other cabooses standing on the spur. No one was in the caboose at the time but Rodgers, but as soon as the impact occurred, other members of the crew went in and found Rodgers lying struggling on the floor with his throat cut. He had evidently been thrown against the glass window of the caboose and his head thrust through the glass, which broke and inflicted the cuts. A surgeon was summoned to his aid, but he bled to death, life becoming extinct in about thirty minutes after the injury occurred. He evidently suffered great pain, for witnesses testified that he made considerable effort to speak to them, but was unable to do so on account of the accumulation of blood in his throat.

The act of negligence set forth in the complaint is that the "night was dark and defendant's servants carelessly and negligently ran said caboose upon the sidetrack with such unusual force and at such a dangerous speed that the deceased, who was in the cupola of said caboose, where his duties required him to be, was unable to check the speed of said caboose, and when said caboose struck the cars standing upon said sidetrack, he was thrown forward against the glass in the window of said caboose with such force, that the glass was broken, and his head was driven through the glass and his throat cut."

There are several assignments with respect to the giving and refusing of instructions; but we will only discuss the testimony in the case, for we have reached the conclusion that it was insufficient to sustain the charge of negligence. The uncontradicted testimony is, we think, to the effect that the flying switch was made in the ordinary method, and that Rodgers frequently was engaged in making the switch just in the manner in which it was made on this occasion.

There is a slight variance in the testimony as to the speed the caboose was going at the time the engine was released from it, some of the witnesses putting it at from four to six miles, and some at seven or eight miles; but they all agree that the speed which it was going at the time was the customary speed in making that switch.

There is some testimony tending to show that the switch could have been made at a less speed than that; but testimony of that character is not sufficient to establish negligence, for the reason that the uncontradicted evidence is that it is perfectly safe to cut the caboose loose while running at a speed of seven or eight miles an hour with a hand brake on it with which to control the movement. The fact that it could have been switched at a lower rate of speed does not make out a case of negligence.

Two or three witnesses introduced by the plaintiff testified that they heard the impact of the caboose against the other two cabooses standing on the spur track, and that it made an unusual noise, in fact, it resounded with a great crash. The evidence is, too, that the two cabooses on which the brakes were set were driven a distance of about fifteen feet by the impact of this caboose, and that the two cabooses were injured by the impact.

This testimony only shows, however, that the caboose in which Rodgers was riding came against the other cabooses with tremendous impact; but that resulted from the failure to apply the brake and does not establish a greater rate of speed than that mentioned by the other witnesses, as all stated that it was not running at an unusual rate of speed. It only proves that the caboose was not under control, and that its speed was considerable when it struck the others on the spur, but it does not tend to fix a rate of speed greater than that described by the other witnesses, and, therefore, raised no conflict in the testimony which called for a submission of the issue to the jury. In other words, the uncontradicted evidence of the witnesses who testified with reference to the speed of the caboose at the time the engine was released from

it shows that it was not running at an unusual speed while doing that work, and that the cause of the impact was the failure to apply the brake. The witnesses all say that instead of the caboose being controlled by Rodgers soon after the engine was released, it began to pick up speed as it went down the spur, which was down grade. The caboose ran a distance of 515 feet from the time the engine cut loose from it to the point it collided with the other cabooses. Witnesses say that during this time it was picking up speed instead of lessening it, and that when they noticed the brake was not being applied, several of them hallooed to Rodgers to put on the brakes, and that the engineer gave the signal from his engine to set the brake.

There are no circumstances, we think, which can fairly be said to contradict the statements of these witnesses as to the momentum which was given to the caboose before it was cut loose from the engine, and we are of the opinion that there is no negligence shown, but that the injury occurred solely on account of the failure to apply the brake and control the caboose after it was separated from the engine. The injury, therefore, resulted from accidental cause and without fault, so far as the evidence shows, on the part of any one, unless it be that of the deceased himself.

There is no allegation in the complaint that there was anything wrong with the brake, and no charge of negligence in that regard. All the testimony shows that the caboose was a new one, and that the brake was in good working order. Several of the witnesses used the brake immediately before and immediately after the accident. One of the witnesses testified that he went in and tried the brake as soon as the caboose stopped, and it was ascertained that Rodgers was injured. He stated that the brake was not set and that it was in perfect working order.

There is a suggestion in the testimony that the chains on hand brakes sometimes fail to wind properly and thus interfere with the use of the brake; and it may

be that this prevented the use of the brake in this instance. Rodgers was an experienced brakeman, having been working on the road about eleven months, and frequently doing this particular kind of work. The witnesses describe him as being a good brakeman, who knew what was required of him, and it is difficult to believe, under the circumstances, that he failed to discharge his duty, and yet there is no satisfactory reason found in the record why the brake was not applied. We need not indulge in conjecture on that point, however, for, conceding that he made every reasonable effort to control the car, it is uncontradicted that the speed was not an unusual or dangerous one; that the car could have been controlled while going at that rate of speed and that for some reason or other the brake was not used and the speed of the car was not controlled.

Counsel for plaintiff attempt to sustain the judgment on negligence in attempting to put the car in on the spur track with a flying switch.

There is no charge of negligence of that kind in the complaint, but some of the witnesses testified that there was a rule of the company against using the flying switch except in case of emergency and when the track and switches were in good condition.

The evidence is, however, uncontradicted that this rule was habitually disregarded to the extent that it amounted to an entire abrogation of the rule, for all of the train men testified that the invariable custom was to store cabooses on sidetracks or spur tracks in that manner. If that was the unvarying custom it amounted to an abrogation of the rule and became one of the incidents of the service, the danger from which the deceased assumed when he took service.

Deceased met his death while in the line of his duty and as the result of a shocking accident, which naturally excites the sympathy of all, but we are unable to discover any testimony in this record which is sufficient to warrant the finding that any of the members of the train crew were guilty of negligence in switching the caboose,

or in the method in which it was done. The verdict is therefore unsupported by the testimony and the judgment must be reversed for that reason. Reversed and remanded for a new trial.

HART, J., dissents.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. CURTIS.

Opinion delivered May 11, 1914.

1. DEEDS—CONDITION SUBSEQUENT—BREACH.—A. deeded land to defendant, the deed reciting that a section house was to be erected on the land, and when the same shall "cease to be used as such (a section house), the title to the land shall revert to" A. *Held*, where the grantee ceased to use the property and a building thereon which it had constructed, as a section house, the title reverted to and vested in A., the grantor, and it was not necessary for A. to take possession of the land in order to effect a forfeiture for failure on the part of defendant to comply with the condition. (Page 96.)
2. REAL PROPERTY—BUILDING—PART OF THE REALTY.—A. deeded land to defendant, who agreed to erect and maintain a section house thereon, the deed providing that when defendant ceased to use the property as such, that title thereto should revert to A. *Held*, where defendant abandoned the use of the property as a section house, the title to the land reverted to A., and under the terms of the agreement the house would be held as fixed to the land, and defendant would be liable to A. for the value thereof, after having removed the same from the land. (Page 97.)

Appeal from Greene Circuit Court, First Division; *J. F. Gautney*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellee alleged that on the 12th of April, 1909, he was the owner of an acre of land in Greene County, which he described, and that on the above date he conveyed the land to appellant by a deed which contained, among others, the following clause: "For and in consideration of the sum of one dollar and the stipulations hereinafter mentioned to me in hand paid by the St. Louis Southwestern Railway Company, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said St. Louis Southwestern

Railway Company and unto its successors and assigns, the following lands (describing same). This deed is made for the purpose of erecting and maintaining a section house on above described land by the grantee herein and when it shall cease to be used as such the title to the land shall revert to and vest in said S. H. Curtis. To have and to hold the same unto the said St. Louis Southwestern Railway Company, and unto its successors and assigns forever, with all the appurtenances thereunto belonging." Then follows a covenant of warranty of title.

The appellee alleged that in accordance with the conveyance the railway company (appellant) entered upon the land and erected a small section house thereon and occupied the same as a section house until the 4th day of March, 1911, when it ceased to keep and occupy the house as a section house, and thereby broke its contract and forfeited the title acquired under the conveyance; that notwithstanding the forfeiture, the appellant held the house until the 27th day of December, 1912, when it vacated the same, and appellee on that day took possession of the property; that on the 30th of December, 1912, the appellant wilfully and unlawfully entered upon the possession of the premises and wilfully, forcibly and unlawfully proceeded to evict the appellee and to remove the above house from the land, to appellee's damage in the sum of $550.

The appellant answered, admitting that it entered upon the property mentioned in the complaint and that it constructed the house thereon, and alleged that the same was constructed by it to remain on the land so long as appellant desired to use the property, but no longer; that it was not intended for a permanent building. It denied that the house, or any part of it, reverted to the appellee. Admitted that it moved the house, but denied that it did so unlawfully, and denied that the plaintiff was damaged in any sum; denied that the value of the house was more than $100.

The case was sent to the jury, and appellee testified that appellant used the building as a section house for a year and a half, when it vacated the same as a section house and rented it to a tenant for other purposes. Appellee gave appellant and its tenant notice to vacate the house. The tenant moved out and afterward rented the property from appellee and moved back in the house.

There was testimony on behalf of the appellee tending to show that the house was worth from three to five hundred dollars. There was testimony on behalf of the appellant tending to show that the house was worth from ninety to one hundred dollars. The house had a rental value of $2.50 per month.

Letters of appellee to appellant's agent were introduced, tending to show that during negotiations between them in regard to a settlement appellee stated that he was willing to pay $40 to appellant for a quitclaim deed by way of settlement.

The court instructed the jury as follows: "The deed conveys the property to defendant for the purpose of maintaining a section house thereon, and provides when it ceases to be used for such purpose the title will revert to plaintiff. It is admitted defendant complied by building the house. When the defendant moved the house the condition of the conveyance was broken and the house being a part of said real estate, reverted to the plaintiff with the land. You are instructed to return a verdict for the plaintiff in such sum as you may find to be a fair market value of the house which was removed from the land, taking into consideration the condition of the house, the place where it was located, and the value of the real property, if you find it has any value, at that place and at that time, at the time of the removal of the house." To the giving of which appellant duly excepted.

The verdict was in favor of the appellee for $200. Judgment was entered against the appellant for that sum, and it has duly prosecuted this appeal.

Sam H. West and *J. C. Hawthorne,* for appellant.

1. The deed was an absolute conveyance. The clause providing that the land should revert and vest in the appellee is inconsistent with the granting, habendum and warranty clauses in the deed. 77 Ark. 168.

2. The house having been constructed at Pine Bluff, Arkansas, and moved from there to different points where it was set up and used as a section house, the last place being at the point in question here, the presumption is legally raised that it was never intended by appellant to permanently annex the house to the realty. It was not in fact a fixture to the real estate, and appellant had the right to move it at any time without reference to the title to the real estate. 56 Ark. 55.

The court erred in holding that one in possession of land under a conditional or base fee was liable for waste before the termination of the estate. 95 Ark. 18; 4 Kent (14 ed.) 354; 12 Am. St. Rep. 305; 1 Washburn on Real Prop. (4 ed.) 89; 55 L. R. A. 701.

Johnson & Burr and *W. S. Luna,* for appellee.

The language of the deed is clear and unmistakable that when the appellant ceased to use the house as a section house the title to the land should revert to the appellee.

When erected upon the land, the house became a permanent fixture and appellant had no legal right to remove it. 66 Ark. 87.

WOOD, J., (after stating the facts). 1. Appellant contends that the deed in controversy is an absolute conveyance, and relies upon *Bain* v. *Parker,* 77 Ark. 168. In that case the deed was as follows: "The grantors, in consideration of one dollar and the further consideration of the building, equipping and operating a line of railroad, etc., to be completed by January 1, 1899, have granted, bargained, sold and conveyed," etc. In that case we held that the words "to be completed by January 1, 1899," when taken in connection with the other provisions of the deed, did not amount to a condition subsequent. We said: "There are no words indicating that

the estate should be forfeited if the road was not completed at the date named. These words import nothing more than a covenant, which, upon the acceptance of the deed by the grantee, became binding upon him, and for the breach of which the grantor may recover damages suffered thereby, but the deed remains valid."

The language of the deed under review in that case relied upon as showing a condition subsequent was entirely different from the clause of the deed now under consideration. In that case the words "to be completed by January 1, 1899," were not conditions upon which the title was forfeited. As was there said, they only amounted to a covenant to do certain things, but there was nothing to indicate that if the things prescribed were not performed the title in the grantee would be forfeited and would revert to the grantor. But here the provision "when it shall cease to be used as such (section house) the title to the land shall revert," expresses a condition subsequent, upon the happening of which the title is to revert to the grantor. The words "when it (the section house) shall cease to be used as such" are clearly words expressing a condition, and the words "the title to the land shall revert to and vest in S. H. Curtis," clearly express the intention of the parties to the deed that the title should revert to and vest in the grantor upon the happening of the condition.

Here the undisputed evidence shows that appellant did cease to use the section house as such before it removed the same from the premises, and therefore, under the express terms of the condition, the title reverted to and was vested in the appellee.

The qualified or base fee which the appellant had under the deed terminated upon the breach of the condition subsequent. The evidence shows that the condition subsequent was not complied with, and that the estate reverted before appellant moved the house from the land. Upon a breach of the condition subsequent, *ipso facto* the title reverted and was vested in the appellee, and it was not necessary for the appellee to take possession of the

land in order to effect a forfeiture for failure on the part of the appellant to comply with the condition. See *Moore* v. *Sharpe,* 91 Ark. 407.

The undisputed evidence shows that the appellee did take possession of the land and declare a forfeiture for the condition broken before appellant moved the house.

2. Appellant contends that the house in controversy was not a fixture, and therefore appellant had the right to move the same, without regard to the title to the land. But we are of the opinion that the clearly expressed intention of the parties as gathered from the language of the deed was that the section house should be erected on the land and used as a section house, and this being the very purpose of the deed, the trial court was correct in holding as matter of law, under the language of the instrument, that the section house was a fixture. See *Ozark* v. *Adams,* 73 Ark. 227, and cases cited.

3. The house in controversy being a fixture, the evidence was sufficient to sustain the verdict of the jury as to the value thereof.

The judgment is therefore correct, and it is affirmed.

SAFFELL v. STATE.

Opinion delivered May 11, 1914.

1. CRIMINAL LAW—DAMAGING CHURCH PROPERTY—ALLEGATION OF OWNERSHIP.—It is unnecessary in an indictment charging the damaging of church property, under Kirby's Digest, § 1923, to name the owner of the property damaged. (Page 99.)
2. CRIMINAL LAW—DAMAGING CHURCH PROPERTY—ALLEGATIONS IN INDICTMENT.—An indictment under Kirby's Digest, § 1923, is properly drawn which alleges that defendant "did * * * injure, tear down and remove, a certain church building." (Page 99.)
3. CRIMINAL LAW—DAMAGE TO CHURCH PROPERTY—SPECIFIC INTENT.—A specific intent to injure some one is not an ingredient of the crime of damaging church property, denounced in Kirby's Digest, § 1923. (Page 99.)
4. CRIMINAL LAW—DAMAGE TO CHURCH PROPERTY—USE OF PROPERTY.—Defendant will be held guilty of the crime of damaging church property, under Kirby's Digest, § 1923, although the building was also used as a public schoolhouse. (Page 100.)

Appeal from Lawrence Circuit Court, Western District; *R. E. Jeffery,* Judge; affirmed.

McCaleb & Reeder, for appellant.

1. The demurrer should have been sustained to the indictment. It was not good at common law, as no allegation of ownership appears. 48 Ark. 57-9; 66 *Id.* 65; 14 A. & E. Enc. L. (1 ed.) p. 12; Kirby's Dig., § § 1923, 2227, subdiv. 2.

2. Reversible error was committed in the exclusion of material testimony. 117 N. W. 528; 110 Mass. 401; 118 N. W. 706; 108 S. W. 1131; 6 Atl. 619; 3 Cush. 558; 61 Atl. 9; 54 Pac. 502; 32 Am. Dec. 661; 104 N. W. 800.

3. Rejected instruction No. 1 correctly stated the law. 97 Ark. 36-7; 65 Ark. 426.

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

1. The indictment was sufficient. Kirby's Dig., § 1923, 2233.

2. There was no error in the exclusion of evidence.

3. There was no error in the court refusing the instructions offered by appellant.

WOOD, J. The appellant was convicted on an indictment which charged as follows: "That the said J. A. Saffell, in the district, county and State aforesaid, on the 30th day of December, 1913, did unlawfully, wilfully, maliciously and mischievously injure, tear down and remove a certain building known as the Harmony Church building, the same being public property," etc.

Appellant demurred to the indictment. The court overruled the demurrer, and appellant urges this ruling of the court as one of his grounds for reversal.

The statute under which appellant was indicted is as follows:

"To cut, write upon, deface, disfigure or damage any part or appurtenance of the inclosure of the Statehouse, or any other building belonging to the State, or of any church or schoolhouse, or other public building, or of any citizen of this State, when not occupied, shall be a mis-

demeanor and punishable by a fine not exceeding one hundred dollars." Kirby's Dig., § 1923.

The indictment was sufficient to charge the offense under the above statute. The name of the owner of the church was not necessary to identify the crime at which the statute was leveled. The language of the statute does not require the name of the owner to be mentioned. To charge in the language of the statute, or in words of the same purport, that one disfigured or damaged any church house, was sufficient. "Where an offense involves the commission, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, is not material." Kirby's Dig., § 2233.

Even if the indictment had erroneously designated the particular denomination, or the trustees thereof holding the title for the members of the church, still the indictment would not have been defective on that account. The words "injure, tear down and remove" are certainly broad enough to include the words "deface, disfigure or damage."

The indictment was sufficient to advise the appellant of the crime with which he was charged, and he was not prejudiced because of the failure to use the precise words of the statute. See Kirby's Digest, § 2229.

2. The appellant complains because the court refused to allow him to testify that in tearing down the building he did not have any intention of injuring anybody. To constitute the offense charged, it was not necessary that the appellant should have had the specific intention of injuring any one. A specific intent to injure some one is not an ingredient of the crime charged, and if one tears down, injures or damages a church house he is guilty, under the statute, of a misdemeanor, whether he intended to injure any specific individual or many individuals or not. The offense is complete when the act

is done, regardless of the intent of the offender in the commission of the unlawful act.

There was testimony to the effect that the church house was also used as a schoolhouse. Appellant complains because the court refused to grant prayers for instructions to the effect that the appellant would not be guilty by reason of the school district having occupied the building for school purposes. The ruling of the court in refusing these prayers was not prejudicial error. Appellant was not charged with injuring a schoolhouse, and there is no contention that the building alleged in the indictment was not a church house. Therefore, appellant would be none the less guilty because the property was also a schoolhouse as well as a church house. The appellant is in no attitude to complain because the court refused to submit the issue as to whether the house mentioned was used for a schoolhouse as well as for church purposes. Appellant himself testified that he donated the site for church purposes and executed a deed to three trustees. There is nothing to show that the land was ever reconveyed to the appellant, and the testimony warranted the jury in finding that the use of the building had not been abandoned for church purposes. There was nothing to show that the title was to revert to the appellant even if it had been abandoned for church purposes. The undisputed evidence showed that the house alleged was a church house, named Harmony Church, and that it was torn down by appellant.

There is no error in the record, and the judgment is affirmed.

MERCHANTS & FARMERS BANK v. HARRIS.

Opinion delivered May 11, 1914.

1. FRAUDULENT CONVEYANCES—FAILURE TO ANSWER—PRESUMPTION.—In an action to set aside a fraudulent conveyance, the grantor, individually, will be treated as having admitted the fraud, where he fails to answer. (Page 104.)

2. FRAUDULENT CONVEYANCES—FAILURE TO MAKE INQUIRY.—The grantee of a person who conveys property with the intent to defraud his creditors, where the facts and circumstances are sufficient to put a man of common sagacity upon inquiry, and where reasonable diligence would lead him to discover the fraud of the vendor, will be charged with notice of the fraud and held to have assisted the vendor in carrying out his fraudulent purposes. (Page 108.)

3. FRAUDULENT CONVEYANCES—PARTIES CHARGEABLE—EVIDENCE.—Under the evidence, the vendor and vendee of property held to be parties and chargeable with fraud in a conveyance made to defraud creditors. (Page 108.)

4. FRAUDULENT CONVEYANCES—LEVY OF EXECUTION—LIEN.—A lien may be fixed by the levy of an execution on lands which have been fraudulently conveyed by a debtor, prior to the rendition of the judgment against him. (Page 111.)

5. FRAUDULENT CONVEYANCES—LEVY OF EXECUTION—LIEN.—A judgment-creditor of a vendor who conveyed certain property in order to defraud his creditors, acquires a lien on the property conveyed, by bringing an action to set aside the conveyance and levying an attachment on the land conveyed, and asking that the lien be enforced by a sale of the property to satisfy the creditor's judgment. (Page 111.)

6. FRAUDULENT CONVEYANCES—INNOCENT PURCHASER.—The purchaser of land upon which a writ of attachment has been levied under the *lis pendens* statute (Kirby's Digest, § § 5152 and 5153) is not an innocent purchaser for value. (Page 111.)

7. FRAUDULENT CONVEYANCES — LIEN—EQUITY — JURISDICTION. — Where equity has acquired jurisdiction to set aside a fraudulent conveyance, besides setting the conveyance aside, equity will enforce a lien upon the land acquired by the plaintiff creditor by virtue of the levy of a writ of attachment upon the land, and will order the land sold to satisfy the judgment. (Page 111.)

8. EQUITY—JURISDICTION—COMPLETE RELIEF.—The chancery court having assumed jurisdiction for one purpose, will retain it for all and grant all the relief, legal or equitable, to which the parties are entitled. (Page 111.)

9. FRAUDULENT CONVEYANCES—SUBSEQUENT PURCHASERS—RELIEF.—Purchasers from the grantee in a conveyance made to defraud creditors, may recover the purchase price from said grantee, where they are not parties to the fraud, equity having set the conveyance aside, although they had knowledge of the fraud between the original grantor and grantee. (Page 112.)

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

R. G. Harper and *Patterson & Green,* for appellant.

1. The deed was fraudulent and void. 22 Ark. 186; 20 Cyc. 439-440-441; 33 Ark. 338; 45 *Id.* 522; 20 Cyc. 446; *Ib.* 447-8; 55 Ark. 582; 14 *Id.* 69; 20 Cyc. 449-452; 50 Ark. 320; 55 *Id.* 579; 58 *Id.* 453; 52 *Id.* 459; 47 *Id.* 301; 20 Cyc. 470-472; 31 Ark. 666; 20 Cyc. 764-5-9.

2. A person is presumed to intend the necessary and natural consequences of his voluntary acts. 4 Cyc. 419; 68 Ark. 480, 481.

3. Hahn at least had information to put him on inquiry. 50 Ark. 320; 55 Ark. 579; 58 *Id.* 453; 52 *Id.* 459; 47 Ark. 301; 20 Cyc. 470-472; 31 Ark. 666; 20 Cyc. 764-5-9, 771-2-7-9, 780-1-2-6; *Ib.* 801, 802; Wait, Fraud. Conv., § § 9, 10, 382.

4. Where the plaintiff has shown strong circumstances of fraud, the burden shifts to the parties to the fraudulent conveyance to explain the circumstances of fraud. 20 Cyc. 453-5; 7 Ark. 269; *Ib.* 197; 20 Cyc. 763-6; 62 Ark. 267.

5. Harris was insolvent. Kirby's Digest, § 3313, 6297; 20 Cyc. 757.

6. Appellant's attachment is a lien which chancery will enforce. 1 Shinn on Attachments, § § 54, 87; 104 Ill. 180; 11 N. J. Eq. (2 Stock), 520; 6 Gray (Mass.) 520; 9 Minn. 108; 13 N. H. 53; Kirby's Dig., § § 349, 360, 5152-3; 67 Ark. 325; 81 Ark. 73; Shinn on Attachments, § § 214, 415, 313, 664; 20 Cyc. 661, 690.

7. Where a court of chancery has jurisdiction for one purpose, it will afford complete relief. 77 Ark. 576; 74 *Id.* 104; 75 *Id.* 55; 33 *Id.* 328; 23 *Id.* 746.

7. McMillan and Mrs. Taylor were not innocent purchasers. Shinn on Att., § § 84, 87.

McMillan & McMillan, for appellee.

1. There was no fraud. 32 Ark. 255; 23 *Id.* 258.

2. Embarrassment is no proof of fraud. 26 Ark. 23; 41 *Id.* 225; 18 *Id.* 141.

3. Fraud is never presumed; it must be proven.

4. The chancellor's findings should be sustained. 4 Crawford's Dig., pp. 150-154; 110 Ark. 367.

Gaughan & Sifford, for appellees.

1. The levy of the attachment created no lien. Kirby's Digest, § 360; 67 Ark. 328; 81 *Id.* 73.

2. The evidence is not sufficient to prove that Hale was a party to any fraudulent intent on the part of Harris.

WOOD, J. On the 11th of March, 1911, D. T. Harris sold to G. T. Hale a certain house and lot situated in Arkadelphia, Clark County, Arkansas. Harris and Hale lived at Junction City, in Union County, Arkansas. Hale was the father-in-law of Harris.

On the 17th of March, 1911, the Merchants & Farmers Bank, of Junction City, brought suit against D. F. Harris, in the Union Circuit Court, on a promissory note for $2,500, and caused a general attachment to be issued, directed to the sheriffs of Union and Clark Counties. The sheriff of Clark County, on the 18th day of March, levied on the property in controversy, and filed his certificate of such levy, giving a full description of the property, with the recorder of deeds, in compliance with the provisions of section 5152 of Kirby's Digest. The deed from Harris to Hale to the property in controversy was recorded before the levy of the attachment.

At the October, 1911, term of the Union Circuit Court, the appellant bank obtained judgment against Harris and the attachment was sustained. Between the date of the levy of the attachment and the rendition of the judgment, the property in controversy was sold by Hale to McMillan and by McMillan to Mrs. Taylor.

Appellant then instituted this suit in the chancery court of Clark County to set aside the deeds from Harris to Hale, and from Hale to McMillan, and from McMillan to Mrs. Taylor, alleging that the conveyance from Harris to Hale was fraudulent and void, and that subsequent purchasers had notice of appellant's lien by its attachment.

The appellees, except Harris, answered, denying that the conveyance from Harris to Hale was fraudulent, and setting up that appellees McMillan and Taylor were inno-

cent purchasers, having no notice of the attachment proceedings, and that they paid the value of the land. Appellees McMillan and Taylor filed a cross-complaint with their answer, setting up that McMillan had paid Hale $1,500 for the property, and prayed that in the event the court should set aside and cancel the deed mentioned that McMillan have judgment against Hale for that sum, with interest.

1. The first question presented by the record is one of fact, as to whether or not the deed from Harris to Hale was fraudulent.

Harris himself did not answer the complaint. Therefore, so far as he is individually concerned, the charge of fraud must be taken as admitted; besides, the testimony tending to show that he sold the land in controversy to Hale for the purpose of defrauding creditors is overwhelming.

It could serve no useful purpose to enter into detail in discussing the facts. It suffices to say that Harris was heavily indebted, and that being pressed by his creditors, he conveyed all of his property, of every description, in a short while, to his near relatives and friends, under circumstances which showed clearly that he intended to place his property beyond the reach of creditors, and by these conveyances he rendered himself wholly insolvent.

As to whether or not the appellee Hale participated in the fraudulent purpose of Harris in making the conveyance, the salient facts are as follows: At the time the deed was made, Harris and Hale lived in the same yard. Harris owed Hale more than $1,500. Nevertheless, Hale gave him a check for $1,500 in cash, the agreed price of the land, because he said that Harris was down and out, and he married his baby girl. He might have a settlement with him some time, and might never. He didn't request Harris to pay him at that time because it was almost in the family. He had done that much for all of his children. He didn't however, intend to make a gift to Harris; expected some day to have it all in writing. He didn't say anything to Harris at the time about

letting it apply on his debt, and Harris didn't offer to pay the debt. Hale supposed that Harris was able to pay all his debts. Knew, however, that he was tangled up with the Harris Lumber Company. He knew that Harris was needing some money and thought that to buy the property for $1,500 was a bargain. He had never seen the property. He gave Harris a check on the Citizens Bank for $1,500. At that time he could not say whether he had only about $165 to his credit or not. He had not noticed his account. He did not have any agreement in advance with the bank as to honoring this check for $1,500. He had never overdrawn before to that amount. He made no arrangements with the bank to cash this check, any more than it was understood that he would overdraw and that his checks would be honored. He didn't pay any interest on the amount. The bank never made any demand on him for any interest.

It was unusual for him to give $1,500 for property he had never seen. The explanation he gives as to why he bought it is as follows: "I had a daughter that had a boy she wanted to keep in school, and she talked about moving to Arkadelphia where she could keep him in school there and buy some property there. There was some property over in Harrison we had a mortgage on, and we thought maybe we could swap this Arkadelphia property, and we thought my daughter, Mrs. Blackburn, would move there. Mrs. Blackburn and the boy had seen the Arkadelphia property, and I thought I would dispose of the property in that way. I thought I could sell it to Mrs. Blackburn. I expected to turn it over to Mrs. Blackburn and let her make the trade. She went and looked at the property. I think the owner of the house in Arkadelphia went to Harrison and looked at that property, and they hammered around and could not trade. So that stopped that part of it. There was nothing more to that. Then Mrs. Blackburn was trying to buy some other property and move to Arkadelphia, and about that time Harris came to me to sell this, and we made the trade. Mrs. Blackburn was then clear out of the notion, and that left

it on my hands. * * * I suppose I gave Harris this check in payment for the land when the deed was delivered. I might have given him the check a day or two before that; I don't remember. The check paid for the land. I closed it out with very little negotiations any way. Thought if I could locate Mrs. Blackburn, that it was a bargain. Didn't know at the time I bought the property that Harris was financially embarrassed, and that he was selling at a sacrifice. I was going on what he said. He said it was a bargain on the land, and that he needed some money, and from what I heard about the property, I thought it ought to be well worth that. He didn't promise to make good any loss I might sustain. Didn't have any agreement as to loss. I kept the property a few months and sold it for $1,500. I lost interest on my money for several months, unless I got a little rent on it. Don't think I collected any rents. No one particularly was looking after the property for me. McMillan was the man I sold the property to. I negotiated the sale. I didn't find it such a bargain as I thought. I didn't do what I expected. I bought it whether I was going to make anything or not. The price I sold for was paid by check payable to me. I deposited the check in the Citizens Bank; don't remember about what date it was. I might have consulted Harris about things. I just had the $1,500 at the Citizens Bank on deposit and got credit for it, and maybe went and drew on it, or it might have been held there for a while. Don't remember when I received this check; it was a little later than the check I paid for the place with, if I mistake not."

The testimony of the cashier of the Citizens Bank, of Junction City, was, in substance, to the effect that on March 1, 1911, G. T. Hale, who was a customer of the bank, had a balance to his credit of $165.22, and on March 15, $164.07. At no time during the month of March did he have as much as $1,500 to his credit. About $500, or a little over, was the highest balance he ever had during the year 1911. He had an overdraft of $8.20 which appeared June 9 and continued until November 16.

The cashier didn't remember who presented the check of Hale for $1,500, but Mrs. D. F. Harris, wife of D. F. Harris, was credited with it March 15, 1911. The check was not credited to Harris' account. It was carried as a cash item. The bank occasionally carried checks as cash items. The rule was to charge the drawer, except on special occasions. The special occasion this time that caused the bank to carry it was that Doctor Hale didn't have the money. The check was carried several months before he took it up. The bank got no interest for that time. The $1,500 was subject to check by Mrs. Harris while carried as a cash item. The bank had no agreement that the check should remain in the bank until Doctor Hale took up the $1,500 cash item. There was no collateral security put up by Hale for the $1,500. The cash item was carried from March 15 until August 28, 1911. Then the item was charged to his account and carried as an overdraft until September 12, 1911. The overdraft of $1,500 was paid by his giving the bank a draft for $1,500 that was entered for collection and paid September 12, 1911. No interest was paid on the overdraft. The bank was not necessarily out of the interest as Hale still had an account with the bank. The cashier stated that he carried the $1,500 as a cash item himself. Doctor Hale agreed to take it up in a few days. Six months was a long time to carry an item that way. During the time the cashier had a conversation with Doctor Hale, in which Hale said he was arranging to take up the $1,500 overdraft in the sale of the property. The cashier had no conversation with Harris as to carrying the cash item; the only way he talked to him was about the property. Harris told the cashier that Doctor Hale had a deal on, and if he consummated the deal—the $1,500 was actually placed to Mrs. Harris' credit, and she was free to draw on it. That was the same $1,500 G. T. Hale gave check to Harris for. Hale had done business with the bank for many years. He had been a stockholder since its organization, and the cashier stated that Hale had the confidence of the bank. During the time that the bank

was carrying the check as a cash item, Hale, five or six times, asked about how his credit stood. He asked whether or not any money had been deposited to apply on what he owed for this $1,500 check. He didn't say who he expected to deposit the money to cover the check, or how it was to be paid. Every time he asked about his account, the cashier called his attention to the fact that his account was overdrawn, and that the overdraft did not include the $1,500 check.

Without going into detail in discussing the above facts, *arguendo,* we are of the opinion that they clearly show that the conveyance from Harris to Hale was for the purpose of defrauding Harris's creditors, and that Hale participated in such fraud. But if we are not correct in that, certainly the facts and circumstances were sufficient "to put a man of common sagacity upon inquiry, and with the use of reasonable diligence, to lead him to the discovery of the fraudulent purpose of the vendor," and Hale, having neglected to make inquiry that would have enabled him to discover the fraud, is, charged with notice thereof, and must be held to have assisted Harris in carrying out his fraudulent purpose. *Dyer* v. *Taylor,* 50 Ark. 320. The facts bring this case well within the doctrine announced by this court in the above case and numerous other cases. See, *Bryan-Brown Shoe Co.* v. *Block,* 52 Ark. 459; *Adler-Goldman Com. Co.* v. *Hathcock,* 55 Ark. 579; *Rosewater* v. *Schwab Clothing Co.,* 58 Ark. 453.

We are of the opinion that a clear preponderance of the evidence shows that the conveyance was made for the purpose of enabling Harris to appropriate the $1,500 to his own use in fraud of his creditors, and that the facts and circumstances are such as to make Hale a participant in the fraudulent purpose of Harris, or, at least, to make him chargeable with the fraud.

2. The next question is, did the appellant, by its levy on the property in controversy under the order of general attachment, acquire a lien which a court of chancery will enforce against the appellees?

This court, in *Doster* v. *Manistee National Bank,* 67 Ark. 325, held that under the statute giving a judgment-creditor a lien on the real estate "owned by the defendant in the county in which the judgment is rendered" (Kirby's Digest, § 5152, 5153), a judgment is not a lien upon land which the judgment-debtor, prior to the rendition of the judgment, had conveyed in fraud of his creditors. In that case the court said: "Where a debtor has fraudulently conveyed his real estate before any judgment is rendered against him, or has procured same to be fraudulently conveyed to another, he is not in any sense the owner of such real estate, nor is he thereafter seized in law or equity of such real estate, nor is the grantee seized for his use. The authorities generally recognize the fact that a deed to land, although fraudulently conveyed, carries the title of the grantor."

In that case we further held that a fraudulent conveyance is not void absolutely, but conveys the legal title, subject to the creditor's right to avoid it for fraud.

Section 360 of Kirby's Digest provides that an order of attachment "binds the defendant's property in the county in which it might be seized under an execution against him from the time of the delivery of the order to the sheriff or other officer."

The appellees contend that the words "real estate owned by the defendant" in the judgment lien statute (Kirby's Digest, § 4438), and the words "defendant's property" and "property of defendant" in the attachment lien statute are, in legal effect, precisely the same, and that under the doctrine in *Doster* v. *Manistee National Bank, supra,* the appellant acquired no lien by virtue of its attachment because before the issuance of the order of attachment the property in controversy had been conveyed to the appellee Hale.

Conceding the correctness of the contention of the appellees that the language of the above statutes is the same in legal effect it by no means follows that the appellant did not acquire a lien on the property in controversy by virtue of its levy of the writ of attachment. In

Doster v. *Manistee National Bank, supra,* while holding that there was no statutory judgment lien on the lands which had been fraudulently conveyed before the rendition of the judgment, we distinctly recognized the rule that a lien might be fixed by the levy of an execution on lands which had been fraudulently conveyed by a debtor prior to the rendition of a judgment against him. On this point, in the *Doster* case, above, we said: "We must discriminate properly between the statutory judgment lien and the lien acquired by virtue of an execution issued under a general judgment." And, quoted from the Supreme Court of Pennsylvania as follows: "A lien is, indeed, a necessary and inseparable incident of seizure in execution, except where the execution is merely instrumental in enforcing a prior and superior lien by judgment." And from Herman on Executions, p. 265: "Where the judgment is a lien on land, there can be no independent lien acquired by the issue of an execution. But where the land is seized by virtue of a judgment, which is no lien, the execution becomes a lien."

In the later case of *Ward* v *Sturdivant,* 81 Ark 78, this court, with reference to the *Doster* case, said: "One reason for holding that a judgment was not a lien in such case is that where a creditor has obtained judgment, but taken no steps to attack the fraudulent conveyance, or to subject the property conveyed to his judgment, innocent parties might be misled into dealing with such property as the property of the fraudulent grantee, and might be exposed to injury if a judgment was held to be an absolute lien in such cases. But that reason does not apply where the creditor not only recovers a judgment, but levies an execution upon the property and sells it as the property of the fraudulent grantor; for that conclusively shows that the creditor has elected to treat the conveyance as void, and to subject the property to his debt."

In *Ward* v. *Sturdivant, supra,* we held that a judgment-creditor who has levied upon and purchased at an execution sale land fraudulently conveyed by the debtor previous to the rendering of a judgment can recover pos-

session of the land without first going into equity to set aside the fraudulent conveyance. In the recent case of *Sears* v. *Setser,* 162 S. W. 1083, 111 Ark. 11, we reiterated the doctrine of *Doster* v. *Bank,* and *Ward.* v. *Studivant, supra,* holding that: "A judgment is not a lien upon land which the judgment-debtor had previously conveyed to defraud his creditors, such conveyances not being void, but only voidable, and there is no lien on it until the levy of an execution on it." These cases, by analogy, rule the present case. Here the appellant not only had its writ of general attachment issued, but had the same levied upon the property in controversy as the property of the appellee Harris. It acquired a lien on the property by virtue of the levy of the attachment, which lien, by analogy to the doctrine of the above cases, it had the right to enforce as against the fraudulent grantee Hale, by treating the property, notwithstanding the fraudulent conveyance, as the property of the vendor Harris. This the appellant has done by this suit to set aside the fraudulent conveyance and asking that the lien be enforced by a sale of the property to satisfy appellant's judgment.

3. Appellees McMillan and Taylor are not innocent purchasers for value. They had notice of the lien acquired by appellant by virtue of the levy of the writ of attachment, under the provisions of the *lis pendens* statute (Kirby's Digest, § § 5152 and 5153), which were fully complied with. The evidence also tends to show that appellee, Mrs. Taylor, had actual notice. See, Shinn on Attachments, § § 54-87.

4. The chancery court having acquired jurisdiction for the purpose of setting aside the fraudulent conveyance, should not only grant the relief prayed for in that respect, but should proceed to enforce the lien by ordering the land in controversy sold to satisfy the judgment in favor of appellant. The chancery court, having assumed jurisdiction for one purpose, will retain it for all and grant all the relief, legal or equitable, to which the parties are entitled. See, *Apperson* v. *Ford,* 23 Ark. 746; *Apperson* v. *Burgett,* 33 Ark. 328; *Cribbs* v. *Walker,* 74

Ark. 104; *Dugan* v. *Kelly*, 75 Ark. 55; *Dickinson* v. *Arkansas City Imp. Co.*, 77 Ark. 576.

5. Appellees McMillan and Taylor, in their cross complaint, prayed for judgment against Hale in the sum of $1,500, provided the deeds were cancelled. We are of the opinion that they are entitled to such relief, and that judgment should be entered for them against appellee Hale in said sum, with interest from the date that same was paid by McMillan to Hale. While McMillan and Mrs. Taylor had notice of appellant's lien, they did not participate in the fraudulent conveyance, and as against Hale, are entitled to relief.

The court erred in its decree. The same will be reversed, with directions to enter a decree in accordance with this opinion, and for such further proceedings as may be necessary, not inconsistent herewith.

JOINER v. STATE.

Opinion delivered May 11, 1914.

1. CONTINUANCES—DISCRETION OF COURT—ABUSE.—The granting of a continuance is within the discretion of the court, and in the absence of an abuse of that discretion, the ruling of the court will not be disturbed. (Page 114.)
2. CRIMINAL LAW—ALIBI—REASONABLE DOUBT.—If the evidence of defendant which tends to prove an alibi, when taken together with the other evidence, would leave the jury in reasonable doubt as to whether the defendant was present when the crime was committed, then the jury should acquit. (Page 116.)
3. CRIMINAL LAW—INDICTMENT—VARIANCE—OWNER OF PROPERTY STOLEN—NAME.—An indictment charged that defendant stole property belonging to one J. R. Reynolds. The proof showed his name to be J. B. Reynolds. *Held*, there was no variance between the indictment and proof, if the jury believed beyond a reasonable doubt that the prosecuting witness, J. B. Reynolds, was the identical person named in the indictment as J. R. Reynolds. (Page 118.)

Appeal from Garland Circuit Court; *Calvin T. Cotham*, Judge; affirmed.

M. S. Cobb, for appellant.

1. The court's refusal to grant a continuance on the showing made was an abuse of discretion warranting a reversal.

2. Instruction 1 given by the court to the effect that the burden of proving an *alibi* was upon the defendant, but that if on the whole case the testimony raised a reasonable doubt that the defendant was present at the time the crime was committed, she should be acquitted, was inconsistent with instruction 1, given at defendant's request, and was erroneous. 110 Ark. 15; 102 Ark. 627; 93 Ark. 564.

3. The allegation of ownership is material, and must be proved as alleged. The court erred in charging the jury in substance that if they believed that the J. B. Reynolds who testified in the case was the J. R. Reynolds named in the indictment, there was no variance. 55 Ark. 244; 100 Ark. 184; 97 Ark. 1, and cases cited; 108 Ark. 418.

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

1. There was no abuse of discretion. The motion for continuance was properly overruled.

2. There is no inconsistency in the instructions given on the question of *alibi.* That given on the part of the State has been approved by this court in *Ware* v. *State,* 59 Ark. 379-391; 69 Ark. 177-180; *Tillman* v. *State,* 112 Ark. 236.

3. The court's instruction on the question of variance was correct, and the question whether J. R. Reynolds was identical with J. B. Reynolds was properly submitted to the jury. 102 Ark. 356.

HART, J. Appellant prosecutes this appeal to reverse a judgment of conviction against her for the crime of grand larceny. The facts are as follows:

J. B. Reynolds lived in South Hot Springs, in Garland County, Arkansas, and on the night of the 24th of June, 1913, went into the city for the purpose of attending a lodge. The lodge did not open, and he went

to a rooming house on Benton Street to visit a friend and stayed there until about 10:30 o'clock. When he started home he met appellant, and she asked him if he did not want a room. He replied that he did not. Appellant then walked up close to him and placed her hands upon him. She talked to him for about a minute and then left him. Reynolds then proceeded on his way, and when he had gone about a half a block he discovered that appellant had taken his pocket book, containing ten one-dollar bills and two ten-dollar bills. A witness for appellant testified that on the night in question she was with appellant at the home of Eva Jordan, drinking beer, and that appellant did not leave the house from 7 o'clock in the evening until midnight.

Counsel for appellant first assigns as error the action of the court in overruling her motion for a continuance. Appellant, in her motion for continuance, which was duly verified by her, stated that Ophelia Brown and Will Scofield, if present, would testify that on the night of the 24th of June, 1913, they were with her at the home of Eva Jordan, in Hot Springs, and that appellant did not leave the house from about 7 o'clock in the evening until after midnight. Appellant further stated that the case was set for trial during the fall of 1913; that she was ready for trial and had all her witnesses present, including Ophelia Brown and Will Scofield; that the prosecuting attorney stated that on account of the numerous cases pending in court he would not be able to try the case against her at that term of the court, and that she understood that the case had been continued for the term; that the absent witnesses lived in Little Rock, and that they left for their homes; that on the third day of January, 1914, she received knowledge that the case had been set down for trial on the 8th inst.; that she immediately caused a subpoena to be issued for said witnesses, and sent the same to the sheriff of Pulaski County; that on the 8th day of January, 1914, the sheriff of Pulaski County returned said subpoena unserved and marked "not found." The attorney for appellant also testified

that he understood that the case had been continued for the term, but says that he does not know whether the witnesses for appellant were then present in court; that as soon as he found out that the case had been reset, he caused a subpoena to be issued for the absent witnesses, and sent it to the sheriff of Pulaski County for service. The question of granting continuances calls for the exercise of discretion by the trial court, and, unless there has been an abuse of the discretion, the ruling of the trial court will not be disturbed. *Hamer* v. *State,* 104 Ark. 606; *Striplin* v. *State,* 100 Ark. 132; *Jackson* v. *State,* 94 Ark. 169; *Bevis* v. *State,* 90 Ark. 586.

The record does not show that the trial court made any order continuing the case against appellant for the term. Appellant says that she understood that the court had made such an order and that her witnesses were in attendance at the trial, and that the absent witnesses immediately left for their homes in Little Rock. She did not know their street number, and made no effort to ascertain it. She did not keep in communication with the witnesses, and made no further effort to ascertain if they were in Little Rock until the case was again set for trial in January, 1914. The record does not show that she had had a subpoena issued for them in the first instance, or that she took any legal steps whatever to procure their attendance until the case was set for trial in January, 1914. The sheriff of Pulaski County was not able to find the witnesses in the city of Little Rock, and the presumption is that they had left there. The appellant did not attempt to keep in communication with them, and does not pretend to know where they now are. There is nothing to show that the witnesses are now within the jurisdiction of the court and that their attendance could be procured hereafter. These were all proper matters to be considered by the court in passing upon appellant's motion for continuance; and we are of the opinion that it did not abuse its discretion in refusing it.

Counsel for appellant next insists that the court erred in giving an instruction at the instance of the State

on the defense of an *alibi,* and relies upon the case of *Woodland* v. *State,* 110 Ark. 15, to sustain his contention. In that case the court said that the jury was not told, as it should have been, that although the burden of establishing the defense of an *alibi* as an affirmative fact was upon the appellant, yet if the evidence which he had offered in support of the defense, taken in connection with all the other evidence in the case, was sufficient to raise a reasonable doubt of appellant's guilt, the jury should acquit. The judgment was reversed because the court refused to give such an instruction at the request of appellant, and because the instruction on the defense of an *alibi,* as given by the court, did not cure the error in refusing to give the instruction asked by appellant.

We do not deem it necessary to set out the instruction complained of, for an instruction in the same language was approved by this court in the case of *Ware* v. *State,* 59 Ark. 379, and *Rayburn* v. *State,* 69 Ark. 177. In the latter case the court said, in substance, that the effect of the instruction complained of was that, if the evidence of appellant which tended to prove an *alibi* was such that—taken together with the other evidence—the jury were left in reasonable doubt as to whether the appellant was present when the crime was committed, they should acquit him. An instruction on the defense of an *alibi* was given in this case at the request of counsel for appellant, and in the language asked by him. This shows that the court did not mean, in the instruction complained of, to shift the burden upon appellant to prove his innocence. If counsel for appellant thought the instruction was susceptible of that meaning, he should have called the court's attention to it, and, no doubt, the court would have changed its form to meet his objection.

The indictment charges the ownership of the money stolen to be in J. R. Reynolds. The prosecuting witness testified that his initials were "J. B.," instead of "J. R." His testimony, taken before the grand jury, which was signed by him, was thought to be signed "J. R.," and, on this account, the prosecuting attorney, in drawing the

indictment, charged that J. R. Reynolds was the owner of the money stolen. It appeared that the letter "B" in the name of the prosecuting witness, in his signature to the minutes of the grand jury, closely resembled the letter "R." The larceny was committed on the 24th day of June, 1913, and the prosecuting witness was carried to the jail, where appellant was confined, on the 26th inst., and there identified her as the person who had taken the money from him. The court instructed the jury, in substance, that the question of the identity of the person described in the indictment as the owner of the money charged to have been stolen with the one mentioned in the evidence is one of fact, and that if the jury believed from the evidence, beyond a reasonable doubt, that the prosecuting witness, J. B. Reynolds, is the identical person named in the indictment as J. R. Reynolds, there is no variance between the proof and the indictment. Counsel for appellant assigns as error the action of the court in giving this instruction, and relies upon the case of *Blankenship* v. *State,* 55 Ark. 244. In that case the court held where an indictment for larceny charges the goods stolen to have been the property of J. P. Kirby and G. W. Leggett, and the evidence shows that they were the property of J. P. Kirby and E. S. Leggett, the variance is fatal, unless the goods alleged to have been stolen are described in other respects with such certainty as to identify the act. We do not think that case is an authority for the position taken by counsel for appellant. There E. S. Leggett and G. W. Leggett were different persons. Here the proof shows that J. B. Reynolds and J. R. Reynolds were the same person. The facts in the present case bring it within the rule announced in the case of *Bernhard* v. *State,* 76 Ga. 613. Bernhard was charged with stealing cotton, and the court said, with reference to a contention precisely similar to the one now made, that where the cotton was alleged to belong to a man whose first initial was "J," and the proof showed that it was "I," or *vice versa,* there was no error in instructing the jury that if the initial was written wrong by mis-

take in the indictment the proof of ownership in the person bearing the true name would be sufficiently made. The court further said that the letters "I" and "J," are often written exactly alike. So it may be said here, the letters "R" and "B" are often written so that they closely resemble each other, and the one may be mistaken for the other. The proof shows that the prosecuting attorney was misled by the signature of the prosecuting witness to the grand jury minutes, and in this way the mistake occurred. The court committed no error in giving the instruction.

The evidence was sufficient to warrant the verdict, and the judgment will be affirmed.

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

Opinion delivered May 11, 1914.

INTERSTATE COMMERCE—ROUTE THROUGH ANOTHER STATE.—A railroad selling a ticket from Fort Smith, Ark., to Hot Springs, Ark., may charge a passenger fare of three cents per mile, where a portion of the trip is outside the State of Arkansas.

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

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

This case is controlled by this court's decision in the case of *St. Louis & San Francisco Railroad Company* v. *State,* 87 Ark. 562, and by the decision of the United States Supreme Court in *Hanley* v. *Kansas City Southern Railway Company,* 187 U. S. 617. The case should be reversed and dismissed.

Appellee, pro se.

Incidental passage over the soil of another State than that of the origin and terminus of the transportation, gives the State jurisdiction over such transportation. 116 U. S. 517; 21 S. E. 391.

If one State only is affected by the transportation, it is intrastate. 6 Law. Ed. 39; 21 S. E. 391; 115 Fed. 373; 145 U. S. 192; 86 Ia. 587; 17 L. R. A. 443; 53 N. W. 351; 78 Ark. 182.

HART, J. Appellee sued appellant to recover the penalty provided by section 6620 of Kirby's Digest for charging a greater compensation for the transportation of passengers than allowed by the statutes of the State, and recovered judgment. To reverse that judgment, appellant prosecutes this appeal. The facts are as follows:

Appellant has a continuous line of railroad from Fort Smith, Ark., to Hot Springs, Ark. Fort Smith is situated on the extreme western border of the State, and between that station and Van Buren, Ark., the next station east, appellant's line of railroad runs through the State of Oklahoma for a distance of about four miles. Appellee purchased from appellant a ticket from Fort Smith, Ark., to Hot Springs, Ark., paying therefor at the rate of three cents a mile, a greater sum than appellant is allowed to charge under the statutes of the State.

Appellant maintains a rate of three cents per mile from the city of Fort Smith, *via* the route mentioned above, to the city of Hot Springs, pursuant to a passenger tariff which it has duly and regularly established and filed with the United States Interstate Commerce Commission, and duly published. Appellee embarked on one of appellant's trains for Hot Springs, and, while *en route,* traversed the State of Oklahoma for the distance of four miles. That is to say, although appellee went from one point in Arkansas to another point in the same State, while *en route* he passed without the State and through part of another State.

The court should have dismissed appellee's complaint. The case is ruled by the decision of this court in the case of the *St. Louis & S. F. Rd. Co.* v. *State,* 87 Ark. 562, and by the decision of the Supreme Court of the United States in *Hanley* v. *Kansas City So. Ry. Co.,* 187 U. S. 617. In the latter case the court held that to bring the transportation within the control of the State

as a part of its domestic commerce, the subject transported must be, during the entire transportation, under the exclusive jurisdiction of the court.

The judgment will be reversed and the cause of action dismissed.

HARBISON v. HAMMONS.

Opinion delivered May 11, 1914.

1. BILLS AND NOTES—CONSIDERATION—ANTECEDENT DEBT.—The transfer of a negotiable instrument before maturity, in payment of an antecedent debt, is a sufficient consideration to constitute the purchaser a holder for value. (Page 123.)
2. BILLS AND NOTES—INNOCENT PURCHASER—BURDEN OF PROOF.—The burden is upon the maker of a note to show that the holder had notice of the fraudulent procurement of the note. (Page 123.)
3. BILLS AND NOTES—FRAUD AS DEFENSE—VALUE—BURDEN OF PROOF.—Where, in an action on a promissory note, the defense is made that the execution of the note was procured by fraud, the burden is on the plaintiff to show that value was given for the note. (Page 123.)
4. BILLS AND NOTES—INNOCENT PURCHASER FOR VALUE—BURDEN OF PROOF. In an action on a promissory note, when the holder thereof shows himself to be a holder for value, the burden is then shifted back to the makers of the note to show that the holder had notice of the fraudulent procurement of the note at the time he purchased it. (Page 124.)
5. APPEAL AND ERROR—INSTRUCTION—FAILURE TO EXCEPT.—A party can not complain that the court did not give an instruction on a matter which the court held was not an issue in the case, and to which ruling no objection was made. (Page 125.)
6. CIRCUIT COURT—JURISDICTION—AMOUNT.—Where one M. was made a party defendant to an action on a note in the circuit court, and judgment was asked against her in the sum of $73.34, the amount is below the jurisdiction of the circuit court, and the circuit court is without jurisdiction as to M. (Page 126.)
7. BILLS AND NOTES—INTEREST AFTER JUDGMENT.—Where a note stipulated that it bear interest at the rate of 10 per cent per annum, without stipulating for interest after maturity, it will bear 10 per cent interest from date until maturity and 6 per cent interest thereafter. (Page 126.)
8. APPEAL—ERROR—COSTS.—Costs will not be awarded on the reversal of a judgment where the error would have been corrected on motion of appellant, in the trial court. (Page 127.)

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

STATEMENT BY THE COURT.

This is an action upon a promissory note by J. W. Hammons against J. H. Harbison and Minerva Harbison and G. L. Lynch. The defendants filed an answer in which they denied that Hammons was the owner of the note sued on. They alleged that the note was procured by the fraudulent representations of Johnson & Jarrett, the payees, and alleged that Hammons was not a *bona fide* purchaser for value before maturity of the note. The note was introduced in evidence by the plaintiff's attorney. It bears date of November 12, 1908, and it is due and payable ten months after date to the order of Johnson & Jarrett, and is signed by the defendants.

J. C. Jarrett testified that the note was executed by the defendants and was given for the premium of a policy of life insurance in the St. Louis National Insurance Company issued upon the life of J. H. Harbison; that he and Johnson, the other payee in the note, were the local agents of the company and procured the application of Harbison for the policy of insurance; that the plaintiff, J. W. Hammons, was the State agent of said company, and that the note sued on was transferred by Johnson & Jarrett to Hammons not later than February, 1909, in payment of certain indebtedness owed by them to Hammons; that at the time the note was transferred to Hammons the latter did not have any knowledge that there was any defense to the note.

The defendant, J. H. Harbison, testified, in effect, that the note was procured by Johnson & Jarrett by means of fraudulent representations. In rebuttal, Jarrett denied that the note had been procured by means of fraudulent representations, and stated that it was given to pay the premium upon a policy of life insurance upon the application of J. H. Harbison therefor.

Other facts will be referred to in the opinion. The jury returned a verdict for the plaintiff against all the defendants, and the case is here on appeal.

G. B. Oliver, for appellant.

1. The verdict is without evidence to support it. (a) The note sued on bears not only the endorsement of Johnson & Jarrett, but also that of J. W. Hammons, the appellee, in which is *prima facie* proof that he is not the owner.

That a plaintiff has transferred the note, or has parted with his interest, is a good defense. 8 Cyc. 60; 5 Ark. 93.

(b) The answer alleges that the note was obtained by fraud, and appellant's testimony supporting this allegation is nowhere contradicted.

(c) The court had no jurisdiction of the case stated against Mrs. Harbison, and the judgment against her is void, and would have been void if it had been confined to the amount for which judgment was asked against her.

2. The court erred in its charge on the question of fraud. The burden falls on him who asserts fraud, to establish it *by a preponderance of the evidence.* 20 Cyc. 108-J; 9 Cyc. 762 (13), and cases cited; 78 Ark. 87.

3. The court erred in refusing to charge the jury to find for the defendants, if they found that the note had been altered by adding the words "10 per cent per annum, since its execution and without defendants' permission. 49 Ark. 40; 57 Ark. 277.

R. P. Taylor and *J. L. Taylor,* for appellee.

1. The undisputed testimony shows the endorsement and delivery of the note to appellee before maturity and for value.

Mrs. Harbison was originally sued for the full amount of the note. The fact that she may not have been liable for the full amount would not determine the jurisdiction, the criterion for which is fixed by the plaintiff's claim. 44 Ark. 100.

2. The court's instruction on the question of fraud was correct. The burden is on him who alleges fraud to prove it by clear and satisfactory evidence. 92 Ark. 518.

HART, J., (after stating the facts). It is first insisted that there is no evidence to warrant the verdict, but we

do not agree with counsel in this contention. The note was introduced in evidence by the plaintiff's attorney. It bore date of November 12, 1908, and was payable to Johnson & Jarrett ten months after date. Jarrett testified that, not later than February, 1909, the note was transferred to the plaintiff in payment of an indebtedness owed by Johnson & Jarrett to him. His testimony in this respect is not attempted to be contradicted. The transfer of a negotiable instrument before maturity, in payment of an antecedent debt, is a sufficient consideration to constitute the purchaser a holder for value. *Southern Sand & Material Co.* v. *Peoples Savings Bank & Trust Co.,* 101 Ark. 266; *Miles* v. *Dodson,* 102 Ark. 422. Jarrett also testified that at the time the note was assigned to Hammons the latter did not have any notice that there was any defense to the note. If it be said that Jarrett's testimony on this point is not undisputed because he was contradicted in regard to his statement that the note was not procured by fraud, still the burden of proof was upon the defendants to show that the plaintiff had notice of the fraudulent procurement of the note. Where, in an action on a promissory note, the defense is made that the execution of the note was procured by fraud, the burden is on the plaintiff to show that value was given for the note. *Tabor et al.* v. *Merchants National Bank,* 48 Ark. 454. The reason assigned for this rule is that "where there is fraud the presumption is that he who is guilty will part with the note for the purpose of enabling some third party to recover upon it, and such presumption operates against the holder, and it devolves upon him to show that he gave value for it." But when such payment is shown, it devolves upon the defendant to prove that plaintiff purchased with notice, actual or constructive, that the execution of the note was procured by fraud. *Bank of Monette* v. *Hale,* 104 Ark. 388; *Old National Bank of Fort Wayne* v. *Marcy,* 79 Ark. 149. The rule is that the plaintiff must show himself to be a holder for value, and, on having done so, the burden is then shifted back to the makers of the note to

show that plaintiff had notice of the fraudulent procurement of the note at the time that he purchased the paper. The reason is that the facts which constitute the fraud are, for the most part, affirmative in their nature, and must be set up by the defendants as a defense to the action on the note. Therefore, the burden of proof is upon them to establish their defense.

Mr. Daniel, after approving the rule as announced above, said: "This principle is obviously correct, for to require the plaintiff to show absolutely that he had knowledge of facts would be to burden him with the necessity of proving an impossible negative. He makes out a *prima facie* case by proving that the instrument was endorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith without notice of fraud, because it is not likely that he would give full value for a note which he believed to be fraudulent, taking the hazard upon himself, and because it would be difficult to prove good faith in any better way." Daniel on Negotiable Instruments (6 ed.) vol. 1, § 819; *Commercial Bank of Danville* v. *Burgwyn et al.* (N. C.), 17 L. R. A. 326.

Again, it is contended by counsel for defendants that the court erred in instructing the jury as to the amount of proof necessary to establish fraud in the procurement of the note; but we need not determine this assignment of error. As we have already seen, the plaintiff proved that he was a purchaser for value before maturity of the note. The burden of proof was then cast upon the defendants to show that the plaintiff had notice that the note was procured by fraud. The defendants made no effort whatever to establish this fact. If it be held that the testimony of Jarrett to the effect that the plaintiff did not have notice of any fraud in the procurement of the note was not undisputed because his testimony in other respects was contradicted by that of the defendant, J. H. Harbison, this contradiction to his testimony would not be affirmative proof that the plaintiff had notice that the note was procured by fraud. The burden

being upon the defendants to establish that fact, and no effort having been made by them to do so, it becomes immaterial whether or not the court erred in instructing the jury as to the amount of proof that would be necessary to show that the note was procured by the fraudulent representations of Johnson & Jarrett, for this issue passed out of the case when the defendants failed to show that the plaintiff had notice of the fraudulent procurement of the note.

It is next urged by counsel for defendants that the court erred in refusing to instruct the jury that if it should find that the note had been altered by adding the words "10 per cent per annum" since its execution, without permission from the maker, it should find for the defendants. This instruction was abstract. Therefore, the court properly refused to give it. J. H. Harbison testified that he could not read and write. He did not state that the words "10 per cent per annum" were added to the note after its execution. He only stated that the words "10 per cent per annum" were not mentioned when the note was read to him before he signed it. The court, when this testimony was introduced, held that it could only be considered competent insofar as it tended to prove fraud in the procurement of the note. His ruling in this respect was not excepted to by the defendants, and the action of the court in thus limiting the testimony was not made one of the grounds of the motion for new trial. In addition, the testimony of Jarrett shows that the words were in the note when it was signed by the defendants, and that they were not added there afterward. The defendant can not complain that the court did not give an instruction on a matter which the court held was not an issue in the case, and to which ruling no objection was made.

The defendant, Minerva Harbison, was the wife of J. H. Harbison. She was not made a defendant to the original complaint filed in this action. Subsequently an amendment to the complaint was filed by the plaintiff in which she was made a party defendant, and judgment

was asked against her in the sum of $73.34. The case was instituted in the circuit court, and the amount for which Mrs. Harbison was sued not being within the jurisdiction of the court, the judgment against her is void, and will be reversed and the cause of action against her dismissed.

The judgment against the defendants, J. H. Harbison and G. L. Lynch, will be affirmed.

ON REHEARING.

HART, J. Counsel for appellants has called our attention to the fact that the court over his objection gave the following instruction: "If you find for the plaintiff against both defendants, your verdict will be for amount of note sued on together with 10 per cent interest from date to present time."

The court erred in giving this instruction. The note stipulated that it should bear interest at the rate of 10 per cent per annum without stipulating for interest after maturity. Therefore, it bears interest at the rate of 10 per cent per annum from date until maturity, and thereafter at 6 per cent. *Johnson* v. *Downing,* 76 Ark. 128, and cases cited. Therefore, the judgment will be modified in accordance with this opinion.

It does not follow, however, that appellant should be entitled to the costs of appeal. The rule in regard to interest announced above has been established by many decisions of this court, extending over a long period of time. The action of the court in giving the instruction in regard to the interest was not a material issue in the case, and only arose as incidental to the other issues involved. Therefore, it may be regarded as an inadvertence, or oversight, on the part of the court in the nature of a clerical error. If counsel for appellant had specifically called the court's attention to the instruction and had pointed out the error in it, the court doubtless would have corrected it. In other words, counsel should have made a specific objection to the instruction, or, in his motion for a new trial, should have specially called the

court's attention to the mistake, and, not having done so, appellant will not be allowed to recover the costs of appeal. It has been held that costs will not be awarded on reversal of the judgment where the error could have been corrected on motion in the trial court without appeal. 11 Cyc. 209.

WAUGH v. COOK.

Opinion delivered May 11, 1914.

1. BILLS AND NOTES—UNAUTHORIZED ALTERATION.—The unauthorized alteration of a promissory note by raising the rate of interest is a material alteration and avoids the same. (Page 131.)
2. BILLS AND NOTES—ALTERATION—RELEASE OF SURETY.—An agreement extending the time of payment, made by the principal debtor with the holder of a note, must, in order to release the surety, be such an agreement as the principal debtor may enforce. (Page 132.)
3. BILLS AND NOTES—ALTERATION—RELEASE OF SURETY.—An agreement between the principal debtor and the holder of a note to extend the time of its payment, made upon a false representation that the surety consented to such an extention will not release the surety, because the agreement is itself invalid, unenforceable, and not binding on the principal debtor. (Page 132.)
4. BILLS AND NOTES — ALTERATION — RATIFICATION. — Where plaintiff brought suit on a note which had been altered with his knowledge, but believing all the parties thereto had assented to the alteration, he will not be held to have ratified the alteration, when the same was actually done without authority. (Page 133.)

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

STATEMENT BY THE COURT.

On the 3d day of February, 1913, Mrs. Lou Cook instituted this action in the circuit court against M. J. Compton, T. J. Hood, J. Arthur Porter, William A. Porter and C. H. Waugh, to recover upon a promissory note for seven hundred dollars, alleged to have been executed by them in her favor. On the 7th day of April, 1913, the plaintiff dismissed the cause of action as to T. J. Hood and filed an amended complaint in which she stated

that subsequent to the delivery of the note originally sued on by her M. J. Compton, one of the original signers of the note, altered the same by raising the rate of interest from 8 to 10 per cent, and by allowing T. J. Hood to sign the note as surety, without the consent of the other signers to said note to make such alteration. The complaint states that plaintiff expressly disclaims any right under the note as altered, and seeks recovery on the note as originally executed.

The facts are as follows: At the time of, and prior to, the execution of the original note upon which this action is founded, M. J. Compton and J. Arthur Porter were partners in business in Independence County, Arkansas. They borrowed seven hundred dollars from Mrs. Cook on February 24, 1911, and William A. Porter and C. H. Waugh signed the note as sureties. Subsequently Compton purchased Porter's interest in the business and sold it to T. J. Hood. On February 4, 1912, a few days before the note became due, Mrs. Cook sent her son-in-law, Joe Martin, to collect it. Martin testified substantially as follows:

I went to Compton and demanded payment of the note. He told me that if the collection of the note was pressed the sureties would have to pay it. I told him that Mrs. Cook could get a higher rate of interest for her money. Compton told me that he would give her 10 per cent per annum, instead of 8 per cent, if payment of the note would be extended. I asked him what security they could give, and he said the same ones. I then carried the note back to Mrs. Cook to obtain her consent, and she gave it. I then carried the note back to Compton and told him that Mrs. Cook was a widow woman and I wanted the matter fixed right. I asked him if the securities would stand for it. I never received any information prior to the bringing of this suit that the sureties had not consented to the change in the note. Compton altered the note by raising the interest from 8 to 10 per cent, and the note was then signed by T. J. Hood. The other sureties to the note did not again sign it, but I

understood from Porter that they had agreed to it. He said in the first instance that he would give the same sureties.

In his cross examination, there appears the following:

Q. You did not tell her you had seen Mr. Waugh?

A. No, sir; I did not say anything about him. I did not know anything about my having to see him. I just took Compton to be a man of his word. He told me the same securities would stand.

Q. He just said that was his understanding?

A. He left the impression on me that he had done seen them and talked it over.

Q. He did not tell you that he had seen Mr. Waugh?

A. No; he did not just come right out and say that.

Q. And you did not ask him if he had seen Mr. Waugh?

A. No; I just asked him what securities he could give, and he said the same ones.

Mrs. Lou Cook testified: I understood from Mr. Martin that the sureties had consented to the change of interest in the note. I did not know that Mr. Waugh claimed that the note had been altered without his consent until after this suit was brought. As soon as I found out that he claimed that he had not authorized the change in the note, I filed an amended complaint in this action and disclaimed any rights under the note as altered, and sued on it as originally executed.

Other evidence was introduced in favor of plaintiff to the effect that payment of the note had been demanded of Waugh after the alterations in it were made and that Waugh did not at that time claim that he was released from liability on the note because it was altered.

Compton testified that he raised the rate of interest from 8 to 10 per cent, and that Hood signed the note. Compton says that he did not tell Martin that the same sureties would stand on the altered note; that he did not see them and did not know whether they would agree to the alteration or not.

C. H. Waugh testified: I knew nothing about the change of the rate of interest. I was not consulted about it by any one. I never gave my consent to any change in the note to anybody.

Other evidence introduced tended to show that the defendant, Waugh, was the only solvent signer of the note. The firm of Porter & Hood became bankrupt.

The jury returned a verdict in favor of the plaintiff, and the defendant, Waugh, has appealed.

Dene H. Coleman and *Chas. F. Cole,* for appellant.

1. Any unauthorized material alteration of a promissory note avoids it as to all nonconsenting parties. 5 Ark. 377; 27 Ark. 108; 32 Ark. 166; 35 Ark. 146; 48 Ark. 426; 57 Ark. 277. This is especially true as to nonconsenting *sureties.* 65 Ark. 550; 93 Ark. 472.

The contention that, although the alterations were material and avoided the note, appellee should be permitted to recover upon the note as originally executed, would be good only as against *principals* or *makers* who received the consideration or some benefit under the contract in question, and who would be bound independently of the writing. 2 Am. & Eng. Enc. of L. (2 ed.) 200; 2 Cyc. 184-5; 63 Ia. 158.

Many courts have upheld the rule that after a material alteration, no recovery can be had against a nonconsenting surety either upon the original or altered terms of the contract. 68 Pa. 237; 4 T. R. 320; 3 L. R. A. 724-727; 24 L. R. A. (N. S.) 1155; 2 Cyc. 182; 13 Am. Dec. 684; 11 Bush (Ky.) 69; 93 Ark. 478-9; 65 Ark. 550.

2. The court should have given the instruction numbered 2, requested by appellant.

Appellee seeks to repudiate the altered instrument under the claim that she relied upon the fraudulent representation of Compton that "the same sureties would stand."

The means of ascertaining whether or not appellant had consented to the change were as accessible to appellee as to Compton. It was her duty to seek the assent of

the surety, and, in failing to do so, she took upon herself the hazard of changing the contract and relieved the surety. 65 Ark. 550; 4 Pa. St. 348.

She will be presumed to have informed herself of the truth of Compton's statements, and, if she has failed to do so, must abide the consequences of her own carelessness. 95 Ark. 136; 31 Ark. 170; 30 Ark. 686; 11 Ark. 58; 26 Ark. 28; 1 Ark. 31.

Samuel M. Casey, for appellee.

1. Appellee, relying upon the statement of Martin, her agent, that the sureties were consenting to the alteration, authorized him to have the note changed in accordance with their agreement. It subsequently developed that the sureties had not consented to it. The change, therefore, having been made without the consent of the sureties, it was also made without her consent.

An alteration of a note, allowed by an agent without authority, amounts to nothing more than an alteration, a spoliation, by a stranger, and the rights and liabilities of the parties are not affected thereby. 50 Ark. 360, and cases cited; 2 Cyc. 151, 152; *Id.* 155.

2. If appellee was bound by the act of Martin, she is nevertheless entitled to recover, because his consent to the alteration was obtained through fraud and misrepresentation practiced upon him by Compton, one of the makers of the note. 32 Cyc. 203; 55 Am. St. Rep. 871; 2 Mason, 478, 27 Fed. Cas. No. 16365.

HART, J., (after stating the facts). The unauthorized alteration of a promissory note by raising the rate of interest is a material alteration and avoids the note. *Exchange National Bank* v. *Little,* 111 Ark. 263, 164 S. W. (Ark.) 731; *N. Y. Life Ins. Co.* v. *Martindale et al.,* 75 Kan. 142, 12 Am. & Eng. Ann. Cas. 677.

In the case of *McDougall* v. *Walling,* 15 Wash. 78, 55 Am. St. Rep. 871, the court held:

"1. An agreement extending the time of payment made by the principal debtor with the holder of a note must, in order to release the surety, be such an agreement as the principal debtor may enforce.

"2. An agreement between the principal debtor and the holder of the indebtedness to extend the time for its payment, made upon a false representation that the surety desired and consented to such extension will not release the surety, because the fraudulent misrepresentation employed in procuring it makes the agreement itself invalid, unenforceable, and not binding on the principal debtor."

In the case of *Bangs* v. *Strong,* 10 Paige (N. Y.) 11, the court held that where an agreement is obtained from the creditor by a principal debtor upon a false representation of the latter that the surety had authorized him to make it, and the surety afterward refused to assent to the agreement, the creditor will be at liberty to repudiate it.

It is contended by counsel for defendant that the testimony does not bring the case within the principles of law decided in these cases. They contend that the testimony amounts to no more than a representation by Compton that, in his judgment, the sureties would still be liable on the note. We do not agree with them in this contention. We think that the jury was warranted in finding that Compton represented to Martin that the sureties had agreed that the alteration might be made in the note. In other words, the jury might have inferred from the testimony of Martin, considered as a whole, that Compton represented to Martin that the sureties to the note had assented to the new arrangement and that such representations were false. In such case the sureties would not be discharged unless the plaintiff had acted under the agreement after she was aware of the fact that it had been entered into without authority and that the sureties refused to assent to the same.

In the case of the *State* v. *Churchill et al.,* 48 Ark. 426, the court said that there is no better settled principle than that to hold one bound by any word or act as a waiver it must be shown that he spoke or acted with a knowledge of all the facts and circumstances attending the creation of the right he is alleged to have waived.

In 2 Cyc. 174, it is said: "Ordinarily, a plaintiff can not avoid the effect of an alteration of which he is chargeable with knowledge after he has brought suit upon the instrument in its altered form, since by suing upon the altered instrument he is deemed to have ratified the alteration; but if the suit is brought without knowledge of the alteration this will not amount to a ratification."

The testimony on the part of the plaintiff tends to show that at the time she originally instituted this action she did not have any knowledge that the defendant, Waugh, had not assented to the alteration in the note. She testified that she did not subsequently acquire such knowledge until after she instituted the suit, and that as soon as she found out that Waugh claimed that he had not assented to the alteration she repudiated any rights under the note as altered and filed an amended complaint in which she sought to recover upon the instrument as originally executed. The question of whether the alteration in the note was procured by the false representations of Compton to the effect that the sureties had consented thereto was submitted to the jury upon proper instructions.

The court also submitted to the jury the question of whether the plaintiff ratified the alteration in the note by her subsequent assent or acquiescence after she learned that the defendant, Waugh, claimed that such alteration had been made without his knowledge or consent. Objection is made by the defendant to one of these instructions because he was singled out in the instruction. We do not deem it necessary to set out the instruction. It is sufficient to say that the particular reference was made to Waugh because he was the only solvent signer to the note and was the only real defendant to the action.

Again, it is contended by counsel for defendant that the court erred in refusing to give instruction No. 2, which is as follows:

"In order to vitiate a contract on the ground of fraudulent representation or fraud, the misrepresentation or fraud must relate to a matter material to the contract and in regard to which the other party had a right to rely, and did rely. If the means of information as to the matters represented is equally accessible to both parties, they will be presumed to have informed themselves, and if they have not done so they must abide the consequences of their own carelessness."

There was no error in refusing this instruction. It is not claimed by plaintiff that she made a contract with the defendant, Waugh, for a change of the rate of interest in the note. She seeks to recover on the ground that Porter, one of the original makers of the note, represented to her that he had secured the consent of the sureties to make the alteration in the note, and that by such fraudulent representations procured her consent to the change in the note. If her testimony was true, there was no valid and binding agreement entered into between her and Porter for an alteration in the note, and the act of Porter in changing the note amounted to no more than the spoliation of it.

Other assignments of error are urged upon us for the reversal of the judgment, but we have carefully considered the instructions given by the court, as well as those refused by it, and are of the opinion that the respective theories of the parties were fully and fairly submitted to the jury. We find no prejudicial error in the record, and the judgment will be affirmed.

JARRETT v. JARRETT.

Opinion delivered May 18, 1914.

1. HOMESTEAD—GOVERNED BY WHAT LAW.—Deceased occupied land as his homestead when he died in 1869. A widow and children were left. The land was sold to pay debts in 1877, by an administrator under order of court. In an action between the heirs and the purchaser at the sale, *held* the rights of the parties are to be determined by the homestead laws of the State which existed at the time of deceased's death in 1869. (Page 137.)

2. HOMESTEAD—ABANDONMENT—UNDER CONSTITUTION OF 1868.—Where there are no minor children, the remarriage of the widow operates as an abandonment of the homestead, under the Constitution of 1868. (Page 137.)
3. DOWER—ASSIGNMENT OF—QUARANTINE RIGHTS—HOLDING THROUGH TENANTS.—Under Kirby's Digest, § 2704, a widow may occupy the homestead of her deceased husband, until dower is assigned to her, and she may hold this possession through tenants. (Page 137.)
4. DOWER—QUARANTINE—RIGHTS OF HEIRS.—The occupancy of the homestead by the widow, until dower is assigned to her, is not adverse to the heirs, and the statute of limitations will not run against the heirs, so long as the widow continues to occupy the premises. (Page 137.)
5. HOMESTEAD—SALE—ABANDONMENT—JURISDICTION OF PROBATE COURT.—An administrator's sale of a homestead for the debts of deceased, prior to the abandonment by the widow, is void, the probate court being without jurisdiction to order such sale. (Page 137.)
6. HOMESTEAD—ALLEGATION OF—MOTION TO MAKE MORE DEFINITE.—Where a complaint inferentially establishes that the property was deceased's homestead, in order to raise the defects in the complaint, it' is necessary for the defendant to move to make more definite and certain. (Page 138.)

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

R. P. Taylor and *C. H. Henderson,* for appellant.

Under the undisputed evidence the administrator's sale was a nullity, by the provisions of the Constitution then in force, Const. 1868, art. 12, § 3. It was nearly seven years after his sale before she remarried or acquired any other homestead. 47 Ark. 445; 48 Ark. 230; 56 Ark. 563.

Having by remarriage lost her claim of homestead in the premises, she, nevertheless, still retained her widow's right of quarantine. Kirby's Dig., § 2704; 34 Ark. 63. And her possession during the quarantine period may be by tenant or agent. 45 Ark. 341.

No assignment of dower ever having been made to the widow, her possession through tenants up to the time of her death was rightful, and not adverse to the rights of the heirs, but rather in subordination to their claims.

97 Ark. 33; 126 Ala. 309, 28 So. 487; 126 Mich. 217, 85 N. W. 576.

S. A. D. Eaton, for appellees.

If the probate court had no jurisdiction to order the sale, the burden was upon appellant to show that fact. Appellant's proof should show that the land was the homestead of H. C. Jarrett at the time of his death, and should negative both by pleading and proof that the debts, to pay which the land was ordered sold, were of a trust nature; for, if they were trust debts, the court had jurisdiction, notwithstanding the land may have been a homestead. Const. 1868, art. 12, § 3; 67 Ark. 239.

The widow's homestead right, if she had any, ceased immediately upon her remarriage. Const. 1868, art. 12, § 5. And thereupon appellant's cause of action accrued. He is long since barred by the statute of limitations.

McCULLOCH, C. J. This is an action at law instituted by appellant to recover a tract of land in Randolph County, Arkansas, containing 160 acres, the parties to the action all claiming title from a common source, one H. C. Jarrett, who died on November 4, 1869, while occupying the land as his homestead. He left several children, all of whom are parties to this action, and a widow, who died in the year 1909. The widow occupied the land with her children until she remarried in the year 1884, when she and the children removed therefrom, but the widow continued to hold possession of the land through her tenants and collected the rents up to the time of her death.

There was an administrator of the estate of H. C. Jarrett, one Thomas Simington, who sold the lands under order of the court to pay debts on December 18, 1877, one Thomas Foster being the purchaser at the administrator's sale, and he subsequently conveyed to one of the defendants in this case.

The defendants plead the bar of the statute of limitation, and also defend under the conveyance to one of them from the purchaser at the administrator's sale.

The court gave a peremptory instruction in favor of the defendants, and the plaintiff has appealed.

The rights of the parties are to be determined by the homestead laws of the State which existed at the time of the death of H. C. Jarrett in the year 1869. That was under the Constitution of 1868, which provided that the homestead of the owner should, after his death, "be exempt from the payment of his debts, in all cases, during the minority of his children, and also so long as his widow shall remain unmarried, unless she be the owner of a homestead in her own right." Sec. 5, art. 12, Constitution 1868.

The homestead was not subject to sale for the debts of the decedent until the widow abandoned it by remarriage in the year 1884.

It does not appear from the pleadings or proof that any of the children were minors at that time, and the remarriage of the widow operated as an abandonment of it as a homestead.

Notwithstanding her abandonment of the land as a homestead, she still had the right to occupy the premises through her tenants by virtue of her quarantine rights under the statute. Kirby's Digest, § 2704.

Her occupancy was, therefore, not adverse to the heirs, and the statute of limitation did not begin to run against any of them so long as the occupancy of the widow continued. *Brinkley* v. *Taylor,* 111 Ark. 305, 163 S. W. 521.

The administrator's sale to Foster was void for the reason that the probate court was without jurisdiction to order it prior to the abandonment by the widow. *McCloy & Trotter* v. *Arnett,* 47 Ark. 445; *Bond* v. *Montgomery,* 56 Ark. 563.

It is insisted by counsel for defendant that the allegations of the complaint are not sufficient to show that the property was the homestead of H. C. Jarrett at the time of his death, it being contended that the allegations only state conclusions of law on that subject.

We are of the opinion, however,that the allegations of the complaint are sufficient, inferentially at least, to set forth the homestead right, and that in order to properly raise the defects in the complaint a motion to make more definite and certain would be required. No such motion was presented, and the evidence establishes specifically all the facts necessary to make the property the homestead of H. C. Jarrett at the time of his death.

We are of the opinion, therefore, that the court erred in giving a peremptory instruction in favor of the defendants. Reversed and remanded for a new trial.

FIRST NATIONAL BANK OF FORT SMITH v. NORRIS.

Opinion delivered May 18, 1914.

1. TAXATION—ASSESSMENT—APPEAL TO COUNTY COURT—HEARD, WHEN.—Act 249, page 230, Acts 1911, provides for the hearing by the county court of all appeals from the board of equalization, and requires that they shall be heard and passed upon before the fourth Wednesday in October. Plaintiff appealed from the assessment fixed by the board of equalization, which was heard by the county court, which rendered a judgment fixing the amount of plaintiff's assessment. *Held*, when the court later, without notice, after the lapse of the statutory time limit, undertook to make a new order, the same will be held void. (Page 140.)

2. TAXATION—ERRONEOUS ASSESSMENT—PAYMENT—RECOVERY BACK—ALLEGATIONS OF COMPLAINT.—In an action to recover taxes paid the sheriff in pursuance of a void order of the county court, it is necessary for the plaintiff to allege that the collector has retained in his hands the excessive amount of the tax collected. (Page 141.)

3. TAXATION—ERRONIOUS ASSESSMENT—PAYMENT—RECOVERY BACK—REMEDY.—A taxpayer who pays taxes in excess of what is due, under a void order of the county court, fixing all erroneous assessments, has a remedy to recover the same back provided by Kirby's Digest, § 7180, which authorizes the county court to order the refunding of taxes paid into the treasury under an erroneous assessment. (Page 142.)

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

H. C. Mechem, for appellant..

1. When the court on October 22, 1912, entered its judgment, it exhausted its power, and had no jurisdiction in the absence of appellant and without notice to it, to vacate that judgment, and enter up another and different one against it.

The jurisdiction of a court ends with its final judgment, except as to motions for new trial or other method of reviewing the case provided by statute. 67 Ia. 175; 85 N. W. 22; 121 N. W. 27; 89 Pac. (Col.) 46; 2 Neb. 60.

2. The county court had no jurisdiction to hear and pass upon the matter after the fourth Wednesday in October, which, in 1912, was October 23. Acts 1911, No. 249, § 4.

No brief filed for appellee.

McCULLOCH, C. J. Appellant instituted this action in the circuit court of Sebastian County, Fort Smith District, against appellee as tax collector to recover the amount of taxes alleged to have been illegally extended against its property in the county and paid under protest to said collector.

It is alleged in the complaint that appellant made a return of its property in due form to the assessor of the county, showing taxable property amounting in valuation to the sum of $237,000; that the board of equalization, during its regular session, raised the valuation of appellant's property to $300,000, whereupon appellant appealed from the action of the board to the county court, and that court, at its session held on the second Wednesday of October, reduced the valuation to $267,000, but on January 4, 1913, it being an adjourned day of the October term thereof, without notice to appellant, said court set aside its former order and restored the valuation of appellant's property to $300,000, the amount fixed by the board of equalization; that the county clerk extended the amount of appellant's taxes upon the tax books upon said valuation of $300,000 and delivered same to the collector, who demanded of appellant, and the latter paid under protest, the taxes so extended, which were, by the sum

of $841.45, in excess of the true amount of a valid assessment. It is alleged that the act of the county court in attempting to make a new order changing the assessment on January 4 was void, and that said enforced collection of said sum of $841.45 was illegal. Judgment was asked against the collector for recovery of said excessive amount.

We are not favored with brief by appellee, and consider the case only upon the brief of appellant and such further investigation as the judges have pursued for themselves.

Whether, in the absence of a statute limiting the time within which the county court may change its judgments revising assessments, that court has the power to change the valuation without notice to the owner, and, after having once fixed the valuation, we need not determine, for this case, we think, is controlled by the plain letter of the statute. The General Assembly of 1911 enacted a statute, approved May 4, 1911, changing the time for meeting of the county boards of equalization and extending the time thereof, and also fixing the time within which county courts may hear appeals. Act 249, page 230, Acts of 1911. It provides, in substance, that the county boards of equalization shall meet on the first Monday in September and continue to exercise their functions until the fourth Wednesday of October, but that the assessment of property shall not be raised by a board after the second Wednesday in October until the taxpayer affected has been duly notified and given an opportunity to be heard. The act further provides for appeals from the board of equalization to the county court, and that "all appeals taken from the order of the board of equalization shall be taken to the October term of the county court, and such appeals, even if taken after the regular October term of the county court has convened, shall be heard and passed upon by said court before the fourth Wednesday in October."

The primary question which arises is, therefore, whether the last named provision of the statute, fixing

the time for county courts to hear appeals, is mandatory or merely directory.

We held in the case of *Waters-Pierce Oil Co.* v. *Roberts,* 96 Ark. 92, that the provision fixing the time for action by the board of equalization in revising assessments was intended to be mandatory and that any attempt on the part of the board to raise assessments after the time fixed was void.

The reasoning of the opinion in that case leads to the conclusion that the provision of the act of 1911 now under consideration was intended to be mandatory, for the time was fixed for the protection of the taxpayer so that he might have an opportunity to present his grievance and that a time might come when he could know that further revision of his assessment would not be attempted.

It is unnecessary in this case to enter upon any consideration of the power of the county court to continue a hearing begun within the time limit and extending over beyond it, for that question does not arise here. The county court heard the complaint in this case and rendered a judgment fixing the amount of appellant's assessment, and later, without notice and after the lapse of the statutory time limit, undertook to make a new order.

We are of the opinion that the order was void and that appellant's taxes should have been extended on the books at the amount which the county court fixed by its first order.

It does not follow, however, that appellant has adopted appropriate proceedings to recover the excess. The case of *Sanders* v. *Simmons,* 30 Ark. 274, was precisely like this except that the assessment of the plaintiff's property was fraudulently raised by forgery after it had been fixed by the board of equalization. He paid the amount so extended and sued the collector for the amount; but this court held he was not entitled to recover for the reason that his complaint contained no allegation that the collector still held the funds in his hands.

It does not appear from the complaint in the present case that the collector has retained in his hands the amount of the excess, and for the same reason stated in *Sanders* v. *Simmons, supra,* the circuit court was correct in denying relief.

The statute (Kirby's Digest, § 7180) affords a complete remedy for taxpayers under circumstances like this by authorizing the county court to make an order refunding taxes which have been erroneously assessed and paid into the treasury. The judgment in this case is, of course, without prejudice to the right to pursue that remedy.

Judgment affirmed.

TOLLIVER v. STATE.

Opinion delivered May 18, 1914.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE TO CONVICT.—Defendant was indicted for the crime of murder in the first degree, and the evidence held sufficient to warrant a verdict of guilty of murder in the second degree. (Page 145.)

2. CONTINUANCES—DISCRETION OF THE COURT.—Where defendant in a criminal trial asked a continuance for the term on account of the absence of certain witnesses, and no attempt was made to show where the witnesses were, or that they could not be found in a few days, it will be held that the court did not abuse its discretion in refusing a continuance for the term. (Page 146.)

3. EVIDENCE—DYING DECLARATIONS.—Evidence that deceased exclaimed, "I am all in," and called on God to forgive his sins, held sufficient to warrant the admission of statements of deceased, made at the time, as dying declarations, when deceased died a few days thereafter. (Page 146.)

4. HOMICIDE—INTENTION TO KILL—PRESUMPTION.—It can not be said as a matter of law that the act of defendant in striking deceased on the head with a bottle will raise a presumption that defendant intended to kill deceased, because a bottle is not an instrument calculated to inflict great bodily harm, and under the facts the method in which it was used was not so calculated. (Page 148.)

5. HOMICIDE—ERRONEOUS INSTRUCTION—INTENT—PREJUDICE.—Although an instruction on the issue of criminal intent is erroneous in a

trial for homicide, the same will be held not to be prejudicial when defendant was convicted of second degree murder, specific intent to take life not being an essential element of that degree of homicide. (Page 149.)

Appeal from Garland Circuit Court; *Calvin T. Cotham,* Judge; affirmed.

Wm. G. Bouic, for appellant.

1. Where a continuance is sought on account of the absence of witnesses whose testimony is material to the defense, and not merely cumulative, and due diligence has been used to procure their attendance, and shown in the motion, it is an abuse of discretion and reversible error to refuse such continuance. 60 Ark. 576; 100 Ark. 301, 310, 311; 99 Ark. 394; *Id.* 547.

2. The alleged dying declarations of the deceased, as detailed by the witness Jackson, were improperly admitted. The entire statement was incomplete as to manner, time, place, circumstances and parties, and its admission was highly prejudicial to the rights of the appellant. 4 Enc. of Ev. 985; *Id.* 1000; 32 Miss. 433; 118 Mo. 491; 24 Am. Dec. 695; 5 Rand. (Va.) 701; 68 Ark. 355; 2 Ark. 229; 104 Ark. 175, 176, 177.

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

1. There is no abuse of discretion in overruling a motion for a continuance where the motion shows that two of the absent witnesses live in the town where the trial is being had, with no showing that they were not in the town when the trial was called, and there is no showing that further process was sought to enforce their attendance; and where it appears that the third witness is a nonresident of the State, and there is nothing to show that his testimony could, with any degree of certainty, be obtained. 110 Ark. 402; 92 Ark. 29, 30. See, also, 94 Ark. 169.

2. We think the dying declaration was properly admitted. There is enough in the record to show that the deceased, at the time he made the statement, was speaking in the consciousness of impending death. 109 Ark. 510.

McCULLOCH, C. J. Appellant is accused of killing one Charles Bowen by striking him on the head with a bottle, and she was adjudged guilty of murder in the second degree under an indictment which charged murder in the first degree.

Appellant is a negress and was the keeper of a bawdy house in the city of Hot Springs at the time of the killing, which occurred at her resort on November 1, 1913, on the closing day of the Hot Springs Fair.

Deceased was a young white man, nineteen years of age, who resided in the adjoining county, and came to Hot Springs with some of his companions to attend the Fair, or, at least, to spend the closing night of the Fair in Hot Springs. The young men went to appellant's resort, and most of them, if not all, were intoxicated. Deceased was intoxicated to a noticeable extent. They were at the place about midnight, and after remaining there a short while, the party, led by deceased, started to leave, when deceased, standing at the front door, broke the glass out of the door. The testimony adduced by the State tends to show that when this occurred, appellant was somewhere in the rear of the house, but came forward, and when she saw what had been done, started back in the direction she had come from, making the remark, "I will fix the son-of-a-bitch," and returned in a moment with a beer bottle in her hand, and walked out where deceased was on the porch and struck him on the side of the head with the bottle. Deceased was carried by his companions to a hillside not far away, where they left him lying down. They returned a short time afterward and carried him to a hotel in Hot Springs and put him to bed. The next day he was carried to his home in the country, and died within a few days, having been attended by a physician in the meantime.

The evidence tended to establish the fact that death resulted from the blow inflicted by appellant. Several of the young men were introduced by the State as witnesses, and their respective narratives of the circumstances varied to some extent, but the conflict was not

material. The testimony of each of them tends to establish a felonious homicide.

Appellant herself gave a somewhat different account of the affair. After telling about the visit of the young men to her resort, she stated that the young men were considerably intoxicated, especially the deceased, who was a stranger to her; that while she was in the back part of the house she heard the noise of the falling glass toward the front, and went forward and asked who broke the glass in the door, and one of the young men replied that "Some one threw a rock;" that she looked out through the door where the glass was broken and saw a man on the steps whom she supposed was the one who threw the rock, and she stepped back in another room and picked up a beer bottle and hurried out to the front door and "threw it out down the steps," and didn't know whether she hit him or not.

One of the State's witnesses testified that it looked like a quart beer bottle.

The evidence was, we think, sufficient to warrant the jury in finding the defendant guilty of murder in the second degree.

The case is brought here on numerous assignments of error.

The first is in the ruling of the court refusing to grant a continuance.

The killing occurred, as before stated, on November 1, 1913, and the indictment against appellant was returned into court on November 17, 1913, and the case went to trial on January 7, 1914. On that day appellant, through her counsel, presented a motion for postponement until the next term of the court in order to procure the attendance of three absent witnesses. Two of them, who are alleged to have resided in the city of Hot Springs, had been summoned as witnesses, but were not in attendance. It is stated in the motion that appellant had made diligent search for them, and had been unable to find them, but could procure their attendance at the next term of the court.

If the court had been asked to postpone the case for a few days to give time to make more diligent search for these two witnesses, it is presumed that the time would have been granted. But that was not done, and, on the contrary, postponement was sought until the next term of the court. No attempt was made to show where the witnesses were or to show that they could not be found within a few days.

No abuse of discretion is shown in refusing to postpone the case until the next term.

It is stated in the motion that the other absent witness had not been found by the sheriff; that he was connected with one of the "concessions" at the Fair, and his address could not be ascertained at that time because of the fact that "at this period of the year exhibitions which accompany Fairs are usually in their winter quarters, and that as soon as the itinerary of State Fairs is announced the whereabouts of said witness can easily be ascertained."

That is rather too remote to justify the court in postponing the case. At any rate, it can not be said that the court abused its discretion in refusing to grant a postponement under those circumstances.

The next assignment relates to the admission of a statement of deceased as a dying declaration, it being contended that the evidence is not sufficient to show that deceased was at that time *in extremis,* or that he made the statement in contemplation of immediate dissolution.

The witness testified that he visited deceased at his home a day or two before he died; that deceased seemed to be suffering very much, and said, in the presence of witness, "I am all in. My head is killing me," and turned over and commenced crying, choked up and couldn't talk, and in a little while exclaimed, "I have done so wrong so many times, my Lord, my God, I pray, forgive, forgive." He was permitted then to state, after relating those circumstances, that deceased made the statement to him that "She hit me with a bottle."

We have reached the conclusion that this testimony was sufficient to warrant the court in submitting it to the jury with an instruction permitting them to determine whether deceased made the statement with the knowledge of impending death and in contemplation of his immediate dissolution.

Moreover, we are of the opinion that the statement had no prejudicial effect, for the reason that the testimony is undisputed that appellant hit deceased with a bottle, the only conflict in the testimony being whether she struck the blow with the bottle in her hand or whether she threw it at deceased and struck him, a point to which the alleged declaration of deceased did not reach.

There are numerous assignments with respect to the giving and refusing of instructions. The record has not been abstracted either by appellant or the Attorney General, and we have been compelled to explore the record ourselves. The instructions are very numerous and covered all the different phases of the case. It would be an useless task to set out all the instructions and comment on them, and as we find no prejudicial error, we refrain from doing so.

There are two instructions, however, upon which we deem it proper to offer some comment. They are two given over appellant's objection by the court of its own motion, and read as follows:

"15. The court instructs the jury that every person is presumed, in law, to contemplate the ordinary and natural consequences of his act, so, in this case, if you find from the evidence beyond a reasonable doubt that defendant hit and struck Charlie Bowen on the head with a bottle as alleged in the indictment, and that death ensued as a consequence or result thereof, her intention to kill the said Charlie Bowen is a legal presumption, and the State is not required to make further proof of her intention to kill him. This intention, however, may be rebutted by proper evidence."

"17. You are instructed that if you believe from the evidence beyond a reasonable doubt, that the defend-

ant, Millie Tolliver, was the proprietress of the house in the city of Hot Springs, Arkansas, known as the Indian Club, which said house was, under the direction and management of Millie Tolliver, used as a place of entertainment and amusement to which the public were generally invited; and that the deceased, Charlie Bowen, visited said house and while there fell into or otherwise broke the glass of the door of said house, and that the said defendant thereupon became angry at the said Charlie Bowen and threw a bottle at him, striking him upon the head, thereby causing the death of the said Charlie Bowen, within a day and a year from said blow so inflicted by said defendant Millie Tolliver, then, in that event you will find the defendant guilty of murder in the first degree, provided that she acted after deliberation and premeditation and with malice aforethought, and of murder in the second degree should you find that she struck the blow with malice and without deliberation and premeditation."

Instruction No. 15 is erroneous as applied to the facts of this case, for it can not be said, as a matter of law, that striking with a bottle raises a presumption of intention to kill. That is true when a weapon is used which is necessarily deadly in its use, or where the method in which an instrument is used is necessarily calculated to inflict great bodily harm; but a bottle is not necessarily a dangerous weapon, nor is the method in which the jury might have found that it was used necessarily calculated to inflict great bodily harm. The danger to be anticipated depended entirely upon the method in which the blow was inflicted and the force which was used. See, *Rosemond* v. *State,* 86 Ark. 160; Wharton on Homicide (3 ed.), § 87.

The instruction was incorrect, but it was not prejudicial, for the reason that appellant was only convicted of murder in the second degree, and the specific intent to take life is not an essential element of that degree of of homicide.

The same may be said with respect to instruction No. 17, which is erroneous as applied to the highest degree of murder. That instruction permitted the jury to find appellant guilty of murder in the first degree in the absence of any intent to kill, but it was not erroneous as a charge upon murder in the second degree, because it told the jury that the blow must have been struck with malice before the accused could be guilty of murder in the second degree. It therefore did not exclude the consideration of the degrees of manslaughter, which were embodied in other correct instructions on that subject.

Since appellant was only convicted of murder in the second degree, the erroneous part of the instruction which related to murder in the first degree was not prejudicial.

Judgment affirmed.

STATE, *ex rel.* MOOSE, ATTORNEY GENERAL *v.* SOUTHERN SAND & MATERIAL COMPANY.

Opinion delivered May 18, 1914.

1. STATE—SAND AND GRAVEL—NAVIGABLE STREAMS—CONTROL.—The State having dominion over the sand and gravel in the river beds of navigable streams, may require corporations taking sand and gravel therefrom to pay the State therefor. (Page 158.)
2. STATE—NAVIGABLE STREAMS—SAND AND GRAVEL.—A statute requiring payment to the State for sand and gravel taken from the beds of navigable streams does not levy a tax, but provides a method of utilizing the common property of the State for the benefit of the citizens. (Page 159.)
3. STATE—NAVIGABLE STREAMS—SAND AND GRAVEL.—Act 265, Acts 1913, requiring every one who desires to take sand or gravel from the beds of navigable streams to notify the Attorney General, and requiring corporations, but not individuals, to pay therefor, *held* not to provide an unreasonable requirement. (Page 159.)
4. CONSTITUTIONAL LAW—CITIZENS—CORPORATIONS.—Corporations are not regarded as citizens within the meaning of art. 2, § 18, Const. of 1874, which provides that no privileges or immunities shall be granted to any citizen or class of citizens upon terms which shall not equally belong to all citizens. (Page 159.)

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

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

1. The title to the bed of navigable rivers within this State is vested in the State in trust for the use of the public. 53 Ark. 314-319, 323.

The *jus privitum,* the common-law right which the King enjoyed in the soil of the bed of navigable waters, and the *jus publicum,* the right vested in Parliament to use and control both the land and water, both became a part of the power vested in the Legislatures of the different States of this country upon their creation; and the State, through its Legislature, has the right to dispose of the bed of a navigable stream in the same manner as any of its other public property. Farnham on Law of Waters and Water Rights, § § 212-215; 93 N. Y. 129-155; 21 Law Ed. (U. S.) 801; 100 Fed. 714-717; 40 Pac. 92, 93; 50 Pac. (Cal.) 277-285; 38 Law Ed. (U. S.) 333-351; 49 S. W. (Tex.) 721, 722; Gould on Waters, § 36; 35 S. E. (Ga.) 375-377.

The rule is stated by the United States Supreme Court as follows: "It is the settled rule of law in this court that absolute property in and dominion and sovereignty over the soils under the tide waters were reserved to the several States, and the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders." 35 Law Ed. (U. S.) 971-982, and authorities there cited. See, also, 57 Law Ed. (U. S.) 490-496; 54 *Id.* 95-100; 51 *Id.* 956-973.

It follows, therefore, that if the State has title to the bed of navigable streams within her borders, that she may dispose of as other parts of the public domain (subject, in the case of such streams, to the rights of navigation and fishery), by grant, sale or lease, she has the right to sell the deposits on such beds, consisting of sand or gravel. And the act in question is a *sale* by the State of her sand and gravel, and not a *tax.*

2. While the State holds the bed of the stream in trust for the use of the public, that trust is merely to see that navigation is kept open and free, and that the citizens of the State are not interfered with in their common right of fishery. As is said by Professor Farnham in his criticism of the Wisconsin case relied on by appellee, 58 L. R. A. 93: "The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, *or can be disposed of without any substantial impairment of the public interest in the lands and water remaining.*" Farnham, Water and Water Rights, § 173. See, also, 40 Pac. (Ore.) 92; 53 Pac. (Wash.) 545; 16 Ann. Cases (Wash.), 196 and notes; 46 L. R. A. (N. S.) 363-369.

That the sand and gravel in the bed of the river are the property of the State which no person or corporation has any right to take and appropriate as against the State without her consent and license, is supported by a recent New York case. See, 140 N. Y. 333, 339, 340.

For the distinction between the title of the State to the water in navigable streams, and the title to the soil in the bed of the streams, see 44 Am. Rep. (N. Y.) 393-399.

John W. Newman, for appellee.

1. By the acts of Congress forming the Territory, and admitting the State of Arkansas into the Union, the State took title to her lands subject to the provision that "the Mississippi and Missouri rivers and the navigable waters flowing into them, * * * shall be common highways and forever free to the people of the said Territory and to the citizens of the United States without any tax, duty or impost."

Under these provisions the State took the same title to the beds of inland navigable rivers that the King of England, under the common law, held in the lands covered by the tidal waters in that country. 12 How. (U. S.) 442, 13 Law Ed. 1058; 152 U. S. 1-57; 38 Law Ed. 331-352.

See, also, 16 Pet. 367-410; 10 Law Ed. 997-1013; 15 How. 426, 14 Law Ed. 757-760; 18 How., 15 Law Ed. 270.

The authorities are uniform to the effect that the title of the State to the beds of navigable streams within its borders, is in trust for the use of the public, a fact which this court recognized in a case wherein a gravel bar in the White River was involved. 53 Ark. 323; 73 Ark. 236. See, also, 227 U. S. 229, 57 Law Ed. 490-496; 186 Fed. 426; 146 U. S., 36 Law Ed. 1018; 1 Vattel, § § 239-246; 18 L. R. A. 670; 12 L. R. A. 583-585. Wherever the question has arisen, the taking of sand and gravel from the beds of navigable rivers has been placed in the same class with the taking of water, fish, ice, etc. 38 Pa. St. 380; 7 Allen 166; 1 Farnham on Waters, 652; 83 Tenn. 209; Hall on Seashore (2 ed.), 92-186.

Sand and gravel continually shift and drift about in the bed of a stream within a general movement down stream, and with respect to the title and use thereof, the language of this court in regard to fishing, in the *Mallory* case, 73 Ark. 236-249, is applicable: "The transitory nature of the property renders the benefit so diffusive that all may join in the enjoyment thereof, and for that reason the sovereign holds as the representative of the public, so as to regulate and protect the common use."

See, also, 89 N. W. (Wis.) 839, 58 L. R. A. 93, cited with approval in the *Mallory* case, *supra.* 16 Pet. 367.

2. The right of the public to use the water, fish, sand, etc., is secondary to the right of navigation, and must give way when the improvement of navigation and commerce demand it. Of this matter the Congress of the United States has absolute control, and has exercised that control in the passage of the Rivers & Harbors Act of September 19, 1890, 26 Stat. at Large 454, which, in part, provides as follows: "That it shall be unlawful * * * under any act of the legislative assembly of any State, * * * to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the

United States, unless approved and authorized by the Secretary of War."

The act of Congress controls, and the compliance with the rules laid down by the War Department prevents any lawful interference by the State. 174 U. S. 689-708; 96 U. S. 24 L. Ed. 668; 32 Fed. 9; 140 U. S. 35 Law Ed. 603; 100 Fed. 714; 41 Atl. 18; 93 U. S., 23 L. Ed. 782.

3. The act confers such arbitrary power upon the Attorney General, with reference to his choice of customers and fixing the price for the sand and gravel, or withdrawing it from the market altogether, as to render it void. 49 Md. 217; 118 U. S. 356, 30 L. Ed. 220-227.

McCULLOCH, C. J. The General Assembly of 1913 enacted a statute entitled, "An Act to protect the beds of all navigable streams in the State of Arkansas," and, after reciting that "the navigable streams of Arkansas belong to Arkansas, and the sand and gravel bars of same belong to Arkansas," provides:

"Section 1. That it shall be unlawful for any railroad company, corporation or company or person of any kind whatever to take sand or gravel from any sand or gravel bar of any navigable stream in this State without first notifying the Attorney General of the same, and then by his consent, the said railroad company, corporation or company may take from said navigable stream sand or gravel by paying into the State treasury the sum of not less than four cents per cubic yard for sand, and not less than five cents per cubic yard for gravel. *Provided,* the sums collected under this act shall be placed to the credit of the general revenue fund." Act No. 265, p. 1088, Acts of 1913.

The Attorney General instituted this action for the benefit of the State against appellee, a domestic corporation, alleging that the latter had been taking and removing sand and gravel from the bed of the Arkansas River without the consent of the State and without paying or offering to pay into the treasury of the State the price prescribed by statute; and praying for a discovery of

the amount of sand and gravel thus taken, and for a decree for the price of same.

The court sustained a demurrer to the complaint on the ground that the statute is void.

The contention of appellee through its learned counsel is that the State's ownership of the beds of navigable rivers is merely as trustee for the use of its citizens without any such proprietary interest as would give authority to sell the same, or any part thereof, or to grant special privileges therein.

It may be conceded without further controversy that the rights held by the State are as trustee for its citizens, that being true as to all property to which the State holds title.

In the case of *Knight* v. *United States Land Association,* 142 U. S. 161, Mr. Justice Lamar, speaking for the court, repeated the rule which had often been announced in substance in former decisions:

"'It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.''

In a very recent case, decided by the same court, it was said in the opinion that "it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and State Governments under the Constitution, that lands underlying navigable waters within the several States belong to the respective States in virtue of their sovereignty, and may be used and disposed of as they may direct, subject, always, to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations.'' *Scott* v. *Lattig,* 227 U. S. 229.

Questions relating to the source of the State's title constitute a broad field in which much learning may be displayed; but those questions are so well settled, and have been so concisely stated in many decisions that it is an useless task to pursue that subject. The best statement of the law on that subject which we can find is in an opinion of the New York Court of Appeals, and we take the liberty of quoting at length therefrom as follows:

"From the earliest times in England the law has vested the title to, and the control over, the navigable waters therein, in the Crown and Parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership of dry land, was regarded as *jus privatum,* and was vested in the Crown. But the right to use and control both the land and water was deemed a *jus publicum,* and was vested in Parliament. The Crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters, in the interest of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by Parliament. * * * In this country the State has succeeded to all the rights of both Crown and Parliament in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the State. In England, Parliament had complete and absolute control over all the navigable waters within the kingdom. It could regulate navigation upon them, could authorize exclusive rights and privileges of navigation and fishing, could authorize weirs, causeways and dams for private use to be constructed in them, and could interrupt and absolutely destroy navigation in them. * * * So, in this country, each State (subject to limitations to be found in the Federal Constitution), has the absolute control of all the navigable waters within its limits." *Langdon* v. *Mayor, etc.,* 93 N. Y. 129.

In other words, there is a union in the state governments of America of all the powers of King and Parlia-

ment in England over navigable waters and the beds thereof, subject only to the paramount jurisdiction of the United States for the control of navigation.

In the decisions there are references made to the proprietary rights of the English kings, a term which has no place in our system of Government, as all rights of the sovereign under the American system are exercised, and all property rights held, for the benefit of the people. All of the property rights which are held in common by the people of our States are subject to the control of the legislative branch of Government, save certain inalienable rights which the individual citizen does not yield up to the Government, and the power of the sovereign people is complete in the regulation and disposition of those rights.

Chief Justice Beasley, speaking for the New Jersey Court of Errors and Appeals in the case of *Stevens* v. *P. & N. Rd. Co.*, 34 N. J. Law 532, said:

"The principle seems universally conceded that, unless in certain particulars protected by the Federal Constitution, the public rights in navigable rivers can, to any extent, be modified or absolutely destroyed by statute. * * * But the dominion over the *jura publica* appears to be unlimited. By this power they can be regulated, abridged, or vacated. We have seen that, by the common law, the King was the proprietor of the soil under the navigable water, and this being regarded as a private emolument of the Crown, was susceptible of transfer to a subject. But such transfer did not divest or diminish, at least, after *Magna Charta,* the public rights in the water, and consequently the grantees of the Crown held the property in subjection to the common privilege of fishery and navigation. The consequence was that the King could not deprive the subjects of the realm of these general rights. This was a power that resided in Parliament, and not in the monarch."

Mr. Farnham, in his work on Waters and Water Rights (Vol. 1, p. 260), says:

"The King never held any of the non-tidal rivers in trust until he was compelled to convey his waste land in trust for the public, and after that time Parliament and the King held the whole title, which they could dispose of as they saw fit, subject to existing rights of navigation in the stream. The American States succeeded to all the title held by both the King and Parliament, and there is nothing to prevent them from making any grant which they may wish to make."

Now, the State can not delegate its trusteeship by disposing of navigable waters or beds thereof, for one Legislature might resume a power which had been surrendered by its predecessor; but it is quite another thing to say that the Legislature, in the exercise of its control over the beds of streams, can not grant the rights, upon terms or for a price named, to take sand or gravel, call it a sale, or a regulation, as it may please one to term it. The bed of the stream being held by the sovereign for the benefit of the citizens that right may be enjoyed in the way that the legislative branch of Government may determine for the benefit of the public, and it is not inconsistent with a public use to require those who actually take sand and gravel to pay for it so that the benefits may be diffused among all of the people of the State.

This does not imply the right of the State to relinquish its control over the river bed or to permit its use in a way which would interfere with navigation. This idea finds explicit approval, we think, in the opinion of Mr. Justice Field, speaking for the Supreme Court of the United States, in *Illinois Central Railroad Co.* v. *Illinois,* 146 U. S. 387, where he said:

"The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the

public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled."

In the opinion of the court in the case of *Shively* v. *Bowlby,* 152 U. S. 1, Mr. Justice Gray, after a careful review of the authorities with respect to the title of the States in beds of tide waters and navigable streams, and the character of governmental control thereof, said: "Each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations whether owners of the adjoining upland or not, as it considered for the best interest of the public."

This principle is recognized in the many decisions holding to be valid grants by the State of parts of the beds of navigable waters for wharfage purposes, or for reclamation.

In the State of Florida there is a statute prescribing the terms upon which phosphate deposits may be removed by corporations or persons from the beds of navigable streams and fixing prices to be paid to the State for same. That statute has been upheld. *State ex rel.* v. *Phosphate Commission,* 31 Fla. 558.

Now, it can not be claimed that the disposal or sale of sand or gravel, in the bed of the river is a relinquishment of the State's control over the common property, or that it impairs the rights of common enjoyment, or that it interferes with navigation.

We are of the opinion, therefore, that it was within the power of the Legislature to enact this statute.

A few words must be said with respect to the terms of the statute. It will be observed that the first section, which has been quoted, is peculiar in that it refers to

persons as well as corporations in the beginning, but requires only corporations to pay for the taking of sand and gravel. The only burden imposed upon individual citizens is that of first notifying the Attorney General. That, of course, is not an unreasonable requirement. It is only railroad corporations and other corporations which are required to pay for the sand and gravel.

This is not a tax, but a method of utilizing the common property of the State for the benefit of the citizens.

If it be treated as a privilege, that of taking sand and gravel, the corporations of the State have no rights to participate in that privilege which the Legislature is bound to respect, as they are not citizens within the meaning of the Constitution, which provides that "no privileges or immunities shall be granted to any citizen or class of citizens which upon the same terms shall not equally belong to all citizens." Constitution of 1874, § 18, art. 2; *Waters-Pierce Oil Co.* v. *Hot Springs,* 85 Ark. 509.

In very numerous decisions of the Supreme Court of the United States it has been held that corporations are not citizens within the provisions of a similar clause of the Constitution.

They are protected by the due process clause of the Constitution of this State and of the United States, and for that reason illegal exactions can not be imposed.

But, conceding to the citizens, that is to say, to natural persons who are citizens of the State, the right to take sand and gravel as a common right, there is nothing to limit the power of the Legislature to require corporations to pay for sand or gravel taken out of the beds of streams.

The act fixes a minimum price for sand and gravel, which must be paid in any event by the corporation taking the same, and as the act contains no express authority to the Attorney General to fix a greater price than that, it amounts, after all, to the Legislature definitely fixing the price. The act is unobjectionable on that account.

We are of the opinion that the court erred in sustaining the demurrer to the complaint, and the decree is reversed and the cause remanded with directions to overrule the demurrer.

HART, J., dissents.

WESTERN UNION TELEGRAPH COMPANY v. COWARDIN.

Opinion delivered May 18, 1914.

1. APPEAL AND ERROR—INVITED ERROR—INSTRUCTIONS.—Where the appellant requested the court to submit a certain question as an issue to the jury, he can not complain that the verdict of the jury was erroneous on that issue. (Page 163.)

2. TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGES—DAMAGES—QUESTION FOR JURY.—In an action for damages caused by the failure of the addressee of a telegram to hold the dead body of a child until the arrival of the sender, *held* it was a question for the jury to determine whether the failure to hold the body was due to the failure of defendant to deliver the message promptly, or the failure of the addressee to understand the message. (Page 164.)

3. TELEGRAPH COMPANIES—DEATH MESSAGE—DELAY—QUESTION FOR JURY. Where a death message was sent as a "day letter" and not as a "regular message," and the sender alleged damages by reason of a delay in the delivery thereof, *held*, it was a question for the jury under the evidence as to whether the appellant was negligent in sending the message as a "day letter" instead of as a "regular message" (Page 168.)

4. TELEGRAPH COMPANIES—DEATH MESSAGE—"DAY LETTER"—QUESTION FOR JURY.—Where there is a conflict in the testimony as to whether defendant was instructed to send a death message as a "day letter" or "regular message," the question should be submitted to the jury. (Page 168.)

5. TELEGRAPH COMPANIES—DELAY—NEGLIGENCE.—Where a telegraph company's transmitting agent knows, or under the circumstances should know, that on account of the receiving office being closed there will be delay in delivering an urgent message which is intended for immediate delivery, it is incumbent on him to so inform the sender; and, if he fails to do so, the company is liable for damages resulting from such neglect. (Page 168.)

6. TELEGRAPH COMPANIES—KIND OF MESSAGE—DAY LETTER—AGENT OF SENDER.—The sender of a death message sent the same to the telegraph office for transmission. *Held*, it was error to instruct the

jury that the bearer of the message, a boy of fourteen years, was not the sender's agent, and that when the boy said the message was to go as a "day letter," that it was the duty of the agent to explain to the boy the difference between a "day letter" and a "regular message." (Page 169.)

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

STATEMENT BY THE COURT.

In April, 1909, appellee and her husband adopted a baby boy, eleven months old. They named him Paul Cowardin. Paul died in the Orphan's Home at Monticello, Arkansas, July 30, 1909, at 10 A. M. The superintendent of the Home transmitted a message to appellant's operator at Monticello, addressed to appellee, at Bentonville, Arkansas. The message read as follows: "Paul Cowardin died this morning at 10 o'clock. Will be buried at 9. With heart full of sympathy. Signed, J. M. Williams." The message was delivered to appellant's operator at Monticello at about 1 or 1:30 P. M. Appellant's agent transmitted the message to the relay office at Little Rock. All points north of Monticello were relayed to Little Rock. The records of appellant's office at Little Rock showed that the message was received on that day at 2 o'clock and sent to St. Louis at 3:30, that being the proper relay office for messages to Bentonville, Arkansas.

On account of the Bentonville loop wire being broken, appellant routed the Bentonville business to Fort Smith. At that time the peach harvest was on and the business, for that reason, was heavy. At 5 P. M. that day the day letters were four hours and fifteen minutes behind the regular full rate messages, which took precedence over day letters, and for that reason that message was delayed to await its regular turn, the same being a day letter. The message was pasted on a day letter blank. The day letter blank contained on its face the following: "Send the following day letter subject to the terms on the back hereof which are hereby agreed to," and on the back was endorsed: "Day letters may be forwarded as a de-

ferred service and the transmission of such day letters is, in all respects, subordinate to the priority of transmission and delivery of regular day messages."

The operator at St. Louis began handling the message at 8:31 P. M. At 9:51 the operator sent it to the operator at Fayetteville, who said he would 'phone it to Bentonville. At 10 o'clock P. M., July 30, 1912, the appellee received the message. She answered at 10:30 that night, as follows: "Mr. Williams, Monticello Baptist Orphanage. Have body embalmed at my expense and hold, if possible, until I come. Signed, Mrs. Paul Cowardin." At 8:15 on July 31, Williams received the last message, and in reply, wired the appellee as follows: "Your telegram came too late. Can't hold child until you arrive."

The appellee started from Bentonville to Monticello on July 31, and arrived at Monticello August 1. When she reached Monticello, the baby had been buried a day and a half. She went for the purpose of carrying the baby back with her and burying him beside his father, at Hartford. The child died with pellagra and the officials would not permit her to disinter the remains and move them at that time.

The above are substantially the facts upon which appellee predicated her complaint against the appellant, in which she alleged the latter had neglected to promptly transmit and deliver the messages, and that by reason of such negligence she had been damaged in the sum of $1,200.

The appellant set up that the telegrams were both received and sent as day letters, and denied specifically the allegations of negligence, and denied that the prompt transmission and delivery of either of the telegrams would have caused the body to be embalmed and held until her arrival, and denied that the failure to embalm and hold the body was caused by any delay in the transmission of the messages. Denied that any negligence on appellant's part caused appellee any damage.

The cause was sent to the jury upon instructions which will be noticed in the opinion. There was a verdict and judgment in favor of the appellee in the sum of $800, and the cause is here on appeal. Other facts stated in opinion.

H. C. Mechem, for appellant.

Hal L. Norwood and *Hill, Brizzolara & Fitzhugh,* for appellee.

WOOD, J., (after stating the facts). 1. The court, at the request of appellant, granted prayers for instructions which told the jury that if the earlier receipt of appellee's request to embalm and hold the body would not have prevented the funeral from taking place when it did, and if the failure to embalm and hold the body was the result of Williams's misunderstanding of appellee's wish, expressed in her telegram, the jury should find for the appellant.

Appellant now contends that the evidence shows conclusively that the failure to embalm the body was not by reason of the late receipt of the message, but because Williams, the superintendent of the Orphans' Home, did not understand that it was appellee's desire to take the body back for burial; that if Williams had known her desire in this respect, the body would have been embalmed notwithstanding the delayed telegram. The appellant, having requested the lower court to submit this as a jury question, is not in an attitude to complain that the verdict of the jury was erroneous on this issue. *Berman* v. *Shelby,* 93 Ark. 472. Moreover, we are of the opinion that it was proper to submit the issue to the jury.

There was testimony tending to show that if the message had been received on the 30th, the day the child died, the body would have been embalmed and held in compliance with the request of the appellee. There was also testimony which warranted the jury in finding that the telegram was received twenty-two hours after the child died; that the child died with pellagra, an infectious disease; that the funeral cortege was ready to move when the message was received; that the superintendent, the

president of the board of control, and those in charge of the funeral arrangements, including the undertaker, thought that it was best to bury the body at that time as quickly as possible; that it was not safe to the other children in the home to have the casket opened up and the body embalmed. The undertaker does state, in a second deposition, that if he had known that it was appellee's desire to have the body embalmed and removed, he would have removed the same to his parlors and embalmed it, even at that belated hour, if the telegram had been addressed to him. But the telegram was not addressed to him, and he could not have obtained possession of the body for embalming purposes without the consent of the authorities having control over the Home.

It was a question for the jury, under the evidence, as to whether the failure to embalm and hold the body was caused by the delay in delivering the message, or by a failure on the part of Williams to comprehend the meaning of appellee's telegram.

2. The court, at the instance of the appellee, submitted to the jury to find whether or not appellant was negligent in the handling of the message from Williams to appellee, and whether or not appellant was negligent in handling the message in reply from appellee to Williams. The appellant complains that these instructions are without evidence to warrant them. The learned counsel for appellant assumes that there was no negligence on the part of appellant in transmitting the message as a day letter instead of a "straight message," and contends that the uncontroverted evidence shows that, being sent as a day letter, there was no negligence in handling the same. But we are of the opinion that it was a question for the jury, under the evidence, as to whether or not the appellant was negligent, in the first place, in sending the message as a day letter instead of a regular message.

The sender of the message testified that he 'phoned the message to appellant's agent at Monticello, and the agent in charge of appellant's telegraph office at Monticello testified that he would have accepted the message

from Williams by 'phone to be sent to appellee. The difference between the cost of the day letter and a straight message was sixteen cents. He never knew a death message sent as a day letter to save sixteen cents. A death message is only considered as a preferred message when on the prescribed form and sent as such. The 12:30 on the message was in his handwriting. He did not know when he put it there. The habit was to put the time of receiving the message on it. A straight message was given precedence over a day letter. The regular agent stated that he first saw the message about 1:30. The clerk who received the message, witness supposed, placed the day letter blank on it. The witness did not see the boy who brought it. Witness did not think that the handwriting on the message was that of Mr. Williams.

Witness Owens testified that he was clerk of the Iron Mountain Railway Company at Monticello, Arkansas, and on July 30, 1912, he received a message, in the absence of appellant's agent, addressed to Mrs. Pearl Cowardin, Bentonville, Arkansas. He wrote the words, "Day letter—23—paid." He received it from some boy from the Baptist Orphans' Home. The boy who brought it paid the tariff for a day letter on the message. Witness asked the boy if he wanted it sent as a straight message or a day letter, and the boy told witness to send it as a day letter; so witness accepted it as a day letter and put it on the file of the operator where he would get it when he came in. Witness did not explain to the boy the difference between a straight message and a day letter, supposing that the boy had instructions from Williams how to send it. Witness asked him how he wanted it sent, and he answered like he knew. Witness did not put the time it was received on it. He pasted the day letter blank on the back of the message. The paper on which the message was written was headed, "Monticello, Baptist Orphans' Home, Monticello, Arkansas, July 30, 1912." The witness was in the habit of receiving messages in the absence of the operator and collecting for them. He knew Mr. Williams's handwriting; thought this was his hand-

writing. He had never seen any of his handwriting except his signature.

It appears that the testimony of Williams tended to show that the message was transmitted over the 'phone to appellant's agent to be sent to the appellee, without directions as to the form it should take in sending. The message, on its face, showed that it was a death message. Witness was shown Williams's signature to the depositions and testified that the signature upon the message was not similar to the signature on the deposition, but that the signature on the message looked like Williams's signature. He did not know whether the body of the telegram was in Williams's handwriting or not, as he had never seen any of his handwriting except his signature. When a message is received on a plain piece of paper, they usually attach it to the form it is to be sent on, and witness did so in this case.

There is an irreconcilable conflict in the evidence as to whether the message was 'phoned by Williams to the operator at Monticello, or whether or not Williams sent the same to appellant's operator at Monticello by a boy. If the message was given over the 'phone it appears then as a straight message; and, on the contrary, if it was delivered through Williams's agent—a boy—then the testimony is to the effect that the boy directed the agent to send it as a day letter. If the agent received it over the 'phone, he assumed to send it as a day letter without first obtaining the authority of the sender, and was therefore negligent in causing an urgent death message to be classified as a day letter, and in thus having the same delayed in transmission and delivery.

The testimony of the witnesses on behalf of appellant, tending to show that the message was received through the boy as the agent of Williams, is more or less conflicting, in itself, and is in direct conflict with the testimony of appellee. It was therefore a question for the jury as to whether or not the appellant was negligent in the transmission and delivery of the message from Williams to the appellee.

Even though the message may have been directed by the sender to be sent as a day letter, we are of the opinion that it was still a question for the jury to determine as to whether the appellant was negligent in its transmission and delivery. It could serve no useful purpose to discuss in detail the facts which warranted the submission of that question to the jury.

It was a question also for the jury as to whether or not appellant was negligent in handling the message from appellee to Williams. The operator at the office where this message was received was requested by the appellee to forward it immediately, and he promised her that he would do so, but he did not explain to her that the office at the place of delivery was not a night office, and that the message, therefore, could not be delivered on account of office hours until the next morning, causing a delay of nine hours and forty-five minutes in the delivery of the message. Had he informed her she would have used the long-distance telephone.

The case is ruled on this point by the case of *Western Union Telegraph Co.* v. *Harris,* 91 Ark. 602. In that case we held (quoting syllabus): "Where a telegraph company's transmitting agent knows, or, under the circumstances should know, that on account of the receiving office being closed there will be delay in delivering an urgent message which is intended for immediate delivery, it is incumbent on him to so inform the sender; and if he fails to do so, the company is liable for damages resulting from such neglect."

3. The court granted, among others, appellee's fourth prayer for instruction, as follows: "If you find from the evidence that the message from Mr. Williams to Mrs. Cowardin was sent on plain paper to the office of defendant with sufficient money to pay the regular rate, and the agent of defendant, without explaining to the boy bringing the message the difference in service or cost between the day letters and regular messages, asked which form to send it on, and was told by the boy to send it as a day letter, and on that direction so sent it, and if

you find such direction was without the knowledge of Williams, then the defendant can not avail itself of the deferred service due to the form of the message as a defense for not properly transmitting it."

This prayer was erroneous and the granting of it was necessarily prejudicial to the rights of appellant. It assumes that it was necessary for appellant's agent, before receiving the same to be sent, as a day letter, to explain to the boy bringing the message the difference in service and cost between day letters and regular messages.

If the boy was entrusted by Williams with the mission of taking the message to appellant's operator and of directing him how to send the same, then it was not appellant's duty to give to Williams's agent any explanation as to the difference between day letters and regular messages. There was nothing in the testimony except the boy's age to warrant the conclusion that he was ignorant of the difference. If the boy was Williams's agent he was under Williams's directions, and Williams himself, for aught the evidence shows to the contrary, may have already explained to him the difference in the messages and the particular form under which he desired the message sent.

If, as contended by appellant's counsel, and as the evidence tends to show, Williams entrusted the boy with the duty of sending the message and gave him authority to send it as a day letter instead of a regular message, then there was no duty on appellant to explain to Williams's agent the difference between straight messages and day letters. Williams could select his own method for transmitting the message to appellant's operator, and it was his province to select the form that he wished the message to take. It was not incumbent on appellant to give Williams's agent, if the boy was his agent, any explanation of the difference between regular messages and day letters.

It was a question for the jury, taking into consideration the boy's age, and the other circumstances, assum-

ing that Williams sent the message by the boy to the depot, to determine whether or not the boy was acting in the capacity of agent of Williams for the purpose of sending the message and directing the particular form it should take, or whether or not he was a mere messenger, without any discretion in the matter, and simply serving as a vehicle for the transmission of the message from Williams to the appellant's operator at the depot.

The vice of the instruction is that it assumes as a fact that the boy was not Williams's agent, vested with the authority to speak for Williams, and having knowledge of the difference between day letters and straight messages and discretion to select between the two. It assumes as a matter of law that it was necessary for appellant to explain the difference between a regular message and a day letter to the boy regardless of the evidence tending to show that the boy was about fourteen years of age, and that he appeared to know the difference. The instruction assumes that the boy was not Williams's agent to send the message, and also assumes that in giving directions that the message should be sent as a day letter, the boy was acting without authority from, and without the knowledge of, Williams.

Other objections are urged, but we find no reversible error in the rulings of the court except as above indicated. For the error in granting appellee's prayer for instruction No. 4, the judgment must be reversed and the cause remanded for a new trial.

THOMPSON v. CRENSHAW GRAIN COMPANY.

Opinion delivered May 18, 1914.

1. SALES—BREACH OF WARRANTY—REMEDY.—Where goods delivered to a buyer are inferior in quality to that which was warranted by the vendor, and the buyer accepts the goods and pays the purchase price thereof, he may bring an action for breach of warranty. (Page 173.)
2. SALES—BREACH OF WARRANTY—TENDER OF PURCHASE PRICE.—Where the buyer of chattels has instituted an action for breach of war-

ranty, the seller can not defeat his right of recovery by offering to receive back the goods and return to him the purchase price. (Page 173.)

3. SALES—BREACH OF WARRANTY—MEASURE OF DAMAGES.—Where the seller of chattels commits a breach of warranty as to kind, quality or condition of the goods sold, the measure of the buyer's injury will be the difference between the value of an article of the kind warranted and the value of the kind actually delivered, and the buyer may recover damages amounting to this difference. (Page 174.)

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

STATEMENT BY THE COURT.

This is an action by C. S. Thompson against the O. A. Crenshaw Grain Company, brought in the circuit court on the 6th day of February, 1913, to recover damages for an alleged breach of warranty in the sale of a car of corn. The plaintiff filed an affidavit for attachment, in which he stated that the defendant was a nonresident of the State of Arkansas, and caused a garnishment to be issued against the Hope National Bank of Hope, Arkansas. The facts are as follows:

C. S. Thompson, of Hope, Arkansas, wrote to the O. A. Crenshaw Grain Company, a partnership doing business at Charleston, Missouri, for prices on a car of corn, and on the 6th day of January, 1913, received in reply the following letter:

"Your letter of the 5th at hand and noted, we wish to offer you corn in the sack f. o. b. your station today at 62 cts. and we can offer you naked yellow ear corn at 61 cents delivered; this is all good corn, and we try to never use any bad corn if we can prevent it. Hoping these prices will be satisfactory, and we will hear from you in a few days, we remain, yours truly."

Thompson accepted the offer and ordered the corn. The corn was loaded on the car at Belmont, sixteen miles below Charleston, and was received by the Crenshaw Grain Company at Charleston the next day after it was loaded. The car was at once forwarded to Hope. The Crenshaw Grain Company drew on Thompson for the

price of the corn, with the freight added, through the Hope National Bank, of Hope, Arkansas, and attached the draft to the bill of lading. According to the testimony of Thompson, the car reached Hope about four days before the draft and bill of lading, and the draft was paid two days after it came. The draft for the purchase price and freight added amounted to $510.66, and was paid by Thompson on January 25, 1913. Thompson also testified that the corn had been at Hope four days before it was opened; that when the car was opened, the corn was hot and steaming and had sprouts on it from one and a half to two inches long; that the corn was in the same condition all through in spots, and was not fit for use except to feed to hogs. Thompson stopped payment on the draft and telegraphed the Crenshaw Grain Company to come and investigate the condition of the corn, and also told them that the corn was short in quantity. After some telegraphic correspondence between them, the corn was released by the Crenshaw Grain Company, and Thompson paid the draft and took charge of the corn. Other witnesses for Thompson testified that they were experienced grain men, and that they thought it would take about a week or ten days for corn to grow sprouts as long as the sprouts they saw on the corn in question; that when the car was opened they examined the corn, and it was worth not more than twenty-five cents per bushel.

The witnesses for the defendant testified to a state of facts substantially as follows: When the corn was loaded upon the car it was good, dry corn, and had been husked; that the roof of the car leaked to some extent, but not badly. The railroad agent promised that the car should be shipped direct to Hope without a stop, and it left Charleston about the 18th day of January. There was no rotten corn in the car, and none of it had sprouted when shipped from Charleston. That on the 11th day of February, 1913, the defendant offered to take back the car of corn, and tendered to the plaintiff the amount of

the draft, which he had paid. This tender was refused by the plaintiff.

In rebuttal the plaintiff said that an amount of money was tendered him by the agents of the defendant, but that the sum of $510.66 was not tendered him; that he does not know the exact amount of money that was tendered to him because it was not counted out.

The court directed a verdict in favor of the defendant, and the case is here on appeal.

U. A. Gentry, for appellant.

1. There appears to be but one controlling question in this case, viz., whether or not appellant had the right to retain the corn in its damaged condition and sue for a breach of the implied warranty. If he did have that right, the court erred in giving the peremptory instruction. As to the implied warranty in a sale of this kind, see 77 Ark. 546; 72 Ark. 343; 48 Ark. 330; Benjamin on Sales, § § 645, 646.

One of the remedies recognized by law, where the goods bought are inferior in quality to that which was warranted by the vendor, is that the purchaser may accept the goods and sue for the breach of the warranty. 2 Benjamin on Sales, 1151, § 1348; 79 Ark. 66; 149 S. W. 52.

2. It appears, therefore, that appellant had the right to retain the corn and to bring action for the breach of warranty, hence the question of tender does not properly belong in the case; but, in any event, the alleged tender was not made until after suit was brought, and did not include the costs accrued to date. 72 Ark. 213; 38 Cyc. 138, and cases cited in note 41.

Steve Carrigan, Jr., for appellee.

1. When upon consideration of the entire evidence in a case, it appears that reasonable minds could reach but one conclusion therefrom, it becomes a question of law, and it is proper for the court to direct the verdict. 89 Ark. 534; 116 S. W. 106; 112 S. W. 910; 163 S. W. 149.

2. It was not necessary to tender the accrued cost. Had the tender been accepted when made, the court, as a matter of right, could have adjudged the cost against appellee. Payment of the debt sued for, during pendency of the suit, will not bar a judgment against the defendant for cost. 28 Ark. 461.

HART, J., (after stating the facts). Counsel for appellant seeks to reverse the judgment on the ground that the court erred in directing a verdict in favor of defendant; and in this connection we think he is correct. At the time the plaintiff purchased the car of corn involved in this suit, he had no opportunity to inspect the same, and there was an implied warranty on the part of the seller that the corn was reasonably fit for use. *Truschel* v. *Dean,* 77 Ark. 546; *Bunch* v. *Weil,* 72 Ark. 343. According to the testimony of the plaintiff, the corn had sprouted and was rotten and unfit for use. The plaintiff paid for the corn and received it. Where the goods delivered to the buyer are inferior in quality to that which was warranted by the vendor, and the buyer accepts the goods and pays the purchase price thereof, he may bring an action for breach of warranty. Benjamin on Sales, (7 ed.), § 893; Mechem on Sales, Vol. 2, § § 1807-1809-1810; *Yellow Jacket Mining Company* v. *Tegarden,* 104 Ark. 573; *Warden* v. *Middleton,* 110 Ark. 215, 161 S. W. (Ark.) 151. It is true the defendants adduced evidence tending to show that they offered to take back the car of corn and to pay back to the plaintiff the amount he had paid for the same. This offer, however, was not made until February 11, 1913. The present suit was instituted on February 6, 1913. Thus, it will be seen that plaintiff instituted the action before the tender was made to him. He exercised his option to receive the goods and pay for them and sue the defendant for a breach of warranty. After he had done this the defendants could not defeat his right of recovery by offering to receive back the goods and return him the purchase money.

For the benefit of the parties on a retrial of the case, we will determine the question of the measure of dam-

ages. Mr. Mechem says: "Where the article furnished by the seller is not such in kind, quality or condition as it was expressly or impliedly warranted to be, the direct and natural loss to the buyer who keeps it is obviously the difference between the value of an article of the kind he was thus entitled to receive and the value of the article which he has in fact received. For this loss he is entitled to compensation. There may, of course, be other losses resulting from the seller's default, and these will be considered later; but the direct and immediate loss will be at least this difference in value. For the breach of warranty, then, as to kind, quality or condition, the measure of the buyer's injury will be the difference between the value of an article of the kind warranted and the value of the kind actually delivered; and for this difference the buyer may recover damages." Mechem on Sales, Vol. 2, § 1817.

For the error in directing a verdict in favor of the defendant, the judgment will be reversed and the cause remanded for a new trial.

MALONEY v. MARYLAND CASUALTY COMPANY.

Opinion delivered May 18, 1914.

1. INSURANCE—CONTRACT—CONSTRUCTION.—The contract in a policy of insurance is always to be construed most strongly against the insurance company, because it prepares the contract of insurance. (Page 181.)
2. INSURANCE—ACCIDENT INSURANCE—NOTICE.—Although an accident insurance policy provides that notice of an injury must be given the company as soon as reasonably can be done after an accident, the beneficiary in the policy will not be barred from recovery, when the deceased did not give notice of the injury, although he lived some time after receiving the same, and where the beneficiary did give notice within two weeks after deceased's death, which was as soon as she discovered that deceased had such a policy. (Page 181.)
3. INSURANCE—ACCIDENT INSURANCE—DEATH—PROXIMATE CAUSE.—In an action on an accident insurance policy, it is error to charge the jury that deceased must have come to his death only as the result

of the injury, and that there can be no recovery unless the accident was the exclusive and independent cause of his death. (Page 183.)

4. ACCIDENT INSURANCE—"ACCIDENTAL" DEATH.—If an injury occurs without the agency of the insured, it will be held to be "accidental," even though it may be brought about designedly by another porson. (Page 183.)

5. INSURANCE—WARRANTY BY INSURED.—Where in an application for accident insurance the applicant stated "my habits of life are correct and temperate. I am neither partially or wholly blind, * * * no exceptions," the same will not be construed as a warranty by the applicant. (Page 184.)

6. INSURANCE—APPLICATION—KNOWLEDGE OF AGENT—ESTOPPEL.—Where an application for accident insurance was written up by the agent of the insurance company, and the answers were written by the agent without consulting the assured, the company is chargeable with the knowledge of its own agent, and is estopped from denying that which its own agent has asserted to be true. (Page 184.)

7. EVIDENCE—ATTENDING PHYSICIAN—DUTY TO OBJECT.—Although the testimony of an attending physician is incompetent, its introduction must be objected to, and in the absence of an objection, its admission is not prejudicial. (Page 184.)

Appeal from Drew Circuit Court; *James R. Cotham*, Special Judge; reversed.

STATEMENT BY THE COURT.

Mrs. Jennie Maloney instituted this action against the Maryland Casualty Company to recover upon a policy of accident insurance in which she was named as the beneficiary. The facts are as follows:

The policy was issued to Edward S. Maloney, the husband of Jennie Maloney, on the 12th day of January, 1912, for a period of three months. Before the policy expired, it was renewed for an additional period of three months. The policy insured Edward S. Maloney against bodily injuries, effected independently and exclusively of all other causes, through external, violent and accidental means. The policy also contained the following clause:

"Subject to its terms, limits and conditions, this policy covers the assured in the event of death or disability due to freezing, hydrophobia, gas or poison (suicide, sane

or insane, or any attempt thereat, not included); likewise in event of death or disability from septicemia or blood poisoning due directly to a bodily injury sustained while this policy is in force."

Section 11 of the policy under the title of "Agreements," reads as follows, towit:

"11. Written notice must be given to the company at Baltimore, Maryland, or to the agent countersigning this policy, as soon as may be reasonably possible, of any injury for which a claim is to be made, with full particulars and full name and address of the assured or beneficiary as the case may be. Affirmative proof of death, or loss of limb, or sight, or duration of disability must be furnished to the company within two months from the time of death, or loss of limb or sight, or duration of disability for which the company is liable. No suit for recovery hereunder may be brought until after three months from the date of filing final proofs at the company's home office, nor brought at all unless the same shall be instituted within one year from the time of death, or loss of limb, or sight, or termination of disability for which the company is liable. Claims not brought in accordance with these requirements will be forfeited to the company."

E. S. Maloney resided at Monticello, Arkansas, and in April, 1912, he was at Russellville. While there he was stricken with acute inflammatory rheumatism, and for a period of three weeks from April 23, 1912, he was confined to his bed there, and was then removed to a hospital at Hot Springs, Arkansas. He was a very large man, and lay on his back nearly all of the time. About a week and a half before his removal, his nurse, while attempting to place a bed-pan under him, let it slip and strike him. He cried out at the time that he was hurt. The bed-pan struck him at the lower end of his backbone. He was removed from the hospital at Hot Springs to his home at Monticello, and was treated by a physician there some fifteen or twenty days before his death. His death occurred on the 15th day of July, 1912. The

physician who treated him just prior to his death testified that he died from blood poison, and that the blood poison originated from a sore on the lower part of his spine right at the upper end of the coccyx bone; that the sore extended higher up the longer he lived, and that the end of the coccyx bone seemed to be the center of the sore; that the coccyx bone is the bone next to the spinal column. In short, the physician testified that he died from blood poison, which resulted from the abrasion caused by the sharp end of the bed-pan striking his coccyx bone.

The plaintiff did not know of the existence of the policy sued on until about two weeks after her husband's death. As soon as she learned of its existence, she notified the company of her husband's death, and, within the time prescribed in the policy, made proof of his death and sent it to the company.

Evidence was adduced in behalf of the defendant tending to show that there was no abrasion whatever on the insured's back as a result of the bed-pan striking him; that the sore described by the physician who treated him just prior to his death was a bed sore, which was caused by the insured lying on his back so long. In short, the testimony of the defendant was to the effect that the blood poisoning which caused Maloney's death did not result from the bed-pan striking him, as stated by the witnesses for plaintiff. Other testimony will be referred to in the opinion. The jury returned a verdict for the defendant, and the plaintiff has appealed.

James C. Knox and *Patrick Henry,* for appellant.

1. Under the holding of this court in the Meyer case, 106 Ark. 91, appellee would be liable, notwithstanding the deceased was afflicted with a disease, if the death resulted when it did on account of the aggravation of the disease from accidental injury.

The trial court's theory of the law as expressed in the instructions given is in direct conflict with the opinion in that case.

2. As to the burden of proof, it was only incumbent on appellant to prove that the injury was the result of

external, violent and accidental means, and when that was done the burden shifted to the appellee to show that the insured in fact died from other causes. 73 S. W. 592.

3. The provisions in the policy as to notice, contemplated two kinds of notices, one where the injury is other than those named in the last sentence, and the other those mentioned in the last paragraph thereof. 85 Fed. 401; 27 S. W. 436.

Want of notice is purely a matter of defense, to be specially pleaded, and the burden is on the defendant to show a forfeiture on that ground. 53 Pac. 242; 13 N. E. 604; 13 Gray 431; 71 Pac. 423; 16 N. Y. Supp. 27. Even if the burden was on appellant to establish the fact of having given the notice, there is no dispute in the evidence, and where the evidence as to the time notice was given is not disputed, it is for the court, and not for the jury, to say whether it was given in a reasonable time. 27 S. W. 436; 8 Gray, 33; 24 N. E. 1041; 17 N. Y. 609; 12 N. E. 315.

4. The fourth instruction is erroneous. There was no burden on appellant to show that disease was not an indirect cause of the death, but it was incumbent on appellee to show a substantial proximate connection between the disease and the death. 73 S. W. 592.

5. Instruction 7 was patent error. An injury resulting from a cause not the design of Maloney himself was accidental within the meaning of the policy. 17 So. 2; 91 N. W. 135; 60 S. W. 492; 16 S. W. 723; 40 S. W. 1080; 26 Pac. 762; 8 S. W. 570; 28 S. W. 877; 61 N. W. 485; 36 S. W. 169; 68 Fed. 825.

6. The court erred in the ninth instruction, charging the jury that deceased warranted his habits of life to be correct and temperate, and directing the jury to find for the defendant if the evidence showed that his habits were not temperate. The words "no exceptions" appearing at the conclusion of the warranty clause qualify only the last sentence, and can not be construed to qualify the first sentence in any way.

The application being on a printed form furnished by the company, its language will be construed most strongly against the company. 1 Cyc. 245; 65 Ark. 59; 38 Fed. 19; 60 Atl. 180; 115 N. W. 869.

Moreover, the company's agent, as he testified, drew up the application for Maloney himself, and the company is estopped from setting up this defense. 41 S. W. 1093, 64 Ark. 253; 13 S. W. 799, 53 Ark. 215; 40 N. W. 469; 69 N. Y. 128; 79 S. W. 733; *Id.* 119; 85 S. W. 103; 13 Wall. 222; 36 N. Y. 550; 42 N. Y. S. 52.

Williamson & Williamson, for appellee.

Since the evidence conclusively showed that no notice of the injury was ever given, or opportunity afforded to investigate, and that no notice was given of any kind until after Maloney's death, and since the policy stipulated that noncompliance with the requirements as to notice would forfeit the policy, appellee was, as a matter of law, entitled to a directed verdict. Hence, the judgment should be affirmed, regardless of whether or not errors occurred in the trial. 4 Cooley's Briefs on Law of Insurance, 3570; 1 Cyc. *et seq.; Id.* 276, 277, cases there cited.

The notice of accident, as provided by the terms of the policy, is a condition precedent to recovery. 197 Mass. 101, 14 Am. & Eng. Ann. Cas. 209, and authorities collated in note at page 292; 71 Ark. 126; 87 Ark. 171.

In this case the stipulation for forfeiture is in the contract, which brings it within the rule laid down in *Hope Spoke Company* v. *Maryland Casualty Company,* 102 Ark. 11, which is in accord with general authority. 176 Mo. 253, 75 S. W. 1102; 88 S. W. 127; 83 Pac. 1015; 4 Cooley's Briefs, 3457.

There can be no force in the contention that in the event of the death of the insured no notice need be given. 142 Fed. 653-659.

HART, J., (after stating the facts). Counsel for defendant contend that the judgment must be affirmed, regardless of the fact of whether the court committed error in instructing the jury. They base their contention upon

the ground that the notice of accident, as provided by the terms of the policy, is a condition precedent to recover, and that notice was not given within a reasonable time after the accident happened; but we can not agree with them in this contention. It is true the accident happened on the 23d day of April, 1912, and that the insured remained conscious until the date of his death, on July 15, 1912, and that no notice was given until the 31st day of July.

In the case of *Western Commercial Travelers Assn.* v. *Smith,* 85 Fed. 401, the policy provided that "in case of any accident or injury for which claim is to be made under this certificate, or, in case of death resulting therefrom, immediate notice shall be given in writing, with full particulars of the accident, and that failure to give such notice would invalidate the claim. The court held that two classes of notices were intended, one an immediate notice of accident or injury when not resulting in death, and the other an immediate notice of death resulting from such injury, the latter to be given by the beneficiary, and that a notice so given in the latter case was sufficient, though no notice of the injury was given before death. See also *McFarland* v. *U. S. Mutual Accident Assn.,* 27 S. W. (Mo.) 436.

Counsel for defendant contend that the above cited cases are not in accord with reason and authority; and in support of their position they cite the case of the *Travelers Insurance Co.* v. *Nax,* 142 Fed. 653, where the Circuit Court of Appeals of the Third Circuit held:

"Where an accident insurance policy providing for the payment of a weekly indemnity to the insured in case of an accidental injury, and the payment of the amount of the policy to a named beneficiary in case of his death from such an injury, made it an express condition that 'immediate written notice' should be given to the company 'of any accident and injury for which claim is made,' such proviso required notice to be given within a reasonable time; and where the insured lived for seventy-two days after an accidental injury, during which time

he was in full possession of his faculties, his failure to give any notice of the accident before his death, without any excuse therefor appearing, as a matter of law defeated any right the beneficiary would otherwise have had to recover on the policy for his death, which was dependent on such notice as fully as the right of the insured to recover benefits in his lifetime."

An attempt is made by the court in that case to distinguish it from the policy in the case of the *Western Commercial Travelers Assn.* v. *Smith, supra.* But we do not agree with the reasoning of the court in the Nax case. Forfeitures are not favored in the law; and this principle is peculiarly applicable to policies of insurance, where the contract is always to be construed most strongly against the insurance company because it prepares the contract of insurance. This principle is too well settled in this State to require a citation of authority to support it. It is a cardinal canon of construction of contracts that the court should put itself in the place of the parties to the agreement and then consider how its terms affect its subject-matter, and thereby ascertain the intent of the parties. Under the policy sued on in this case, the beneficiary had no claim until the death of the assured. Therefore, there must be no good reason to require her to give notice of the accident or injury before death occurred and before her claim arose. She could not know whether she had a claim until after her husband's death; and she was not required to give notice of the accident on account of which her claim arose before she knew whether or not it would come into existence. Moreover, the plaintiff did not know that her husband had the policy sued on until after she found it among his papers, about two weeks after his death; and she at once then gave notice to the company of her claim under the policy. The policy required that notice must be given as soon as may be reasonably possible of any injury for which a claim is to be made. The undisputed evidence shows that the plaintiff did this

a soon as she learned of the existence of the policy after her husband's death.

In the case of *Cady* v. *Fidelity & Casualty Company of New York,* 17 L. R. A. (N. S.) 260, the Supreme Court of Wisconsin, in discussing this precise question, said that service of notice by a beneficiary as soon as practicable after obtaining knowledge of the existence of the policy is sufficient. Several well considered cases are cited which support the principle there announced.

Counsel for plaintiff also assign as error the action of the court in giving instruction No. 4 at the request of the defendant; and in this contention we think they are correct. The instruction reads as follows:

"The court instructs the jury that if they find from the evidence that the deceased, Edward S. Maloney, came to his death as the direct or indirect consequence of disease or that his death was caused wholly or in part by bodily infirmities or diseased condition of the body and that the alleged accident or injury was not the exclusive and independent cause of his death, then your verdict will be for defendant."

In the case of *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, the court held:

"When an accident insurance policy limits liability to 'bodily injuries sustained through accidental means resulting directly, independently and exclusively of all other causes of death,' and it appears that death resulted from an aggravation of a latent disease to which the deceased was subject, an instruction is correct to the effect that the defendant insurance company is liable, under the contract, if death resulted when it did on account of the aggravation of the disease from the accidental injury, even though death from the disease might have resulted at a later period, regardless of the injury."

In the case of *French* v. *Fidelity & Casualty Company of New York,* 17 L. R. A. (N. S.) 1011, the Supreme Court of Wisconsin held that death from blood poisoning following a slight accidental abrasion of the skin is within an accident insurance policy against bodily inju-

ries sustained through external, violent and accidental means, independently of all other causes.

Here the proof on the part of the plaintiff shows that the insured received an accidental injury to the coccyx bone by his nurse striking it while he was attempting to place a bed-pan under him; that an infection later on started at the place where the bed-pan struck him, and that he died thereafter from blood poisoning. From this testimony the jury might have found that, but for the accidental injury, there would have been no cause for infection, and that there might have been an abrasion of the skin through which the disease germs entered the insured's body and subsequently produced his death. If the jury found such a state of facts, the wound produced by the accident was the proximate cause of his death.

In addition to the above cases already cited, see *Cary* v. *Preferred Accident Insurance Company,* 5 L. R. A. (N. S.), (Wis.) 926, and case note.

The court, at the request of the defendant, gave instruction No. 8, which is as follows:

"The court instructs the jury that if Maloney's death was not the result of the alleged accident alone, but was due to both the accident and a disease of which he was suffering, then there is no liability on the part of defendant and your verdict will be for defendant."

This instruction is erroneous for the reason assigned in discussing instruction No. 4.

We also think the court erred in giving instruction No. 7 at the request of the defendant. The instruction is as follows:

"If the jury find from the evidence that the injury to Maloney was the result or effect which was the natural and probable consequence of an act or course of action intended by those waiting upon Maloney, then this can not be said to be produced by accidental means, and your verdict will be for the defendant."

If an injury occurs without the agency of the insured, it may be logically termed "accidental," even though it may be brought about designedly by another person. 2

Bacon on Benefit Societies and Life Insurance (3 ed.) § 482.

The court also erred in giving instruction No. 9. It is as follows:

"The court instructs the jury that as part of the contract sued on, Edward S. Maloney, the assured, warranted that his habits of life were correct and temperate, and if the jury find from the evidence that said Edward S. Maloney's habits of life were not temperate as stated in the policy, then your verdict will be for the defendant."

The alleged warranty, the breach of which is here complained of by the defendant, is as follows:

"My habits of life are correct and temperate. I am neither partially or wholly blind, deaf, crippled, lame, paralyzed, nor have I ever been subject to epilepsy, fits, vertigo, or sleep walking, and in all regards I am in sound condition mentally and physically, except as follows: No exceptions."

In the application of the rule that the policy must be construed as favorably as possible to the insured because it was written by the insurance company, we think that the words "no exceptions" refer to the sentence immediately preceding it. The first sentence of the section, towit, "My habits of life are correct and temperate," can not be construed as a warranty.

Moreover, the undisputed testimony shows that the application was written up by the agent of the insurance company, and that the answers were written by him without consulting the assured. Therefore, the company is chargeable with the knowledge of its own agent, and is also estopped from denying that which its own agent has asserted to be true. See *Peebles* v. *Eminent Household of Columbian Woodmen,* 164 S. W. 296, 111 Ark. 435.

It is also contended by counsel for plaintiff that the court erred in admitting the testimony of the attending physicians of the insured. The testimony was not competent if it had been objected to. *Mutual Life Insurance*

Company of New York v. *Owen,* 111 Ark. 554, 164 S. W. 720. The record shows, however, that no objection was made to the admissibility of this testimony; and in the absence of objection being made the testimony was competent.

Error is also assigned in the giving of other instructions; but we do not deem it necessary to set out the instructions complained of or to discuss them in detail. We think the principles of law applicable to a retrial of the case are sufficiently discussed already, and for the errors indicated in the opinion the judgment must be reversed and the cause remanded for a new trial.

RADFORD v. SAMSTAG.

Opinion delivered May 18, 1914.

1. APPEAL AND ERROR—OVERRULING DEMURRER—FINAL ORDER.—Where the chancery court overruled a demurrer, but did not enter a final order adjudging the rights of the parties, the court may, at a later time, reconsider the demurrer, while the cause is still pending or undisposed of by the court, and change its decision if it sees proper to do so. (Page 188.)
2. JUDGMENTS—PROCUREMENT BY FRAUD—NECESSARY ALLEGATIONS.—The chancery court is without jurisdiction to entertain an action to set aside a judgment at law, on the ground of fraud, when it was not alleged that fraud had been practiced on the law court in procuring its judgment. (Page 189.)
3. APPEAL AND ERROR—APPEAL FROM JUSTICE COURT—DISMISSAL—REMEDY.—Where the circuit court dismissed an appeal from the justice court, the remedy of the party aggrieved is by way of appeal to the Supreme Court, in the absence of a showing that fraud was practiced in the circuit court in procuring the judgment of dismissal. (Page 189.)

Appeal from Logan Chancery Court; *W. A. Falconer,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellant was the plaintiff below, and alleged in his complaint that a judgment had been obtained against him by fraud, accident or mistake, and that he had a meritorious defense to said action, which he set out. Appel-

lees demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action and that the court had no jurisdiction of the subject-matter. This demurrer was overruled and no further action appears to have been taken, until at the third term of the court thereafter, when a new chancellor had been elected and was presiding, when the demurrer was again presented and was sustained by the court and the action dismissed, and the temporary restraining order which had been granted was dissolved. This appeal is prosecuted from that decree.

The material allegations of the complaint were that appellees had brought suit against the plaintiff and one C. L. Poole on an implied contract to pay for certain services, and that upon the trial of said cause the justice of the peace discharged the said Poole, but rendered judgment against plaintiff for the sum of one hundred and fifty dollars. That both parties prayed an appeal, and it was then and there agreed that all formalities should be waived and that the transcript should be lodged with the clerk of the circuit court, which was then in session and should be tried in said court at that term, and that a transcript and the papers were transferred to said court by the said justice the next day, and said cause was docketed in said court, and when said cause was called for trial it was agreed that it should be continued until the January term following. Said defendants entered their appearance in the circuit court and agreed to said continuance without making any motion to dismiss for want of an affidavit for appeal, which affidavit could have been supplied at that time, if said motion had been made, as the time in which an appeal could be taken had not then expired; that the justice by mistake or inadvertence had failed to prepare and file a proper transcript of the proceedings of his court, which failure was not due to any default of plaintiffs. That the attorneys for defendant agreed they would see that a proper transcript was filed so that a trial might be had at the ensuing August term; but they failed so to do.

The circuit court dismissed the appeal because the transcript failed to show an affidavit for an appeal had been filed. The breach of the agreement to file a proper transcript constitutes the fraud of which appellant complains. The complaint further alleged that an execution had issued on the justice's judgment and there was a prayer that the enforcement of this judgment be enjoined until the final hearing, at which time the court was asked to set aside said judgment and grant him a new trial. An answer was filed, denying the material allegations of the complaint.

Appellant insists that the order of the court overruling the demurrer was a final decree, which passed beyond the control of the court at the end of the term and could only be set aside upon appeal, and that in any event the court erred in sustaining the demurrer. Appellee joins issue on both these propositions and in addition says the chancery court had no jurisdiction.

W. A. Ratterree, J. S. McKnight and *Poole & Speer,* for appellant.

1. Fraud and collusion give a court of chancery jurisdiction, and when that court assumes jurisdiction for one purpose it will grant complete relief. Story on Equity, § 58; *Id.* § § 64, 65, 70.

2. The judgment on the demurrer became final at the expiration of the term and appellees could not properly present the same demurrer to a different chancellor at a subsequent term and obtain a ruling on it. 2 Black on Judgments, § § 709-711; 63 Ark. 254; 86 Ark. 505. The remedy would be by appeal or bill of review. Black on Judgments, § 329; 86 Ark. 504; 99 Ark. 433-437.

3. Where a judgment is obtained in a court of law by fraud, accident or mistake, unmixed with negligence on the part of judgment-defendant, a court of equity has jurisdiction, on a showing of a meritorious defense, to compel the party obtaining the judgment to submit to a new trial. 35 Ark. 123; 61 Ark. 347; 38 Ark. 283; 1 Black on Judgments, § 356.

Roberts & Kincannon and *Carmichael, Brooks, Powers & Rector,* for appellees.

1. The order of March 12, 1912, was not a final order or decree, and is, therefore, not *res judicata.* It was a mere preliminary step in the case, or interlocutory order, and did not purport to adjudicate the rights of the parties in any sense, but, on the contrary, continued the case and left it open for future disposition on its merits. 92 Ark. 101, 102; 102 Ark. 380; 99 Ark. 496; 83 Ark. 371.

2. The complaint does not state a cause of action. An allegation of fraud, stated in general terms, is not sufficient, but the facts constituting the fraud must be set out. Moreover, before one can be relieved in a court of equity from the liability of a judgment obtained at law, he must show that he was not guilty of negligence or laches. 6 Ark. 79; *Id.* 317; 12 Ark. 401; 43 Ark. 107; 91 Ark. 362. Plaintiffs in this case were guilty of negligence in failing to file the affidavit for appeal from the justice of the peace to the circuit court. 87 Ark. 230; 48 Ark. 73; 19 Ark. 647; 93 Ark. 266.

3. The chancery court was without jurisdiction. 19 Ark. 647, 648, 649.

SMITH, J., (after stating the facts). It will be observed that the order of the court which appellant says is *res judicata* was not one sustaining a demurrer and dismissing a complaint, but was one overruling a demurrer and allowing thirty days in which to file an answer. The cause was then continued for the term. This was not a final order, and did not adjudge the rights of the parties, and there was nothing to prevent the court from reconsidering the demurrer, while said cause was still pending and undisposed of before him, and from changing his opinion and decision if he saw proper to do so.

In the case of *Luttrell* v. *Reynolds,* 63 Ark. 254, it was held that an order sustaining a demurrer and entering a judgment of dismissal thereon is final and conclusive until reversed on appeal. It was so held, because such order was an adjudication of the rights of the parties. But in the case of *Adams* v. *Primmer,* 102 Ark.

380, it was said that "where a trial court sustained a demurrer to a complaint, without entering any further order or judgment, its action was not final, and the order can not be appealed from." To the same effect are the cases of *Atkins* v. *Graham,* 99 Ark. 496, and *Moody* v. *J., L. C. & E. Ry. Co.,* 83 Ark. 371. In the case of *Atkins* v. *Graham, supra,* it was said: "The order simply sustaining the demurrer to the complaint did not finally determine the merits of the case, and was not a final judgment. An appeal only lies in this court from a final judgment of the lower court."

The chancery court in overruling the demurrer did not adjudge the rights of the parties, and consequently there was no final order from which an appeal could be taken.

We think appellee's position that the chancery court was without jurisdiction was well taken because appellant had a complete remedy at law. *Wood* v. *Stewart,* 81 Ark. 41; *Wadkins* v. *Merchants Bank of Vandervoort,* 96 Ark. 465, and cases there cited.

But the failure of appellant to proceed in the proper court was no ground for dismissal of his complaint, and the cause should have been transferred to the circuit court, had a cause of action been stated in the complaint. *Wood* v. *Stewart, supra.* But the chancery court properly dismissed the complaint because it did not in fact state a cause of action. It was not alleged that any fraud had been practiced upon the circuit court in procuring the dismissal of the appeal from the justice of the peace, and if the action of the circuit court in dismissing the appeal was erroneous, appellant's remedy was by appeal to this court, from that order.

The decree of the chancellor is therefore affirmed.

BRIGGS v. COLLINS.

Opinion delivered June 1, 1914.

1. EVIDENCE—WHEN UNDISPUTED—EXCEPTION.—When the testimony of a witness is distinct and positive, and is not in any way contradicted, it will be treated as undisputed, unless the witness is interested in the result. (Page 192.)
2. AGENCY—AUTHORITY—CANCELLATION OF OWN DEBT—NOTICE.—An agent with authority to solicit insurance or to sell any commodity and receive money or other things of value in payment of the price has no apparent authority to accept the cancellation of his own indebtedness in satisfaction of such price, and where the person dealt with has knowledge of the agency, he can not avail himself of payment made in that way. (Page 192.)
3. INSURANCE—PREMIUMS—PAYMENT.—Defendant took a policy of insurance, giving the agent his note, but agreeing that it should not be paid, but should cancel a debt which the agent owed the defendant. The agent then transferred the note to plaintiff, a *bona fide* purchaser, for value. *Held*, the defendant could not set up his agreement with the agent as a defense to an action on the note in the hands of an innocent holder. (Page 193.)

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

J. I. Alley, for appellants.

The agency and the fraudulent acts of the subagent being undisputed, appellant is bound thereby, and can not claim protection as an innocent purchaser for value. 161 S. W. 142; 75 Ark. 95; 76 Ark. 373; 71 Ark. 295; 57 Ark. 11.

G. C. Hardin, for appellee.

Trask had no authority to settle his individual debt with the property of the insurance company. His agreement with appellants was purely in an individual capacity, and was in no sense binding upon appellee nor upon the insurance company. 54 Ark. 75; 60 Ark. 532; 62 Ark. 348, 88 S. W. 950; 81 Ark. 202; 76 Ark. 328. And appellants were bound to know that Trask had no authority to settle his own debts with property of the company. 28 Ark. 98; 62 Ark. 33. See, also, 53 Ark. 135; *Id.* 253; 79 Ark. 401-405; Story on Agency, § 77; 64 Tex. 337; 92 N. C. 532; 161 S. W. 142; 101 Ark. 603.

McCULLOCH, C. J. Plaintiff, W. B. Collins, instituted separate actions before a justice of the peace against defendants, A. C. Briggs and F. H. Daniels, to recover the amount of two negotiable promissory notes executed by the respective defendants to one Trask, and by Trask assigned to plaintiff.

On appeal to the circuit court the two cases were consolidated and tried together, and the court gave a peremptory instruction in favor of the plaintiff against each of the defendants for the amount of the note which he had executed.

Plaintiff was the general agent of an insurance company and maintained his offices at Fort Smith. Trask was soliciting agent, acting under appointment from plaintiff, and procured applications from the two defendants, who resided at Mena, Arkansas, and policies were accordingly issued to them by the company. The defendants executed negotiable promissory notes to Trask for the amounts of their respective premiums, and Trask assigned the notes before maturity to plaintiff, who accepted same and credited Trask with the face value in settlement for premiums collected.

Defendant Daniels testified on the trial of the case that he was engaged in the livery business in Mena; that Trask was indebted to him for a livery bill and agreed to let the first premium go as a credit on said debt. He testified also that he gave the note to Trask upon the representation by the latter "that he wanted it in making a settlement with the company," but would return the same to him within a few days after he had shown it to the company as an evidence of the fact that the policy had been taken in good faith. He testified that there was no other consideration for the note.

Defendant Briggs testified to a similar state of facts with reference to his transaction with Trask and the execution of the note.

Plaintiff testified that the notes were assigned to him by Trask before maturity, and that he gave Trask credit for them in his settlement, advancing to him enough

money to cover his commission, and that he made it good to the company. He testified that he knew nothing about the understanding or agreement with defendants concerning the premiums.

The testimony of plaintiff tends very strongly to show that he was an innocent holder of the notes, having paid full value therefor, and there is nothing in the record to contradict him. The only thing that prevents his testimony being treated as undisputed is his direct interest in the result of the transaction. *Skillern* v. *Baker,* 82 Ark. 86.

But aside from that question we are of the opinion that the evidence was undisputed upon other material questions in the case, and that the court was correct in giving a peremptory instruction. The substance of the testimony of each of the defendants was that he took out the policy of insurance under an agreement with Trask that the premium should be paid by crediting the same on Trask's indebtedness to him.

An agent with authority to solicit insurance or to sell any commodity and receive money or other things of value in payment of the price has no apparent authority to accept the cancellation of his own indebtedness in satisfaction of such price, and where the person dealt with has knowledge of the agency, he can not avail himself of payment made in that way. *Arnett* v. *Glenn,* 52 Ark. 253; *Smith* v. *James,* 53 Ark. 135; *Grooms* v. *Neff Harness Co.,* 79 Ark. 401.

There must be express authority to an agent to collect the price in that way before the principal is bound by such act.

The proof in this case is sufficient to show that Trask, the soliciting agent, was authorized to accept payment of money, or to take notes and to convert the same into money; but that does not imply the authority to accept the cancellation of his own debt. Therefore, the fact that he obtained the notes on the false representation that he would only use the same to exhibit to the company as an evidence of good faith in taking the insurance

does not constitute a defense, for the reason that the cancellation of his debt did not constitute a payment of the premiums. If the notes had not been taken and no payment was ever made except by cancellation of the indebtedness of Trask, the company would be entitled to recover the amount of the premiums, and as these notes represented the premiums and plaintiff is a valid holder of same, and has satisfied the claim of the company for the premiums, he is entitled to recover the amount, notwithstanding the fact that the notes were obtained under a false promise to return them. In other words, according to the undisputed facts, the defendants owe the amounts of the premiums on their policies, and they are in no position to complain that these premium notes were obtained by a false promise that they would be returned after exhibition to the company. They owe the amounts, and it is immaterial to them who they are paid to.

Judgment affirmed.

FERGUSON v. McLAIN.

Opinion delivered June 1, 1914.

1. LOCAL IMPROVEMENT—BRIDGE—PUBLIC BENEFIT.—A bridge for the use of the public is of benefit to the traveling public, and also of special benefit to the adjoining lands, and may be constructed from the proceeds of local assessments. (Page 195.)
2. LOCAL IMPROVEMENT—PROPERTY INCLUDED—ACTION OF CITY COUNCIL.—The action of a city council in including property in an improvement district, is, except when attacked for fraud or demonstrable mistake, conclusive of the fact that such property adjoins the locality to be affected by the improvement, within the meaning of the Constitution. (Page 195.)
3. LOCAL IMPROVEMENT—BRIDGE—CITY.—The whole of a city may be included in one improvement district for the construction of a public bridge. (Page 195.)

Appeal from Jackson Chancery Court; *George T. Humphries,* Chancellor; affirmed.

Phillips, Hillhouse & Boyce, for appellant.

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

McCULLOCH, C. J. The council of the city of Newport passed an ordinance, upon petition of a majority in value of the owners of real property in the city, creating an improvement district, composed of the whole city, for the purpose of erecting and maintaining a bridge across Newport Lake, a body of water, about a mile in length and 200 feet in width, lying within the limits of the city.

A board of improvement was appointed in accordance with the provisions of the statute, and the board proceeded to form plans to make the improvement, and appellant, who was a property owner in the city, instituted this action to restrain further proceedings. He attacks the ordinance creating the district on the ground that the character of the improvement is not such as may be made by taxation as for local improvements within the meaning of the Constitution and statutes of this State; and the suit also involves an attack on the proceedings of the board, in that there is a variance between the improvement described in the petition of the property owners, and that which is about to be undertaken by the board. The petition was for the formation of a district for the purpose of erecting and maintaining, at the site of the present bridge across Newport Lake, a new bridge and roadway leading from the east end of such new bridge to the west end of Malcolm Avenue; whereas it is alleged that the board has adopted a plan to construct an earthen embankment out into the lake at the site of the old bridge, and to construct a short bridge, only about twelve feet in length, to connect the abutments.

The chancellor sustained a demurrer to the complaint, and after final judgment dismissed the complaint for want of equity.

The first question presented was decided in the case of *Shibley* v. *Fort Smith & Van Buren Bridge District,* 96 Ark. 410, where we held that "a bridge for the use of the public, like a street in a city or a highway in the country, is undoubtedly of great benefit and convenience to the traveling public; nevertheless, it may be also of

special benefit to adjoining lands and a fit subject for construction from the proceeds of local assessments."

It was decided in *Little Rock* v. *Katzenstein,* 52 Ark. 107, that the action of the city council in including property in an improvement district is "except when attacked for fraud or demonstrable mistake—conclusive of the fact that such property is 'adjoining the locality to be affected' by the improvement, within the meaning of the Constitution."

The fact that the statutes empower councils of cities and incorporated towns to construct and repair bridges does not prevent property owners, or a majority in value thereof, undertaking that kind of improvement pursuant to the terms of the local improvement statute. Municipalities are authorized to pave streets, and yet it is a common thing for that to be done at the expense of the owners of property affected thereby.

That the whole of the city may be included in one improvement district is settled by the decision of this court in *Matthews* v. *Kimball,* 70 Ark. 463.

The question as to the amount of benefits does not arise in this case and that must, primarily, be settled by the board of assessors. The statute affords adequate remedy for relief against excessive or unequal assessments. According to the allegations of the complaint, this is a bridge which may operate as a peculiar benefit to all the property in the city, it being the only connection between two parts of the city and also the only method of approaching the city from a large section of farming country.

There is no merit in the contention that there is an attempt to depart from the character of the improvement authorized by the petition. The petition deals with a description of the improvement merely in general terms, and the plan is left entirely for future development by the board. The fact that the bridge is to be shortened and an earthen embankment constructed as a part of the passageway through and over the lake does not alter the character of the improvement as a bridge.

Decree affirmed.

BARRENTINE v. THE HENRY WRAPE COMPANY.

Opinion delivered June 1, 1914.

1. JUDGMENT—SUSTAINING DEMURRER—CONCLUSIVENESS.—A judgment sustaining a demurrer is an adjudication of the case upon its merits, and any error in rendering the judgment must be corrected by appeal. (Page 197.)
2. JUDGMENT SUSTAINING DEMURRER—NEW ACTION—RES ADJUDICATA.—If the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in a second suit, the judgment in the first action is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of that cause, as disclosed in the second declaration, were not heard and decided in the first. (Page 197.)

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

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

Since, as was held on former appeal, 105 Ark. 485, no cause of action was stated in the first complaint, the real facts were never in issue and were not passed upon by the court. The case was not disposed of on its merits, which is essential before a question can be *res judicata*. 83 Ark. 545; 89 Ark. 542; 23 Cyc. 1215; *Id.* 1232. Where this court has held a judgment upon a demurrer was a judgment upon the merits, 63 Ark. 254 and 99 Ark. 433, the only holding was that the judgment was final upon the questions *in issue*.

S. Brundidge, for appellee.

Appellant is bound by the former adjudication. If, on the sustaining of the demurrer, he had seen proper to amend his complaint, bringing in the new matter now pleaded, he would have been entitled to a trial on the merits; but having refused to do so, and after this court has sustained the lower court, he can not now inject new matter into the case, but is bound by the former judgment. 99 Ark. 436; 105 Ark. 492.

McCULLOCH, C. J. Plaintiff, James W. Barrentine, instituted an action in the circuit court of White County

against The Henry Wrape Company, a corporation, to recover damages on account of personal injuries which he sustained while in the employment of defendant. He alleged that his injuries were caused by other servants and employees throwing rocks and other missiles about the premises of the defendant, one of which missiles struck him in the eye. The circuit court sustained a demurrer to the complaint, and, the plaintiff declining to amend, final judgment was rendered against him. We affirmed that judgment on the ground that facts sufficient to constitute a cause of action were not alleged, in that it was not shown that the negligent servants were acting within the scope of their authority, or that they were within the control of defendant at the time the acts of negligence were committed, or that either the servants or the plaintiff himself were on the premises of defendant at the time. In other words, we held that the mere statement that other employees were engaged in throwing dangerous missiles about the premises and that plaintiff was injured thereby did not state a cause of action. 105 Ark. 485. The plaintiff thereupon instituted a new action (the present one) and in his complaint supplied the omitted allegations necessary to state a cause of action. The defendant pleaded *res adjudicata* and has set forth in support of its plea the pleadings and judgment in the former case. The plea was sustained and final judgment was rendered, from which this appeal has been prosecuted.

We have held that a judgment sustaining a demurrer is an adjudication of the case upon its merits and that any error in rendering the judgment must be corrected by appeal. *Luttrell* v. *Reynolds,* 63 Ark. 254.

But Mr. Herman states the rule that "if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in his second suit, the judgment in the first action is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of that cause, as disclosed

in the second declaration, were not heard and decided in the first." 1 Herman on Estoppel, § 273.

That statement is taken by the text writer from the opinion of Mr. Justice Clifford in the case of *Gould* v. *Evansville, etc., Rd. Co.*, 91 U. S. 526.

In the case of *Grotenkemper* v. *Carver*, 4 Lea (Tenn.) 375, Judge Cooper, delivering the opinion of the court, said:

"If, however, the court decides that the complainant has not stated facts sufficient to constitute a cause of action, and that the bill is otherwise liable to any specific objection urged against it upon demurrer, such decision does not extend to any issue not before the court on the hearing of the demurrer. It leaves the complainant at liberty to present his case, so corrected in form or substance as to be no longer vulnerable to the attack made upon it in the former suit."

The same rule was stated by Mr. Freeman in his work on Judgments (vol. 1, § 267).

This seems to be the settled rule, and applying it to the pleadings now before us, it is evident that the present case falls squarely within it. The former judgment was based upon the facts set forth in the complaint in the first action and was an adjudication only of those facts, and not of the additional facts set forth in the present complaint.

The court erred, therefore, in sustaining the plea of former adjudication, and the judgment is reversed and the cause remanded with directions to overrule the plea and for further proceedings.

SIMS v. EVERETT.

Opinion delivered June 1, 1914.

1. TRIAL—EFFECT OF BOTH PARTIES ASKING INSTRUCTED VERDICT.—Where each of the parties to an action requested the court to direct a verdict in his favor, and requested no other instruction, the effect is an agreement that the issue be decided by the court, and the decision has the same effect as a verdict of the jury would have had. (Page 201.)

2. SURETYSHIP—RELEASE OF SURETY—STATUTE.—At common law, a surety could not compel a creditor to sue the principal debtor, and become discharged by the failure of the creditor to do so, and Kirby's Digest, § § 7921 and 7922, giving the surety that right, is in derogation of the common law and should be strictly construed. (Page 201.)

3. SURETYSHIP—DISCHARGE OF SURETY—NOTICE BY SURETY.—Kirby's Digest, § § 7921 and 7922, which provide that the surety on any bond, note, etc., may at any time after action has accrued thereon, by notice in writing, require the person having the right of action to forthwith commence suit against the principal debtor, must be complied with strictly, and unless the surety gives the required notice in writing, he is not discharged by the mere inactivity of the creditor or his failure or refusal to sue the principal debtor. (Page 203.)

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

Samuel M. Casey, for appellants.

The statute provides that the surety on a note may request the holder to bring suit against the principal, and if he fails to do so within thirty days from the time of *written notice,* the surety will be exonerated from liability. Kirby's Dig., § § 7921, 7922. There is no contention that written notice was given; hence, there is no release under the statute.

If oral notice is permissible, as is contended under the opinions of this court in 34 Ark. 44, and 35 Ark. 463, the sureties could not claim a release from liability until they had shown clearly the nature and terms of the notice, that it was given after the notes were due, that the principal was then solvent, and that they have been damaged by reason of the delay of the holder of the note. There is nothing in the record proving any of these facts. 6 Ark. 353.

Dene H. Coleman, for appellee.

1. Both parties having requested a peremptory instruction, the finding of the trial court will not be disturbed either if there was no evidence to sustain appellants' cause of action, or if there was any evidence to

sustain appellees' defense. 162 S. W. 641; *Id.* 721; 97 Ark. 91; 100 Ark. 166.

2. It is admitted that appellees were merely sureties. Where a surety either *verbally* or in writing requests the holder of a note to sue the principal, and he fails to do so, and the principal afterward becomes insolvent, the surety is thereby discharged. 6 Ark. 352; 34 Ark. 45. See also 4 Pa. St. 348; 65 Ark. 552.

McCULLOCH, C. J. This is an action to recover from appellees, J. M. Everett and W. A. Halliburton, the amount of two negotiable promissory notes executed by them as sureties for J. T. Halliburton to O. B. Edmondson, now deceased. Edmondson, by written endorsement on the back of each of the notes, assigned the same to the Union Bank & Trust Company and the latter in turn assigned same to appellant, Albert Sims, who instituted this action; but subsequent to its institution said Union Bank & Trust Company, as the executor of Edmondson's estate (he having died), was joined as plaintiff.

The case originated before a justice of the peace, and there were no written pleadings; but the two appellees, as sureties, defended on the ground that they requested the payee of the note to sue, and that he failed to do so, and by reason thereof the principal had become insolvent so that his liability could not be enforced.

The only evidence tending to support that defense, if it be held to be a good defense, is that of witness Christopher, who stated that he heard a conversation between Edmondson and one of the sureties, in which the latter told Edmondson "to collect his money, that it was due and that he didn't want to have to pay it."

The only testimony which it is claimed tended to establish the solvency of the principal debtor at or about the time the request was made was that of a witness who stated that he heard a conversation between Edmondson and the principal debtor, in which the latter said that if required he would sell his wagon and team to pay the notes and that Edmondson told him that he didn't want him to do so, as the sureties on the notes were good.

The court was requested by the parties on both sides of the controversy to give a peremptory instruction, and the court refused to grant appellant's request, but instructed the jury to return a verdict in favor of appellees, the defendants.

The case, therefore, stands here as if the jury had, upon correct instructions, returned a verdict in appellees' favor, and the sole question is that of the legal sufficiency of the evidence. *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71.

There was testimony tending to qualify the interest of appellant Sims in the notes and to show that the original payee had an interest therein; but inasmuch as there was a valid assignment in writing he was authorized to sue, and appellees can not question the consideration upon which the assignment is based. Moreover, the executor of the original holder is made party, and that eliminates any question of the relative interests of the parties in the recovery.

The statutes of this State provide that "any person bound as surety for another in any bond, bill or note, * * * may, at any time after action hath accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor," and that "if such suit be not commenced within thirty days after the service of such notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, such surety shall be exonerated from liability to the person notified." Kirby's Digest, § § 7921, 7922.

It is not shown that the terms of the statute were complied with, but it is contended that noncompliance with the verbal request was sufficient to exonerate the sureties if the principal was solvent at the time the request was made and afterward became insolvent.

The trial court evidently based the decision upon that view of the law.

It is said that the law has been so declared in three of the decisions of this court. *Hempstead* v. *Watkins,*

Admr., 6 Ark. 317; *Thompson* v. *Robinson,* 34 Ark. 44; *King* v. *Haynes,* 35 Ark. 463.

There are statements to that effect in the opinions in the two cases last cited, but in each case it was mere *dictum,* for the reason that the point was not involved and the court did not decide it.

The case of *Hempstead* v. *Watkins, Admr., supra,* was cited in each of those cases as supporting the statement; but the point was not decided in that case.

In the case last referred to notice had been given in the manner provided by statute, but had not been complied with, the suit brought within the time specified in the statute having been instituted by the plaintiff in the wrong capacity. After the expiration of the statutory time for complying with the notice another suit was instituted, and judgment was rendered against the principal and sureties; and subsequently the sureties filed a bill in the chancery court to restrain the enforcement of said judgment against them. The point of the case was whether or not the sureties had any remedy in a court of equity which was not barred by the judgment at law, and the court decided that the judgment at law did not bar the sureties of their equitable remedies and that the chancery court had jurisdiction to grant relief to the sureties against the enforcement of said judgment and following the decision of the New York court in the case of *Pain* v. *Packard,* 13 Johnson 173, said that "the statute is but declaratory and an extension of an existing and an originally equitable remedy, and which has been adopted and converted by courts of law into a subject of legal cognizance."

In *Thompson* v. *Robinson* the surety requested the payee in the note to sue the principal debtor and attach the property of the principal, and, after judgment, instituted action in chancery to restrain the enforcement. The court held that no ground for relief was shown, for the reason that there appeared no ground for attachment of the property of the principal debtor. The court said that mere delay or neglect to sue, without notice, would

not discharge the surety, but that "if, after the debt was due, the surety, verbally, or in writing, request the creditor to sue the principal, who is then solvent, and the creditor fail to do so, and the principal afterward becomes insolvent, the surety is thereby discharged."

King v. *Haynes* was a suit in equity to enjoin the enforcement of a judgment against a surety on the ground that the creditor had extended the time of payment without his consent; but this court held that there had been no extension for a definite period upon a valid consideration and the surety was not discharged. Mr. Justice EAKIN in the opinion of the court stated the rule announced in *Hempstead* v. *Watkins, supra,* but held that the proof was not sufficient to bring the case within that rule.

So, it will be seen that in each of those cases the announcement of that rule was *dictum.*

It is clearly against the great weight of authority, and we think it also inconsistent with other decisions of this court.

We have held that the statute on the subject is in derogation of the common law and of the contractual rights of the parties to such instrument and should be strictly construed. *Cummins* v. *Garretson,* 15 Ark. 132; *Thompson* v. *Treller,* 82 Ark. 247.

An examination of the authorities discloses the fact that there was no such rule at the common law and that in the absence of a statute the surety can not compel the creditor to bring suit against the principal and is not discharged by the failure of the principal to do so.

Mr. Brandt calls attention to the few cases holding to the rule above announced, but says that it is contrary to the great weight of authority, and cites numerous cases in support of that statement. "The great majority of cases on the subject hold," he says, "in the absence of any statutory provision, that if after the debt is due the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterward becomes insolvent, the surety is not

thereby discharged. The ground upon which these decisions rest is, that the principal and surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal. If the surety desires a suit brought against the principal, he may himself pay the debt, and immediately sue the principal. The contrary doctrine is an innovation, and was unknown to the common law." 1 Brandt on Surety & Guaranty, § 265.

The doctrine seems to have originated with the case of *Pain* v. *Packard, supra,* decided by the New York Court of Errors in 1816.

Chancellor Kent, in the case of *King* v. *Baldwin,* 2 Johnson's Chancery Reports, 554, refused to follow the rule announced in *Pain* v. *Packard,* and on appeal the Court of Errors reversed his decision by a divided court, the deciding vote being cast by the Lieutenant Governor, who was a layman.

The New York courts, in later decisions, have recognized the rule announced in *Pain* v. *Packard,* but almost invariably have done so with protest against its correctness.

The case has been condemned by nearly all the courts which have had occasion to discuss the law on the subject.

Chief Justice Parker, speaking for the Massachusetts court in *Frye* v. *Barker,* 21 Mass. 381, said:

"We never have adopted the law stated to be settled by the New York case of *Pain* v. *Packard,* that a surety may discharge himself, if upon request the creditor does not sue the principal. * * * The cases cited of a discharge to the surety, where the principal may still be holden, are chiefly cases of obligation to perform some duty other than the payment of money, where the terms of the contract are changed by the obligee without the consent of the surety. * * * There seems to be no reason, in the case of money contracts, for discharging the surety because the promisee neglects to sue the principal, for the surety may pay the debt and then bring an action himself."

In the case of *Inkster* v. *First National Bank,* 30 Mich. 143, Mr. Justice Christiancy, speaking for the court, said:

"The case of *Pain* v. *Packard,* 13 Johns. 174 (which has been followed in New York, not without some vigorous protest, and to some extent in some other States), was, we think, a clear departure from the common law; and we find nothing in the English decisions to warrant the qualifications of a surety's liabilities there recognized."

Many other decisions discuss the doctrine laid down in *Pain* v. *Packard,* and expressly decline to follow it, declaring it to be an innovation. *Davis* v. *Huggins,* 3 N. H. 231; *Dane* v. *Corduan,* 24 Cal. 157; *Langdon* v. *Markle,* 48 Mo. 357; *Hickok* v. *Farmers' & Mechanics' Bank,* 35 Vt. 476; *Jenkins* v. *Clarkson,* 7 Ohio, 265; *Stout* v. *Ashton,* 5 T. B. Monroe (Ky.) 251; *Nichols* v. *McDowell,* 14 B. Monroe (Ky.) 6; *Gage* v. *Mechanics' National Bank,* 79 Ill. 62; *Huff* v. *Slife,* 25 Neb. 448.

Those cases hold, in effect, that, in the absence of statute, the surety has no right to require the creditor to proceed against the principal and that a failure to sue upon request does not discharge the surety.

In *Stout* v. *Ashton, supra,* where it was proved that the surety, who had requested the payee to sue the principal, insisted upon suit being brought, the court said:

"We can not concur with the court below, by supposing the surety to be released by the mere laches, or neglect, of the obligee to bring suit. No case which has come under our notice goes that far. On the contrary, it is well settled that mere delay in bringing suit, by the obligee, though urged to do so by the surety, does not discharge the surety; and for a good reason. The surety has undertaken positively to pay the debt. If his obligee will not sue, and he is in danger, he can relieve himself by fulfilling his obligation; that is, by paying his debt, and taking the whip into his own hands, and pursuing his principal."

In the other case cited above from the Kentucky Court of Appeals it was said:

"If he (referring to the surety) has an equitable right to require the creditor to sue and coerce the debt out of the principal, the extent of that right, and the manner in which he can avail himself of it, have been defined and prescribed by statute, and he can not avail himself of it in any other mode."

In Ohio there is a statute on the subject similar to ours, and the Supreme Court of that State in the case above cited said:

"Since this statute was passed, the common law rule has not been in force in this State; and it is unnecessary to inquire what its provisions are, for it has given place to the statute, and is repealed by it, if any such rule existed as that which would discharge a surety who gave the creditor notice to sue the principal, *by parol,* if the creditor did not proceed accordingly. The statute of Ohio requires the notice to be *in writing.*"

We are convinced, therefore, that the *dicta* contained in the three decisions referred to in the beginning are erroneous and should not be allowed to control in the decision of this case on the question presented. They are, therefore, disapproved, and the rule is announced that the statute on this subject controls, and unless complied with the surety is not discharged by mere inactivity on the part of the creditor or failure or refusal to sue the principal.

The question, whether or not the creditor may waive the form of the notice and accept verbal notice, is not raised in the present case, and it is left for decision in some case in which it is directly raised.

The judgment of the circuit court is therefore reversed and judgment will be entered here in favor of appellants for the amount of the notes sued on with interest. It is so ordered.

MAYERS v. LARK.

Opinion delivered June 1, 1914.

1. REVIVOR—TITLE TO LANDS.—In an action involving the title to land, the cause should be revived, after the death of one of the litigants in the name of his heirs. (Page 211.)

2. APPEAL AND ERROR—REVIVOR—TITLE TO LAND—HARMLESS ERROR.—In an action involving the title to land, where defendant died while the cause was pending, it is error to revive the action in the name of a special administrator, but when all the heirs of deceased are before the court, the error will be held harmless. (Page 211.)

3. GIFT—CONVEYANCE BETWEEN HUSBAND AND WIFE.—Where a husband voluntarily conveys property to his wife, or causes it to be conveyed to her, even if he furnishes the money, there is a presumption that it was a gift. (Page 213.)

4. GIFTS—PRESUMPTION—PROOF TO OVERCOME.—Where a presumption arises that a conveyance made to a wife was a gift from her husband, the evidence held insufficient to overcome that presumption. (Page 214.)

5. TRUSTS—RESULTING TRUSTS—EVIDENCE.—In order to establish a resulting trust, the evidence must be full, clear and convincing. (Page 215.)

6. ATTORNEY'S FEES—REVERSAL OF CAUSE.—An order of court allowing attorney's fees to appellee's attorneys, falls with a reversal of the decrees in favor of appellee, and the decree allowing such fees will be reversed also. (Page 215.)

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

Joseph M. Hill and *Henry L. Fitzhugh,* for appellants.

1. The record conclusively shows that the property was bought and paid for by Mrs. Mayers. The fact that the deeds were made to her, while not conclusive, raises a strong presumption in her favor, which can only be overcome by the clearest and most positive proof. The fact that Doctor Mayers, during the sixty years of their married life, never asserted any claim or title in himself, is strong proof that he had no rights to assert; and if he was satisfied to let the title remain in his wife, even if the

property had been bought by him, this fact is binding on his heirs.

The testimony utterly fails to establish a resulting trust in favor of Doctor Mayers, but falls entirely below the requirements of the law, that the proof must be full, clear and convincing. 89 Ark. 185; 75 Ark. 445; *Id.* 556; 76 Ark. 14; 67 Ark. 354.

2. If Doctor Mayers purchased the property and paid for it with his own funds, his having taken, or caused the title to be taken, in the name of his wife, will be treated in law as an advancement or gift, and her title as good. 104 Ark. 304; 73 Ark. 281; 89 Ark. 579; 76 Ark. 389; 89 Ark. 182.

Pryor & Miles, for appellees.

1. The preponderance of the evidence establishes the fact that the property was conveyed to Mrs. Ayers, in trust; that the deed was made to her at the request of her father, who, at that time, was involved in bankruptcy proceedings. No necessity or reason existed why she should have held the property as trustee for her mother, nor any reason shown why, if her mother purchased the property, the deed should not have been made directly to her. The evidence shows that the lot Mrs. Mayers really purchased with her own funds, a legacy from a deceased relative, was deeded directly to her; and the mere fact that the daughter afterward conveyed the property in question to her by deed would not vest her with the equitable title, since the daughter could convey no better title than she herself possessed. The chancellor's findings will not be disturbed unless clearly contrary to the preponderance of the evidence. 44 Ark. 216; 76 Ark. 252.

Under the law as it existed at the time of the purchase, even if it had been made with the funds of the wife, it would become the property of the husband. 84 Ark. 359; 80 Ark. 381.

There is no evidence that Mrs. Mayers ever asserted any title to the property adverse to her husband. The mere fact of his knowing that the trusteeship had been changed from his daughter to his wife, would not bar or

estop his heirs from claiming his interest in the property. 63 Tex. 432; 45 Am. Dec. 391.

2. From the time of the conveyance from Johnson to Mrs. Ayers, the property was impressed with the trust relationship existing between Doctor Mayers and Mr. Ayers. The fact of the existence of the constructive or resulting trust is, in effect, admitted. The only question to be determined is whether Mrs. Ayers held as trustee for her father or her mother. She says for her father, and her testimony is amply supported.

McCULLOCH, C. J. The subject-matter of this controversy is a lot on Garrison Avenue, in the city of Fort Smith, and plaintiffs, who are appellees here, are endeavoring to prove that the title is held in trust by their mother, who was one of the defendants and who died while the cause was pending in the court below. The action was instituted at law by the plaintiffs, Mrs. H. C. Lark and Mrs. V. L. McCoy, against their mother, Mrs. Mary L. Mayers, and her three other daughters, Mrs. Rapley, Mrs. Rogers and Mrs. Linde, the object of the suit being to have the property partitioned.

The cause was transferred to the chancery court, and proceeded to final decree, from which an appeal has been prosecuted to this court.

The plaintiffs, in their amended complaint, alleged that the property in controversy was purchased by their father, Michael Mayers, from one Raphael M. Johnson, and, at his instance, conveyed to his daughter, Harriett C. Lark, one of the plaintiffs, with the understanding and agreement that the latter should hold the title for him (the said Michael Mayers), and that subsequently, towit, in the year 1874, said Harriett C. Lark executed a deed by which she intended to convey the property to her father, said Michael Mayers, but by mistake conveyed the same to his wife, Mrs. M. L. Mayers, one of the defendants.

The prayer of the complaint was that defendant, Mrs. Mayers, be declared a trustee holding the legal title for the benefit of plaintiffs and other children of said

Michael Mayers, and that the court divest the title out of said trustee and vest it in said children.

The suit embraced other property in the State, but which was afterwards eliminated from the litigation.

Mrs. Mayers and the other defendants answered, denying that the property in controversy was purchased by Michael Mayers, or that he had any interest therein save as the husband of said Mrs. M. L. Mayers, and denied that there was any mistake with reference to the conveyance. They alleged that the property was purchased by said Mary L. Mayers with her own funds, and that the title was conveyed to her daughter, Mrs. Lark, then Mrs. Ayers, to hold for her, and that subsequently, at her request, Mrs. Lark conveyed the property to her. Mrs. Mayers also pleaded that she had been in undisputed possession of the property for more than forty years, and had paid taxes thereon during that time and up to the commencement of this action.

The original complaint was filed and summons was issued on April 28, 1909.

The depositions and proof in the case, at least, most of it, was taken prior to the death of Mrs. Mayers, which occurred in March, 1912.

During the pendency of the action, Mrs. Mayers conveyed the middle third of the lot to her daughter, Mrs. Linde, and the east third thereof to her great granddaughter, Eleanor May Anderson, who was a child four or five years old. After the death of Mrs. Mayers, the guardian of Mrs. Linde, who had been adjudged to be *non compos mentis,* intervened in the action and asserted title under said conveyance; and also the guardian of the child, Eleanor May Anderson, applied to be made a party, also claiming the portion of the lot conveyed to her. They were accordingly made parties.

Mrs. Mayers resided in Texas at the time of her death, and the probate court there appointed an administrator, and the chancery court revived the case in the name of said special administrator.

The order of revivor in the name of the special administrator was improper, for title to land being involved the cause should have been revived in the name of the heirs; but inasmuch as the heirs were all parties to the action and were actively litigating the cause, and the two grantees in the conveyances of Mrs. Mayers were made parties subsequent to her death, the error in the order of revivor is unimportant.

Michael Mayers and his wife, Mary L. Mayers, intermarried in the year 1848 at Fort Smith, Arkansas, and lived there continuously until a few years after the close of the war between the States. Michael Mayers was a druggist and was called Doctor Mayers. The property in controversy was purchased from one William Sweeney in January, 1868, and a part of the purchase money was paid in cash at the time of the purchase, the total price being about nine hundred or one thousand dollars. No conveyance was made by Sweeney at that time. On August 19, 1869, the balance of the purchase money was paid with money borrowed from Raphael M. Johnson, and on that day Sweeney conveyed the lot to Johnson; and on November 4, 1869, Johnson conveyed the property to Harriett C. Lark, the daughter of Michael and Mary L. Mayers, she being then the wife of Captain Ayers of the United States Army.

It is unnecessary to determine whose money was used, whether that of Michael Mayers or his wife, in purchasing the property from Sweeney, and a discussion of those details is immaterial, for we rest our opinion upon subsequent transactions. Mrs. Ayres held the title to the property until December 1, 1874, when she and her husband joined in a quitclaim deed conveying the title to her mother, Mrs. Mayers.

When the property was purchased from Sweeney, it had no improvements thereon of any value, but a building was subsequently placed upon it which was destroyed by a cyclone which swept over the city of Fort Smith about the year 1877. After that money was borrowed and used in constructing a brick building on the property and

a mortgage was executed on the property by Mrs. Mayers to secure payment of the borrowed money. In applying for the loan, there was discovered a defect in the acknowledgment to the deed of Mrs. Ayres to her mother, and she was asked to execute a new deed to correct the mistake in the old, which was done, and the deed was duly executed June 2, 1884.

Doctor Mayers died in the year 1904. He and his wife, Mary L., lived together uninterruptedly from the time they married up until the date of his death. They removed to Texas a few years after the purchase of the Fort Smith property, the precise year of their removal not being disclosed in the record so far as we have observed, and property was acquired in the State of Texas, which, subsequent to the death of Doctor Mayers, was adjudged to be community property.

The property in controversy was carried on the tax books of Sebastian County, Arkansas, in the name of Mrs. Mayers, and she paid the taxes thereon continuously from the year 1874 until the date of her death.

The principles applicable to this case are so well settled that there can be no controversy as to the law of the case.

It is unnecessary to determine, as before stated, who purchased the property from Sweeney, whether Doctor Mayers or his wife. Nor need we inquire into the details as to whose money was used in making the purchase, for it is undisputed that Raphael M. Johnson conveyed the property to Mrs. Lark, then Mrs. Ayres, to hold the title as trustee, and that subsequently Mrs. Ayres conveyed the property to her mother, Mrs. Mayers, at the request of her father, as well as her mother. There can be no dispute about that, and the testimony of Mrs. Lark herself shows that her father knew of the execution of the conveyance to her mother. That deed was placed of record, as was the second deed executed in 1884 to correct the error in the first one. It is true that Mrs. Lark says that the understanding was, at the time Johnson made the deed to her, that she should convey it to her

father when requested, and that when she executed the deed to her mother, she thought she was conveying it to her father. But it is conceded that she was merely holding the title as trustee, and had no beneficial interest therein, and it was immaterial what she thought about it if, as a matter of fact, her father authorized the conveyance to her mother, or consented thereto. It is, as before stated, undisputed that Doctor Mayers knew that the property was conveyed to his wife and authorized it to be done, and he knew throughout the remainder of his life that the title was in his wife. She testified that he knew all about it and treated it as her property and acted for her under a power of attorney which she executed.

The case stands, then, regardless of the details of the original purchase, as one where the husband voluntarily conveys property to his wife, or causes it to be conveyed to her, and under those circumstances, even if he furnishes the money, there is a presumption that it is a gift.

In the similar case of *Womack* v. *Womack,* 73 Ark. 281, it was said:

"Conceding that Womack purchased the land, and paid for it, and had the title taken in name of his wife, it was absolutely her property. 'If a husband purchases property, and has it conveyed to his wife, or expends money in improving her property, the advances will be presumed to be gifts.' "

The cases in which that principle is announced are very numerous, and it is unnecessary to cite any more of them.

The plaintiffs in this case, therefore, upon the undisputed facts, started with the presumption against them that the conveyance to Mrs. Mayers was a gift from their father, even if his money was used in the purchase, and the only remaining question is whether or not they have overcome that presumption with sufficient proof to justify the court in declaring that it was not a gift, and that a trust resulted.

Our opinion is that they have not adduced sufficient proof for that purpose, and that the chancellor erred in declaring a resulting trust. There is, in fact, little, if any, proof of a substantial character, in the record tending to show that Doctor Mayers ever treated the property other than as being owned by his wife. All the proof adduced tends the other way. Of course, there is an attempt on the part of the plaintiffs to discredit the testimony adduced by defendants in support of their claim that Doctor Mayers, by affirmative acts, showed that he treated the property as his wife's; but the plaintiffs offer little, if any, testimony themselves, which has any substantial effect in showing that Doctor Mayers intended the conveyance otherwise than as vesting the title absolutely in his wife. The only thing seriously urged as showing a claim on the part of Doctor Mayers to ownership of the property is an agreement in the record with reference to a will that he is said to have executed. Neither of the parties introduced any such instrument, but in the examination of Mrs. Lark, it developed that after the death of Doctor Mayers, Mrs. Mayers had proposed for probate in Texas a will purporting to be that of Doctor Mayers, but that she (Mrs. Lark) produced a later will revoking the former one. These instruments are referred to as being brought out in certain litigation in Texas concerning the property there, and the record shows a concession on the part of the defendants that such a will was in existence whereby Doctor Mayers devised whatever reversionary interest he might have in certain mortgaged property.

The record does not show what property was meant, as the wills were not produced and copied in the record, but the inference is, from the way in which the matter appears in the record, that it referred to the mortgaged property in Texas. Be that as it may, however, we are of the opinion that mere execution of a will by Doctor Mayers referring in that vague way to whatever interest he might have was insufficient to rebut the presumption of a voluntary gift on his part.

The rule is that in order to establish a resulting trust, the evidence must be "full, clear and convincing." *Johnson* v. *Richardson*, 44 Ark. 365.

Instead of the proof in this case being convincing that a trust was intended, it appears to us that the weight of the evidence is against the existence of any trust or any intention to create one. The decree must, therefore, be reversed, and the cause is remanded with directions to dismiss the complaint of the plaintiffs for want of equity.

The allowance by the court of fees to the attorneys for plaintiffs, of course, falls with the reversal of the decree in favor of plaintiffs and the decree allowing such fees is also reversed.

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

Opinion delivered June 1, 1914.

1. CARRIERS—SHIPMENT OF FREIGHT—SHORTAGE OF CARS.—The fact that the defendant was short of stock cars on a certain division of its railway system, is no defense to an action for damages for failure to furnish stock cars, and does not show that the carrier exercised ordinary care to supply the demand of the shipper. (Page 219.)
2. CARRIES—SHORTAGE OF CARS—FREIGHT.—In an action for damages for failure to furnish freight cars, the defendant must show, to relieve itself from liability, that it could not, by the exercise of ordinary care, have supplied the cars demanded by plaintiff. (Page 219.)
3. CARRIERS—FREIGHT—SHORTAGE OF CARS—EVIDENCE—SERVICE TO OTHER SHIPPERS.—In an action against a carrier for damages for failure to furnish plaintiff with stock cars, evidence is admissible that defendant carrier supplied stock cars, to other shippers at the same station with plaintiff, who demanded the same after plaintiff had demanded cars of the carrier. (Page 220.)
4. CARRIERS—DAMAGES—FAILURE TO SUPPLY CARS—EVIDENCE.—In an action for damages for failure to furnish stock cars, testimony of an experienced stockman, who observed the cattle to be shipped, as to their loss in weight due to the delay in shipment, is competent on the amount of damages for the delay. (Page 220.)

Appeal from Boone Circuit Court; *George W. Reed,* Judge; affirmed.

STATEMENT BY THE COURT.

The appellees, who were partners in the live stock business, sued the appellant for failure to furnish cars, alleging that they had 129 head of cattle ready for shipment, and that they made application to the appellant, through its agent at Pyatt, in Marion County, for three stock cars; that the agent informed them that the cars would arrive upon a certain date; that on that date they drove their cattle to the station, or made preparation to do so, and were then informed that the cars intended for them were not left at Pyatt for the purpose of shipping appellees' cattle; that continuously after said date, viz., the 10th day of October, they tried to obtain cars for the purpose of making shipment of their cattle, but failed to obtain same, and that by reason of the long delay in shipping their cattle, caused by the negligence of the appellant in failing to furnish cars, they had been damaged in the sum of $584, the items of which they specified.

Appellant, after denying the allegations of the complaint, set up the following: "That on or about the times and dates that plaintiffs allege that they ordered said cars, it would have been impossible to furnish same, and that defendant could not have furnished same on account of the fact that all of the cars of that kind and character desired by plaintiffs were in use, and that there were more orders for same on each and every day from October 10 until October 22, than could possibly be furnished by defendant."

There was testimony on behalf of the appellees tending to establish the allegations of their complaint.

On behalf of the appellant, F. J. Potter testified that he was chief dispatcher at Cotter when the demand for cars was made by appellees; that orders for cars wanted for shipment of live stock were sent to him to be filled. Their records showed that they were short of cars on his division October 12, 13, 14 and 15; that they offered the appellees cars on the 16th and 17th, but that appellees

did not want to load on those days. They preferred to wait until the 19th, and on the 19th, appellant was short of stock cars, and could not supply them until October 22, when it again offered appellees cars for loading their cattle. The cars were actually furnished and placed for appellees on the evening of October 22, and remained there awaiting their convenience until the morning of October 24.

The reason why there were more cars short a few days after this order was received, than at the time of receiving their order, was because of increased orders for cars, and not having cars to fill them. Orders were increasing every day, and appellant did not have enough cars to fill the orders, owing to the great demand. There was a very unusual demand at that time for stock cars in the business of the defendant. The company and the system owned a sufficient number of cars to handle the business during an ordinary season and an ordinary run of business.

There was a verdict in favor of the appellees in the sum of $350. Judgment was entered for that sum, and this appeal has been duly prosecuted. Other facts stated in the opinion.

E. B. Kinsworthy, McCaleb & Reeder and *T. D. Crawford,* for appellant.

1. The testimony of Joe Keefe to the effect that the company had furnished cars to other parties after appelless had demanded cars, was purely hearsay and incompetent. It was further inadmissible, because there was no allegation charging discrimination, and appellant had had no opportunity to prepare a defense against such a charge.

2. The stock were never weighed before shipment, and the testimony as to the depreciation of the stock in weight was without any proper basis upon which to ground the testimony. How could any one say that the stock depreciated fifty pounds per head, and how could appellant rebut such testimony?

3. Since there was no competent evidence to contradict appellant's positive evidence that there was an extraordinary demand for cars at this time, and that under ordinary conditions, it had ample equipment to supply all reasonable demands, the court should have directed a verdict for appellant. 81 Ark. 373.

Appellees, pro se.

1. The testimony with reference to appellant having furnished cars to others who made demand therefor after appellees had demanded cars, was introduced only for the purpose of showing that there was not such an extraordinary demand for cars at this time as would prevent appellant, by the use of ordinary care, from supplying the demand of appellees, and it was competent and admissible for that purpose. 81 Ark. 388.

2. There was sufficient foundation laid for the admission of the testimony as to depreciation in weight in showing that the witness was a stock man of experience, that he had bought and pastured the cattle, and had been with them continuously from the time they were driven from the pasture until they were sold in Kansas City.

3. The dispatcher's testimony did not warrant a directed verdict for appellant. Under the evidence adduced, it was for the jury to say whether or not the company was negligent in furnishing the cars. 6 N. Y. S. 836; 6 Cyc. 373, note.

WOOD, J., (after stating the facts). The appellant contends that the uncontroverted evidence showed that there was an extraordinary demand for stock cars, which prevented the appellant from being able to supply the stock cars more promptly, and that appellant had an ample equipment of stock cars for use under ordinary conditions and to supply all reasonable demands, and that therefore a verdict should have been directed in its favor.

The testimony of appellant's chief dispatcher, having supervision of the furnishing of cars on the division from which the shipment in controversy was made, was not sufficient to exempt appellant from liability for a failure to furnish the appellees cars for the shipment of their

cattle. This testimony, in a general way, shows that appellant was short of cars on this division when demand was made upon it by the appellees at the particular time when appellees desired to make the shipment of their cattle. That this shortage was because of the increased orders for stock cars, and not having cars to fill them; that the demand was great and unusual on this division. But this testimony does not show, or even tend to show, that the appellant did not have a sufficient number of cars on other divisions which it could have used for the purpose of meeting the increased demand on the division on which Pyatt is situated. For aught the evidence shows to the contrary, the appellant, by the use of ordinary care, could have sent in cars from other division points, without discommoding shippers at those points, in order to supply the temporary needs of shippers at the station of Pyatt.

Although the demand for stock cars was great and unusual on the division on which Pyatt is situated during the time appellees were seeking to ship their cattle, it was the duty of the appellant to endeavor to meet this unusual demand, and to satisfy the requirements of shippers from that station by exercising ordinary care to have the need supplied.

The testimony upon which appellant grounds its defense against this alleged charge of negligence is not sufficient in law to constitute a defense.

There was no testimony, by those having in charge the equipment of appellant's system with necessary stock cars, tending to prove that appellant as a system did not have, or by the exercise of ordinary care, could not have had, abundant facilities to meet the requirements of the shippers at all stations on its entire system. The testimony falls short of proving, or even tending to prove, that appellant could not have furnished stock cars to meet the requirements of shippers at this particular time by the exercise of ordinary care. While it was the duty of appellant's chief dispatcher at Cotter to supply the demands of shippers for stock cars at the station of Pyatt, yet there is nothing to show that he exercised or-

dinary care to have the cars brought in from other points on the system to meet the unusual demands that were made upon him by the shippers at Pyatt. His testimony only shows that there was a great and unusual demand, and that there was a shortage of cars on his division, but it falls far short of showing any reason for this shortage, and does not show that the shortage might not have been obviated by the exercise of ordinary care upon the part of those whose duty it was to furnish the necessary shipping facilities to meet the demands of all shippers.

There was no testimony, therefore, to warrant the court in submitting to the jury the question as to whether the shortage of stock cars at Pyatt was caused by an unprecedented and extraordinary demand which could not be anticipated by the appellant. The instructions submitting this issue were more favorable to appellant than it was entitled to, and it has no ground for complaint on account of the instructions of the court or the verdict of the jury on this issue.

The appellant contends that the court erred in permitting testimony tending to prove that others at Pyatt ordered cars after the appellees, and that these shippers received cars for the shipment of their cattle before appellees' demand was supplied. There was no error in permitting the testimony tending to prove that other shippers who had cattle for shipment at Pyatt demanded cars after the demand of appellees had been made upon appellant, and that these shippers were supplied before appellees were furnished with cars. This testimony tended to prove that appellant had cars to meet the demands of its shippers, and tended to prove that the failure on the part of appellant to comply with the demand of appellees was not on account of the dearth of cars to meet the requirements of shippers at Pyatt.

There was no error in permitting one of the appellees to testify that the stock depreciated in weight to the extent of fifty pounds per head during the time that the shipment was delayed by reason of the alleged failure of appellant to furnish cars. The witness by whom this testimony was adduced had bought the cattle and had

continuously observed them from the time he acquired them until they were sold in Kansas City. He was an experienced stock man, and from his observation, could testify as a fact as to the depreciation of the stock in weight. His testimony giving his estimate of the amount of such depreciation was competent and proper for the jury to consider in determining the amount of appellees' damage by reason of the loss in weight of the cattle while their shipment was delayed.

The testimony was ample to sustain the amount of the verdict. The judgment is correct, and it is affirmed.

SCHARFF DISTILLING COMPANY v. DENNIS.

Opinion delivered June 1, 1914.

1. JUDGMENTS—PLEADINGS.—A party is entitled to judgment under Kirby's Digest, § 6244, when the statements in the pleadings show him entitled thereto, and where plaintiff in his complaint set out his right to certain property under an alleged sale and transfer to him from one L., and in reply denied defendant's challenge of his right thereto, it is error for the court to set aside a verdict in plaintiff's favor, and enter a judgment in favor of defendant. (Page 225.)
2. JUDGMENT NON OBSTANTE VERDICTO—GROUNDS FOR.—To justify a judgment *non obstante verdicto*, not based solely on the pleadings or as disclosed by the record proper, the testimony justifying such verdict would have to be undisputed, so that the court might declare, as a matter of law, that the party in whose favor the judgment was entered was entitled to it, notwithstanding the verdict in favor of the other party. (Page 225.)
3. TRIAL—UNCONTRADICTED TESTIMONY—DIRECTED VERDICT.—Where the evidence developed at a trial is not uncontradicted, it is improper to declare, as a matter of law, that one party is entitled to a verdict. (Page 226.)
4. SALES—INSOLVENCY OF VENDOR—NOTICE.—When appellant claims title to personal property under a sale from one L., who was later adjudged a bankrupt, it is a question for the jury to determine whether appellant had knowledge of the facts, so as to put him on knowledge that L. was insolvent. (Page 226.)
5. SALES—INTENTION—QUESTION FOR JURY.—It is a question for the jury whether the parties to a contract of sale intended to make a sale and as to whether the same was completed. (Page 226.)

Appeal from Polk Circuit Court; *Jefferson T. Cowling,* Judge; reversed.

STATEMENT BY THE COURT.

E. R. Lyman, in January, 1913, was engaged in the retail liquor business in Mena. He bought a large part of his stock from the appellant, and on the 6th of May, 1913, he was indebted to appellant in the sum of $733.89. Appellant sent its agent to Mena to collect this balance due on account. Appellant's agent saw Lyman on the 6th of May, and Lyman told him that he was in trouble and did not have the money to pay him, but he said: "I have got your goods there." They agreed that plaintiff should have the goods that it had previously sold to Lyman in satisfaction of the debt due from Lyman to appellant. The testimony of appellant's agent was to the effect that the goods, which consisted of barrels, cases and kegs of whiskey, brandy, etc., were separated from the other goods of Lyman's stock. Some of the cases that had been broken were recased. But before the goods were taken away Lyman's brother came in and wanted the agent to leave the case goods and take some other goods in the place of them, and when the agent went back Lyman's brother refused to deliver the goods. When the goods that appellant had sold were being separated from the other goods in his stock Lyman took a piece of paper and put the articles and amount down, and put the barrels on one side to separate them from the other goods. This list was turned over to the agent and the goods were handled by Lyman and the porter, who placed them by themselves in the north part of the room. The agent did not go down to get the goods but to collect the money. He did not know that Lyman was indebted to other parties, and did not know that he was in financial trouble. Lyman said he was short of money and therefore would let appellant have the goods. Appellant preferred the money to the goods, but directed its agent to take the goods if he could not get the money. The agent did not make any inquiry of Lyman as to what he owed.

The above are substantially the facts upon which plaintiff (appellant) brought suit against Lyman to recover certain articles of personal property, consisting of barrels and cases of whiskey, wine, etc. G. B. Dennis, the appellee, who had been appointed as trustee in bankruptcy for the estate of E. R. Lyman, on motion, was substituted as defendant in the cause, and answered, denying the allegations of the complaint; denying that appellant was the owner of the goods or that same had ever been delivered to appellant in satisfaction of the debt due it by Lyman, and set up that on the 16th of May, 1913, Lyman was adjudged a bankrupt under the acts of Congress relating to bankruptcy, and that appellant knew at the time it attempted to take the goods and at the time of the institution of the suit that Lyman was a bankrupt; that the attempted transfer and sale of the property in controversy was not four months prior to the filing of the petition in bankruptcy, and was made while Lyman was insolvent, and that appellant was put on notice that Lyman was insolvent, and that the attempted sale and transfer of the property in controversy was a preference in favor of appellant.

The appellant denied that it knew at the time of the alleged sale and transfer of the goods and at the time the suit was filed that Lyman was a bankrupt, and denied that Lyman was insolvent at that time; denied that it was put on inquiry that would have led to knowledge of such insolvency.

The appellant adduced evidence tending to prove that while appellant's agent was in Lyman's place of business looking over and selecting the goods and rolling them around he was notified that a petition in bankruptcy was being prepared for Mr. Lyman. The petition was prepared and filed on May 16. There was testimony tending to show that at the time of the alleged sale and transfer of the goods in controversy Lyman was insolvent.

The court instructed the jury, among other things, that if they believed from a preponderance of the evi-

dence that Lyman agreed to return the goods described in the complaint and that said goods were separated from the balance of the stock and that they agreed that Scharff & Co. take the goods, and that the price at which they were to be taken was agreed upon that this would be a sale and delivery of the goods. It further told the jury that if Lyman, at the time of the alleged sale, was insolvent, and that the agent of plaintiff knew or had reason to believe that he was insolvent, that the sale would be void, and that plaintiff would not be entitled to recover.

The jury returned a verdict in favor of the plaintiff.

The defendant filed a motion setting up that the evidence did not authorize a judgment upon the verdict to be entered against him, and that the evidence showed that the result of the transaction between the plaintiff's agent and Lyman, the bankrupt, amounted to a preference in favor of the plaintiff, and therefore he prayed the court not to enter judgment against the defendant and that judgment be entered in his favor against the plaintiff for the value of the property in controversy, notwithstanding the verdict in plaintiff's favor. The court sustained the motion, set aside the verdict and entered judgment for the defendant, from which this appeal has been duly prosecuted.

Bernard Greenfelder and *W. Prickett,* for appellant; *Thos. W. Clark,* of counsel.

1. The court erred in setting aside the verdict and rendering judgment *non obstante veredicto* in favor of appellee. 23 Cyc. 778; Kirby's Dig., § 6244; 6 Ark. 264; 17 *Id.* 84; 99 *Id.* 376; 100 *Id.* 52; 11 Enc. Pl. & Pr. 917; 17 Ark. 84; 86 *Id.* 570; 88 *Id.* 107.

Elmer J. Lundy, for appellee.

1. Kirby's Dig., § 6242, virtually settles the point of the court's authority to set aside a verdict and enter judgment. *Ib.,* § 6244. The cases cited by appellant were decided under the common law rule and not applicable now.

2. This court always affirms where the judgment is right on the whole record, although the court committed

error. 60 Ark. 508; 62 *Id.* 228; 64 *Id.* 236; 57 *Id.* 242; 46 *Id.* 542; 43 *Id.* 296; 44 *Id.* 556; 73 *Id.* 604.

3. Appellant knew that Lyman had failed to meet his bills in due course of business. This put him on inquiry. 5 Fed. 287; 18 Wall. 635; 17 *Id.* 473; 1 Loveland on Bankruptcy, 1010; 189 Fed. 295; 196 U. S. 502.

WOOD, J., (after stating the facts). After setting aside the verdict, which was in favor of the appellant (plaintiff below), the court erred in entering judgment, notwithstanding the verdict, in favor of the appellee. There is nothing on the face of the pleadings to warrant the court in rendering a judgment in appellee's favor.

The appellant, who was the plaintiff below, claimed the property by an alleged sale and transfer of the same to it by Lyman, which it set up in its complaint, and in its reply denied the allegations of the appellee's answer which challenged the appellant's alleged right and title to the property. It could not be said, therefore, that the appellee was entitled to have judgment entered in his favor under section 6244 of Kirby's Digest, which provides that, "Where, upon the statement in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so entered by the court, though a verdict has been found against such party."

The ruling of the trial court, however, in not entering a judgment in accordance with the verdict and in setting aside the verdict, was tantamount to reserving the cause for future consideration under the provision of section 6242 of Kirby's Digest. We need not determine whether the court, under the latter section, would be authorized to enter a judgment *non obstante veredicto,* for if there could be any warrant for such a judgment, not based solely upon matters appearing in the pleadings or as disclosed by the record proper, the testimony justifying such verdict would have to be undisputed so that the court might declare as matter of law that the party in whose favor the judgment was entered was entitled to it, notwithstanding the verdict in favor of the other party.

Therefore, without deciding whether a judgment *non obstante veredicto* could be entered upon undisputed evidence, it suffices to say that the evidence developed at the trial in this cause is not uncontradicted and did not justify the court in declaring as a matter of law that the appellee was entitled to recover. Without entering into detail in discussing the evidence, we are of the opinion that it was a question for the jury to determine as to whether or not Lyman was insolvent at the time of the alleged transfer of the goods in controversy to appellant, and as to whether or not appellant knew or had notice of such facts as to put it upon inquiry which would have discovered the insolvency of Lyman, if he was insolvent. The court, having set aside the verdict, instead of entering judgment for the appellee, should have sent the cause to the jury to again pass upon the issues of fact involved, that is, as to whether or not there had been a completed sale of the property between Lyman and appellant by any agreement to that effect and a delivery of the goods in controversy, and as to whether or not Lyman was insolvent, and whether appellant knew, or had notice of such facts as to make it chargeable with knowledge, of Lyman's insolvency, if he was insolvent.

In view of another trial it is proper to say that the instruction in regard to the delivery was erroneous. The court should not have assumed that the facts recited in the instruction on the question of delivery constituted a delivery, but should have told the jury to consider these facts in determining whether or not there was a delivery of the property. As to whether or not there had been a contract of sale and a delivery so as to render the sale complete was a question of intention between appellant and Lyman and the jury should have been directed to determine from the evidence as to whether or not it was the intention of the parties to make the sale and whether or not they did complete it by a delivery of the goods in controversy. *Elgin* v. *Barker*, 106 Ark. 482.

For the error in entering a judgment in favor of the appellee the judgment is reversed and the cause remanded for a new trial.

ROBINSON v. LITTLE ROCK RAILWAY & ELECTRIC COMPANY.

Opinion delivered June 1, 1914.

1. NEGLIGENCE—QUESTION FOR JURY.—When the evidence, viewed in the strongest light in favor of the plaintiff, who was injured due to the alleged negligence of defendant, is such that reasonable minds might differ as to whether the injury was caused by defendant's negligence, a question is made for the jury. (Page 232.)
2. STREET RAILWAYS—INJURY TO PASSENGER—NEGLIGENCE—QUESTION FOR THE JURY.—Plaintiff, a passenger on a street car, after signaling the conductor to stop at the next corner, arose, and was thrown from the car, when the same turned a corner quickly, without stopping. *Held*, it was a question for the jury, whether the conductor was negligent in failing to give a signal to stop, or in not seeing plaintiff's signal to him; or in failing to see plaintiff rise from her seat as the car approached the corner, and whether, if he saw her, he was negligent in not signaling the motorman to stop. (Page 235.)
3. STREET RAILWAYS—CONDUCTOR—DUTY TO PASSENGERS.—It is the duty of the conductor of a street car to keep on the alert to see if passengers wish to alight. (Page 236.)
4. STREET RAILWAYS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—NOTICE TO REMAIN SEATED.—It is not contributory negligence, as a matter of law, for a passenger, upon approaching a street corner, to arise from his seat, preparatory to leaving the car, after having given the conductor a signal to stop, although the company gives the passenger notice to remain seated until the car stops. (Page 236.)

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

STATEMENT BY THE COURT.

The appellant sued appellee for damages arising out of personal injuries. She alleged that she was a passenger of the defendant (appellee); that there was a sharp curve in the line of railway at Wright avenue and Schiller avenue; that she desired to leave the car at that point and when in about a half block of that point she signalled the conductor to stop the car; that the conductor ignored the signal, but continued and accelerated the speed of the car; that she believed the car would be stopped in accord with her signal, and when within a few

feet of Wright avenue and Schiller avenue she arose from her seat for the purpose of alighting from the car when it was stopped at that point; that the motorman and the conductor carelessly and negligently ran said car at an unreasonable rate of speed around said curve, and that on account of said negligence she was thrown from the car against the pavement and seriously injured, to her damage in the sum of $5,000, for which she prayed judgment.

The appellee denied the allegations of the complaint, and set up contributory negligence on the part of the appellant.

After the evidence was adduced, appellant, by leave of the court and with the consent of the appellee, amended her complaint to conform to the proof, alleging that she believed the conductor observed the signal given by her, and that there was a decrease in the rate of speed of the car, and that she arose and was standing in the car to alight when it stopped, and that the conductor negligently failed to observe her signal and negligently failed to observe plaintiff standing in the car.

The testimony was as follows: Appellant was a passenger on appellee's Fifteenth Street car on the night of April 3, 1909. She was fourteen years of age. She intended to get off at the last curve on Schiller Avenue and Wright Avenue. As she approached the point going into Wright Avenue from Schiller Avenue she looked for a bell but there was none on the car. She raised her hand to signal the conductor, who was on the back part of the car. The car was an open summer car. She did not arise to give the signal. She believed the conductor saw her signal. She picked up her bundles and stood between the seats. While she was standing the car started around the curve and she thought it would stop. The car was "slowing down." About the time the car got around the curve was the last thing she remembered. She pointed out on the plat where she gave the signal which was about half way between the first curve and the last curve. The car was "slowing down" as it went

around the last curve. She thought the car was going to stop; was standing up.

She first stated that she was around the curve, but, upon being questioned, stated that she could not say as to that, but pointed out about where she was. She was standing between the seats while the car was making the curve, and pointed out about where she was thrown off. She was thrown off right around the curve off of Wright Avenue on Schiller Avenue, after she had passed around the curve. She was asked what caused her to be thrown off of the car and replied as follows: "Why, going around the curve, I think it was, so fast; going around the curve or something, after it went around; just after we went around it went faster, or something was the cause of it."

She knew the car went faster by the motion of the car. She could feel the increase of the speed in her body. She was holding two small bundles in her right hand, and the last she remembered doing with her left hand was taking hold of the back of the seat in front of her. She never got on the running board of the car. The car does not usually stop until it gets around the curve. She was about in the center of the car, and there was just about room for one passenger to sit between her and the outside of the car. She thought the car was going to stop after it went around the last curve, and got up from her seat just about the time the car entered the last curve.

There was a sign on these cars which read, "Remain seated until the car stops." She knew it was there at the time of the trial, but didn't pay any attention to it at the time of her injury, and didn't remember whether she ever noticed it before. She didn't attempt to alight, but something threw her out while she was standing in the car as it rounded the curve. She knew she was thrown off just after she got around the curve. She was asked the following question: "Can you explain, Miss Robinson, why the quickening of the speed of the car should throw you across the floor of the car and across

the end seat and across the running board of the car?'' and answered: ''No, sir; unless the car had jerked or something.''

She was also asked, ''If the car had jerked, would not that have caused you to sit down in the seat behind you, and not throw you out on the pavement?'' and answered, ''I suppose it would; I don't know.''

She stated that she could not explain how it occurred; that it quickened its speed and threw her out on the ground. She stated that she never stepped off the car when the car was going. She was asked this question: ''You can conceive of no means standing on the floor of the car in the position you described, by which the quickening of the speed of the car could have thrown you out on the pavement?'' and answered, ''No, sir.''

Witness Mathes testified substantially as follows: He was a passenger on the car at the time plaintiff fell. A signal was given by the plaintiff on approaching the end of the private way, and was disregarded as to the regular stop at Wright Avenue and Schiller Avenue. It was sounded at the end of the private way. It was only two car-lengths from the corner in question. Witness gave no signal to the conductor, but plaintiff did. There was no reduction in the speed after the signal was given by her. She arose from her seat and stood between the two seats. The conductor did nothing; he could not have reached her if he had wanted to. The car went around the curve pursuing the regular rate of speed. Witness perceived no jerks. The car made no lurch except such as would occur from rounding an ordinary sharp curve. There was no sudden movement forward. Plaintiff seemed to be thrown off by the sudden rounding of the curve without a stop signal. She rolled over several times and finally stopped, face down, in the dirt, probably 125 feet from the corner of Wright and Schiller avenues. She was picked up insensible. At the time she fell from the car it was just completing the round of the curve. She fell on Schiller Avenue. Witness saw her rise and give a signal, but he did not remember the kind of signal except that it was a bell signal, but witness did not re-

member whether it was a rope or a button. The conductor was in the extreme rear end of the car, on the platform behind the glass partition. Witness didn't know that the conductor received it. The car was finally stopped by an emergency signal after the accident had happened.

The appellee demurred to the evidence. The court sustained the demurrer and instructed the jury to return a verdict in favor of the appellee, and from a judgment in appellee's favor, this appeal has been duly prosecuted. Other facts stated in the opinion.

Oscar H. Winn and *Manning, Emerson & Morris,* for appellant.

1. Following the well established rule, in determining whether or not the court was right in directing a verdict for the appellee, the evidence will be given its strongest probative force in favor of the appellant. 89 Ark. 222-227; 95 Ark. 560; 96 Ark. 394.

2. It is equally well established that a jury question is presented where the evidence is such that reasonable minds may reach different conclusions from that evidence, and in such case it is always error to direct the verdict. That is the situation presented here.

3. "A common carrier of passengers by street car is required to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons employed in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended." *Supra.*

When the appellant arose from her seat in the car, that was a signal to the conductor, of which it was his duty to take notice, that she desired to alight at the next corner. 1 Nellis on Street Railways, § 303.

"The conductor must be alert to see if any one is alighting or attempting to alight before he starts the car, and *his absorption in other duties will aggravate rather than excuse the charge of negligence in starting while a passenger is attempting to alight.*" *Id.,* § 305. See, also,

as sustaining appellant's case throughout, 80 Pac. (Cal.) 780.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

1. It is in proof that there was a sign on the backs of the seats, in letters about two and one-half inches high, requesting passengers to remain seated until the car stops. There is undisputed and positive testimony on the part of appellant and her witnesses that there was no sudden jerk or lurch of the car. The burden of proof was upon appellant to show negligence on the part of appellee. That burden was not discharged by allegation or proof that after the car rounded the curve, it went faster, for that was not negligence; nor by saying that she thought it was going to stop and did not, for the failure to stop was not negligence; nor by saying that she was misled by the car rounding the curve slowly, for it was prudent to do so rather than negligent.

It was incumbent on appellant to show by affirmative proof, some act which would constitute negligence upon the part of appellee in the operation of the car. 111 App. Div. 404; 97 N. Y. Supp. 841; 75 Ark. 211.

2. This court has announced the correct rule that, "Carriers of passengers by street railways are not insurers of the safety of their passengers, nor bound absolutely to carry them safely, without injury; nor to provide such measures to protect them against accidents and injuries caused by their own acts or omissions, which the exercise of reasonable foresight would not anticipate." 75 Ark. 211. The conductor is not bound to interfere to protect a passenger from danger resulting from his own act, unless the conductor could have reasonably anticipated that he would be injured without such interference. *Id.;* 76 Ark. 356. See, also, 55 Atl. 836.

WOOD, J., (after stating the facts). The court erred in directing a verdict in favor of the appellee.

The evidence must be viewed in the most favorable light for appellant, and when given its strongest probative force in her favor, we are of the opinion that reason-

able minds might reach different conclusions on the question as to whether or not the injury to appellant was caused by the negligence of the appellee, as alleged in her complaint. It was therefore a question of fact for the jury to determine.

"A common carrier of passengers by street car," says Mr. Booth, "is required to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons employed in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended." Booth on Street Railway Law, § 328, quoted in *Little Rock Traction & Electric Co.* v. *Kimbro,* 75 Ark. 211; also, *Oliver* v. *Fort Smith Light & Traction Co.,* 89 Ark. 229.

In the Oliver case, *supra,* the car was running very slowly or had stopped. The plaintiff was on the running board. He disengaged one hand and held onto the post of the car with the other while paying his fare, and as he was in the act of handing his fare to the conductor, the car started forward with a jerk, causing the crowd on the footboard with the plaintiff to surge back and forth, which crowded him off. In that case, we said: "The appellee, as the evidence tends to show, having slackened the speed of its car, or stopped same, for passengers to get on or off, was negligent if it started the car forward again with a sudden jerk so as to cause its passengers, who were on the footboard and exercising ordinary care for their own safety, to surge back and forth and thus to crowd and throw some of them from the train."

In *Little Rock Railway & Electric Company* v. *Doyle,* 79 Ark. 378, Doyle was a passenger of the railway company, and as the car approached the point where he wished to debark, he motioned the conductor to stop for him to get off, and the conductor obeyed and slowed the car as plaintiff was advancing to the rear end of the car, and continued to slacken its speed until he reached the step of the platform. While he was standing on the rear of the car, with his left hand holding the handrail,

and when the speed had been slackened so that he could step from the car with safety, and while he was in the act of alighting from the slowly moving car, its speed was suddenly increased, and he was thereby thrown from the car. In that case we held that the company was liable in damages, if the passenger, while in the act of stepping from the slowly moving car at a street crossing, was injured without negligence on his part by reason of the fact that the speed of the car was suddenly increased, whereby he was thrown off and injured.

Now, viewing the testimony in its most favorable aspect for the appellant, it tends to show that at a point about a half block from where appellant intended to get off the car, she signalled the conductor to stop for that purpose; that the car was "slowing down," and that the appellant thought that same was going to stop. The jury might have concluded from the "slowing down" of the car after appellant had given the conductor the signal to stop, that the conductor had observed such signal and was obeying the same by causing the speed of the car to be lessened for that purpose; that the appellant, believing that the conductor had observed the signal, and was having the speed of the car slackened in order to stop the same for the purpose of allowing her to debark, arose from her seat as the car was "slowing down" preparatory to leaving the car when the same should stop; that she was standing between the seats with her right hand clutching her bundles and her left hand holding to the back of the seat, near the end of the seat, on the right-hand side, when the car, instead of stopping, as she supposed it would do, increased its speed, thereby throwing the appellant from the same to the pavement about the time the car had rounded the curve.

There was testimony to the effect that after the car passed the curve on Wright and Schiller avenues, where the injury occurred, it was down grade, and that the car would run by itself after it got out of the bind of the curve, and if the current were turned on would accelerate its speed, causing the same to start very suddenly; that

one situated as the appellant was, two seats back from the center of the car, would be thrown out by a sudden jerk of the car, and that if she had been in front of the center of the car, it would have thrown her back, but not out of the car.

It was a question for the jury, under the evidence, to determine whether the conductor saw the signal of the appellant, and, if so, whether or not he was negligent in failing to give the motorman the signal to stop the car, and whether or not, if he did not observe appellant's signal, he was negligent, under the circumstances, in failing to observe the same. It was a question for the jury to determine also whether or not the conductor was negligent in failing to observe the situation of the appellant as she was preparing to get off the car at the usual stopping place around the curve, and if he did observe her situation, whether or not he was negligent in not having the motorman stop the car instead of permitting the speed of the car to be suddenly increased.

The appellant, by the fall, was rendered insensible. The jury would have been warranted in finding that taking into consideration her position on the car, and the violence with which she fell or was thrown from the car, and the increase of the speed of the car as it rounded the curve, that same must have gone forward with a sudden lurch or jerk, or else with a very rapid whirl around the curve. The facts bring the cause within the doctrine of the above cases.

Mr. Nellis, in his work on Street Railways, Vol. 1, § 303, says: "Where a passenger leaves his seat in a car and moves toward the door as the car comes to a stop to enable passengers to alight, such conduct may be considered as a manifestation to the one in charge of the car of an intention and desire to depart from it, and the car should not be started until he has been given a reasonable opportunity to do so." And the same author says (§ 305): "The conductor must be alert to see if any one is alighting or attempting to alight before he starts the car, and his absorption in other duties will aggravate

rather than excuse the charge of negligence in starting while a passenger is attempting to alight."

The doctrine announced in our own cases, *supra,* and by the learned authors on Railway Law, above quoted, when applied to the facts of this record, makes it a question for the jury to determine whether or not there was negligence in the method of operating the car which resulted in the injury to appellant. To be sure, there was evidence from which the jury might have found that the appellee was not negligent, but, as already stated, this was a question about which reasonable minds might draw different conclusions, which makes it an issue of fact for the jury, and not one of law for the court. The same may be said with reference to the issue of contributory negligence. It can not be said as a matter of law that there was contributory negligence on the part of appellant because she arose as the car began to slow down on approaching the place where she expected to debark, and stood in that position with one hand on the seat and the other holding her bundles, as described in the testimony.

In *Babcock* v. *Los Angeles Traction Co.,* 60 Pac. 780, a passenger took a position in the open space in the front end of a street car, and when the car approached the street corner at which he desired to alight, he started toward the outside of the car for the purpose of leaving the same. The car was passing around a curve, and on account of its excessive rate of speed the passenger, while not holding with either hand, was thrown from the car and injured. In that case, the Supreme Court of California said: "The court could not declare that it was contributory negligence on his part to start to get off from the car before it had come to a full stop. There is no rule of law which requires a passenger in a street car to retain his seat or other position until the car has actually stopped, and it is a matter of universal observation that thousands, every day, leave their seats to get off before the car has stopped, without sustaining any injury. The claim of the appellant that the plaintiff's attempt to get off the car while it was rounding the curve was itself

a hazardous act, from which his injury resulted, rests upon assuming the existence of other facts which could be determined only by the jury."

The doctrine of that case is sound and is controlling here on the issue of contributory negligence. The notice to passengers to remain seated until the car stops is a wise precautionary measure which passengers might do well to observe, but the failure of a passenger to comply with such request on the part of the company can not be considered contributory negligence as a matter of law. The failure of appellant to observe and obey such notice is a fact which, taken in connection with all the other facts adduced in this record, should be considered by the jury in determining whether or not she was guilty of contributory negligence.

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

INCORPORATED TOWN OF CORNING v. THOMPSON.

Opinion delivered June 1, 1914.

1. JUDGMENT—FINALITY—MOTION FOR NEW TRIAL.—Where judgment is rendered, and the court does not pass upon a motion for a new trial filed, during that term, after the expiration of the term, the judgment becomes final, and the court has no power to set the same aside at the succeeding term. (Page 239.)
2. JUDGMENT—MOTION FOR NEW TRIAL—CONTINUANCE.—Where a judgment has been rendered, the filing of a motion for a new trial and the continuing of the cause thereafter, does not have the effect of setting aside the judgment. (Page 239.)
3. JUDGMENT—ADJOURNMENT OF TERM—FINALITY.—Where a judgment is entered and becomes final by adjournment of the term during which the judgment was rendered, it can not be opened up and a new trial granted at a subsequent term. (Page 239.)

Appeal from Clay Circuit Court, Western District; *J. F. Gautney*, Judge; reversed.

STATEMENT BY THE COURT.

The attorney for the incorporated town of Corning filed an information with the mayor, charging the appel-

lee with the crime of running a house of assignation contrary to the ordinances of the town. Appellee was convicted by the mayor and appealed to the circuit court. In the circuit court he was tried by a jury, who returned a verdict of guilty against him, assessing his fine at the sum of $25. The court, at that term of the court, entered a judgment in favor of the appellant against the appellee for the sum of $25, as a fine, and all costs, and directed "that if said fine and costs are not promptly paid, said defendant be remanded to the custody of the sheriff of Clay County, and that he be confined in the jail of said county until said fine and costs are fully paid, not to exceed one day for each seventy-five cents."

On the next day after this judgment was entered, appellee filed his motion for a new trial, and the record shows that "the cause is continued until court in course." At the succeeding term of the court, the court set aside the verdict for the reason that there was "not sufficient evidence to support it," and entered up a judgment discharging the appellant and his bondsmen, and for costs against the town. This appeal has been duly prosecuted.

J. N. Moore, for appellant.

The verdict of the jury was right and should stand.

No brief for appellee.

WOOD, J., (after stating the facts). Section 2421 of Kirby's Digest, provides: "The application for a new trial must be made at the same term at which the verdict is rendered, unless the judgment is postponed to another term, in which case it may be made at any time before judgment."

This statute contemplates that the motion for a new trial shall be made at the same term of the court at which the verdict is rendered, and that it shall be acted upon at that term unless the judgment is postponed to another term. In the present case, judgment was entered at the term of the court at which the trial was had, and that term of the court adjourned without the court setting aside the judgment. This judgment, therefore, became

final, and the court had no power to set the same aside at the succeeding term.

The order of the court continuing the cause after the motion for a new trial was filed did not have the effect to set aside the judgment. Under the statute, when the appellee filed his motion for a new trial, the court might have postponed entering the judgment until another term of the court, and continued the hearing on the motion, and that would have operated as a continuance of the cause. In that case the appellee might have had his motion for a new trial passed on at the subsequent term, but this was not done, and therefore the appellee lost the benefit of his motion for a new trial when the term of the court at which his trial was had and judgment entered was adjourned until court in course.

Where judgment is entered and becomes final by adjournment of the term of court during which the verdict was rendered, it can not be opened up and a new trial granted at any subsequent term. See *Ayers* v. *Anderson-Tully Co.*, 89 Ark. 160.

It follows that the court erred in entering a judgment setting aside the verdict and discharging the defendant, and exonerating the bondsmen, and entering a judgment for costs against the appellant. The judgment is therefore reversed and remanded, with directions to dismiss the application for a new trial.

CITY OF EL DORADO *v.* SCRUGGS.

Opinion delivered June 1, 1914.

1. CONSTITUTIONAL LAW—TAKING PRIVATE PROPERTY—COMPENSATION.—Under the Constitution, private property may not be taken, appropriated or damaged without just compensation to the owner. (Page 224.)
2. RIPARIAN RIGHTS—POLLUTION OF STREAM—DAMAGES.—The pollution of a stream flowing through plaintiff's land constitutes a damage thereto within the meaning of the constitutional guaranty, which may not be done without compensation. (Page 245.)
3. SEWER DISTRICT—DAMAGE TO LAND—DISCHARGE OF SEWAGE—CONSTRUCTION OF SEWER.—A sewer district constructed a septic tank from

which the sewage was discharged into a stream flowing through plaintiff's land, causing plaintiff damage. *Held*, although after completion the sewer passed under the control of the city, nevertheless the sewer district and not the city would be liable for the damage to plaintiff's property. (Page 245.)

4. SEWER DISTRICTS—DAMAGE TO LAND BY SEWAGE—MEASURE OF DAMAGES.—Where plaintiff's land was damaged by the discharge of sewage into a stream flowing through his land, the measure of damages would be the difference in value of the land before and after the stream was used as an outlet to the sewer. (Page 245.)

5. DAMAGES—MARKET VALUE OF LAND.—In determining the market value of land damaged by defendant, the owner may show every advantage that his property possesses, present and prospective, in order that the jury may determine what price it could be sold for upon the market. (Page 245.)

6. MUNICIPAL CORPORATIONS—WRONGFULLY FLUSHING SEPTIC TANK—DAMAGES—LIABILITY—SEWER DISTRICT.—Neither the sewer district nor the city is liable to a land owner whose land is damaged by reason of the acts of the city employees in wrongfully flushing the septic tank, and polluting a stream flowing through plaintiff's land. (Page 246.)

7. MUNICIPAL CORPORATION—TORTS OF OFFICERS.—A city is not liable for the torts or wrongful acts of its officers. (Page 246.)

8. DAMAGE TO LAND—POLLUTION OF STREAM.—The owner of land can not recover damages because of the ruination of his dairy business by reason of the pollution of a stream running through his land, with sewage, but such facts may be considered as elements in the damage to plaintiff's land. (Page 247.)

9. DAMAGE TO LAND—POLLUTION OF STREAM.—In an action for damages growing out of the pollution of a stream with sewage, flowing through plaintiff's land, the jury may only consider the injury that resulted to plaintiff's land, and the plaintiff may show any use to which the property was adapted, and its depreciation in value by reason of the fact that the stream which ran through his land had been used as a permanent outlet for the sewer. (Page 247.)

Appeal from Union Circuit Court; *George W. Hays*, Judge; reversed.

STATEMENT BY THE COURT.

L. J. Scruggs instituted this action in the circuit court against the city of El Dorado and Sewer Improvement District No. 1 of the city of El Dorado to recover

damages for using a stream running through his land as an outlet to a sewer. The facts are as follows:

Sewer Improvement District No. 1 was organized in the city of El Dorado for the purpose of constructing a sewer. In the construction of the sewer a septic tank was erected. The tank is made of concrete and is covered over and practically air tight. The septic tank is located on lands purchased and owned by the defendants, and is situated more than 100 feet from the nearest point of plaintiff's land. It is 591 feet from his house. There is a stream of water which runs through the plaintiff's land; and the drainage from about one-fourth of the city of El Dorado is discharged into this stream. After the sewage is chemically treated in the septic tank, this stream, after leaving the septic tank, to the place where feet from the place where the sewage is deposited in the stream, aftr leaving the septic tank, to the place where the stream enters plaintiff's land. It is 562 feet from where the sewage enters the stream to plaintiff's residence, on a straight line. The sewage, when it enters the septic tank, is chemically treated, and passes through a process of purification, and then comes out of the septic tank as a stream of water which seems to be perfectly clear and is, according to the testimony of the defendants' witnesses, practically pure and odorless. According to the testimony of the plaintiff's witnesses, offensive odors arise from the septic tank, and the water which comes therefrom is not pure. The additional flow of water causes the stream through plaintiff's land to overflow, and sediment is deposited on the grass next to the bank of the stream. The plaintiff owned and operated a dairy, and the deposit of the sewage into the stream rendered the water unfit for his cattle to drink, and the sediment that was deposited on the bank when the stream overflowed rendered the grass unfit for the use of the cattle until it had been purified by rain falling and washing it off. The odor from the septic tank was also offensive to the plaintiff and his family at their residence.

Other facts will be referred to in the opinion. The jury returned a verdict for the plaintiff, and the defendants have appealed.

Geo. M. LeCroy and *Neill C. Marsh,* for appellants.

1. The pollution of a stream, rendering it unfit for use, is held, in many cases, to be a virtual taking without compensation of water rights or riparian privileges. 50 L. R. A. 564; 72 Conn. 531; 145 Ill. 23; 45 N. Y. 365; but the outflow of sewage was shown to have rendered the stream unfit for use for any purpose. In none of these cases was the sewage treated or purified. Another line of cases is in conflict with these. Damages to riparian owners by the discharge of city sewage into a stream in a skilful manner and in conformity to the statute, are merely consequential and not recoverable. 135 Ind. 547; 26 Ark. 277; 18 Ind. 482; 110 Mass. 216; 112 Ind. 542; 79 *Id.* 491; 41 Am. Rep. 618.

2. The city is not liable. 110 Mass. 216; 28 Cyc. 1333, note 6; 14 Am. Rep. 592; 49 Ark. 139; 93 *Id.* 250; 98 *Id.* 206.

3. The court erred in its charge as to the measure of damages. Hale on Damages, 361; 91 Ark. 58; 6 L. R. A. 254; 14 *Id.* 329; 116 Pa. 818.

4. The district is merely the agent of the property owners, and not the agent of the city. It exercises the governmental functions delegated to it by law. 55 Ark. 148; Kirby's Digest, § § 5664, 5672, 5719. Improvement districts are *quasi*-corporations and not liable for the negligence of officers or agents. 94 Ark. 380; 171 Mass. 427; 9 Wheaton, 720.

5. Improvement districts have no control over and no power to operate sewers after completion, and when completed their liability ceases. 56 Ark. 206; 53 *Id.* 300; 97 *Id.* 318; 161 S. W. Rep. 1057.

Patterson & Green, for appellee.

1. Appellants have created a nuisance, thus taking plaintiff's property for public use without compensation. 48 L. R. A. 698-9, note 3. Our Constitution prohibits the

damaging as well as taking without compensation, and *damaging* is a taking of property. 50 L. R. A. 504; 72 Conn. 531; 48 L. R. A. 691; 18 Okla. 32; 11 A. & E. Ann. Cas. 581; 155 S. W. 910; 47 L. R. A. (N. S.) 137; Lewis on Em. Dom., § 61; 28 Cyc. 1293; 29 *Id.* 1205.

2. Improvement districts are liable. Kirby's Dig., § § 2921, 2925, 5729; 56 Ark. 191; 94 *Id.* 380; 161 S. W. 1057; 54 Ark. 140; 5 Miss. 197.

2. The charge as to measure of damages was the law. The damages were permanent. *McLaughlin* v. *City of Hope,* 107 Ark. 442; 47 L. R. A. (N. S.) 137; 154 S. W. 186; 77 N. E. 407; 131 S. W. 1016; 92 *Id.* 930; 63 *Id.* 981; 92 *Id.* 957.

3. A lower riparian owner has the right to have the water come to him unpolluted. 123 S. W. 251; 107 Ark. 442. An attempt to sterilize the sewage does not relieve from damages. 35 Atl. 499; 29 Cyc. 1155; 91 Ark. 61; 85 *Id.* 544; 122 N. Y. 18.

4. It is not necessary to show negligence to establish a case of damage in cases like this. 91 Ark. 61; 107 *Id.* 442; 28 Cyc. 1293.

5. The city is liable. 73 Ark. 448; Dillon, Mun. Corp., § 1024.

HART, J., (after stating the facts). The concrete case we have to deal with is that a sewer improvement district was formed in the city of El Dorado, and when it was constructed the sewage was carried into a septic tank, where it was chemically treated, and from there was discharged in the form of water into a natural water-course which ran through the plaintiff's land. The water was discharged into the stream which ran through plaintiff's land at a point about 500 feet distant from it. The plaintiff conducted a dairy on his land, and, according to the testimony adduced by him, the water course was polluted by the sewage being discharged into it so that it was rendered unfit for his cattle to drink. It was also shown by him that noxious and offensive odors emanated from the septic tank which were injurious to the health of himself and family. It was also shown that the dis-

charge of the sewage into the stream caused it to overflow, whereby a sediment was deposited on the grass which grew near the banks of the stream on plaintiff's land, thereby rendering it unfit for grazing purposes until the sediment had been washed off by rains.

Our Constitution provides that private property shall not be taken, appropriated or damaged without just compensation to the owner. In the case of the *Hot Springs Railroad Company* v. *Williamson,* 45 Ark. 429, the difference between a Constitution which contains this provision and one which contains a provision that private property shall not be taken for public use without just compensation was pointed out. The court said that it may be now taken as well settled that in a Constitution which provides that private property shall not be damaged for public use without compensation, it is no longer necessary that there should be a physical invasion or spoliation of one's lands in order to give a right of recovery.

In the application of this principle, in the case of *McLaughlin* v. *The City of Hope,* 107 Ark. 442, 47 L. R. A. (N. S.) 137, the court held that the turning of sewage by a municipal corporation into a stream, to the injury of a lower riparian owner of property, is within our constitutional provision requiring compensation for damaging property for public use. The court further held that the damages to be awarded for the draining of sewage into a stream by the permanent plant of a municipal corporation should be assessed on the theory of a permanent taking under the right of eminent domain. The reason given is that the riparian proprietor is entitled to have the water of the stream flow through his land unpolluted and uncontaminated by the discharge of the sewage; and such right is held to be a real and tangible property right and as much entitled to the protection of the constitutional provision as the right of the riparian owner to have the soil remain in its place. The right to have the stream flow through his land unpolluted is a part of the freehold of which the owner can not be de-

prived, except by due process of law. Therefore, the pollution of the stream constitutes a damage to his property within the meaning of the constitutional guaranty, which may not be done without compensation.

In the present case the sewer improvement district constructed the sewer and discharged the sewage into the stream which flowed through the plaintiff's land; and this was a damage to his property by reason of the construction of the sewer, and the sewer district, and not the city is liable in damages to the plaintiff therefor. It is true that when the sewer was completed it became subject to the control of the city of El Dorado, and the board of the sewer district no longer had control over it. *Pine Bluff Water Co.* v. *Sewer District,* 56 Ark. 205. It will be noted, however, that it was a part of the plan for the construction of the sewer that the sewage from the septic tank should be discharged into the stream which ran through the plaintiff's land. For this reason, whatever damage the plaintiff may have suffered was an incident to the construction of the sewer. Therefore, the city was not liable to him for the damages, but the sewer district alone was liable. The measure of damages to the plaintiff would be the difference in value of his land before and after the stream was used as an outlet to the sewer. *Texas & St. Louis Ry. Co.* v. *Kirby,* 44 Ark. 103. In determining the market value of the plaintiff's property, the rule, as established in this State, is that the owner may be allowed to show every advantage that his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for upon the market. *Kansas City So. Ry. Co.* v. *Boles,* 88 Ark. 533. See also *Kansas City So. Ry. Co.* v. *Anderson,* 88 Ark. 129. In the application of these principles to the present case it may be said in estimating the damages that accrued to the plaintiff he may show the value of his land for any purpose to which it was adapted at the time the damage was done to it, and in considering its value after the stream which ran through it had been polluted by the discharge of the sewage into it, the jury

might consider the fact that the stream had been polluted by the sewage, that an additional quantity of water had been discharged into the stream, which caused it to overflow and deposit a noxious or offensive sediment on the grass so as to render it unfit for grazing purposes, if the proof shows such to be the case, and also the further fact that noxious and offensive odors are emitted from the septic tank which are injurious to the health or comfort of the plaintiff and his family.

The proof on the part of the plaintiff tended to show that after the sewer was constructed and put in operation it was flushed frequently, and that the result of this flushing was to increase the pollution of the stream and also the offensive and obnoxious odors which were emitted from the septic tank. The evidence discloses, however, that it was not necessary to flush the septic tank oftener than once a year, or perhaps not that often. Therefore, the damages suffered by the plaintiff by the wrongful flushing of the tank could not be recovered either against the sewer district or against the city. Such damage was not incident to the construction of the sewer, but resulted from the wrongful acts of those who operated the sewer. The sewer district could not be held liable for the negligence of its servants in constructing or operating the sewer. *Wood et al.* v. *Drainage Dist. No. 2 of Conway County,* 110 Ark. 416, 161 S. W. 1057. This court is also committed to the doctrine that a city is not liable for the torts or wrongful acts of its officers. *Trammell* v. *Russellville,* 34 Ark. 105; *Collier* v. *Fort Smith,* 73 Ark. 447; *Franks* v. *Holly Grove,* 93 Ark. 250; *Gregg* v. *Hatcher,* 94 Ark. 54. Therefore, the court erred in allowing a recovery on account of the wrongful acts of the officers of the sewer district or of the city in flushing the septic tank when it was not necessary to do so.

Of course, in estimating the damages that accrued to the plaintiff the jury might take into consideration all damages that were suffered by the plaintiff on account of the necessary flushing of the septic tank, for that would

be a damage that would be incident to the construction and proper operation of the sewer.

The evidence of the plaintiff also shows that he operated a dairy on his farm at the time the stream was taken as an outlet for the sewer. His dairy business was not a part of the realty, and if the sewer district had instituted condemnation proceedings against the plaintiff it could not have condemned either the cows used by the plaintiff or his dairy business.

The evidence of the plaintiff also tended to show that he was unable to sell his milk because his customers believed that it was impure by reason of his cows drinking from the polluted stream. He was allowed to recover damages on this account. This was error. The injury to his dairy business was not an element to be considered in estimating the damage to his land. If his land was more profitable to be used in running a dairy than for any other use, its adaptability for that use might be considered by the jury in estimating the damages to his land by reason of the pollution of the stream, but the court could not allow as an element of damages to his land the loss he suffered in the business of operating a dairy. The jury could only consider the injury that resulted to his land, and, as above stated, in determining that fact, the plaintiff should be allowed to show any use to which his property was best adapted, and its depreciation in value by reason of the fact that the stream which ran through his land had been used as a permanent outlet for the sewer.

We have not taken up and discussed the assignments of error in detail, or in the order in which they are presented in the briefs, but we think the principles of law which we have announced are a sufficient guide for a retrial of the case.

For the errors indicated the judgment must be reversed and the cause remanded for a new trial.

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

Opinion delivered June 1, 1914.

1. CARRIERS—FREIGHT—NOTICE OF INJURY—WAIVER.—A stipulation in a contract for shipment of live stock requiring notice of a claim for loss or injury within a specified time, is for the protection of the carrier and may be waived by it. (Page 252.)
2. CARRIERS—DAMAGE TO FREIGHT—NOTICE—WAIVER.—The mere knowledge on the part of a claim agent of a railway company that a shipper claims damages for injury to freight, unaccompanied by any act upon the part of the claim agent looking to an adjustment of the loss, is not sufficient to constitute a waiver of a stipulation requiring the claim to be made in writing within a prescribed time. (Page 252.)

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

STATEMENT BY THE COURT.

This is an action by C. W. Shepherd against the St. Louis, Iron Mountain & Southern Railway Company to recover damages alleged to have been sustained in a shipment of cattle from Bergman, Arkansas, to Kansas City, Missouri. The facts are as follows:

On the 9th day of November, 1912, C. W. Shepherd entered into a written contract with the railroad company for the shipment of the cattle, in which the railroad company is called "the first party" and Shepherd "the second party." The contract recites that the rate charged for the shipment of live stock under the contract is lower than the rate charged if the shipment is not made under the contract. The sixth clause of the contract is as follows:

"Sixth. That, as a condition precedent to the recovery of any damages for any loss or injury to live stock covered by this contract for any cause, including delays, the second party will give notice in writing of the claim therefor to some general officer or to the nearest station agent of the first party, or to the agent at destination or to some general officer of the delivering line, before such

stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served one day after the delivery of stock at destination, to the end that such claim may be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims, and to any suit or action brought thereon."

The cattle were shipped from Bergman about 8 o'clock on the morning of the 9th of November, 1912, and arrived at the stock yards in Kansas City, where they were to be unloaded, about 5 o'clock in the evening on the 10th inst. Other cattle in the same train were at once unloaded in the stock yard so they might be fed and watered. The cattle in question, according to the testimony of the plaintiff, were not unloaded until about 8 o'clock of the morning of the 11th inst. The plaintiff stated that the employees at the stock yard refused to unload them until that time for the reason that they claimed that the waybill had not been delivered by the railroad company and that they could not unload the cattle until they received the waybill. The plaintiff further testified: I went to see a claim agent of the railroad company and related to him the circumstances and condition of the cattle and asked him to investigate. I told him that I intended to claim damages. He told me to put my claim in writing and told me that these accidents could not be helped; said for me to let it go and take it up with the company's offices at home. I never gave any agent of the company any written notice of my intention to claim damages. I did inform the claim agent that the cattle were in the pen at the stock yard, and I wanted him to go down and look at them.

The plaintiff also testified as to the loss in weight of the cattle in consequence of the delay in unloading them, and as to the amount of loss sustained by him in consequence thereof.

A witness for the defendant testified that he was engaged in unloading and counting stock that came into

the Kansas City stock yard; that he knew about the particular car of stock in controversy; that the car was received in the Kansas City stock yards at 5:25 o'clock in the afternoon, and that they were unloaded in about twenty minutes thereafter; that there was no waybill accompanying them; that the rule of the stock yard about feeding and watering the night on which the cattle are received is that if the shipper wants them watered and fed the stock yard company does this for him; that if he waters them himself, the stock yard company feeds them.

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

E. B. Kinsworthy, McCaleb & Reeder and *T. D. Crawford,* for appellant.

1. Notice of intention to claim damages is a prerequisite to recovery. It is a condition precedent to recovery of damages for loss or injury that notice be given to some general officer or station agent. 63 Ark. 331; 67 *Id.* 407; 82 *Id.* 353.

2. In the absence of a statute parties may stipulate for a period of limitation shorter than that fixed by statute. 25 Cyc. 1017; 101 Ark. 310; Acts 1907, p. 557; Am. Cas. 1913, E. p. 868; 82 Ark. 839; *Ib.* 469; 83 *Id.* 502. The only exception is, the time must not be unreasonable. 227 U. S. 657; cases, *supra.* Kirby's Dig., § 5083, does not apply.

C. W. Shepherd, pro se.

1. Due notice was given to an agent of the company. The only object of the notice is to afford the company a fair opportunity to investigate the claim. 63 Ark. 331; 70 *Id.* 401. There was a substantial compliance with the provision as to notice. 75 S. W. 782; 94 *Id.* 735.

2. The suit was brought within six months.

HART, J., (after stating the facts). In the case of *Cumbie* v. *St. Louis, I. M. & S. Ry. Co.,* 105 Ark. 406, the court held that a provision in a bill of lading of fruit that a written notice of intention to claim damages should be presented to the carrier within thirty-six hours after

notice to the consignee of arrival of the fruit at the place of delivery is not unreasonable, as it is the consignor's duty to have the consignee, or an agent, at the destination to ascertain the condition of the fruit. See also *St. Louis & S. F. Rd. Co.* v. *Pearce,* 82 Ark. 353. A stipulation in a contract for the shipment of live stock requiring notice of a claim for loss or injury within a specified time is for the protection of the carrier and may be waived by it. *Cumbie* v. *St. Louis, I. M. & S. Ry. Co., supra; St. Louis S. W. Ry. Co.* v. *Grayson,* 89 Ark. 154; *St. Louis, I. M. & S. Ry. Co.* v. *Jacobs,* 70 Ark. 401.

In the Cumbie case the court sustained a demurrer to the complaint. In that case the complaint alleged that the delivering carrier, through its agent, examined and knew of the condition of the peaches while in its possession after their arrival at their destination. The court held that where the facts stated show that the delivering carrier has actual knowledge of all the conditions that a written notice could give it, then the written notice is not required. It was, therefore, held that the court erred in sustaining a demurrer to the complaint.

In the Grayson case the claim was presented to a general officer of the railway company. He directed that the claim be presented to the chief clerk in the claim department, which was accordingly done, and negotiations looking to an adjustment of the damages were pending for some time thereafter. The court held that the railway company, by proceeding to investigate the claim, led the shipper to believe that the claim would be settled on its merits and that the jury, under such circumstances, was warranted in finding that the railway company waived the immediate notice stipulated in the contract.

In the Jacobs case, verbal notice was given to the proper agents of the railway company, upon which they acted, making all investigations they desired to make and without demanding any written notice. The court held that under these circumstances there was a waiver of the written notice.

In the present case, verbal notice was given by the shipper to a claim agent of the railway company at Kansas City, the place of destination. No notice of any kind was given to any general officer of the company at the place of destination, or to the station agent there. The claim agent was not such an agent to receive notice as was provided in the contract; and it is not shown that the claim agent had any authority to represent the railway company in the matter of receiving the notice contemplated by the contract. The claim agent, upon receiving the verbal notice, did not enter into negotiations with the shipper looking to an adjustment of his alleged loss. He did not accept the notice nor in any wise act upon it. He did not mislead the shipper in any way, but told him that he must give a written notice as required by the contract. Mere knowledge on the part of the claim agent of the railway company that the shipper claimed damages for injury to his cattle, unaccompanied by any act upon the part of the claim agent looking to an adjustment of the loss, is not sufficient to constitute a waiver of a stipulation requiring the claim to be made in writing within a prescribed time. There is nothing in the record tending to show any circumstances from which the jury might have inferred that the carrier waived the stipulation requiring written notice within the time specified in the contract. There is nothing in the record, as was in the Cumbie case, to show knowledge on the part of the company that the shipper had suffered loss. It was not shown that the claim agent was the proper person to receive the notice, and his knowledge could not be imputable to the railway company. The court therefore erred in not directing a verdict for the railway company. For this error the judgment must be reversed, and, inasmuch as the facts of the case seem to have been fully developed, the cause of action of the plaintiff will be here dismissed.

TOWNSLEY v. HARTSFIELD.

Opinion delivered June 1, 1914.

1. OFFICERS—TERMS—EXPIRATION.—Where deceased, a county officer, was elected to succeed himself, but died before the expiration of the first term, a vacancy is created in the first term by his death, but at the commencement of the second term no new vacancy arises, and the appointee for the balance of the first term holds over until the election and qualification of his successor. (Page 255.)
2. WORDS AND PHRASES—"OR OTHERWISE."—The words "or otherwise" in law, when used as a general phrase following an enumeration of particulars, are commonly interpreted in a restricted sense as referring to such other matters as are kindred to the classes mentioned. (Page 256.)
3. ROAD OVERSEER—TERM—APPOINTMENT.—Act 177, Acts 1905, relating to the appointment of road overseers, gives to the county judge the power to appoint where there was no election, or when the person elected road overseer, for any reason, failed to qualify. (Page 256.)

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

STATEMENT BY THE COURT.

At the general election in 1910, Frank Irvin was elected road overseer of Center Township in the Greenwood District of Sebastian County, Arkansas. The statute provides that his term of office shall be the same as that for township and county officers. See Act No. 177, Acts 1905, approved April 18, 1905. Irvin entered upon the discharge of his duties as such road overseer, and continued in said office until his death, some time in October, 1912. At the general election held in 1912, he was again elected to the office of road overseer. He died before his first term expired, and on the 29th day of October, 1912, the county judge of Sebastian County appointed Virgil Townsley to fill the vacancy caused by his death. In November, 1912, a new county judge having come into office, W. A. Hartsfield was appointed road overseer for said township; and the latter qualified and entered upon the discharge of the duties of said office. This is a proceeding by Virgil Townsley against W. A. Hartsfield to

try the title to said office. The decision of the lower court was in favor of Hartsfield, and Townsley has appealed.

Jesse A. Harp, for appellant.

1. The judgment of the circuit court is in conflict with the plain terms of the Constitution providing that, "All officers shall continue in office after the expiration of their official terms and until their successors are elected and qualified." Const., art. 19, § 5.

It is contrary to the policy of the Government which seeks to guard against vacancies in office. The "hold-over" policy has been repeatedly upheld by this and other courts. 82 Ark. 341. See, also, 103 U. S. 471; 1 Am. & Eng. Enc. of L. (1 ed.), 562; 37 Cal. 44; 9 Mich. 227; 113 Ind. 234.

A road overseer is a public officer, and the Legislature could not make his case an exception to the constitutional rule above stated. 84 Ark. 547; 81 Ark. 40.

2. The act relied on by appellee, No. 370, Acts 1911, contains nothing which, either by express terms or by implication would prohibit holding over pursuant to the Constitution, even if it had any such right. If the intention of the Legislature is not clear, such construction must be given the act as will preclude the probable occurrence of a vacancy.

Pryor & Miles, for appellee.

Frank Irvin, the overseer, having died after he was elected to succeed himself, but prior to the expiration of his first term, the only question involved is whether Townsley, under his appointment, should hold over beyond the unexpired term of Irvin, or was terminated by the expiration of that term, making appellee's appointment valid for the succeeding term.

Under Act 370, Acts 1911, p. 1025, Townsley's appointment was limited to the unexpired part of the term Irvin was serving when he died, *i. e.,* to "the time designated for all county and township officers to expire." 89 Ark. 34; 7 Am. & Eng. Ann. Cases 112; 23 Am. & Eng.

Enc. of L. (2 ed.), 418, and authorities cited in footnotes; 69 Miss. 740; 29 Cyc. 1396.

HART, J., (after stating the facts). It will be noted from the statement of facts that Irvin died while he was serving his first term, and before his new term had commenced. The general rule is that if the deceased was himself the incumbent of the office and was elected to succeed himself, a vacancy is created in the first term by his death; but, by the weight of authority, at the commencement of the second term, no new vacancy arises, and the appointee for the balance of the first term holds over until the election and qualification of his successor. *State* v. *Speidel,* 62 Ohio St. 156, 56 N. E. 871; *State* v. *Elliott,* 13 Utah 471, 45 Pac. 346. See, also, *People* v. *Lord,* 9 Mich. 227. That is to say, when one who is holding an office, and who has been elected to succeed himself, dies before entering upon the new term, a vacancy is thereby created in the term in which he was serving, but not in the new term for which he has been elected, and upon which he has not entered. Therefore, the one who is duly appointed and qualified to fill the vacancy thus created will hold the office for and during the unexpired term of the predecessor and until his successor has been elected or appointed and qualified in the manner provided by law.

It is not disputed by counsel for Hartsfield that Townsley's appointment was valid, but it is claimed that his term ended when Hartsfield was appointed in November, pursuant to the act of 1911, which provides for the filling of vacancies that may occur in the office of road overseer, and which, so far as relates to the question at issue in this appeal, is as follows:

"That when any vacancy in the office of road overseer shall occur from any cause whatever, or upon failure to elect by a tie vote or otherwise, the county court or judge thereof in vacation shall appoint an overseer for such district or fill such vacancy, as the case may be, whose term of service shall expire at the time designated for all county and township officers to expire. Such judge

shall make or cause to be made a true record of appointment."

The office of road overseer was created by statute, and it may be filled by election or by appointment, just as the statute may prescribe. It is manifest from the clause of the act just quoted that when Irvin died, the vacancy caused by his death should be filled by the county court. The section likewise provides that upon the failure to elect by a tie vote or otherwise, the county court, or judge thereof in vacation, shall appoint, etc. The words "or otherwise," in law, when used as a general phrase following an enumeration of particulars, are commonly interpreted in a restricted sense as referring to such other matters as are kindred to the classes before mentioned. Century Dictionary. The author says the phrase "or otherwise," when following an enumeration, should receive an *ejusdem generis* interpretation. Otherwise is also defined by Century Dictionary, the Standard Dictionary and by Webster, as meaning, "In a different manner; in any other way." We think the phrase "or otherwise" in the act under consideration was intended to be used in its broadest and most comprehensive sense. The phrase "or otherwise" is not used in the statute as a general phrase following an enumeration of particulars; but it follows the words "upon failure to elect by tie vote," and is placed in juxtaposition to these words. When the whole clause "upon failure to elect by tie vote or otherwise," is considered together with reference to the purpose and object of the act, it is evident that the Legislature intended to give the county judge the power to appoint where no one was elected or where the person elected failed for any reason to qualify when the time for entering upon the new term arrived. In short, we think the Legislature meant by the clause under consideration to give the county judge the power to appoint where there was no election or where the person elected for any reason failed to qualify. The county judge, pursuant to this section, exercised his power to appoint, and when he did so, the person appointed had a right to the office, and

having qualified and entered upon the discharge of the duties of the office of road overseer, he was the lawful incumbent of that office. It follows that the judgment of the lower court must be affirmed.

KNOWLES v. STATE.

Opinion delivered June 1, 1914.

1. CRIMINAL LAW—CONFESSION—CORROBORATION OF ACCOMPLICE.—A voluntary confession of a defendant made to one who is not an accomplice, is sufficient to corroborate the testimony of an accomplice. (Page 260.)
2. INCEST—SUFFICIENCY OF EVIDENCE.—Evidence of a voluntary confession of the commission of the crime of incest made by defendant to the officers who arrested him, is admissible to corroborate the testimony of the accomplice, so as to support a verdict of guilty. (Page 260.)
3. MARRIAGE—INDICTMENT—PROOF.—When an indictment charging incestuous adultery alleges that defendant was a married man when the crime was committed, evidence of a marriage certificate showing defendant's marriage several years before, coupled with testimony that the woman named in the certificate is defendant's wife, that she was at the trial and that defendant had lived with her for the past twenty years, is sufficient to establish that defendant was a married man when the crime charged was committed. (Page 260.)

Appeal from Benton Circuit Court; *J. S. Maples,* Judge; affirmed.

Walter Mathews, for appellant.

1. Pearl Knowles was an accomplice. 95 Ark. 233; 27 L. R. A. (N. S.) 872.

Proof of a confession of guilt made by the accused is not alone a sufficient corroboration of the testimony of the accomplice. Kirby's Digest § § 2384, 2385; 36 Ark. 117; 43 Ark. 367.

2. In a prosecution of this character, marriage of the accused in fact must be proved, and also the fact of his being married at the time the intercourse was alleged to have been committed. There is no competent proof in the record that *at the time* of the alleged offense, ap-

pellant was a married man. 36 Am. Dec. 742; Kirby's Dig., § § 5193-5195; 56 Pac. 534; 5 S. W. 651; Am. Ann. Cases, 1912-A, 284; 34 Ark. 511; 88 Ark. 135; 95 Ark. 555.

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

1. The objections to the instructions were *en masse,* and will not avail in this court. 109 Ark. 130. No exceptions were saved.

2. The girl's testimony is sufficiently corroborated, and the evidence is ample to show that the accused was a married man at the time the crime was committed.

HART, J. J. M. Knowles has appealed from a judgment of conviction for the crime of incest, charged to have been committed by committing adultery with Pearl Knowles, his daughter. The facts are as follows:

Pearl Knowles testified: I am eighteen years of age, and am the daughter of the defendant, J. M. Knowles. I have had sexual intercourse with him several times a month for the past three years in Benton County, Arkansas. As a result of that intercourse, I gave birth to a child. It died about two or three days after its birth, and my father buried it in the yard near the house. I submitted to all these acts of intercourse of my own accord.

Bob Campbell testified: I am chief of police of the city of Eureka Springs, in Carroll County, Arkansas. I arrested the defendant there, and he wanted to know if he was charged with murdering his child. I told him that he was charged with having sexual intercourse with his daughter. He said: "If I am not charged with murdering the child, I am not uneasy. I do not care for the charge of doing business with my daughter, for I am guilty of that."

Sid Murphy testified: I am constable in Benton County, Arkansas. I went to Eureka Springs after the defendant was arrested there and brought him back to Benton County. While on the way back he confessed to me that he had been having intercourse with his daughter, Pearl Knowles, for the past three years.

Campbell and Murphy each stated that the confession made to him was a voluntary one.

A marriage certificate was introduced to the effect that John M. Knowles and Miss Catherine Edmonson were united in marriage in the State of Kansas on the 25th day of August, 1895.

Margaret Jerminiger testified: I live in the State of Kansas, and have known the defendant for twenty years. He lived in Kansas until about three years ago. The Catherine Edmonson mentioned in the marriage certificate above referred to is my sister and the wife of the defendant. He has lived with her as his wife since their marriage, and she is now present in the court room. I have visited them frequently during their married life.

Jane Lovette testified: I attended Pearl Knowles when she gave birth to the child testified to in this case. The baby died two days after it was born.

Counsel for defendant contends that the court erred in refusing to give the following instruction:

"The court instructs the jury that you can not convict the defendant upon the confession made by him to witnesses Sid Murphy and Bob Campbell unless such confession is accompanied by other proof that the offense with which the defendant is charged was actually committed by him and the proof required to accompany such confession, in order to convict the defendant, can not be made by Pearl Knowles alone."

Section 2385, of Kirby's Digest, provides that the confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such offense was committed. See, also, *McLemore* v. *State,* 164 S. W. (Ark.) 119.

Section 2384, of Kirby's Digest, provides that a conviction can not be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.

The testimony shows that the prosecuting witness voluntarily committed sexual intercourse with her father, and this made her an accomplice. In most jurisdictions where the question has arisen, it has been held that the evidence of a person who was a voluntary party to an incest must be corroborated, because of statutes requiring the evidence of accomplices to be corroborated. See case note to 18 Am. & Eng. Ann. Cases, at page 975; see, also, *Gaston* v. *State,* 95 Ark. 233. It is argued that the confession of the defendant is not a sufficient corroboration of the testimony of the prosecuting witness to warrant the conviction of the defendant. To support his contention, counsel relies upon the case of *Melton* v. *State,* 43 Ark. 367; but we do not think that case is authority for the position assumed by counsel. In that case the alleged accomplice testified that the defendant confessed to him that he had committed the crime, and his testimony, together with that of another accomplice, was held not sufficient to warrant a conviction. Here the confession was not made by the defendant to an accomplice, but was voluntarily made to the officers who arrested him. The defendant's own free confession was sufficient proof to show his own connection with the crime. It has been expressly held that a confession of a defendant made to one who is not an accomplice, is sufficient to corroborate the testimony of an accomplice. *Patterson* v. *Commonwealth,* 86 Ky. 313; *People* v. *Cleveland,* 49 Cal. 578; *Partee* v. *State,* 67 Ga. 570. In the latter case it was urged that the court erred in charging the jury to the effect that the confession of the defendant was sufficient proof or corroboration to support the testimony of the accomplice and to authorize a legal conviction if it believed that he had voluntarily and freely made it. The court expressly held that voluntary confessions are sufficient to corroborate the testimony of an accomplice so as to support a verdict of guilty. We are of the opinion, therefore, that the court did not err in refusing to give instruction No. 4, asked by the defendant.

In the case of *Martin* v. *State,* 58 Ark. 3, the court held that an indictment of a father for incest committed by adultery with his daughter is defective if it fails to allege that the father was at the time a married man. The indictment in the instant case does allege that the father was a married man at the time he committed the incestuous adultery; but it is contended by counsel for defendant that there is not sufficient proof to show he was married. We do not agree with him in that contention. A marriage certificate was introduced in evidence showing that the defendant had married Catherine Edmonson in the State of Kansas on the 25th day of August, 1895. Margaret Jerminiger testified that the Catherine Edmonson mentioned in the marriage certificate was her sister and the wife of defendant; that she was alive at the time of the trial, and that the defendant had lived with her as his wife for the past twenty years. This was sufficient to establish the fact that the defendant was a married man at the time the crime was committed.

There is no error in the record, and the judgment will be affirmed.

LADD v. WATKINS & VINSON.

Opinion delivered June 1, 1914.

1. TRIAL—ATTENDANCE OF ATTORNEY—NECESSITY.—Where a party announces ready for trial, he is required to be present at all steps thereafter to be taken in his case until it is disposed of, and he will absent himself at his peril, and can not complain that a step in the trial was taken in his absence. (Page 264.)
2. TRIAL—CALLING OF CASES—ABSENCE OF COUNSEL.—Where defendant announced ready for trial, but absented himself from the court room immediately thereafter, when the court inquired if a jury would be required, he can not complain when the court dismissed the jury and the case was tried before the court. (Page 265.)

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

STATEMENT BY THE COURT.

This is an action by J. A. Watkins and Baldy Vinson, a firm of lawyers, against E. P. Ladd, to recover $250, alleged to be due for an attorney's fee. The suit was commenced in the justice court, where judgment was rendered for the defendant, and the plaintiffs appealed to the circuit court. This cause, with others, was set for trial in the circuit court on the 5th day of June, 1913. The regular docket set for this day was called, and the following cases were announced ready for trial; *E. J. Ingram* v. *C. T. Jackson; Tedford Auto Company* v. *M. L. Hodge; Arkansas Carpet & Furniture Co.* v. *Mrs. W. H. Arendt, et al.;* and *J. A. Watkins et al.* v. *E. P. Ladd.* The court began with the first of these cases and asked the parties if they desired a jury trial, which question was asked in all four of the above named causes. In the first three cases the parties announced that they desired to waive a jury and agreed that the cases might be submitted to the court sitting without a jury. When the question was asked the parties in the fourth case, viz., *J. A. Watkins et al.* v. *E. P. Ladd,* the court received no response from the defendant. Baldy Vinson, one of the plaintiffs, stated that they did not desire a jury. The court thereupon dismissed the jury and proceeded with the trial of the cases in the order in which they appeared on the docket and announced ready for trial. Lewis Rhoton, the attorney for the defendant, after all the cases had been announced ready for trial, assuming that the case of *J. A. Watkins et al.* v. *E. P. Ladd* would not come to trial until after the cases which had been announced ready for trial in advance of it had been disposed of, went into another part of the courthouse on professional business, and was not present when the court made inquiry as to whether or not the parties in the cases which had been announced ready for trial desired a jury. After he had been absent from the court room about twenty minutes, he returned to the court room and remained there until the trial of the cases in advance of his case had been concluded. When the present case was called for trial, he requested a jury

to try the case, and was then informed of what had transpired in his absence in regard to the waiver of a jury. The court held that a right to trial by jury had been waived, and proceeded to try the case; and the defendant saved his exceptions.

According to the testimony of the plaintiffs, a relative of the defendant, Ladd, was indicted for the crime of murder in the second degree, and Ladd employed the plaintiffs to defend him. The amount of the fee was not agreed upon, but it was agreed that Ladd should pay them a reasonable fee for their services. The plaintiffs defended Bowen and charged Ladd therefor the sum of $250, which was proved to be a reasonable fee. Other evidence was introduced by the plaintiffs tending to corroborate their testimony.

On the other hand the defendant, Ladd, testified that he did not employ them to represent Bowen; that he was present at the trial, but this was because he was interested in his kinsman, and that he was in no way interested in the employment of the plaintiffs, and was not responsible for their fee.

The circuit court rendered judgment for the plaintiffs for the amount sued for, and the defendant has appealed.

Bradshaw, Rhoton & Helm, for appellant.

1. If there is any conflict between the record roll and the bill of exceptions, the record will prevail. The record entry shows that "both parties announce ready for trial; and the defendant requests a trial by a jury, which is by the court overruled," etc. This record is not in accord with any contention that appellant waived a jury, and it must prevail. 108 Ark. 191.

2. When the court assumed to try the case sitting as a jury, appellant objected, and again demanded a jury, which was refused, contrary to appellant's constitutional and statutory right to trial by jury. Moreover, there was a direct conflict in the testimony introduced on the merits, which made a question for a jury. Const., art. 2, § 7; Kirby's Dig., § 6170; 100 Ark. 62. We think this case is

ruled by the decision in *Stark* v. *Couch,* 160 S. W. (Ark.) 853, and authorities there cited.

Mehaffy, Reid & Mehaffy, for appellees.

The question is not whether appellant was entitled to a trial by a jury, but whether that right was waived by appellant's conduct or otherwise. It is a right which must be promptly asserted. Under the circumstances set forth in the record, the court had the right to assume that appellant would not desire a jury, and was acting within its sound discretion in dismissing the panel. 30 Pac. 481; 43 S. W. 1027; 102 Pac. 103.

HART, J., (after stating the facts). The defendant was entitled to a trial by jury unless he waived it. *Starks* v. *Couch,* 109 Ark. 534, 160 S. W. 853. Section 6212 of Kirby's Digest reads as follows: "The trial by jury may be waived by the parties in actions arising on contract, and, with the assent of the court, in other actions in the following manner:

"*First.* By failing to appear at the trial.

"*Second.* By written consent in person, or by attorney, filed with the clerk.

"*Third.* By oral consent in open court, entered on the record."

It will be noted that the present case originated in the justice court and was appealed to the circuit court by plaintiffs. The case was there docketed and set for trial along with three other cases on the 5th day of June, 1913. On that day the parties in all these cases announced ready for trial. The calendar was then called by the court to ascertain what cases were to be tried by the court and what cases by jury. During this proceeding the attorney for defendant absented himself from the court room; but he did so at his peril. It is true the calling of the docket to ascertain in what cases a jury would be waived is a preliminary step, but it is none the less a necessary one. In this way the court is better able to control the attendance of juries during the term, to lessen the expenses of the court, and to facilitate the transaction of business. Therefore, it was a part of the

trial within the meaning of the statute, and the defendant having announced ready for trial, was required to be present at all steps thereafter to be taken in this case until it was disposed of. He absented himself at his peril, and can not complain that a step in the trial was taken in his absence. The issue, as presented upon appeal, stands as if the defendant's counsel was present when the court called the calendar to ascertain what cases should be put upon the jury waived list, and that he did not speak when called upon to do so. Under these circumstances, he will be deemed to have waived a trial by jury.

Again, it is contended by counsel for defendant that when he returned to the court room there were some of the jury present in the court room, although they had been excused from further service during the day. The record does not show definitely how many jurors were present, but, according to the contention of defendant's counsel himself, there were not more than four or five present. If all the members of the jury had been present it might be said that the court abused its discretion in not then allowing the defendant to demand a trial by jury; but the plaintiffs were entitled to a trial by a jury of twelve, and inasmuch as this right could not be given them because the attendance of the absent jurymen could not be secured without delay and expense, the court did not abuse its discretion in refusing to have them summoned again.

We are of the opinion that under the facts as shown by the bill of exceptions the defendant waived his right to a trial by jury; and the judgment will be affirmed.

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

Opinion delivered June 1, 1914.

1. RAILROADS—NEGLIGENCE—SUFFICIENCY OF COMPLAINT.—Where plaintiff shipped watermelons by defendant carrier and traveled in the car with the same, and received an injury due to the alleged negligence of defendant, his complaint in an action against the rail-

road, will be held to state a cause of action when it alleges that plaintiff was a passenger on defendant's train. (Page 277.)

2. CONFLICT OF LAWS—NEGLIGENCE—LIABILITY—DAMAGES.—Plaintiff was injured by an accident on a railroad in Missouri, but brought suit in Arkansas. *Held*, the injury having occurred in Missouri, the laws of that State govern as to the liability, if any; but the remedy to recover damages on account of the injury must be pursued according to the laws of Arkansas, where the suit is brought. (Page 278.)

3. PLEADING—AMENDMENT TO CONFORM TO PROOF.—When a suit is brought in Arkansas on a cause of action arising in Missouri, the *lex fori* controls with respect to the pleadings and procedure, and under the law of Arkansas a complaint will be treated as amended to conform to the proof, although it could not be so treated in Missouri. (Page 278.)

4. CARRIERS—PASSENGERS—QUESTION FOR JURY.—When plaintiff shipped melons by defendant carrier, and traveled in the freight car with the same, it is a question for the jury, under the evidence as to whether plaintiff was a passenger. (Page 278.)

5. CUSTOMS AND USAGES—RAILROADS—SUFFICIENCY OF EVIDENCE.—Evidence held sufficient to warrant a jury in finding that it was the custom of a carrier to permit shippers of watermelons to ride in the box car with the same. (Page 279.)

6. CARRIERS—PASSENGER—PAYMENT OF FARE—DUTY.—Where plaintiff was permitted by a carrier to ride in a box car with a shipment of watermelons, which he was shipping, he will be treated as a passenger, although he had not paid any fare, and none was required of him by the carrier, and the carrier will owe him the highest degree of care consistent with the practical operation of the train which plaintiff accepts as the means and mode of transportation. (Page 281.)

7. CARRIERS—PASSENGER—NONPAYMENT OF FARE—DUTY OF CARE.—When a carrier permits a shipper of goods to ride in the box car with the goods, without the payment of any fare, the carrier will be held to owe him, in the absence of a contract on his part to the contrary, the same duty of care that it owes to one who is strictly a passenger, nor is the carrier relieved of his duty because plaintiff was being transported on an interstate trip in violation of the regulations of the Interstate Commerce Commission. (Page 282.)

8. CONFLICT OF LAWS—BURDEN OF PROOF—LAW OF THE FORUM.—On the question of the burden of proof the *lex fori* governs. (Page 284.)

9. CONFLICT OF LAWS—BURDEN OF PROOF—LAW OF THE FORUM.—Rules of evidence relate to the remedy, and are governed by the law of the *situs* of the remedy. (Page 284.)

10. RAILROADS—INJURY TO PASSENGER—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—In an action for damages for personal injuries caused by the negligent operation of a train, the evidence held sufficient to warrant the jury in finding that the plaintiff was injured by a collision caused by the negligence of the defendant railroad. (Page 286.)

11. CARRIERS—FREIGHT TRAINS—PASSENGERS—DUTY OF CARE.—A carrier owes the same duty of care to passengers on freight trains that it owes to passengers on regular passenger trains. (Page 286.)

12. EVIDENCE—ANSWER TO HYPOTHETICAL QUESTION—OPINION OF WITNESS.—In an action for damages against a railroad company for personal injuries, the answer of a physician to a hypothetical question, is not improper, where the physician undertook to state that in his opinion plaintiff's present condition could be attributed to such an injury as he claimed to have received, and where it did not appear that the witness was stating that the alleged act of negligence was responsible for plaintiff's condition. (Page 287.)

13. APPEAL AND ERROR—JUDGMENTS—RECEIVERSHIP—REFUSAL OF COURT TO MAKE RECEIVER PARTY.—Plaintiff was injured by the alleged negligence of defendant railroad company, and while an action was pending to recover damages caused by the injury, receivers were appointed by the Federal court for said railroad company, *held*, where the defendant suggested the receivership in the trial court and prayed that the prosecution of the suit should be stopped until permission was obtained to have the receivers made parties, and until the same was done, it was not error to overrule the motion and proceed to final judgment. (Page 288.)

14. JUDGMENTS—RECEIVERSHIP—EFFECT.—A judgment against a railroad, in the hands of a receiver, obtained without consent of the court appointing the receiver, and without the receivers being parties, is a lien upon the railroad company's property, but the lien and the right of its enforcement is subject to the receivership, and no action can be lawfully taken in its enforcement, which in any way interferes with the said receivership. (Page 288.)

15. DAMAGES—PERMANENT INJURY—AMOUNT.—A verdict of eighteen thousand dollars damages will not be held excessive, when plaintiff, a man of fifty-four, was injured by the negligence of defendant railway company, in such a way that he wholly lost his earning capacity and was rendered a helpless cripple. (Page 289.)

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

STATEMENT BY THE COURT.

Appellee was the plaintiff below, and alleged in his complaint that he was a citizen and resident of the State of Missouri, and that on the 17th day of August, 1912, he became a passenger upon one of defendant's freight trains for the purpose of being transported from Gibson, Missouri, to Mount Vernon, in the State of Illinois, and that on said day, and while the car in which he was a passenger was being switched from one track to another in the yards of the defendant at Chaffee, Missouri, the same was carelessly, negligently, and recklessly kicked and thrown against other cars standing upon the track, causing the plaintiff to be thrown down in the car in which he was riding, and the contents of the car, consisting of a lot of watermelons and the planks which held the melons in place, were thrown against him, mashing him against the car and injuring him very severely. He alleged that his injuries were occasioned by the negligence of the defendant railroad in this—that the agents and servants of the defendant who were engaged in switching the car in which the plaintiff was riding from one track to another, at Chaffee, Missouri, carelessly, negligently and recklessly, and without any notice to the plaintiff, kicked said car down the track and into other cars standing thereon, with great force and violence, breaking loose the fastenings which held and protected said melons, and crushing him, as aforesaid. As a result of this negligence, he alleged that he had sustained the following injuries: That his body was scraped and bruised; his arms were bruised; he was internally injured by being mashed; his right leg was paralyzed; his left hip injured, and his spine injured; and his nervous system shattered; from which injuries, together with the shock to his nervous system, he has been made sick, lame, nervous and disabled, and has continued to be in that condition from the date of his injury up to the present time, so that he is now a hopeless cripple and will remain so during the remainder of his life. He alleged that continuously since the time of his injury he has suffered

great and excruciating pain of body and anguish of mind, and will so continue to suffer throughout the remainder of his life, as a result of said injuries, and that he has wholly lost his capacity to perform manual labor and earn money, and that he has expended the sum of three hundred dollars for medicine and medical attention. Plaintiff prayed damages in the sum of forty thousand dollars.

The defendant company filed a suggestion in writing, stating that on the 27th day of May, 1913, in a cause pending in the District Court of the United States for the Eastern Division of the Eastern District of the State of Missouri, wherein the North American Company, a corporation, was plaintiff, and the St. Louis & San Francisco Railway Company, a corporation, was defendant, an order was made placing the defendant railroad in the hands of receivers, and this suggestion alleged that the defendant railroad was engaged in interstate commerce and operated a line of railroad through Missouri, Arkansas and Texas, and that said receivers were in charge of all of its property and were operating the same, and that on the 2d day of July, 1913, said receivers filed a copy of the bill of complaint, and the order of the court under which they were appointed and caused the same to be entered of record in the United States Court, Western District of Arkansas, Fort Smith Division, and stated that the receivers were operating within the said Western District of Arkansas by the approval of said court. It was alleged in this suggestion that the plaintiffs in the present case had not obtained leave of the United States Court in either of said districts to sue the receivers, and defendant moved the court to require the plaintiff to obtain leave of the court to prosecute this action and to require said plaintiff to make the receivers parties thereto. This motion was overruled, and defendant saved its exceptions.

The defendant filed an answer, in which it set up its suggestion of the receivership, and the court's refusal to order the receivers to be made parties. The answer contained a general denial of all the material allegations of

the complaint, and specifically denied that the plaintiff was a passenger at the time of his alleged injury, and it was denied that he had been injured.

The evidence upon the part of the plaintiff was to the effect that he lived near Gibson, Missouri, and on the 17th of August, 1912, shipped two carloads of watermelons from that place to Mount Vernon, in the State of Illinois; that one of these cars of melons was sealed, but he took passage in the other car with the intention of peddling melons at all of the stations along the line of the railroad to his destination. He had a man prepare, under his directions, a partition in the unsealed car to hold the melons in each end of the car, leaving a passageway between for his occupancy and in which to sell his melons. He had three planks nailed up on each side, and the space reserved between was the width of the doors, and this space was all open. He took with him a washpan, a glass, towel, bucket, lantern and a chair, with the expectation of occupying this car until he arrived at his destination. He took passage at Gibson in the afternoon, and arrived at Chaffee, Missouri, the following morning, after having spent the night in the car. There were a number of other shippers of melons in this train, and it appears that they, too, traveled in, and occupied during the night, the cars in which they were shipping their melons.

The proof is conflicting in regard to the custom of melon shippers thus to use and occupy the cars containing their melons. Appellee testified that this was the second shipment of melons that he had made, and that on his first shipment he had not been permitted to ride in the car containing his melons, because he had not obtained a peddler's license at the time the bill of lading for the car was issued, but that other shippers having cars of melons in that train were permitted to ride in their cars, and he was told at the time that that privilege would thereafter be accorded him if he asked and secured a peddler's license from the company, when he secured his bill of lading. Appellee testified that when he made this

second shipment the station agent at Gibson handed him his bill of lading with the remark, "This is your peddler's license. If you had had that before, you would not have had any trouble." What was called the "peddler's license" consisted of an endorsement written by the agent upon the face of the bill of lading in the following language: "Peddler's privilege of going in local, man in charge." Appellee testified that he paid $42.50 for transporting this one car of melons, but he did not understand that his peddler's privilege had cost him anything extra. He further testified that he occupied his car openly, without any attempt to conceal his presence there, and the use he was making of the car, and he says that all other shippers in that train did the same, and that he assumed that his right to thus use and occupy his car was unquestioned, and was known to all of the train crew, and that neither the conductor, nor any one else, demanded any fare of him, or intimated that there was any impropriety or breach of the company's rules in traveling in his car. He further testified that the train which brought him to Chaffee, Missouri, was broken up there, and that the cars of melons were shipped to different points. He states that before this was done he and certain other shippers left their cars to secure breakfast, and that he hurried to return to his car, to be "on duty," as he expressed it, for the purpose of selling his melons and being in his car when the railroad company was ready to ship it out. He stated that after returning to his car he was sitting in the door, with one foot over a plank which he had nailed across the door,, and that he was on the left-hand side of the car, at the time the engine fastened to his car, and that as the car moved forward he was riding backward; and he stated that he looked out of his car and saw the engineer looking him in the face and that he was only half the length of the car from him; that the engine started and ran rapidly (the proof on the part of the plaintiff being that the rate of speed was about fifteen miles an hour at the time it collided with the other cars), and that he thought they

were about to transfer his car around to the right track to attach it to the train of which it was to become a part. He describes the collision as follows:

"He started running fast, and I sat there and looked at him until I seen my two cars—saw him shove me on and stop. When he did that I turned my head and looked back to see where I was going, and just as I turned my head the two cars hit a string of cars up there, then there were a few minutes I did not know anything; do not know whether it was two minutes, three minutes or four minutes. The engine was gone; nobody else in sight of me that I could see. When the jar came, it throwed all the melons away from the end, and there was a four-foot space there where there was not a melon. They were piled in the car in this space around me, and the two top planks that was nailed good and solid both come off. The bottom one that was put in behind these notches on the door pulled loose and caught that leg in that shape (indicating) and threw it under the chair (indicating). The chair was sitting against this back partition. When I came to I could not do anything. My knee was holding all the weight; could not get up; made an attempt and could not move. Hip was pressed back here against the chair, and the chair against the partition. I went to throwing busted melons out as fast as I could. About the time I got the plank loose the boys came down and they went to work and throwed out the rest of the melons—a lot of them. Saw a brakeman make two or three steps to catch the car, but he stopped and let it hit; he could not catch it."

Other shippers of melons in the train containing appellee's car testified that they were occupying their cars as appellee did his, and that they not only traveled in their cars betwen the stations but occupied them at night. It was evidently appellee's intention to peddle out one of his cars of melons *en route* to Mount Vernon, and to have the other car of melons for sale there.

Appellee claims to have been very seriously injured, and to have suffered great pain and anguish as a result

of his injury, and that his pain was so incessant and excruciating that he was unable to sleep at nights, and that his rest was always broken, and that he had wholly lost his capacity to perform labor and earn money. He was corroborated as to the extent of his injuries and the severity of his sufferings by Dr. Carl R. Bentley, of the city of Little Rock, and by a Dr. W. L. Parchman, a practicing physician residing at Van Buren, Arkansas. Doctor Bentley testified that he first examined appellee about six months after the injury, in January, and that he examined him again in June, and had examined him again the day before the trial of the case, and that his condition was much worse at the time of the trial than it was when he made the first examination of him in January; that appellee had an organic, or permanent, nerve injury, as indicated by the absence of the reflexes and the constant movement of the limb, testifying that if the limb was affected from some diseased condition of the nerve other than an accident there would not be the movement that obtains. This doctor further testified that appellee was permanently injured, and that he did not believe he would ever get better, but, upon the contrary, would continue to grow worse; that the injury was in the sacrum, involving the sciatic nerve and other nerves that supply the lower extremities. Appellee claimed that there was a loss of sensation in certain portions of his leg, and permitted pins to be stuck in that part of his leg without flinching, and claimed that he experienced no pain when this was done.

The evidence upon the part of the appellant was that there was no rule of the company which permitted shippers of melons to ride in any car, except in the caboose, which was provided for that purpose, and that, although the shippers in the train carrying appellee's melons did, in fact, travel in their cars, that there was no custom to that effect, and that if such practice had been previously indulged in, this had been done without the knowledge or consent of the conductors in charge of the trains. The station agent at Gibson denied that he had told appellant

he could ride in his melon car, but stated that he told him, if he desired to do so, he would have to obtain the permission of the conductor. Appellant denied that there had been any collision, and offered the evidence of one of the melon shippers, who stated that he was on the train with appellee and was on the track right by the side of his car, and about three lengths behind him, and that he did not hear any collision and was satisfied none had occurred. A physician who resided at Chaffee testified that he was the local surgeon for the appellant company at that place, and that he was called to examine appellee shortly after the collision, when he claimed to have been injured. He testified that he found no serious trouble and administered some simple treatment, and that he never made any report of this injury, and his treatment, because he regarded it as of no importance and the injury sustained as too trifling to require a report. Other physicians testified that they had examined appellee and that, in their judgment, he was malingering, and that there was no necessary connection between the troubles of which he complained and the injury which he said he had received.

W. F. Evans and *B. R. Davidson,* for appellant.

1. The petition fails to state a cause of action. 240 Mo. 48, and cases cited; 231 Mo. 605-614; 225 Mo. 478; 223 Mo. 649; 217 Mo. 83; 193 Mo. 194; 169 Mo. 388; 163 Mo. 372-375; 154 Mo. 204; 52 Mo. 333; 97 N. Y. 370.

Under the Missouri practice, even though the petition was not demurred to, yet it may be attacked at any stage of the proceedings, even in the appellate court. 193 Mo. 547; 164 Mo. App. 565.

2. Under the circumstances set out in the record, appellee was not a passenger, and appellant owed him no other duty than to refrain from wilfully or wantonly injuring him. 219 Mo. 553; *Id.* 65; 197 Mo. 119; 176 Mo. 598; 169 Mo. 592; 167 Mo. 206; 159 Mo. 143; 157 Mo. 477; 128 Mo. 64; 126 Mo. 565; 143 Mo. App. 393; 149 *Id.* 648; 166 *Id.* 639; 40 Ark. 298; 49 Ark. 360, 5 S. W. 568; 76

Ark. 106, 88 S. W. 836; 97 Ark. 137, 133 S. W. 841; 42 S. W. 855; 93 S. W. 104; 114 Fed. 123; 48 N. E. 294.

3. Instruction 1 is flagrantly wrong, contrary to the elementary principles of law. If appellee was not technically a passenger, he was no passenger at all.

There is nothing in the record proving or tending to prove that the crew in charge did not discharge their duties on this occasion in the usual and ordinary way and without any negligence. The doctrine *res ipsa loquitur* was not applicable. 195 Mo. 104; 165 Mo. 612; 148 Mo. 139; 130 Mo. 136; 53 Mo. App. 466; 94 *Id.* 289; 98 *Id.* 494; 101 *Id.* 54; 113 *Id.* 636; 147 *Id.* 332; 144 Ill. 261, 33 N. E. 204; 172 Mass. 73, 51 N. E. 450.

The instruction is based upon *general* negligence, whereas, appellee pleads and relies upon *specific* negligence, and must recover, if at all, under his specific charge. 202 Mo. 576; 143 Mo. App. 176, and cases cited.

4. Where a plaintiff's own evidence discloses that he was guilty of contributory negligence, an instruction is erroneous which places the burden upon the defendant to prove such contributory negligence. 207 Mo. 408; 204 Mo. 638; 203 Mo. 406; 197 Mo. 217, 218; 196 Mo. 571, 572; 192 Mo. 142; 191 Mo. 232; 141 Mo. 439, 440; 126 Mo. 670, 671; 112 Mo. 434, 435; 108 Mo. 487; 67 Atl. 635, 636; 79 N. E. 503.

5. In permitting the witness Doctor Bentley to give his opinion as to whether the negligent acts complained of produced the alleged injuries appellee claimed to have sustained in the act, the court permitted the witness to invade the province of the jury, as it was their duty to determine whether the original negligence had anything to do with appellee's condition at the time of the trial. 249 Mo. 195; 240 Mo. 338, 339; 208 Mo. 202; 191 Mo. 347, 348; 285 Mo. 239, 240.

T. M. Seawell and *Davis & Pace,* for appellee.

1. The *lex fori* governs as to the pleadings and procedure, and if the complaint was defective in stating a conclusion, it will be regarded as amended to conform to the proof, and is sufficient after judgment. 81 Ark. 373,

and cases cited; 134 Mo. App. 282-289; Minor on Conflict of Laws, § § 207, 208; 106 U. S. 124; 91 U. S. 406, 31 Cyc. 45; 32 Am. & Eng. Enc. of L. 1383; 22 Ark. 356; 49 Ark. 287; 64 Ark. 29.

2. Appellee was a passenger upon the freight train, and appellant owed him the duty as such at the time of the collision. He was entitled to protection as a passenger, even though he paid no fare and was being transported free of charge. Moore on Carriers, 570; 5 Am. & Eng. Enc. of L., 507, 508; 6 Cyc. 544; 103 Ark. 332; 58 N. Y. 126; 52 N. J. L. 169; 68 Mo. 340; 30 Minn. 126; 2 White on Pers. Injuries, 829; 227 U. S. 601.

The question whether appellee was a passenger was submitted to the jury, and its finding, being supported by the evidence, is binding upon this court. 105 Ark. 320.

A passenger upon a freight train, according to the authorities relied on by appellant, assumes the ordinary risks created by that mode of conveyance, such as the ordinary and usual jars and jerks of the train. If they are the ordinary and usual kind, there is no presumption of negligence, but if unusual and extraordinary, the doctrine *res ipsa loquitur* obtains, and a collision or derailment is *prima facie* evidence of negligence. 89 Ark. 82; 76 Ark. 520; 83 Ark. 22; 90 Ark. 494; 95 Ark. 220; 94 Ark. 75; 113 Mo. App. 636; 53 *Id.* 462-465; 84 *Id.* 498. Being purely a collision, due to the car being shunted or thrown too far, and to a point where other cars were standing, negligence will be presumed, even though the engineer was not aware of the presence of appellee in the car. 34 Ark. 613; 90 Ark. 485; 95 Ark. 310; 58 Ark. 454; 56 Ark. 594; 195 Mo. 104; 149 *Id.* 648-652; 84 *Id.* 498; 9 *Id.* 478; 122 *Id.* 405; 132 *Id.* 143; 153 *Id.* 462-465; 147 Mo. App. 345.

3. Instruction 1 correctly declares the law as applicable to the facts in this case.

Appellant's objection that the instruction is erroneous because, based upon general negligence, is not well taken. The *lex fori* governs as to procedure, and the Missouri doctrine that a charge of specific negligence can

not be established by proof of general negligence, does not prevail in this State. But even under the Missouri doctrine the instruction is good, because the case was tried upon the amended complaint, which charged general negligence, and a collision is *prima facie* evidence of that fact. 222 Mo. 104; 219 Mo. 470; 140 Mo. App. 421; 153 *Id.* 35; 143 *Id.* 643.

4. Doctor Bentley was only requested to give his opinion as to the cause of appellee's present condition. It was not necessary for him to state that the present condition of appellee was the result of the particular injury. The question as propounded was correct, and though the answer might have been improper, it was incumbent upon appellant to move that the answer be excluded, before it could urge the alleged error here. If the hypothetical question was improper upon the ground urged by appellant, it was harmless, because the same character of evidence had been, and was subsequently, admitted without objection. 96 Ark. 52; 87 Ark. 396; 103 Ark. 183; 96 Ark. 7; *Id.* 52; 86 Ark. 23; 82 Ark. 447; 83 Ark. 331.

SMITH, J., (after stating the facts). Appellant says the petition fails to state a cause of action in that it alleges merely that appellant was a passenger upon one of the trains of appellant company, and that the remainder of his complaint shows that appellant was riding in a box car with some watermelons, which he was shipping in a freight train, and that the complaint fails to allege the payment of fare; or the possession of a pass; or any authority to ride upon the train, and that there was nothing in the complaint to show why in any event he did not ride in the caboose where passengers were carried and were expected to ride. And being in a freight car under such circumstances, no presumption obtains in his favor and the complaint should affirmatively show either an express or implied contract which authorized him to ride in said car as a passenger at the time and place of the accident. Appellant states the law of Missouri to be that pleadings are not considered amended to correspond with the proof,

and that although the complaint was not demurred to, yet, if it fails to state a cause of action, it may be attacked on that account at any stage of the proceedings, even in the appellate court. Appellee concedes that such is the law of Missouri; but it does not follow on that account that the judgment must be reversed because of the insufficiency of the complaint. The complaint does not fail to state a cause of action, nor does it even state one defectively, as it states unequivocally that appellee was a passenger at the time of his injury, and that he was injured by the negligent operation of appellant's train of cars. A motion to make the complaint more definite would not have been an improper motion, and, had such motion been made, the court should have required appellant to allege how the relation of passenger and carrier was created, and he should have been required to state in his complaint his authority for being in the car at the time of his injury. But no such motion was made, and proof was offered without objection, showing the circumstances under which appellee entered the car and the facts upon which he based his claim of being a passenger, and his right to be protected as such.

The injury having occurred in the State of Missouri, the laws of that State govern as to the liability, if any; but the remedy to recover damages on account of this injury must be pursued according to the laws of this State, where the suit was brought. *Pritchard* v. *Norton,* 106 U. S. 124; *Public Parks Amusement Co.* v. *Embree-McLean Carriage Co.,* 64 Ark. 29. As the *lex fori* controls with respect to the pleadings and procedure, the complaint will be treated as amended to conform to the proof.

Appellant strenuously urges that appellee was not a passenger at the time of his injury, and it insists that this is true because he had paid no fare, and expected to pay none, and had no pass, and had not been authorized by the conductor, or any other person with authority, to ride in the melon car, and that if appellant had any right to ride upon the train as a passenger without the payment of fare, he should have ridden in the caboose at-

tached to the train and provided for that purpose. And appellant urges that no one with authority could authorize or did authorize the appellee to ride in his melon car, and that there was no custom to that effect.

But these were questions of fact for the jury. Appellee insists that he had paid fare, and that his fare was included in the freight charged him upon the issuance of the bill of lading, and that the appellant company knew the purpose of the shipment of these melons, and to this end endorsed upon his bill of lading the writing, which was in effect a license to appellee to ride in his car and to peddle his melons during the various stops of the train. We think there was sufficient proof to support the finding upon the part of the jury that a custom to this effect existed upon the lines of appellant's railroad. Appellee had two cars of melons in the train, and there were about six other shippers having cars of melons in this train, and all of them were permitted to occupy their cars as appellant did, and no questions were raised or objections made on that account. There was proof of previous similar shipments, although this was only the second shipment made by appellee, and in his first shipment he was not permitted to ride in the car with his melons; but as has been stated, appellee said that this permission was refused to him because he had not procured from the station agent at the point of shipment, a license or a permission to enter his car and peddle his melons; but that other shippers in that train who had procured this permission were accorded that privilege.

Objections were made and exceptions saved to each of the instructions given on motion of appellee. Among other instructions given was the following, numbered 1:

"1. In this case, if you find by a preponderance of the evidence that plaintiff J. L. Coy was really, though not technically, a passenger upon the train of the defendant, and, while such passenger, was injured without fault on his part, and when he had not assumed the risk, by reason of the car in which he was riding, colliding with other cars upon defendant's track, this is *prima facie*

proof of negligence on the part of the defendant, and would justify a recovery upon the part of the plaintiff, unless the defendant shows by a preponderance of the evidence that said injury occurred without negligence on its part."

Appellant says this instruction is erroneous because the evidence does not raise any question for submission to the jury, as to appellee's being a passenger, and for the reason further that it permitted the jury to find that appellee was really, but not technically, a passenger, whereas, it says, if he was not technically a passenger, he was not a passenger at all. And it states further, that as this was an interstate shipment, appellant was not a passenger because the freight rates which had been approved by the Interstate Commerce Commission, did not provide for the carriage of appellee with his melons, and that he violated the law authorizing the fixing of such rates, and that being thus unlawfully upon the train, he can not claim that he was a passenger.

But it has been held in many cases that one may be a passenger though he has not paid any fare as such, and though he does not ride in any car or coach specially provided for the use of passengers. In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Loyd,* 105 Ark. 340, it was said: "Appellee adduced testimony tending to show that where a person shipped a car containing live stock over appellant's road, it was the custom of appellant to permit a caretaker in charge of the live stock to ride free, and this much is conceded by appellant. Therefore, appellee was a passenger, notwithstanding he rode free. *Little Rock & Fort Smith Ry. Co.* v. *Miles,* 40 Ark. 298." And it is also settled that one not technically a passenger may yet be a passenger in fact. In the case of *St. Louis & S. F. Rd. Co.* v. *Kitchen,* 98 Ark. 507, the facts were that Kitchen was a tie inspector for the Chicago, Rock Island & Pacific Railway Company, and was riding on one of defendant's trains in the State of Oklahoma, which was engaged in loading on its cars for transportation, railroad ties, along the line of its road, which were the

property of the Rock Island road. As the ties were loaded for transportation, Kitchen inspected and counted them for his employers. He was allowed to ride on the train as it traveled from place to place for the purpose of picking up the ties; but he paid no fare. This particular train did not carry passengers, but was engaged exclusively in hauling the railway ties. There was a box car in the train called the office car, which was fitted up with desks, etc., for the use of men in their work in connection with the shipment of the ties; also with beds, where men, including Kitchen, slept. There was also a caboose attached to the train. In that case it was insisted that Kitchen was not a passenger and that defendant owed him no duty except the negative one not to wantonly injure him, and it was there said: "In support of this contention they stress the fact that Kitchen did not pay any fare, and was not asked to pay fare, and that, in order to constitute himself a passenger, he must have tendered himself as such to be carried upon a train dedicated to the carriage of passengers, and must have been accepted by one who was authorized to receive passengers. We do not think this contention is a sound one. According to the undisputed evidence, Kitchen was permitted to ride on the train for the purpose of performing service for his employer, the Chicago, Rock Island & Pacific Railway Company, for whom defendant company was then engaged in transporting railroad ties. He represented his employer, the shipper, and must be treated in the same light as if he, himself, was the shipper, and, as a part of the contract of carriage, was permitted to ride for the purpose of shipping his commodity. His relations with the defendant as a carrier were much the same as that of a shipper of cattle, riding on a drover's pass, or as that of an express messenger or railway mail agent who is being transported by the carrier under contract with its employer. Under such circumstances, this court, and all other courts which have passed upon the question, so far as we are advised, have held that, while such a person is not, technically, a passenger, the carrier owed him the

same duty as if he were a passenger, that is to say, the highest degree of care consistent with the practical operation of the train which he accepts as the means and mode of transportation. *Little Rock & Fort Smith Ry. Co.* v. *Miles,* 40 Ark. 298; *Fordyce* v. *Jackson,* 56 Ark. 594; *Voight* v. *B. & O. S. W. Ry. Co.,* 79 Fed. 561."

In 2 Hutchinson on Carriers, § 1018, it is said: "It seems that if the person who is injured by the negligence of the employees of the carrier is lawfully upon its conveyance, even though he is not strictly a passenger, he will be entitled, in the absence of a contract on his part to the contrary, to the same care and diligence for his safety as one who is strictly a passenger."

Nor does the fact, if it is a fact, that appellee was being transported in the car of melons in violation of the Interstate Commerce Commission's regulations, defeat his right to a recovery, nor is the carrier excused on that account from exercising the proper degree of care to appellee under the circumstances. In the case of *Southern Pacific Company* v. *Mary R. Schuyler,* 227 U. S. 601, the facts were that the plaintiff's intestate was riding upon a pass on an interstate trip in violation of the Hepburn act of June 29, 1906, and it was there urged that plaintiff's intestate was not a passenger, and the carrier owed no duty as such. But in discussing that question, it was there said (to quote the syllabus): "An employee in the railway mail service who, in good faith and with the consent of the carrier, accepts when off duty a free passage in interstate transportation, does not forfeit his right to the benefit of a rule of the local law which charges a carrier with the duty to exercise care for the safety of gratuitous passengers, because his gratuitous carriage may have been forbidden by the Hepburn act of June 29, 1906, since that statute itself fixed the penalty for violations of its prohibitions, by declaring that the carrier and passenger shall, in such cases, be deemed guilty of a misdemeanor, punishable by fine."

The court also gave, at the request of appellee, an instruction numbered 2, which read as follows:

"2. The court instructs the jury that if you find that the plaintiff was a passenger upon the defendant's train, as above explained, and was injured without fault on his part, and when he had not assumed the risk by reason of the car in which he was riding colliding with other cars of the defendant upon its track, then in that event to avoid liability, the defendant must show by a preponderance of the evidence in the whole case, that the collision did not occur by reason of any negligence upon its part."

It is urged that this instruction, as well as instruction numbered 1 heretofore set out, imposes upon appellant a higher degree of care than it was required to exercise under the laws of Missouri, in the operation of freight trains carrying passengers, and that the instructions permitted a recovery to be had upon mere proof of injury, provided appellant failed to show that the collision did not occur as a result of one of the ordinary jerks or jars incident to the operation of freight trains carrying passengers.

In the case of *Ray* v. *Railroad,* 147 Mo. App. Rep. 332, the court said: "The law govering the liability of railroad companies for an injury to a passenger on a freight train by oscillations of the train has been expounded in numerous decisions in this and other jurisdictions. A person who takes passage on that kind of train, assumes the risk of injury from such jars and movements as are incident to its operation, if its parts are well constructed and in good repair, and it is properly operated on a safe track; but does not assume the risk of injury from faults in either of those matters, or perhaps kindred ones which an experienced railway man could enumerate, but we can not." And further it was there said: "Taking into consideration the oscillations and jerks commonly and necessarily incident to the movement of a freight train, and that this train was getting under full speed, we hold the mere fact that plaintiff was thrown off by a jerk did not warrant the conclusion of defective track or train appliances, or negligent operation, in other words, the doctrine

of *res ipsa loquitur* does not apply. This is the necessary result of the cases cited *infra,* wherein it was held the evidence for the plaintiffs did not entitle them to a decision by the jury."

An instruction in this case told the jury that there was no complaint of negligence on account of defective track, or train appliances, and that appellee predicated his right to recover solely upon the negligent operation of the train.

Under the laws of this State the presumption of negligence upon the part of the carrier arises where the proof shows that the party injured was a passenger upon any kind of train, and was injured by the operation of the train. But it appears such is not the law in the State of Missouri, where the proof shows there was only such oscillations and jerks as are commonly and necessarily incident to the movement of the freight train; as the proof must go further and show something in the shock of stopping, starting or running the train in the way of displacement of inanimate objects, or persons in secure positions, as to bespeak careless operation, and appellee says as there was no such proof in the present case, that there was no presumption of negligence and the instructions set out were therefore erroneous and prejudicial. On the question of burden of proof the *lex fori* governs, and the rule is stated in Minor on Conflict of Laws, page 486, as follows: "But if the rule prescribed by the *lex delicti* with respect to the defendant's negligence is a mere rule of evidence, such as rules respecting the burden of proof touching negligence, the *lex fori* will govern, not the *lex delicti,* in accordance with the general principle that rules of evidence relate to the remedy, and like all matters of that character are regulated by the law of the situs of the remedy (*lex fori*). See, also, 2 Wharton on the Conflict of Laws, 1107. The evidence offered by appellee was to the effect that the car upon which he was riding was switched against other cars at a rate of fifteen miles an hour, and that a number of melons were crushed and piled upon him, and as a result of this collision the mel-

ons were thrown away from the end of the car and a clear space of several feet was left, and the boards which had been securely fastened to keep the melons in place were torn loose. This evidence, if true, would warrant the jury in finding that appellee was injured as the result of a collision, and not through such impact of his car against another car, as might reasonably be expected to occur in the ordinary operation of freight trains.

The court gave several instructions defining the duty of carriers in the operation of freight trains, on which passengers were carried, and defining the risk of injury which the passenger assumes from the operation of such trains. An instruction on this subject which was asked by appellant, and was numbered 4, read as follows:

"4. A railroad company, as a rule, can not be said to be negligent because there are occasional jars and jerks in the operation of freight trains. Though jars of great, unusual and unnecessary violence would be evidence of negligence on the part of employees operating the trains, jars are common to such trains and the passenger must guard against them, and not unnecessarily expose himself to danger from such jars."

This was modified by the court and given as follows:

"4. A railroad company, as a rule, can not be said to be negligent because there are occasional jars and jerks in the operation of freight trains. Though jars of great, unusual and unnecessary violence would be evidence of negligence on the part of employees operating the train." Appellant complains of this modification.

In the case of *Hedrick* v. *Missouri Pacific Ry. Co.*, 93 S. W. 268, in discussing the liability of a carrier for injuring a passenger riding in a caboose, it was said (to quote the syllabus): "A carrier was not liable for injuries to a passenger riding in a caboose, owing to the jar on the stopping of the train, where the jar was not sufficient to throw the passenger from his feet, and there was no evidence of any defect in the construction of the roadbed or train, or of any negligence in the management thereof." And further in this opinion, in discussing the

risk assumed by the passenger, it was said: "It seems now to be well settled law here, as elsewhere, that where a railroad carries passengers for hire on its freight trains, it must exercise the same degree of care as is required in the operation of its regular passenger trains; the difference only being that the passenger submits himself to the inconvenience and danger necessarily attending that mode of conveyance." *Vide* cases cited by Brace, P. J., in support of this proposition, 65 S. W. 1030. In that case this court adopted the law as announced in *Chicago & Alton Rd. Co.* v. *Arnol,* 144 Ill. 261; 33 N. E. 204; 19 L. R. A. 313, as follows: "Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, can not expect or require the conveniences, or all of the safeguards against danger, that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the accommodation provided by the company, subject to all the ordinary inconveniences, delays, and hazards incident to such trains when made up and equipped in the ordinary manner of making up and equipping such trains, and managed with proper care and skill. * * * But, if the railway company consents to carry passengers for hire by such trains, the general rule of responsibility for their safe carriage is not otherwise relaxed. From the composition of such trains and the appliances necessarily used in their efficient operation, there can not in the nature of things, be the same immunity from peril in traveling by freight trains, as there is by passenger trains; but the same degree of care can be exercised in the operation of each. The result in respect to the safety of the passenger may be wholly different, because of the inherent hazards incident to the operation of one train and not to the other, and it is this hazard the passenger assumes in taking a freight train, and not the hazard and peril arising from negligence or want of proper care of those in charge of it. So long as there were dangers naturally incident to the running of freight cars and a passenger car in the same train, the parties must have been presumed to have

contracted in reference to them, and the plaintiff to have assumed them."

It is urged on the part of appellant that the witness, Doctor Bentley, who testified as an expert witness on behalf of appellee was permitted to submit his judgment and opinion for that of the jury as to the cause of appellee's injury. Such evidence, of course, would be improper, and would call for a reversal of the case, if it had been permitted to be offered over appellant's objection. *Castanie* v. *Railroad Company,* 249 Mo. 195. But we do not think that was permitted to be done in the present case. The witness was asked the following hypothetical question: "Q. I will ask you to state to the jury, if, previous to the 17th day of August, 1912, he had always been a strong man physically, and if, on that day, he was riding in a car that collided with other cars in a violent manner, hurling melons and planks upon him, the plank striking him across the front of the knee, as indicated, and the melons and planks crushing and mashing him at the time, and that within a few days he was compelled to go to bed for a period of seven weeks; that during all of this time, the right leg pained him, paining him so severely at times that he was unconscious, and that within three weeks this trembling condition in his leg set up, what would you conclude from that was the cause of his present condition?"

Upon asking that question, the following colloquy took place:

Mr. Davidson: If the court please, I don't think that is competent. I don't think his question is competent, the hypothetical question that he places, that he has stated.

The Court: Let him answer.

The Witness: I think it would come from the injury.

Q. You think his injury now could be attributed to such an injury received at that time?

A. Yes, sir.

It thus appears that Doctor Bentley was informed in this hypothetical question as to the history of the case. No request was made that the evidence be excluded, and

to answer this question the witness was not required to state that appellee's present condition was the result of the particular injury. He was only requested to give his opinion as to the cause of his present condition, and if his answer was an improper one, no objection appears to have been made to it, and no request was made that it be excluded. It was not improper for the witness to state that in his opinion appellee's present condition could be attributable to such an injury, as he claimed to have received, and it is apparent that this is the question which the witness was attempting to answer; and that there was no attempt to have him state that the collision was responsible for appellee's condition.

Various objections were made and exceptions saved to the action of the court in giving and refusing other instructions; but we consider it unnecessary to discuss these exceptions.

It is insisted that the suit be abated because appellee did not secure permission from the court in which the receivership was pending, to maintain this suit. But there was no request on the part of the receivers that they be made parties to this litigation, and the judgment of the court does not attempt to adjudicate their rights to the control of appellant's properties. The motion which was filed was a mere suggestion to the court that a receiver had been appointed to take charge of appellant's railroad properties, and this suggestion contained the prayer that appellee be not permitted to proceed with the prosecution of his suit until this permission should have been obtained and the receiver made a party. The injury occurred and this suit was pending for trial prior to the appointment of the receivers, and there was no attempt to fix upon these receivers, as such, any liability for appellee's injury. This judgment can not and does not affect the right of the receivers to the control and possession of appellant's property, and while appellee has the statutory lien upon appellant's properties to secure the enforcement of this judgment, this lien and the right to its enforcement is subject to the receivership, and no

action can be lawfully taken in its enforcement, which in any way interferes with the said receivership.

It is lastly insisted that the verdict which was for eighteen thousand dollars, is excessive and such is the case if appellant's witnesses are to be believed. Expert witnesses have testified on appellant's behalf that there was no necessary connection between the injury inflicted upon appellee at the time of the collision and his present condition. Indeed, these witnesses testified that appellee was malingering. But the evidence upon the part of appellee is in sharp conflict with this evidence, and the jury has passed upon this conflict. According to the evidence of Doctors Bentley and Parchman, appellee's condition is very serious, and he will not improve. According to them the injury to the sciatic nerves has produced a nervous condition which results in appellee's leg being constantly in violent motion and entirely beyond his control, so that there is a never ceasing trembling of the limb, which interferes with his rest and sleep, and from which he is constantly suffering pain. And that this condition is a permanent one without hope of relief. There was proof that appellee, who was fifty-four years old, had previously been in good health, and had an earning capacity of $1,500 per year; but that he had wholly lost his earning capacity, and, upon the contrary, had become a helpless cripple. It was the province of the jury to consider this evidence and pass upon its truthfulness, and they have evidently believed this evidence, and, having done so, we can not say that the verdict is excessive, and the judgment of the court below will therefore be affirmed.

FAULKNER v. FEAZEL.

Opinion delivered June 1, 1914.

1. EJECTMENT—EQUITABLE TITLE—LEGAL RIGHT TO POSSESSION.—The equitable title to land, coupled with the legal right to possession, is sufficient to maintain an action of ejectment. (Page 294.)
2. DEEDS—DELIVERY—INTENT OF GRANTOR.—Any disposal of a deed, accompanied by acts, words or circumstances, which clearly indicate

that the grantor intends that it shall take effect as a conveyance, is sufficient. Manual delivery is unnecessary. (Page 294.)

3. DEEDS—DELIVERY—TEST.—The test of whether a deed has been delivered is whether the grantor by his acts, words, or both, intended it as a delivery. (Page 294.)

4. DEEDS—DELIVERY—KNOWLEDGE OF GRANTEE.—A deed from a husband to his wife will be treated as delivered, when the deed is highly beneficial to the wife, and imposed no burdens upon her, where the consideration recited was five dollars, which if not paid was not required to be paid, where the deed was found after the husband's death under lock and key and in a receptacle containing the wife's valuable papers, even though it appear that the wife had no knowledge of the existence of the deed until after her husband's death. (Page 295.)

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

STATEMENT BY THE COURT.

This was a suit in ejectment brought by W. P. Feazel, J. I. McNutt and D. B. Sain against appellants to recover a certain half section of land situated in Howard County. Both parties claim title from the same source, one, G. W. Faulkner. There was a jury trial and verdict and judgment for appellees, from which judgment appellants prosecuted this appeal.

The complaint alleged that plaintiffs were the owners of the land, and derived their title thereto as follows: One G. W. Faulkner conveyed said land in fee simple to his wife, Eliza Faulkner, and that thereafter the said Mrs. Faulkner by her will devised the same to J. I. McNutt, and a copy of the said will is exhibited with the complaint; and that McNutt thereafter deeded a one-half interest to Feazel and Sain. The complaint further alleged that defendants were in the unlawful possession of said land and had been for a period of one year, and there was a prayer for judgment for the possession of the land, and damages for its detention.

Defendant's answer admitted the ownership of G. W. Faulkner, but denied that he deeded the same to his wife,

and denied that Eliza Faulkner had willed the same to McNutt, and denied that said will had been probated, and that the copy attached to the complaint was a true copy of her will, and denied that McNutt had conveyed any interest in the land to his co-plaintiffs, and alleged that if G. W. Faulkner executed any deed to such land, and if plaintiffs have such deed, then they state that it is not the deed of said Faulkner but is a forgery, and that if said Faulkner did execute a deed to his wife that it was never delivered and did not pass any title to her because he retained the same in his possession, until his death, and never authorized any one to deliver it. The answer further alleged that when the said G. W. Faulkner died he left surviving him his widow, Eliza, and the defendants, who were his sons and sole heirs at law, and that the said Eliza had since departed this life, and by reason of her death the defendants succeeded to the title to said land.

The original deed from G. W. Faulkner to his wife was introduced and read in evidence, and appears to have been dated March 5, 1904, and to have been recorded the 23d day of February, 1911. The execution of the deed by McNutt to his co-plaintiffs was admitted. The record of the probate court was produced and read in evidence, showing the will of Mrs. Faulkner to have been probated.

The evidence upon the part of the appellants was to the effect that certain alterations had been made in the deed from Mr. Faulkner to his wife; but it appears to be undisputed that Faulkner did execute and acknowledge the deed to his wife conveying the land in controversy. The justice of the peace who took the acknowledgment testified that the whole body of the instrument was in his handwriting, except the signature of the grantor, but that the interlineations in the deed, consisting in part of the description of an additional tract of land, was not in his handwriting and that he did not know who placed those words in the deed. It was not contended, however, that Mrs. Faulkner had made these changes, for it was shown that she could neither read nor write; nor was it con-

tended that she was instrumental in having these changes made; but, upon the contrary, appellants contend that the proof fails to show any delivery of the deed to her, or any knowledge upon her part of its execution, until after the death of her husband. This deed was in the possession of appellants from the date of Eliza Faulkner's death until the institution of this suit. Indeed, the real question in the case is whether or not Mr. Faulkner had ever delivered the deed to his wife with the intention that it should take effect as such. Mrs. Faulkner died before this litigation was commenced, and the intention of her husband, in regard to the delivery of the deed to her, can only be ascertained from the facts and circumstances in proof.

It appears that Mr. Faulkner was a man above the average in intelligence and experience, and that he had considerable knowledge of land descriptions, and the essentials of a deed, and that he owned other land in addition to the land in controversy. It appears that both Mr. Faulkner and his wife kept their deeds and other valuable papers in a bundle of papers tied up with a string, in a trunk, which belonged to Mr. Faulkner, but that they both had access to this trunk freely. After the death of Mr. Faulkner, his wife requested his nephew to look through these papers, found in the trunk, and get out for her a deed referred to as the Burgess deed, which conveyed another tract of land to Mrs. Faulkner. This deed was found in the bundle of papers in the trunk, along with the deed in controversy. There was evidence tending to show that Mrs. Faulkner had no knowledge of this deed, until after the death of her husband, and that she undertook to make a division of the estate of her husband with the appellants. A lady, who lived with the Faulkners during their lifetime, and who had been reared by them, testified she heard a conversation between them in which Mr. Faulkner made the statement to Mrs. Faulkner that he had deeded her the land in controversy, so that he could homestead some more, and that she did not know the description of the land in the deed

as she did not read it. She had seen the deed, and said it was put in this trunk to which Mrs. Faulkner carried the keys. And this witness also testified that Mr. Faulkner stated that he wanted his wife to stay on the land and "use it during her life, and at her death he wanted the two boys to have it."

The order of the probate court admitting Mrs. Faulkner's will to probate was not appealed from, and it is not now insisted that she did not devise the land to McNutt. Appellants appeared in the probate court and protested against the probate of said will, but abandoned their contest, after the probate court ordered the will probated.

W. D. Lee, J. M. Jackson and *Steel, Lake & Head,* for appellants.

1. Ejectment can not be maintained on an equitable title; there must be a legal right to possession. 36 Ark. 456; 98 *Id.* 30.

2. There is no proof of delivery of the deed. 55 Ark. 633; 13 Cyc. 748; 50 N. E. 198; 36 *Id.* 955; 25 *Id.* 844; 29 *Id.* 870; 35 *Id.* 94; 64 *Id.* 275; 47 *Id.* 1046.

3. It is only where the acts or words of the grantor unequivocally evince an intention to deliver that the question becomes one of law. 77 Ark. 89; 100 *Id.* 427; 98 *Id.* 259.

4. There was error in the court's charge. Cases, *supra.*

D. B. Sain and *W. P. Feazel,* for appellee.

1. An equitable title with the legal right to possession will support an action of ejectment. 98 Ark. 30; Kirby's Digest, § 2737; 54 Ark. 480; 36 *Id.* 456; Perry on Trusts, § 18; 69 Ark. 564.

2. The real test of delivery of a deed is, did the grantor by act or word intend to divest his title? 74 Ala. 213; 81 Cal. 38; 67 Ga. 707; 106 Mo. 313; 7 Ill. 557; 62 *Id.* 348; 30 Miss. 91; Martindale on Conveyances, 175, and § 205; 77 Ark. 89. The delivery was sufficient to

pass title. 100 Ark. 431; 97 *Id.* 283; 74 *Id.* 104; 82 *Id.* 50; 86 *Id.* 150.

3. The deed was not a forgery. 52 Ark. 389; 34 *Id.* 503.

SMITH, J., (after stating the facts). It is contended by appellants that the conveyance by Faulkner to his wife transferred to her only an equitable title to the land in controversy, and that an action of ejectment could not be maintained upon that title. No exception appears to have been made to this deed in the court below, and no objection was made to its introduction as evidence. But, if appellees have any title to this land, they have the right to its possession and an equitable title coupled with the legal right to possession is sufficient to maintain an action of ejectment. Kirby's Digest, § § 2737-2745; *Stricklin* v. *Moore,* 98 Ark. 30; *Alexander* v. *Hardin,* 54 Ark. 480; *Percifull* v. *Platt,* 36 Ark. 456; *Graham* v. *St. Louis, I. M. & S. Ry. Co.,* 69 Ark. 564.

As has been stated, the real question is whether or not the evidence is legally sufficient to support the finding that the deed had in fact been delivered.

It must be confessed that the evidence to establish the delivery of the deed is not altogether satisfying; but we can not say that it is not legally sufficient for that purpose. In the case of *Russell* v. *May,* 77 Ark. 89, it was said: "A delivery of a deed is essential to its validity. It can not take effect without delivery, and what is delivery depends upon the intention of the grantor. Any disposal of a deed, accompanied by acts, words or circumstances, which clearly indicate that the grantor intends that it shall take effect as a conveyance, is a sufficient delivery. 2 Jones on the Law of Real Property and Conveyancing, § § 1217-1224, and cases cited." No particular form of delivery is required. The deed may be manually given by the grantor to the grantee, yet, manual delivery is unnecessary. The real test of delivery is, did the grantor by his acts or words, or both, intend to divest himself of title; if so, the deed is delivered. *O'Neal* v. *Brown,* 67 Ga. 707; *Tyler* v. *Hall,* 106 Mo. 313.

A number of instructions were given at the request of both parties, and others asked by appellants were refused, which will not be set out in this opinion, as, in a general way, those which were given declared the law as here stated and required the jury to find that the grantor had parted with possesion of the deed for the purpose of divesting himself of his title to the land and of conveying that title to his wife. When this intent is effectuated a delivery of the deed is accomplished.

Appellants also insist that the judgment should be reversed because the proof does not show that Mrs. Faulkner was aware of the execution of the deed, until after the death of her husband, and that therefore there was never any delivery of the deed to her, and no acceptance of it by her. A similar contention was made in the case of *Russell* v. *May, supra,* where a deed had been executed by a husband to his wife and it was there said: "An acceptance of the deed by the grantee is also essential to its validity. If it is beneficial to the grantee, and imposes upon him no burdens, an acceptance may be inferred. If it be executed in pursuance of a previous understanding with the grantee, and is beneficial to him, an acceptance is presumed. In this case the deed was unquestionably beneficial to the grantee. But it is said that she did not know of the existence of the deeds until after the death of her husband, and that this fact disproves the acceptance. This does not necessarily follow. The confidential relation of husband and wife existed between the grantor and grantee, and it would have been natural for him to inform her of his intentions in advance, and for the wife to express her approval; and it by no means follows that she did not accept because she did not know of the existence of the deeds until after the death of the grantor, which was on the fourth day after their execution."

We can not know what passed between Mr. Faulkner and his wife in regard to this deed, as they are both dead; but as this deed was highly beneficial to her, and imposed no burden whatever upon her, and recited the

consideration to be five dollars, cash in hand paid, which, if it had not been paid, was not required to be paid, and as this deed was found under lock and key, and in a receptacle containing her valuable papers, we think the jury was fully warranted in inferring an acceptance of the deed on the part of Mrs. Faulkner.

The proof is undisputed that when the deed was acknowledged it was a valid conveyance of the land in controversy, and if it was delivered it conveyed the title to the land there described, and these subsequent interlineations (the proof does not show by whom made) did not operate to defeat the conveyance.

Other exceptions were saved at the trial, and are urged as grounds for reversal, but we find no prejudicial error and the judgment is affirmed.

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

Opinion delivered June 1, 1914.

1. EVIDENCE—PRIVILEGED COMMUNICATIONS — PHYSICIAN. — Information disclosed to a physician to procure him to prescribe as a physician for the plaintiff is privileged. (Page 298.)
2. EVIDENCE—COMPETENCY AND RELEVANCY.—A general objection to the introduction of testimony only raises the issue as to its competency and relevancy. (Page 298.)
3. EVIDENCE—PRIVILEGED COMMUNICATION—GENERAL OBJECTION.—A party objecting to testimony as involving the disclosure of a privileged communication must indicate the ground of his objection, and a general objection to a question as incompetent, irrelevant and immaterial is insufficient. (Page 299.)
4. EVIDENCE—PRIVILEGED COMMUNICATIONS—OBJECTION—HOW RAISED.—An objection to the introduction of the testimony of an attending physician, must be raised specifically, on the ground that the testimony is a privileged communication, and a general objection is insufficient. (Page 299.)

Appeal from Drew Circuit Court; *H. W. Wells*, Judge; affirmed.

Patrick Henry, for appellant.

The damages were inadequate to compensate plaintiff for the injury. The court erred in admitting the evidence of Doctor Harris and in giving the seventh instruction. The jury found defendant guilty of negligence and the cause should be remanded for a new trial only as to the amount of damages. Ann. Cas. 1912, D. 588.

E. B. Kinsworthy, Jas. C. Knox and *T. D. Crawford,* for appellee.

1. A new trial is not allowed on account of the smallness of damages in an action for injury to a person. Kirby's Digest, § § 6215, 6216; 13 Cyc. 135; 4 Sedgwick on Damages (9 ed.), § 1368; 80 N. E. 456; 118 Mo. 328; 78 S. W. 28; 3 Am. Neg. Rep. 737; 81 S. W. 123; 56 *Id.* 725; 12 Bush (Ky.) 465; 86 Ky. 367; 58 S. W. 803; 8 Ky. L. Rep. 875; 39 Ind. 504; 69 *Id.* 458; 74 Pac. 1105; 70 Neb. 357. *Dunbar* v. *Cowgen,* 68 Ark. 444, is erroneous.

2. There was no error in admitting Doctor Harris's testimony. The ground of objection must be indicated. 40 Cyc. 2395; 133 N. Y. 450; 112 N. Y. 493; 81 Mich. 525-534; Kirby's Dig., § 3098.

SMITH, J. Appellant was a passenger on one of appellee's trains, and was injured as she attempted to alight from the train at her destination. She alleged in her complaint, and offered proof tending to show, that when the train had stopped at the station she arose for the purpose of getting off, when, suddenly and without warning, the operatives of the train carelessly and negligently caused the coach in which she was riding to jerk or bump with great force and violence, whereby she was thrown against a seat in said coach and sustained serious injuries. Appellant testified that she incurred expenses for medical attention in the sum of $45, and that she suffered much pain for a period of four months after her injuries, and one of her symptoms of illness was nausea and a dizziness, accompanied by fever at nights.

At the trial a Doctor Harris was called as a witness on behalf of appellant and testified that he had formerly been appellant's physician and had attended her in a pro-

fessional capacity at intervals covering a period of three or four years, and that during this time had treated her for nausea and fever; and he testified that she was always bothered with a sick stomach when she took medicine. The effect of this evidence was to show that appellant had practically the same ailment and symptoms prior to her injury as those she testified about subsequent to her injury. When this witness was interrogated in regard to appellant's previous illness, appellant's attorney objected to this evidence, and his objections were overruled, and exceptions were saved at the time. But the objection made was a general one, and the point was not made that the witness was testifying about matters that were privileged.

The case appears to have been submitted to the jury under proper instructions, and the jury returned a verdict for appellant in the sum of $375, and she appealed from that judgment.

Practically the only question urged for reversal of the judgment is the action of the court in admitting the evidence of the witness, Doctor Harris, over appellant's objection.

It appears from the evidence of the witness Harris that he acquired the information concerning appellant's condition while attending her in a professional capacity, and this information was evidently disclosed to him to enable him to prescribe as a physician, and it was therefore privileged. Kirby's Digest, § 3098; *Mo. & North Ark. Rd. Co.* v. *Daniels,* 98 Ark. 352.

But the objection offered to this evidence was a general one, and the attention of the court was not called to the fact that the evidence was within the inhibition of the statute which precludes a physician from disclosing information which he acquired in a professional capacity and which was necessary for him to possess to prescribe as a physician. This evidence was not incompetent, nor was it irrelevant or immaterial, and a general objection to evidence only raises the question of competency or relevancy.

Discussing the method and form of objection to the admission of privileged communications, the rule is stated in 40 Cyc. 2395, as follows: "A party objecting to testimony as involving the disclosure of a privileged communication must indicate the ground of his objection, and a general objection to a question as incompetent, irrelevant and immaterial is insufficient." Cases are cited to support the text; but as against the rule as there announced the case of *Humphrey* v. *Pope,* 82 Pac. 223, is there cited, as holding that an objection to a question as wholly incompetent, irrelevant and immaterial is insufficient to invoke the inhibition of the Code of Civil Procedure, section 1881, prohibiting the examination of a husband or the wife, as to any communication made by one to the other during marriage. But in this case cited as announcing a rule contrary to the statement contained in the text, the facts were, that in a suit by a wife for the alienation of the affections of her husband, the wife was permitted to testify about conversations she had had with her husband, in the absence of the defendant in that case. It was contended in that case (*Humphrey* v. *Pope*) that this evidence, which related to the relationship between plaintiff's husband and the defendant, was a part of the *res gestae* and admissible under exceptions to the rule excluding hearsay evidence, and also that the objection was not sufficiently specific to invoke the inhibition contained in section 1881 of the Code of Civil Procedure, which prohibits the examination of a husband or wife, as to any communication made by one to the other during marriage. It was there said: "The latter contention rests on the proposition that the objection should have extended to the competency of the witness. It has been repeatedly held that, where evidence objected to is absolutely incompetent, the general objection is sufficient. And the solution of the question now under consideration depends upon whether the plaintiff's evidence falls within this rule. We can readily see why an objection to the competency of experts, children under ten years of age, and persons of unsound mind, as witnesses would be nec-

essary. We can also understand why the specific objection, that particular communications between attorney and client, physician and patient, priest and penitent, were privileged, must be urged. But the lips of both husband and wife are forever sealed as to all communications between them during the marital relation, unless consent is shown, or the cause of action falls within the exceptions. Neither spouse can be examined as to such communications, without the consent of the other, and in our opinion the evidence is incompetent, unless this consent is shown."

Thus it appears that even under the California case a specific objection would be necessary to exclude evidence which was merely privileged. The California code like that of this State renders the husband and wife incompetent to testify for or against each other, except in certain specific cases.

Appellant should have made specific objection that the witness was being interrogated in regard to a privileged communication, and, had this been done, the admission of the evidence would constitute error calling for reversal of the case; but we think that a general objection to the admission of the evidence, as was made here, was insufficient to raise the question of the privileged character of the evidence.

In the case of *Vaughan* v. *State,* 58 Ark. 353, it was insisted that a witness had been permitted to state what the testimony of an absent witness had been, at a former trial, without having laid a sufficient foundation for the introduction of this secondary evidence; but only a general objection to this evidence had been offered at the trial, and in the opinion in that case it was there said: "But if the foundation, as thus laid, was not sufficient, appellant interposed no specific objection to it in the court below. Had the court's attention been called to it at the time as insufficient, it might have been an easy matter to have had additional evidence on the subject. This court has often ruled that a general objection is not sufficient except as to competency or relevancy."

The objection here made was a general one, and, while the evidence was privileged, it was both competent and relevant.

The judgment of the court below is therefore affirmed.

McGOUGH v. STATE.

Opinion delivered June 1, 1914.

1. CRIMINAL LAW—JUROR—COMPETENCY—PRECONCEIVED OPINION.—The entertainment of preconceived opinions about the merits of a criminal case renders a juror *prima facie* incompetent. (Page 304.)
2. CRIMINAL LAW—JUROR—OPINION—RUMOR.—If a juror's opinion is founded upon rumor, and is not of a nature to influence his verdict, his disqualification is removed. (Page 304.)
3. CRIMINAL LAW—JUROR—OPINION—COMPETENCY.—A juror must stand disinterested between the parties to the litigation, and be able to make up his verdict solely on the law and evidence; and if he can not do this, he is not a competent juror, and it is immaterial what the cause may be, which prevents him from so doing. (Page 304.)
4. CRIMINAL PROCEDURE—CHALLENGES.—The court in its discretion may permit the State or the defendant to exercise peremptory challenges after having accepted a juror; but an election by the State to challenge a juror, after his acceptance by both parties, must be exercised before the defendant has exhausted his challenges, and it can not thereafter be done. (Page 305.)
5. HOMICIDE—LESSER CRIME—HARMLESS ERROR.—Where defendant is convicted of a lesser degree of homicide than the evidence warranted, he can not complain of the verdict. (Page 305.)

Appeal from Drew Circuit Court; *James R. Cotham*, Special Judge; reversed.

STATEMENT BY THE COURT.

Marvin McGough appealed from a conviction for manslaughter in the Drew County Circuit Court, on an indictment for murder in the first degree, alleged to have been committed by killing one Guy Ferguson with a gun.

Upon the trial one A. J. Wells was examined touching his qualifications as a juror, and after having been

asked various questions by both the prosecuting attorney and the attorney for the defendant, the court was evidently in doubt about the qualifications of this juror, and thereupon the court propounded the following questions:

Q. I will ask you this question: If you are selected on this jury to try this case, would you decide the case on the law given by the court, and the evidence detailed by the witnesses on the stand, regardless of any preconceived ideas you may have?

A. If I could do it, I would.

Q. From the law and the evidence?

A. I don't know sir; this prejudice stays with a fellow sometimes.

The Court: I will hold this juror qualified.

Defendant's Attorney: You say that opinion is fixed on your mind, and you think that it would go through with you and influence you in the trial of the case?

A. Yes, sir.

The defendant excepted to the action of the court in holding the juror qualified, and challenged him peremptorily.

One Frank Henry was also examined at some length touching his qualifications to serve as a juror, and, when finally the defendant submitted to the court the question of the juror's qualification, the court asked the following questions:

Q. Could you go in the jury box and decide this case from the law given you by the court, and the evidence detailed by the witnesses, and give the State and the defendant the same benefit that you would if you had never heard of the case before?

A. No, sir; I wouldn't.

Q. You are prejudiced?

A. No, sir; but from what I have heard, I have formed an opinion about it, and couldn't change that.

Q. You formed that opinion solely from rumor?

A. Yes, sir; what they said the coroner said about the case.

Q. That is how you formed your opinion about the case—from what somebody told you that the coroner told them about the case?

A. Yes, sir.

This juror was held competent, and was challenged peremptorily by the defendant, and exceptions were saved to the court's action in holding him qualified.

After the defendant had exhausted all of his peremptory challenges, the prosecuting attorney was permitted, over the objection of the defendant, to excuse three jurors who had been previously accepted by both sides, and thereafter the court held three other jurors competent, and the defendant undertook to challenge them, but was not permitted to do so, because he had already exhausted all of his challenges.

The court in its instructions defined the various degrees of homicide, and this was done over the objections of the defendant, who contended that under the evidence he was guilty of either murder in the first degree or was not guilty of any crime.

The proof upon the part of the defendant tended to show that bad blood had existed between the defendant and deceased for some time, and that deceased had threatened to kill the defendant, although the threats had never been communicated. The evidence upon the part of the defendant was to the effect that he and the deceased had disagreed about the use of a wagon owned by the defendant, and had quarreled about the wagon, and that each called the other a liar, and used other offensive language, whereupon the deceased stated he would go home and get his gun and return and kill the defendant, when the defendant shot him to prevent this from being done.

Jas. C. Knox and *Williamson & Williamson,* for appellant.

1. Defendant was guilty of first degree murder or nothing. It was error to charge as to the lower degrees. 102 Ark. 180.

2. The jurors, Wells and Henry, were not competent. 47 Ark. 180-5; 66 *Id.* 53; 69 *Id.* 322; *Ib.* 449; 91 *Id.* 582; 45 *Id.* 165; 56 *Id.* 402. Defendant was prejudiced by the ruling as to these jurors. 98 Ark. 327; 102 *Id.* 180. His challenges were exhausted and he was deprived of a fair and impartial trial. Cases, *supra.*

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

1. The jurors were competent and no prejudice resulted. 66 Ark. 63; 79 *Id.* 127.

2. It is within the court's discretion to permit the State to challenge jurors after they have been examined and accepted by both sides. 70 Ark. 337; 81 *Id.* 589, 590.

SMITH, J., (after stating the facts). We think the jurors, Wells and Henry, were disqualified, because of the state of their feelings toward the appellant, as shown by the answers given by them upon their examination by the court. Numerous cases have discussed the competency of jurors, and the effect of these cases is that the entertainment of preconceived opinions about the merits of a criminal case renders a juror *prima facie* incompetent. But, if it is shown that the opinion was founded on rumor, and is not of a nature to influence his verdict, this disqualification is removed. *Sneed* v. *State,* 47 Ark. 180; *Decker* v. *State,* 85 Ark. 64. But while it is true that an opinion based on mere rumor does not disqualify a juror, provided the juror can say upon his oath that he can and will disregard such opinion, and will try the case solely upon the law and evidence, it can not be said, however, that an opinion based upon a rumor can not disqualify. The juror is supposed to stand disinterested between the parties to the litigation, and to be able to make up his verdict solely on the law and evidence; and if he can not do this, he is not a competent juror, and it is immaterial what the cause may be which prevents him from doing so. One might be so impressed with a rumor as to form an opinion which he would be unable to disregard, and which would enter into his deliberations and conclusions upon the case, and in such cases the juror is dis-

qualified, and we conclude, therefore, that these jurors were disqualified, and the court erred in holding that they were not.

The defendant exhausted all of his challenges, and after he had done so the State was permitted, over his objection, to challenge three of the jurors who had been previously selected. It has been held that the court may, in its discretion, permit the State or the defendant to exercise peremptory challenges after having accepted a juror; but it has also been held that an election by the State to challenge a juror, after his acceptance by both parties, must be exercised before the defendant has exhausted his challenges, and it can not thereafter be done. *Williams* v. *State,* 63 Ark. 527.

The action of the court in permitting the State to challenge the jurors, after appellant had exhausted his challenges, was error, calling for the reversal of the case.

It may be true that appellant was guilty of either murder in the first degree, or that he was not guilty of any crime at all. But the deceased was the only witness to the killing, and we can not know what part of his story was accepted by the jury, nor what parts were rejected. While the jury under the evidence might have found the appellant guilty of a higher degree of homicide than it did, he can not complain of their failure to do so. *Roberts* v. *State,* 96 Ark. 58.

For the errors indicated, the judgment of the court below will be reversed, and the case remanded for a new trial.

KANSAS CITY & MEMPHIS RAILWAY COMPANY *v.* SMITHSON.

Opinion delivered June 8, 1914.

1. EVIDENCE—CONTRACT—PAROL EVIDENCE.—Parol evidence is admissible to explain the subject-matter of a written contract, when the same does not vary or contradict the terms thereof. (Page 310.)
2. CONTRACTS—MUTUAL MISTAKE—RESCISSION.—A written contract will be rescinded where the evidence clearly establishes a mutual mis-

take on the part of both participants in the negotiations as to what they were really contracting about. (Page 310.)

3. CONTRACTS — MUTUAL MISTAKE — RESCISSION — DAMAGES. — Appellee agreed for a certain consideration to give a portion of his land for a public road next a railway right-of-way, which the railway was to construct. Under a mutual mistake, appellant, a railroad, took the said land and used it for its right-of-way. *Held*, a rescission of the agreement being impossible, the appellant will be required to respond in damages for altering the purpose of the contract. (Page 310.)

4. ACTIONS—CONTRACTS—MUTUAL MISTAKE—REMEDY.—Equity is the proper court in which to bring an action for rescission of a contract on the ground of mutual mistake, and it is error to transfer the action to law, even though defendant has so acted that a rescission is impossible, and damages only can be awarded. (Page 210.)

5. APPEAL AND ERROR—TRANSFER FROM EQUITY TO LAW—ERROR—AFFIRMANCE.—Although an action is improperly transferred from equity to law, when the judgment of the court upon the evidence is one which would be affirmed, had the appeal come from the chancery court, the judgment of the law court will be affirmed. (Page 310.)

Appeal from Washington Circuit Court; *J. S. Maples*, Judge; affirmed.

Dick Rice and *J. V. Walker*, for appellant.

1. It is presumed that the law is well known and equally within the knowledge of all persons, and assertions of law, though false, are regarded as mere expressions of opinion and can not be made the basis of an action. 20 Cyc. 19; 44 L. Ed. U. S. 1095; 66 N. Y. 483; 13 N. W. 242; 5 Hill (N. Y.) 303; 39 Am. Dec. 436; 68 *Id.* 653. Everybody is expected to know the law and the legal effect of a written instrument. 46 Am. Rep. 357; 44 Pac. 944; 69 Ind. 1.

2. Fraud must be of existing facts, or facts previously existing, and can not consist of mere promises as to future action. Cases *supra*.

3. Where a contract contains the agreement of parties, evidence can not be introduced to vary or contradict its terms. Kirby's Dig., § 6569.

4. It was error to overrule the motion to strike. Kirby's Digest, § 6145.

John W. Grabiel, for appellee.

1. The demurrer was properly overruled. 99 Ark. 438; 138 S. W. 1003; 96 Ark. 163.

2. Evidence that the representations were false and impossible of fulfilment, and that appellant knew them to be false, and appellee thereby deceived was competent. 55 Ark. 112; 75 *Id.* 89; 100 *Id.* 28; 19 *Id.* 111.

3. Parol testimony was admissible to show the contract was obtained by fraud. 94 Ark. 575; 82 *Id.* 569; 101 *Id.* 135; 87 *Id.* 614; 95 *Id.* 150; *Ib.* 95; 101 *Id.* 95; 81 *Id.* 373; 86 *Id.* 169; 94 *Id.*; 101 *Id.* 95.

4. It is competent always to show the real consideration. 55 Ark. 112; 101 *Id.* 603; 102 *Id.* 669; 105 *Id.* 281.

5. A refusal or neglect to perform his part of a contract will justify a rescission. 38 Ark. 174; Benjamin on Contracts, 361; 191 Ill. 319.

McCULLOCH, C. J. Appellant is a railway company, duly incorporated under the laws of the State of Arkansas, and is engaged in building a railroad from Tontitown to Fayetteville, and in doing so constructed its road across a small tract or lot of land owned by appellee near Fayetteville, in Washington County.

The case was tried in the circuit court as an action for damages for taking the right-of-way without compensation therefor, but it originated in the chancery court, whence it was transferred to the circuit court.

The lot in controversy owned by appellee was situated in the outskirts of the city of Fayetteville and fronted on a public road. It was 100 feet in depth by fifty-five feet in width, and there was situated thereon a small frame building in which appellee was conducting a mercantile business, finding a line of customers among the employees of a near-by manufacturing plant. Fifty feet of the front end of the lot was taken by appellant company and its road constructed across it, and the company moved the storehouse back upon the remaining fifty feet. That detached the property from the public road

and made the storehouse front upon the railroad track without any outlet to the public road or street.

Appellee proved damages to his property sufficient to warrant the jury in awarding him the sum of $350 as compensation for the loss sustained.

The citizens of Fayetteville were interested in inducing appellant to build its line of railroad to that city, and, in order to do so, proposed to make a donation to the company, and also to obtain the right-of-way from Tontitown to Fayetteville. Mr. J. H. McIlroy, a member of a business institution of the city known as the Commercial League, was appointed as chairman of a committee to acquire the right-of-way for the railway company. He approached appellee for the acquisition of the front half of his property, and, after some negotiations, he entered into a written agreement as follows:

"June 26, 1912.

"J. H. McIlroy, Chairman of R. of Way Com., Kansas City & Me. Ry. Co.

"Dear Sir: I propose the following settlement in consideration of the payment to me of $100 in cash, or you acquire me a strip of land on the north end of my lot fifty feet from north to south and of equal with my lot, and the moving of my store building back north about sixty feet from present location, I agree and bind myself to convey to said railway company by good and sufficient warranty deed free from any incumbrance a strip of ground fifty feet in width off of the south end of my lot which is fifty-five feet in width, and the above settlement shall cover any and (all) damage to which I may be entitled by reason of the building of said railroad.

"C. B. Smithson."

This contract was entered into between Mr. McIllroy and appellee at the latter's store, and at that time the railway company was constructing its line and was then engaged in work near appellee's property. Appellee asserts and attempts to prove, that at the time he entered into this contract Mr. McIllroy represented to him that the railroad would be constructed along the line of the

public road, and that by an agreement with the county court, the public road would be moved farther north and run through the front end of appellee's property. This arrangement would have given appellee a frontage on the public road, the same as before the construction of the railroad. Appellee introduced other witnesses whose testimony tended to corroborate his assertion, and there is also proof to the effect that Mr. McIllroy verbally made an arrangement with the county judge whereby the line of the railroad could be constructed along the public road; but the company, in constructing its road, failed to grade off and prepare the public road and its use of the old road was stopped by an injunction.

Appellee commenced this suit in the chancery court, as before stated, and, after setting up the foregoing facts, asked that the written contract be rescinded, and that he be awarded compensation for the damage to his property.

Appellant demurred to the complaint, and the court overruled the demurrer, but, treating it as a motion to transfer, ordered the cause transferred to the circuit court, where, as before stated, it was tried, and the trial resulted in a verdict in favor of appellee.

The evidence establishes very clearly, we think, the fact that when appellee and Mr. McIllroy entered into the written contract, they both thought that the public road was to be run through appellee's lot so that his storehouse, when removed to the back end of the lot, would be built along the line of the old road. In other words, the parties were contracting for the use of a part of appellee's lot for the purpose of establishing a public road on it, and not for the purpose of running a line of railroad through and over it. Now, instead of using the part of the lot taken for that purpose, the railway company has seen fit to depart from that intention, and, leaving the public road where it is now, to construct its railroad over appellee's lot between the storehouse as at present located and the old road, thus rendering the remainder of his property of very little value.

No rule of evidence was violated in permitting appellee to prove this state of facts, for it did not vary or contradict the terms of the contract, but only explained the subject-matter thereof. It clearly establishes a mutual mistake on the part of both participants in the negotiation as to what they were really contracting about, that is to say, the purpose for which the acquired right-of-way was to be used.

The plainest principles of equity applied to those circumstances demand that appellee be given the right of rescission, for it appears that, without his consent and without fault on his part, the right-of-way for the construction of a new public road was made use of for the purpose of constructing a railroad. *Fleischer* v. *McGehee,* 111 Ark. 626.

But inasmuch as appellant, by its own act in disregarding the original purpose and taking the property for use in constructing the road, has made a rescission of the contract impossible, it should be required to respond in damages for thus altering the purpose of the contract. The jury has awarded damages in a sum which we think the evidence clearly sustains.

Appellee sought the appropriate remedy by going into a court of equity, and the case should not have been transferred to law; but inasmuch as the correct result was reached, there was no prejudice from transferring the cause.

The judgment of the court being correct upon the evidence, and one which we would affirm if it came to us on appeal from the chancery court, it follows that there must be an affirmance of the judgment of the circuit court, and it is so ordered.

TEDFORD AUTO COMPANY v. HORN.

Opinion delivered June 8, 1914.

1. CONTRACTS—SECURITY FOR PERFORMANCE—RECOVERY.—Appellee deposited $250 as an advance payment, or in the nature of security, for the performance of his undertaking on a contract entered into

with appellant, to be held by appellant until the expiration of the contract period or unless the contract be cancelled, when it was to be returned to appellee, less any damages that were sustained by appellant by reason of appellee's failure to perform the contract. There was no formal cancellation of the contract. *Held*, appellee is entitled to a return of the deposit at the end of the contractual period less any amount owed appellant for loss or damages sustained by nonperformance of the contract. (Page 314.)

2. CONTRACTS—DEPOSIT—SECURITY FOR PERFORMANCE—BURDEN OF PROOF.—Where A. deposits money with B. to secure his performance of a contract entered into by them, with a stipulation for its return at the end of the contractual period, less any damage suffered by B., caused by A.'s failure to perform, the burden is upon B. to show any damage sustained by him, and in the absence of proof of damage, A. will be entitled to the return of the whole amount deposited, at the end of the contractual period. (Page 314.)

3. CONTRACTS—BREACH—MEASURE OF DAMAGES.—B., a dealer in automobiles, contracted with A., whereby A. agreed to purchase from B. a certain number of cars, and sell the same. *Held*, B.'s damages for A.'s failure to perform the contract is the amount of his profits, if any, which B. lost by reason of A.'s breach of the contract. (Page 315.)

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

James A. Comer, for appellant.

Carmichael, Brooks, Powers & Rector, for appellee.

McCULLOCH, C. J. Appellee instituted this action in the circuit court of Pulaski County against appellant to recover a money judgment for several items, and the court, on the trial of the case before a jury, gave a peremptory instruction in favor of appellee for the recovery of an item of $250, and both parties appealed. Appellee has, however, abandoned his appeal, and that eliminates all of the items except the one mentioned above.

Appellant is a domestic corporation, domiciled at Little Rock, and is engaged in the business of buying automobiles from a manufacturer at Toledo, Ohio, and reselling the same in Arkansas. Its method of doing business is to contract a year in advance for the number of automobiles desired for the trade and to establish sub-

agencies in different parts of the State in addition to operating a sales department in Little Rock.

Appellee was selected as an agent at Danville, Arkansas, his territory covering the whole of Yell County, and a contract was entered into whereby he was to purchase four automobiles at a certain stipulated price, on board cars at Toledo, Ohio, and to have as many more as he found sale for in his territory. The contract provided that he should, at the date thereof, pay to appellant the sum of $250, "as part of the purchase price for the motor cars specified in this contract, which payment shall remain in the seller's possession until the expiration of this contract, provided that any and all of said part of purchase money may, at the option of the seller, be credited against any parts or open account due to the seller from the dealer, and the balance of said purchase money, if any, will then be applied on the purchase price of motor cars as provided herein." The contract further provided that the net purchase price of each car should be paid for as the same was delivered on board cars at Toledo, or within five days after presentation of draft with bill of lading attached at the place of delivery. The contract gave appellant the right to cancel the contract at any time for certain causes therein named, and also contained the following provision with reference to such cancellation: "That in the event, for any reason, this agreement shall be cancelled before its expiration, then the seller may apply and retain that part of the purchase price paid by the dealer at the time of entering into this agreement and remaining in the hands of the seller in payment of any damage or loss which may be caused by failure of the dealer to perform, for any accounts for parts or charges, of whatsoever character, the dealer may have incurred with the seller. In the absence of any of the above contingencies, then such part purchase price shall be returned and paid over to the dealer."

The contract was dated January 17, 1912, and was to run until July 31, 1912.

Appellee paid the $250 specified in the contract, and that is the item which he recovered below.

The first car was shipped to appellee at Danville, and he was unable to pay the freight, and entered into a special contract with appellant whereby the latter agreed to take the car and re-sell it, which was done, appellee waiving his commission and paying the freight.

Appellee did not order another car after that time, and there was no formal cancellation of the contract.

In May, 1912, two persons from Yell County came to Little Rock to buy cars, and applied at appellant's place of business. Appellant's agent called appellee over the telephone and explained to him that they had the opportunity to sell some cars in that territory, but would have to do it at a close profit, and it would be necessary for him to waive his commission, whereupon appellee agreed to do so for the sum of $75, and sent a telegram to appellant in the following words: "I will waive my commission on the three cars sold within the next twenty-four hours for $75."

Appellant sold two cars, and shortly thereafter paid over the sum of $50 to appellee.

The question whether appellee was entitled to the full amount of $75 on this transaction, has been eliminated from the case and need not be further discussed.

The sole question presented is, whether appellee is indisputably entitled to recover the sum of $250, or whether there was enough evidence to warrant the submission of that question to the jury.

The contract between the parties, when considered as a whole, contemplates the advance payment of the sum of $250 in the nature of a deposit by appellee as security for the performance of his undertaking to purchase the stipulated number of automobiles, and it is not merely an advance payment on the price of machines. According to the terms of the contract the deposit was to remain in the hands of appellant until the expiration of the contract period, or unless the contract was sooner cancelled, and that it should be returned to appellee at the expiration of such time, or upon the cancellation of the contract unless applied in satisfaction of loss or damage on the

part of appellant sustained by reason of appellee's failure to perform the contract, or on running account due from appellee to appellant.

There was no formal cancellation of the contract, and no formal demand was made by either party upon the other, but after the transactions which we have mentioned occurred time was permitted to pass without either party taking any steps thereunder.

Under those circumstances appellee was entitled to the return of his money at the end of the contractual period, less any amount that he might have owed appellant on account, or for loss or damage sustained by appellant on account of nonperformance by appellee.

It is not claimed that there was anything due on account, but it is insisted now that appellant sustained damage to an amount in excess of the money thus deposited.

It devolved upon appellant to establish the amount of its damages, and unless it has done so, or adduced some proof tending to establish damage, it can not be said that the court erred in giving a peremptory instruction.

Ordinarily, the measure of damages for breach of a contract of sale by a vendee is the difference between the contract and the market price at the time, and place of delivery stipulated, provided the contract price exceeds the market price. *Nelson* v. *Hirschberg,* 70 Ark. 39; 2 Mechem on Sales, § 1690.

If that rule be adhered to, it is manifest that appellant has not sustained any damages, for there is no attempt to show that the market price of the automobiles was less than the contract price.

That, however, is not the proper criterion in this case. Appellant was not a dealer with an unlimited supply of automobiles or with opportunities to purchase an unlimited supply. The proof showed that he contracted about a year in advance for a supply of automobiles, and that he made a certain profit on those that he sold. His testimony showed that his profit on the four machines covered by this contract amounted to $260, when sold

through a subagent. The measure of appellant's damages for breach of the contract was not the difference between the contract and market prices, but the amount of profits, if any, which he lost by reason of the breach. If, notwithstanding the breach of the contract, appellant was able to sell his supply of automobiles without loss of profit, then it sustained no damage, and in order to make out this it should have proved that there was a loss of profits. We do not find any substantial proof in the record which would warrant the jury in finding that there was any loss of profits at all. The testimony of Mr. Tedford shows the amount of profits which was to accrue to appellant under the contract, but he does not show that they failed to sell these machines and realize profits from other purchasers. He does say in his testimony that appellee's breach of the contract "got me in a hole about four cars," but this does not mean that he lost the profits on four cars. On the contrary, it is evident that he did not mean that, for, according to his own statement, he took the first car off the hands of appellee and eliminated that entirely from the contract. That statement of the witness, putting it in the strongest light, could only mean that they were hindered or embarrassed by appellee's breach of the contract; but in order to show the right to recover, or to retain any part of the deposit, it was necessary to prove that the profits were lost, and, if so, how much.

As there was no proof in the record which would have warranted a jury in fixing any amount of damages, we conclude that the trial court was warranted in taking the case from the jury with a peremptory instruction. That being the state of the record, the judgment must be affirmed, and it is so ordered.

BECK v. ANDERSON-TULLY COMPANY.

Opinion delivered June 8, 1914.

1. TAX SALES—DELINQUENT LANDS—COMPLAINT AND NOTICE.—The complaint and notice required by Act 262, Acts 1909, providing for the sale of certain delinquent lands in the St. Francis Levee District, must correctly describe the lands to be sold, and neither complaint or notice are susceptible of amendment, and such correct description is necessary in order to give the court jurisdiction. (Page 320.)
2. JUDICIAL NOTICE—DESCRIPTION OF LANDS.—The court will take judicial notice that all lands in Crittenden County, Arkansas, are in townships north of the base line and east of the fifth principal meridian, and it is therefore unnecessary, in describing lands in Crittenden County to put the word "north" after the figure designating the township, nor the word "east" after the figure designating the range. (Page 322.)
3. DESCRIPTION OF LANDS—JUDICIAL NOTICE.—The court will take judicial notice of the fact that lands are described under the United States Government survey by designating, first, the section, then the township, and then the range in the order named. (Page 322.)
4. TAX SALES—DESCRIPTION OF LANDS.—The description of lands in the complaint, notice and decree in a proceeding to sell certain lands for delinquent taxes, in the St. Francis Levee District, held valid. (Page 323.)
5. TAX SALES—DELINQUENT LANDS—DESCRIPTION.—The description of lands to be sold for nonpayment of taxes held valid when the complaint described the same as "W. ½ 6-3-7," and the notice described the same as "W. ½ section 6, township 3 north, range 7 east." (Page 323.)
6. TAX SALES—DESCRIPTION.—A description of the land by the abbreviations commonly used to designate government subdivisions sufficiently identifies it; but the use of abbreviations in a tax assessment or notice must be confined to those commonly known or understood. (Page 323.)
7. TAX SALES—DELINQUENT TAXES—AMOUNT—VALIDITY OF DECREE.—The complaint in a chancery proceeding to condemn certain lands for delinquent taxes amounting to $35.20 prayed a lien for taxes, penalty, interest and costs. *Held*, a sale of the land is valid under a decree which recites that the taxes, penalty and costs are $46.88, when the proceedings were properly had, and there is no showing that the decree was entered for an excessive amount of taxes, penalty and costs. (Page 324.)

Appeal from Crittenden Chancery Court; *Charles D. Frierson,* Chancellor; reversed.

STATEMENT BY THE COURT.

The appellee was the owner of 320 acres of land, described as follows: West half of section 6, township 3 north, range 7 east, in Crittenden County, Arkansas. This land had been sold for levee taxes under an act of the Legislature creating the St. Francis Levee District, in 1893, and Amendatory Act No. 262, approved May 24, 1909, providing for a proceeding *in rem.* in the chancery court for the collection of the delinquent assessments against such lands. The act, among other things, provides that the board of directors of the St. Francis Levee District "shall file its complaint setting out the list of lands, * * * each being set opposite the supposed owner, and followed by the total amount of taxes and penalty due upon the same. The clerk of the court shall thereupon cause to be published a notice containing said list of lands * * * with the names of the supposed owners and amounts due, in some weekly newspaper for four weekly insertions before any day of the next term of said (chancery) court, which said notice shall call upon the alleged owners named in the complaint and all other persons claiming any interest whatever in the said lands * * * to appear and show cause why a decree should not be rendered condemning the same for sale for said delinquent taxes, interest, penalty and costs."

The board filed its complaint in the chancery court, under the above act, describing the land as follows:

Name	Description	Acres.	Tax
R. E. Gardner	W. ½ 6-3-7.	320.	$35.20
(and other lands).			

Upon the filing of the complaint the clerk issued a warning order in the form prescribed by the above statute, in which he called upon any and all persons having or claiming an interest in the lands to appear and show cause, etc. The lands were described in the notice as follows:

"Township 3 north, range 7 east.

Name	Part of Sec.	Sec.	Acres	Tax
R. E. Gardner.	W. ½	6	320	$35.20

(and other lands, which were described).

The board of directors of the St. Francis Levee District were plaintiffs and Ruth Ellis and "certain lands" were defendants. The decree recites that "the cause came on to be heard upon the complaint of the plaintiffs and exhibits thereto attached and the proof of publication of warning order or notice required by law, and "oral evidence at the bar of the court," and the court specifically found that the complaint was in due form and due and regular notice of the pendency of the suit had been given, and the court found the amount of taxes, interest, penalty and costs due upon each of the tracts of land and decreed the same a lien as against all persons having any interest therein, and directed the sale thereof in default of payment. The lands were described in the decree under the name of the alleged owner, R. E. Gardner, and as "the west half of section 6, in township 3 north, range 7 east, acres 320, total taxes, interest, penalty and costs $46.88.".

The lands were advertised for sale, and were described in the notice of sale as in the decree. The time for the payment of the amount as directed by the decree having expired without payment of same, the lands were duly sold on the day advertised by the commissioner, and were purchased by certain parties for $500. The commissioner reported the sale to the court, and the time for redemption having expired, deeds were executed to the purchasers, which were presented to the court and the sale was in all things confirmed and the deeds approved. The lands were subsequently sold, by those who bought the same at the court sale, to one J. O. E. Beck for the sum of $3,350. He mortgaged it, with other lands, to one Brown, as trustee for J. A. Beck, to secure the sum of $10,000.

This suit was brought by the appellees to set aside the sale made by order of the chancery court. The com-

plaint set up that the sale was void, among other things, for the following reasons: "That the description of the land set out in the complaint did not contain any proper description of the land, and was not sufficient to identify the land in that it did not indicate the section, township and range," and, further, "that the complaint showed only the amount of taxes due, and did not show the total amount due, including penalty of 25 per cent, as required by the statute."

The appellee prayed that the decree be set aside and that the deeds executed thereunder be cancelled and its title quieted.

The court found that the decree condemning the lands and ordering same to be sold for the delinquent assessments was void, and entered a decree setting the sale aside and cancelling the deeds, from which decree this appeal has been duly prosecuted.

A. B. Shafer and *H. F. Roleson,* for appellant.

1. The principles governing this case are settled by 142 S. W. 836; Acts 1909, 782; Act 1905, 88.

2. An affidavit for warning order is an indispensable prerequisite. 70 Ark. 409; 68 S. W. 242.

3. On collateral attack, the rule is that if the complaint asks the aid of the court, the decision, however erroneous, is not void. 77 Ind. 371; 52 Ark. 160; 52 Ala. 291; 101 N. W. 73; 166 U. S. 533; 23 Kan. 95-97; 21 N. E. 1090.

4. The description of the land was sufficient. 21 N. E. 1090; 37 *Id.* 540; 31 Ark. 379, 383, 384; *Ib.* 329-335; 127 Fed. 219.

5. Errors and defects that do not affect the substantial rights of parties are disregarded by the courts. 148 S. W. 458; 160 *Id.* 866; Kirby's Dig., § 6148; 55 Ark. 37. The policy of the law is to maintain judicial sales. 166 U. S. 533.

C. H. Trimble, for appellee.

1. The court acquired jurisdiction. The proceeding is statutory and the description of the land is sufficient.

59 Ark. 460; 26 Minn. 212; 2 N. W. 495; 49 *Id.* 724; 50 Ark. 188-190; 55 *Id.* 30-33; 70 *Id.* 207. Jurisdictional facts must appear of record. 56 Ark. 420; 51 *Id.* 34; 54 *Id.* 627; 59 *Id.* 483.

2. The proceeding was strictly *in rem.* 50 Ark. 188-191.

3. The rule as to the distinction between presumptions aiding the proceedings of superior courts is stated in 51 Ark. 34-39. A complaint can not be considered to have been amended to fit the proof. 55 Ark. 562; 56 *Id.* 419; 107 Tenn. 214-219, 220.

4. Failure to follow the statute is fatal. 70 Ark. 807; 59 *Id.* 460; 56 *Id.* 419; 51 *Id.* 420; *Ib.* 34-39; 59 Ark. 483. Jurisdictional facts must be stated; they can not rest *on parol.* 55 Ark. 281, 562-565.

5. The lands must be properly described. 37 Cyc. 1303; 107 Tenn. 214, 219, 220; 18 S. W. 1044.

6. A tax sale is void for excess of costs. 61 Ark. 414.

WOOD, J., (after stating the facts). The proceeding in the chancery court to sell the lands for the delinquent assessments under the provisions of the amendatory act of May 24, 1909, was made "a proceeding *in rem.*"

In order to give the chancery court jurisdiction over the particular tract of land in controversy, it was essential that the board file a complaint in which the lands were described with sufficient certainty to enable the clerk to give the notice in the form prescribed by the statute, describing the lands with such accuracy that the alleged owners and all other persons claiming any interest whatever in the lands would be advised, by reading the notice and referring to the complaint, of what particular lands were involved in the proceeding for the sale of the same.

In *Crittenden Lumber Company* v. *McDougal,* 101 Ark. 390, an attack was made by the lumber company upon the validity of the commissioner's deed, made in pursuance of a sale by order of the chancery court on lands that were sold for levee taxes under the authority and in pursuance of the act creating the levee district. In that case we said: "This is a collateral attack upon a domestic judgment of

a court of general jurisdiction. It is well settled that every presumption will be indulged in favor of the jurisdiction of such court, and the validity of the judgment which it enters. Unless it affirmatively appears from the record itself that the facts essential to the jurisdiction of such court did not exist, such collateral attack against the judgment rendered by it will not prevail. It is true that a judgment may be attacked collaterally, where, by the record, it is shown that there was want of jurisdiction in the court rendering it, either of the subject-matter or of the person of the defendant."

As this was a proceeding *in rem,* the filing of the complaint correctly describing the lands, was necessary in order to give the court jurisdiction of the subject-matter. See *McCarter* v. *Neil,* 50 Ark. 188-191. Therefore, unless the land was correctly described so as to enable the clerk to give notice of the particular tract involved the record itself would show that the court had no jurisdiction, and this would render the decree void even on collateral attack, as this is.

A complaint correctly describing the lands, under the act, is the primal step in the proceeding. It is the basis upon which the clerk must act in giving the notice provided for. No presumptions can be indulged in favor of a decree grounded upon a complaint that does not contain a correct description of the particular tracts of land ordered to be sold. The notice must be given by the clerk of the lands described in the complaint. Unless the lands are correctly described, the notice will necessarily be insufficient. Neither the complaint nor the notice are susceptible of amendment, and therefore no presumptions can be indulged contrary to what they show on their face. They are preliminary and prerequisite to a seizure and control by the court of the land sought to be condemned for the delinquent taxes.

But the description of the land in the complaint here was sufficient to give the court jurisdiction over the particular tract of land, which was correctly described by the clerk in the notice he gave under the statutes, and which

is correctly described in the decree under which the land was sold.

All the lands in Crittenden County are in townships north of the base line and east of the fifth principal meridian. Of this the court will take judicial cognizance. It was therefore not necessary to put the word *north* after the figure designating the township, nor the word *east* after the figure designating the range. Under our revenue system lands are listed so that opposite each name follows in order, the description of each tract by section, or the largest subdivision of which the same is capable, designating the number of the section and part thereof, the congressional township or survey, and the value of each tract.

The law prescribes the form in which lands shall be listed on the return of the assessor, as follows: In making such return each separate tract of land in each congressional township shall be placed in the numerical order of the section * * * which returns shall be as near the following form as practicable:

Name of Owners	Part of Section	Section	Township	Range	No. of acres	Value

(Kirby's Digest, § 6976).

This order of the listing of the lands follows the description of the Government survey as to the numbers designating respectively the section, township and range.

In the act creating the St. Francis Levee District it is provided: "The said lands shall be entered (for assessment) upon such books in convenient subdivisions as to survey by the United States Government." The court will take judicial notice of the fact that lands are described under the United States Government survey by designating first the section, then the township, and then the range, in the order named. When these provisions of our revenue law and the act creating the St. Francis Levee District, in regard to the manner in which lands are to be listed and described, are taken into consideration, there can be no room for uncertainty or mistake in the description of the lands contained in the complaint

filed by the board of directors of the St. Francis Levee District. The letter and figures, "west half 6-3-7" under the word "description," as used could only mean the west half of section 6, township 3, range 7; and since all the lands in Crittenden County are in townships north and ranges east, necessarily the words *north* and *east* must be understood as following the figures designating the numbers of the township and range. This description, "west half 6-3-7," was correctly interpreted by the clerk as meaning the west half of section 6, township 3 north, range 7 east, and, accordingly, the notice was published giving the full description of the land, writing out the words "section," "township" and "range," preceding the numbers. Considering the manner in which lands are described, and the subdivisions thereof under the United States Government survey, and that they are to be listed and described in that order under our revenue system, and the act creating the St. Francis Levee District, we are of the opinion that the description contained in the complaint was susceptible of no other interpretation than that placed upon it by the clerk in the notice, and the court in rendering the decree for the condemnation and sale of the land.

In *Cooper* v. *Lee,* 59 Ark. 460, we said: "A description of the land sufficient to identify it and notify the owner is essential to a valid sale in a proceeding to sell land for nonpayment of taxes." And, further, "A description of the land by the abbreviations commonly used to designate Government subdivisions sufficiently identifies it; but the use of abbreviations in a tax assessment or notice must be confined to those commonly used and understood" (pp. 462, 463).

The land was described in the complaint in the chancery proceeding so that any one having sufficient education to read, and enough intelligence to comprehend the usual and ordinary terms in which descriptions of land are couched, could readily understand what lands were involved. No land owner nor any one interested in these lands, if they exercised any sort of diligence, could have

been mistaken as to the description of these lands. The complaint and the publication by the clerk gave notice to the world that the lands, among others, sought to be condemned and sold for delinquent levee assessments were the west half of section 6, in township 3 north, range 7 east, in Crittenden County. The chancery court therefore had jurisdiction and its decree, under which appellants claimed, is invulnerable to the collateral attack made upon it by the appellee.

The appellee contends that the chancery sale was void because the complaint specified that the amount of taxes was $35.20, and that the amount of the penalty and interest was not mentioned; that the warning order contained the same sum, but that a decree was rendered for the sum of $46.88, which rendered same void.

An examination of the complaint that was filed in the chancery proceeding to condemn for delinquent taxes shows that the board of directors asked that a lien be declared and the lands sold for the amount of the taxes and penalty, together with interest and costs due on each tract of land respectively. The notice published by the clerk informed the owners and all others interested that they were required by law "to appear and make defense to said suit or the same will be taken for confessed, and final judgment will be entered directing the sale of said land for the purpose of collecting said delinquent levee taxes, together with payment of interest, penalty and costs which will accrue as allowed by law."

The decree recites that the total tax, penalty and costs allowed by law and adjudged against the tract of land in controversy was $46.88. It also shows that the cause was heard upon the complaint and exhibits, proof of publication, and oral evidence taken at the bar of the court. These recitals of the record are sufficient to justify the decree for the amount named therein. There is no showing that the decree was entered for an excessive amount of taxes, penalty and costs. It will be presumed that the chancery court ascertained the correct amount, and that the decree reflects that sum.

The decree of the chancery court, therefore, in the suit at bar, setting aside the sale of the lands and cancelling the deeds under which appellants claim title, was erroneous, and it is therefore reversed and the cause will be remanded with directions to dismiss appellee's complaint for want of equity.

HART, J., dissents.

DAVIS v. MARTIN STAVE COMPANY.

Opinion delivered June 8, 1914.

1. CONTRACTS—WORDS AND PHRASES—ORAL TESTIMONY TO EXPLAIN.—Where a contract contains words of latent ambiguity or where technical terms are used or terms which by custom and usage are used in a sense other than the ordinary meaning of the words, oral testimony is admissible to explain the meaning of the term or word used. (Page 330.)
2. CONTRACTS—INTENTION OF PARTIES—USAGES.—Usage, when it is uniform and well settled, and is not in contradiction of the expressed terms of the contract, is deemed to form a part of the contract and to enter into the intention of the parties. (Page 330.)
3. CONTRACTS — CONSTRUCTION — EVIDENCE — CUSTOM AND USAGE — DAMAGES.—Plaintiff sold to defendant "all the oak timber on certain land, suitable to make staves or stave bolts." Under the evidence it was customary to use only white oak timber for such purposes. *Held*, under the contract defendant was entitled to cut only white oak timber, and that he would be liable in damages for other timber cut from the land. (Page 331.)

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

STATEMENT BY THE COURT.

J. L. Davis brought this suit against the Martin Stave Company to recover the sum of three hundred dollars, the value of a quantity of red oak timber which he alleges was wrongfully cut from his lands by the Martin Stave Company. In its answer the Martin Stave Company admitted that the plaintiff was the owner of the lands from which the timber was cut, but denied that it wrongfully cut the timber therefrom. The defendant

also alleged that it was the owner of all the red oak timber cut by it under a timber deed from the plaintiff, J. L. Davis. The plaintiff filed a reply in which he admitted that he had sold and conveyed to the defendant all the oak timber on the lands described in his complaint suitable to make staves and stave bolts, but he alleged that at the time he executed the timber deed to the defendant it was understood between them that he was only conveying to them the white oak timber, and its species, and that red oak timber was not at that time used for making bolts. He further alleged that J. L. Jean, by verbal contract, purchased the timber from the defendant, entered into possession of it and paid the defendant the purchase price for the same. The plaintiff thereupon moved to transfer the case to equity, which was done without objection on the part of the defendant.

The facts are as follows:

J. L. Jean testified: I live in Columbia County, and purchased the timber in controversy from J. L. Davis for the Martin Stave Company. Joe Rowe was the agent for the Martin Stave Company, and had been trying to purchase the timber but was unable to do so. I told him that I could purchase the timber for the company if he would allow me to haul the timber, which he agreed to do. After the timber was purchased, Mr. Rowe could not get any hands to help cut the timber, and I told him I would take the timber off of the company's hands for the price it had paid for it if he would give me $6.50 to put it on the yard. He told me he would take it up with the Martin Stave Company and let me know. Later he told me that I could have the timber at the price agreed upon, and I told him I would pay for it out of the first lot of bolts that were turned in. The first check for my bolts came to $250.70, and I paid the company out of this sum. I did not require any deed from the company because I was already in there cutting the timber and expected to get through with it within a month. At the time I bought the timber I understood that white oak was all the timber embraced in the deed. At the time

the timber was bought by the Martin Stave Company from Mr. Davis it was not the intention to purchase anything except the white oak timber and its species. At the time the deed was executed, red oak timber was not used in that community for the purpose of making staves and bolts, and had never been so used, and was not considered suitable for that purpose.

J. L. Davis testified: I have been selling oak timber for fifteen years, and during this time I have never known of any red oak timber to be used for staves or stave bolts. At the time I executed the timber deed to the Martin Stave Company, I intended only to convey the white oak timber and its species, and this was understood by Mr. Rowe and Mr. Jean, who purchased the timber for the Martin Stave Company. The timber deed from J. L. Davis to the Martin Stave Company was dated September 8, 1910, and the consideration recited in the deed was $250. The deed conveyed to the Martin Stave Company "all the oak timber suitable to make staves or stave bolts," growing on the land described in the deed. Red oak was not at that time considered suitable for making stave bolts.

A. J. Carter testified for the defendant: I have been engaged in the stave business for about thirty-five years, and have been manufacturing staves in Columbia County for about eight years. Red oak is suitable for making staves or stave bolts, and I have been using it for that purpose since I have been in the county.

Dave Fullenwider testified: I have been engaged in buying and manufacturing oak timber into staves and stave bolts fifteen years. Prior to September, 1910, red oak timber had not been used in Columbia County for making staves and stave bolts. Prior to that time all oak timber suitable for staves and stave bolts was practically white oak timber. In buying oak timber suitable for making staves and stave bolts, it was generally understood between the parties engaged in that business that it had reference to white oak and its species. Somewhere along about July, 1910, people began to inquire

about red oak staves, and that was the first time that people engaged in the stave business in this section of the country made any inquiry about using red oak to make staves and stave bolts.

The chancellor found in favor of the defendant and dismissed the complaint for want of equity, and the plaintiff has appealed.

C. W. McKay, for appellant.

1. If this were a suit to reform the deed of appellant to appellee, then with testimony like this a court of equity would reform the deed so that it would convey only the white oak timber and species standing on the land. 89 Ark. 310; 71 *Id.* 614; 82 *Id.* 226.

2. Notice to Joe Jean was notice to appellee. 98 Ark. 379; 31 Cyc. 1587.

3. On account of the mistake in the deed no title to red oak timber passed to appellee. Equity acquired jurisdiction on account of the mutual mistake in the description of the property sold. 2 Pom., Eq. Rem., § 683.

4. Parol evidence of a mistake is admissible in all cases. 2 Pom., Eq. Rem., § 682.

W. H. Askew, for appellee.

1. A new issue can not be raised here for the first time. No issue as to fraud or mistake was raised. 95 Ark. 593; 90 *Id.* 59; 88 *Id.* 189; 94 *Id.* 378; 94 *Id.* 390-392.

2. No material allegation of the complaint was sustained by the law or evidence. To reform a deed for mistake or fraud the evidence must be mutual and decisive. 104 Ark. 475-484; 102 *Id.* 326; *Ib.* 575-579; 83 *Id.* 131.

3. The only issue in this case is as to the meaning of the expression, "all oak timber suitable to make staves or stave bolts." The testimony of Dean and Doss was inadmissible. 4 Wig. on Ev., p. 3394, § 2415 B. (a), 105 Ark. 455-458.

4. The only question is whether or not red oak is covered by the description used. 102 Ark. 428; 88 *Id.*

213; 99 *Id.* 218; 95 *Id.* 131; 94 *Id.* 130; 83 *Id.* 283-7; 102 *Id.* 326-334.

5. There is no general prayer for relief in the complaint. 90 Ark. 241-245.

6. Is red oak timber *suitable* for staves or bolts? This is vital. 7 Words & Phrases, 6780; 69 Fed. 93; 15 Pa. 371-379.

HART, J., (after stating the facts). Counsel for the defendant seeks to uphold the decree on the authority of *Hearin* v. *Union Sawmill Company,* 105 Ark. 455; but we do not think that case is an authority for him. There the deed conveyed "all the pine and oak timber ten inches and up." It was contended by the seller that this did not embrace the old field pine which was on the land. Among the reasons given was, that at the time the timber deed was executed it was not profitable to cut old field pine. We held that the language of the deed aptly included every kind of pine on the land. There the deed did not purport to convey merchantable timber, but purported to convey all the pine and oak timber ten inches and up. Old field pine was covered by this description, and we held that, to allow the seller to show by parol proof that it was not so intended would be to contradict or vary the terms of the deed. There the description referred to the size of physical characteristics of the timber, and to have allowed parol evidence to show to the contrary would have contradicted the terms of the deed. Here the language of the deed is "all the oak timber suitable to make staves or stave bolts." The word "suitable," as defined in the dictionaries, means: "Fit, proper or adapted." So that it will be seen that the word referred not only to the physical characteristics of the timber but to its fitness for making staves and stave bolts. According to a preponderance of the testimony, it was not thought or understood in that community at the time the timber deed was executed that red oak timber was suitable for making staves and stave bolts. More-

over, the undisputed testimony shows that the plaintiff and the agent of the defendant who bought the timber for it both understood that red oak timber was not suitable for making staves and stave bolts and that only white oak timber and its species was suitable for that purpose. The rule is that, where the contract contains words of latent ambiguity or where technical terms are used or terms which by custom and usage are used in a sense other than the ordinary meaning of the words, oral testimony is admissible to explain the meaning of the terms or words used. *Paepcke-Leicht Lumber Company* v. *Talley,* 106 Ark. 400. In that case it was also said that every legal contract is to be interpreted in accordance with the intention of the parties making it; and usage, when it is uniform and well settled, and is not in contradiction of the expressed terms of the contract, is deemed to form a part of the contract and to enter into the intention of the parties. As we have already seen, the plaintiff and the agent of the defendant who made the contract for it both testified that it was not their intention to include the red oak timber and that it was not considered suitable for making staves and stave bolts in that community at the time the contract was executed. It may be also said that a preponderance of the evidence showed that at the time the contract was executed red oak timber, according to the custom of the community, was not considered suitable for making staves and stave bolts and was not used for that purpose.

In addition to this, J. L. Jean, who acted as agent for the defendant in purchasing the timber, testified that subsequent to the execution of the timber deed he purchased the timber from the defendant at the price it had paid for it. In other words, he testified he had an understanding and agreement with the Martin Stave Company that he would take the timber off of its hands at the price it had paid for it. This contract was not in writing, but Jean stated that, pursuant to its terms, he cut the timber, which it was understood was embraced in

the contract, and paid the defendant for it. His testimony in this regard is uncontradicted. So it may be said that the undisputed testimony shows that the defendant made a verbal contract for the sale of the timber which it had purchased from the plaintiff and that pursuant to its terms Jean took possession of the timber and paid the purchase money. The facts proved as to the payment of the purchase money for the timber by Jean and the taking possession of the timber by him met every requirement of our decisions as to the part performance of a parol contract necessary to give Jean the right to specific performance. *Arkadelphia Lumber Company* v. *Thornton,* 83 Ark. 403.

Jean says that he did not demand any deed from the Martin Stave Company because he had cut all the timber from the land that he was entitled to under the deed from the plaintiff to the Martin Stave Company. The Martin Stave Company entered upon the land after it had made this contract with Jean and cut the red oak timber from it. It does not make any difference that Jean did not bring suit for specific performance as he was entitled to do. He is not making any claim to the red oak timber, and the Martin Stave Company is not entitled to the red oak timber, because, under the undisputed testimony, it had conveyed to Jean all the timber that it had purchased from the plaintiff. Therefore, it had no right to cut the red oak timber and is liable to the plaintiff for it. The undisputed evidence shows that the defendant cut seventy-five and one-half cords of red oak timber and that the value of this red oak was three dollars per cord. The chancellor should have found for the plaintiff, and for the error in not doing so the decree will be reversed, and inasmuch as the cause has been fully developed, a decree will be entered here in favor of the plaintiff for the sum of $226.50.

PURCELL v. GANN.

Opinion delivered June 8, 1914.

1. DEEDS—LANDS SUBJECT TO MORTGAGE—EQUITY OF REDEMPTION.—A deed to land, made after the execution of a mortgage covering the same conveys only the grantor's equity of redemption. (Page 337.)
2. MORTGAGES—FORECLOSURE—NECESSARY PARTIES.—Where the grantee of lands subject to a mortgage was not made a party to the suit foreclosing the mortgage, he has the right to redeem from the mortgage sale. (Page 337.)
3. INFANTS—INTEREST IN LANDS—RIGHT UNDER DECREE.—Where a decree divests a minor of an interest in lands, under Kirby's Digest, § 6248, he has a right to show cause against the decree within twelve months after arriving at full age. (Page 338.)
4. JUDICIAL SALES—ASSIGNMENT BY PURCHASER—TITLE.—A bidder, to whom property has been struck off at a judicial sale, may assign his bid before the deed has been delivered, and the deed will be made directely to the assignee and pass title to him. (Page 338.)
5. JUDICIAL SALES—CONFIRMATION—CONTINUING JURISDICTION.—A sale made under a decree of the chancery court is not completed until confirmed by the court and a deed to the purchaser confers upon him no right of ownership. (Page 338.)
6. JUDICIAL SALES—PURCHASER AND ASSIGNEE—PARTIES TO SUIT.—The purchaser under a foreclosure sale and his assignee became parties to the suit and are bound by the subsequent proceedings had in the cause. (Page 339.)
7. JUDICIAL SALES—ASSIGNMENT BY PURCHASER—RIGHTS OF PRIOR GRANTEE—EQUITY.—P., the owner of certain lands, mortgaged the same, thereafter deeding the lands to one R. The mortgage was foreclosed, and P. purchased the lands, but assigned his right to a portion thereof to one G., to whom a deed was made. *Held*, title under the sale passed to G., and that Kirby's Digest, § 734, which provides that a conveyance to one who has already attempted to grant away the estate conveyed, inures to the benefit of the grantee does not apply, as that statute will be reasonably construed, and will not be so construed so as to defeat the ends of justice. (Page 339.)
8. NAMES—SERVICE—MIDDLE INITIAL.—Where defendant's name in a civil suit is James R. Purcell, and service was had on him by the name of James Purcell, Jr., and where the record shows that they were the same person, the middle initial of the name is immaterial. (Page 340.)

9. INFANTS—SERVICE OF SUMMONS.—When defendant, a minor's name is James R. Purcell, and summons was issued directed against James Purcell, Jr., and a copy served on his father and a copy left with the father for the defendant, there has been a substantial compliance with the statute in regard to the service of summons upon infants under the age of fourteen years. (Page 340.)

10. JUDICIAL SALES—CONFIRMATION—WHEN COMPLETE.—At a judicial sale the court is the seller, and the whole matter remains under its control until the sale is completed, and until the delivery of the deed and its approval by the court. When this is done, it relates back to the time of sale and carries the legal title from the delivery of the deed. (Page 341.)

11. JUDICIAL SALES—PURCHASE AND ASSIGNMENT—TITLE.—When the purchaser at a judicial sale assigns his interest to another, and the latter paid the purchaser money and a deed was executed to him, the original purchaser does not obtain any title to the land, legal or equitable, within the meaning of Kirby's Digest, § 734. (Page 342.)

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

STATEMENT BY THE COURT.

This proceeding was instituted by James R. Purcell within twelve months after attaining full age, to set aside a decree and to exercise his right to show cause against it in the cause of J. F. Shoemaker and D. Gann against James Purcell, Jr. The facts are as follows:

On the 5th day of February, 1891, James Purcell executed, in favor of McCarthy & Joyce, two mortgages. One of the mortgages was on certain lands in Saline County, Arkansas, and was given to secure a promissory note for the sum of $525 and also $5,000, more or less, to be furnished said mortgagor at his option. The other mortgage was on personal property, and was given to secure the sum of $525, and all other indebtedness which might be due the mortgagees on or before January 2, 1894, the date on which the promissory note for $525 was due. McCarthy & Joyce assigned both of said mortgages to the Bank of Commerce. On the 11th day of June, 1896, after the mortgages had become due, the bank instituted an action in the chancery court against James

Purcell for the purpose of foreclosing said mortgages. On the 15th day of February, 1897, a decree of foreclosure was entered by the chancellor, and in it, it was determined that James Purcell owed the bank the sum of $845, together with accrued interest. The decree declared that the amount found due was a lien on the land embraced in the mortgage, and a commissioner was appointed to sell the mortgaged premises in satisfaction of the debt. The commissioner's report of sale showed that on the 27th day of March, 1897, he sold a part of the personal property embraced in the mortgage for $22, and that he sold all the personal property that had been placed in his possession; that at the same time he sold all the lands mentioned in the real estate mortgage to James Purcell for $600; that James Purcell executed in his favor a note, with sureties for the purchase money. On July 2, 1897, the report of the commissioner was approved by the chancery court, and a deed was ordered made to James Purcell when the purchase money was paid. On October 28, 1897, James Purcell, for the consideration of $200, assigned to Dewell Gann certain of the lands so purchased by him, and directed the commissioner to make a deed to Gann for the same. The commissioner executed the deed to Gann on the 26th day of November, 1897, and the same was approved in open court. On the 28th day of October, 1897, Purcell also made an assignment of certain of the land so purchased by him to John F. Shoemaker for the consideration of $200, and the commissioner made a deed to him for the land embraced in the assignment, and this deed was likewise approved by the court. In 1893 James Purcell deeded the land which he had previously mortgaged to McCarthy & Joyce to his infant son, James R. Purcell, who was at the time about two and a half or three years of age. On April 21, 1899, Gann and Shoemaker filed a petition in the chancery court, alleging the mortgage foreclosure, the sale of the lands thereunder, the purchase of the same by James Purcell, the deed from him to his infant son, the respective assignments by James Purcell to them of his certifi-

cates of purchase at the sale under the mortgage foreclosure, and that they had paid off the judgment which had been declared a lien on said lands. The prayer of the complaint was that James Purcell, Jr., be made a party to the suit; that a guardian *ad litem* be appointed to defend for said minor, and that upon a final hearing of the cause his right of redemption be forever barred and that the title to the lands be confirmed in the petitioners. A summons was duly issued, and the return on the same by the sheriff is as follows:

"I have this 21st day of April, 1899, duly served the within by delivering a copy of the within to James Purcell, Sr., and also giving a copy to James Purcell Sr., for James Purcell, Jr., who is a member of his family over the age of fifteen years, and his father, and at his usual place of abode."

An order was duly entered of record appointing a guardian *ad litem* to defend for the minor defendant, James Purcell, Jr. An answer was filed by the guardian which conformed to the statutory requirements.

Evidence was introduced by the petitioners tending to show that Purcell had transferred to them the certificates of purchase to the lands in controversy, and that they had paid the judgment which had been declared a lien on said land in the suit to foreclose the mortgage on same; that this had been done and the assignment made to them at the request of James Purcell, Sr., in order that he might have certain other lands for his minor son.

The chancellor entered a decree in favor of the petitioners. In it he found that subsequent to the execution of the mortgage by James Purcell, Sr., to McCarthy & Joyce, he had conveyed the land by deed to his infant son, James Purcell, Jr. That at the foreclosure sale James Purcell, Sr., became a purchaser of the land and transferred his certificate of purchase to certain of the lands embraced in the mortgage to the petitioners in consideration that they should pay off the judgment which had been declared to be a lien on the land; that this was done for the purpose of saving other of the lands which had

been deeded by the father to his minor son, and that the consideration in said assignment was fair and reasonable. The decree further provided the time in which the minor defendant might redeem the land, and, in default of his so doing, confirmed the title thereto in the petitioners. Shoemaker and Gann.

The chancellor entered a decree dismissing James R. Purcell's petition for want of equity, and he has appealed to this court.

J. S. Abercrombie, for appellant.

1. Appellant was the owner of the land. When a sale of land is made under a decree and duly confirmed, a binding contract of sale is entered into and the relation of vendor and vendee is constituted. 97 Ark. 397; 84 *Id.* 160; 48 *Id.* 160; Pom. on Eq. 368. Upon confirmation of the sale the equitable title vested in the purchaser. Kirby's Dig., § 734; 47 Ark. 111; 76 *Id.* 527; 95 *Id.* 253; 84 *Id.* 532.

2. Under the above authorities the title inured to the benefit of appellant, and appellee had notice of his title. 84 Ark. 160; 76 *Id.* 527; 84 Ark. 1.

3. Appellant had three years to make defense to the petition. Kirby's Dig., § 657; 80 Ark. 411.

4. Appellant had the right to vacate the judgment. Kirby's Dig., § 6248, eighth div. of § 4431 and § 4433; 70 Ark. 415; 79 *Id.* 194; 103 *Id.* 67; 50 N. E. 221; 186 Ill. 510; 138 Cal. 651; 49 Ark. 397; 90 *Id.* 47; 84 *Id.* 1.

5. The decree of May 25, 1899, was unjust, even if appellant's right was only that of redemption. 84 Ark. 521. The original foreclosure could not be reopened except for the specified causes in Kirby's Dig., § 4431; 60 Ark. 155; 53 *Id.* 110; 33 *Id.* 154; 52 *Id.* 110.

6. Appellant's rights were not adjudicated—he had no notice. 23 Cyc. 913, 1089; 63 Ark. 323.

W. R. Donham, for appellee.

1. A decree of foreclosure is not void for failure to make a subsequent purchaser from the mortgagor a party, as his only right is an equity of redemption. 77

Ark. 379; 74 *Id.* 138; 64 *Id.* 576. Purcell, Jr., had only the right to redeem. A judgment is a bar to all defenses. 76 Ark. 423; 94 *Id.* 329; 74 *Id.* 320; 94 *Id.* 347; 50 *Id.* 527.

2. The recital in the record is that defendant was regularly served with process. Kirby's Dig., § 4425; 25 Ark. 60; 72 *Id.* 266; 100 *Id.* 63.

3. One must show not only that he was not summoned, but he had no notice in time to defend. 72 Ark. 266; 100 *Id.* 63; 50 *Id.* 462; 79 *Id.* 19; 97 *Id.* 76.

4. Purcell's right to file this suit is settled by Kirby's Digest, § 6248, provided he can show any errors in the judgment. This he has not done. 49 Ark. 397; 90 *Id.* 47; Kirby's Dig., § § 4433, 4434. A meritorious defense must be shown. 84 Ark. 532; 50 *Id.* 458; 90 *Id.* 49; 103 *Id.* 69; 70 *Id.* 415; 70 *Id.* 418; 79 *Id.* 194; 103 *Id.* 69; 55 Ark. 22; 22 Cyc. 700.

5. In order to redeem a tender of the debt must be made in good faith. 84 Ark. 527; 71 *Id.* 484; 40 L. R. A. (N. S.) 839.

6. There is no error in the decree.

HART, J., (after stating the facts). The deed from James Purcell to his infant son, James R. Purcell, recited that it was executed in consideration of love and affection. It was made after the execution of the mortgage on the land by James Purcell to McCarthy & Joyce. Therefore, the deed conveyed only the equity of redemption of James Purcell. James R. Purcell was not made a party to the proceedings to foreclose the mortgage on the land, and, having been omitted from the foreclosure suit, he still had the right to redeem from the foreclosure sale. *Dickinson* v. *Duckworth,* 74 Ark. 138. The decree in the case of Shoemaker & Gann against James R. Purcell, which was instituted in 1899, provided that the latter should have a designated length of time within which to redeem from the foreclosure sale and that if he failed to do so the title to said land should be vested in Shoemaker & Gann. James R. Purcell failed to exercise his right to redeem. The condition of James R. Purcell as

an infant appeared in the record in that action. The decree in the case divested him of an interest in lands, and he therefore had a right to show cause against the decree within twelve months after arriving at full age, as prescribed in section 6248 of Kirby's Digest. *Paragould Trust Co.* v. *Perrin,* 103 Ark. 67. Section 734 of Kirby's Digest provides that when one conveys land by deed purporting to convey a fee simple estate and does not own the land at the time, but afterward acquires the title, such after-acquired title, whether legal or equitable, passes at once to his grantor. Under this section, counsel for James R. Purcell contends that when James Purcell bid off the land at the mortgage foreclosure sale he acquired the title thereto by such purchase and that it was an after-acquired title which inured to the benefit of James R. Purcell. It will be remembered that James Purcell became the purchaser of all the lands embraced in the mortgage at the foreclosure sale, and, not being able to pay the amount of the mortgage debt, in order to save a part of the lands for his infant son, James R. Purcell, he assigned his certificate of purchase to a part of the lands to Gann & Shoemaker in consideration that they pay off the amount of the mortgage debt. This they did, and a deed was made to them, and was approved by the court. A bidder to whom property has been struck off at a judicial sale may assign his bid before the deed has been delivered, and the deed will be made directly to the assignee and pass the title to him. 24 Cyc. 31; Wiltsie on Mortgage Foreclosure Sales (3 ed.), vol. 1, § 678. In the case of *Wells et al.* v. *Rice et al.,* 34 Ark. 346, the court said that a sale made under a decree of the chancery court is not completed until confirmed by the court and a deed to the purchaser confers upon him no right to the property. Continuing, the court said:

"'The theory of sales of this character is,' as the court says in *Sessions* v. *Peay,* 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.' "

The purchaser under the foreclosure sale and his assignees became parties to the suit and are bound by the subsequent proceedings had in the cause. As said in the case of *Proctor* v. *Farnam,* 5 Paige, Chan. Rep. (N. Y), 614, "It is a familiar principle that any one who interferes *pendente lite* with the subject-matter of a suit in equity submits himself to the jurisdiction of the court to be exercised by petition or motion in the original suit, and that he acquires no rights in that manner which may not be modified, controlled or directed without any new proceeding directly against him, and this doctrine applies with full force to the case of a purchaser under the decree and to all who claim interest under him." Therefore, we do not think that James Purcell acquired any title, either legal or equitable, under his purchase at the foreclosure sale, but we are of the opinion that the title under such sale passed to his assignees when they paid the purchase price under orders of the court and a deed was executed to them and approved by the court. James Purcell assigned his certificate of purchase to a part of the lands to them and had the deed executed to them for the purpose of saving a part of the lands embraced in the mortgage for his infant son, James R. Purcell. Under these circumstances, every principle of equity favors the claim of Shoemaker & Gann, and if they are to be defeated at all it is simply because of section 734 of Kirby's Digest, which provides that a conveyance to one who has already attempted to grant away the estate conveyed inures to the benefit of his grantee. The statute must be reasonably construed so as to effectuate its purpose, but it should not be construed to defeat the ends of justice.

Again, it is contended by counsel for James R. Purcell that the decree in the case of Shoemaker & Gann against James Purcell, Jr., should be reversed because

James R. Purcell was not made a party to that suit and no service was had upon him. The record shows that James R. Purcell and James Purcell, Jr., are the same persons; and this court has held that under such circumstances the middle initial of a name is immaterial. *Fincher* v. *Hanegan,* 59 Ark. 151. It is true James Purcell, Jr., was named as the defendant in the action; and it was alleged that he was a minor under the age of fourteen years. The summons was issued directed against James Purcell, Jr., but it was served by delivering a copy to James Purcell, the father of James R. Purcell, and also by leaving another copy with James Purcell for James R. Purcell, his infant son, the latter not being at the time at home. This was a substantial, if not a literal, compliance with the statute in regard to the service of summons upon infants under the age of fourteen years. *Huggins* v. *Dobbs,* 57 Ark. 628.

Upon the whole record we find no error, and the decree will be affirmed.

ON REHEARING.

HART, J. Counsel for appellant insists that he should have a rehearing on the authority of the case of *Green* v. *Maddox,* 97 Ark. 397. In that case Henry Maddox became the purchaser of the land at a commissioner's sale, under a chancery decree, in November, 1888. He executed his notes for the purchase money and the sale was reported by the commissioner to the chancery court and was confirmed by the court at its March term, 1889. Henry Maddox went into possession of the land and commenced the erection of a house upon it. Prior to the maturity of the notes which he had executed to the commissioner for the purchase money of the land, Henry Maddox died, leaving surviving as his heirs at law the plaintiff, Hayden Maddox, and his elder brother, named Donald. At the February term, 1890, of the chancery court J. D. Maddox presented to the court a petition alleging that he was the uncle and guardian of the minor heirs of Henry Maddox, deceased, and that there were no funds of said decedent's estate out of which to pay

the purchase money of said land sold to Henry Maddox, and that he had paid the same out of his own funds. He asked an order of the court directing the commissioner, for that reason, to execute a deed to him for the land, which was accordingly done. Upon appeal to this court it was held that when J. D. Maddox paid the purchase money to the commissioner after the sale of the land was made by him to Henry Maddox, and the sale was confirmed, he became a constructive trustee for the heirs of Henry Maddox, to whom his rights descended. Here the facts are essentially different. It is true that James Purcell on March 27, 1897, was the accepted bidder at the commissioner's sale and that the sale was confirmed on July 2, 1897.

Section 6323, Kirby's Digest, provides that a conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be endorsed on the conveyance and recorded with it. Here, as in the case of *Green* v. *Maddox, supra,* the confirmation was made, in the first place, of the sale and afterward of the deed, but in the case of *Green* v. *Maddox* it will be noted that the purchaser died before any one was substituted in his stead as purchaser. It is a recognized practice to allow another person to be substituted for the purchaser and to take the deed directly to himself. Jones on Mortgages (6 ed.), vol. 2, § 1652. In such cases the court is the seller and the whole matter remains under its control until the sale is completed and until the delivery of the deed and its approval by the court. When this is done it relates back to the time of the sale and carries the legal title from the delivery of the deed.

In the present case Gann & Shoemaker were substituted as purchasers in the place of James Purcell by the latter's consent and direction. In this respect the present case is essentially different from the case of *Green* v. *Maddox, supra.* James Purcell, by becoming the purchaser, and Shoemaker & Gann having agreed to be substituted as purchasers in his stead, by his con-

sent and direction, all became parties to the foreclosure proceeding insofar as their rights were concerned. James Purcell having agreed that Shoemaker & Gann should be substituted as purchasers in his stead and that under said agreement, they having paid the purchase money and the deed having been executed to them and approved by the court, they became the purchasers of the land in the foreclosure sale and Purcell did not obtain any title, legal or equitable, within the meaning of section 734, Kirby's Digest. Neither can it be said that James Purcell, being the mortgagor, and thus bound to pay the mortgage debt, that when he bid in the land at the foreclosure sale and the sale was confirmed, this amounted to a satisfaction and discharge of the mortgage. The reason for this is that he asked that Shoemaker & Gann be substituted in his stead as purchasers, and it was their money that bought the property and paid for it. They were properly substituted as purchasers in his stead and the result is precisely the same as if they had personally bid in the property at the commissioner's sale. *Bensieck* v. *Cook* (Sup. Ct. of Mo.), 19 S. W. 642.

Motion for rehearing will be denied.

WILLIAMSON BANK & TRUST COMPANY *v.* MILES.

Opinion delivered June 8, 1914.

1. BILLS AND NOTES—ENDORSEMENT IN BLANK—TITLE.—A note drawn to the maker's order, and endorsed by him in blank, becomes in legal effect a note payable to bearer, and no written endorsement is necessary to pass the title. (Page 345.)
2. BILLS AND NOTES—ENDORSEMENT IN BLANK—BONA FIDE PURCHASER.—Where a note payable to maker's order is endorsed in blank and delivered to the person for whom it was made, a purchaser of the note, in due course, for value, without notice and before maturity may recover on the note against the maker. (Page 346.)
3. BILLS AND NOTES—PURCHASER FOR VALUE.—A bank will be held to be a purchaser for value of a note, where it paid value for the same and placed the amount to the credit of the vendee of the note. (Page 346.)

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

Allen Hughes and *Fink & Dinning,* for appellant.

1. There are only two questions in this appeal. (a) Was there such fraud practiced in procuring the note as would have vitiated it in hands of the original holder, and (b) did appellant pay a valuable consideration for the note?

2. The note was not void for fraud.

3. Appellant took the note in due course of business before maturity and without any knowledge of the circumstances attending its execution. 101 Minn. 470, is at variance with 104 Ark. 388; 163 S. W. 775; 101 Ark. 280.

Bevens & Mundt, for appellee.

1. There is nothing to review on appeal. 70 Ark. 419; 60 *Id.* 250.

2. The note was wrongfully put in circulation. 136 Ia. 390. The consideration failed and the burden of proof was on plaintiff. 13 Ark. 150; 48 *Id.* 450; Bigelow on Bills, 250, 251-2; 136 Ia. 390; 15 Ann. Cas. 668; 11 Ann. Cas. 204; 163 S. W. 798.

3. Plaintiff did not show himself a *bona fide* holder. 11 Ann. Cas. 204; 163 S. W. 798; 104 Ark. 394; 99 *Id.* 391.

HART, J. This action was commenced before a justice of the peace by Williamson Bank & Trust Company against J. B. Miles, Jr., to recover on a promissory note which was executed by the defendant for the sum of two hundred dollars. The plaintiff recovered judgment before the justice of the peace, and an appeal was taken to the circuit court, where the case was tried before the court sitting without a jury. The circuit court found in favor of the defendant, Miles, and the plaintiff, Williamson Bank & Trust Company, prosecutes this appeal to reverse the judgment rendered in favor of the defendant. The facts are as follows:

S. M. Williamson testified: I am president of the Williamson Bank & Trust Company, a banking corpora-

tion organized under the laws of the State of Tennessee, doing business in the city of Memphis. The bank, in the ordinary course of its business, makes a practice of discounting notes and negotiable instruments. The note shown me is signed by J. B. Miles, Jr., dated August 29, 1912, and due three months after date. Miles executed the note in favor of himself and endorsed it in blank. On the 13th day of November, 1912, our bank purchased the note from Rhea P. Cary, attorney for Lamar Heiskell, receiver, and paid therefor the sum of two hundred dollars. Heiskell had been appointed receiver for the Southwestern Motor Car Distributing Corporation, which was the owner of the note. The amount paid for the note was placed to the credit of the receivership to enable the receiver to have funds to take care of and pay for certain cars which were in the city at that time and upon which drafts with bills of lading attached had been drawn. The proceeds thus enabled the receiver to obtain a very considerable profit for the receivership by being able to protect the purchase of the cars. Neither the Williamson Bank & Trust Company nor myself had any knowledge or information whatever of the circumstances attending the execution of said note except that Mr. Cary stated to me that the note was executed in payment of stock which had been subscribed by Miles to the motor car distributing corporation. I had no knowledge whatever that there was any defense to the note. The note is past due and Miles has refused to pay it. I did not know that he claimed to have any defense whatever to the note until this suit was instituted. The suit was commenced on April 17, 1913.

The defendant, J. B. Miles, Jr., testified in his own behalf as follows: I executed the note sued on and introduced in evidence. At the time of the execution of the note a written receipt was given me in exchange for it, which is as follows:

"August 29, 1912. Southwestern Motor Car Distributing Corporation, Memphis, Tennessee. Received from J. B. Miles (note) $200 for two hundred shares of

the preferred stock of the Southwestern Motor Car Distributing Corporation. In case the stock is fully paid for and is not tendered the consideration received by this corporation will be refunded. (Signed) P. A. Daulter."

The consideration for the note was stock in the Southwestern Motor Car Distributing Corporation. The agent of the corporation who induced me to subscribe for the stock and execute the note represented to me that the corporation had plenty of money, but only wanted me to take two hundred dollars' worth of stock because of my influence. He told me that if I did not get the stock they would pay the money back. The corporation was engaged in selling automobiles. Before the note was presented for payment the corporation went into the hands of a receiver. The stock was never sent to me.

The undisputed evidence shows that Miles, the maker of the note, drew it to his own order and then endorsed it in blank and delivered it to the agent of the Southwestern Motor Car Distributing Corporation. It became then, in legal effect, a note payable to bearer, and no written endorsement was necessary to pass the title. *Hale* v. *Citizens Bank of Monette,* 111 Ark. 258, 163 S. W. (Ark.) 775. In that case the court held that where one makes a note payable to himself or order, endorses it in blank, and delivers it to the agent of the company in whose favor it was executed, it becomes in effect a note payable to bearer, and its endorsement by the agent of the company in whose favor it was made is not necessary to constitute the holder of it a *bona fide* holder in due course of business. Williamson, the president of the plaintiff company, testified that he purchased the note in due course of business and paid therefor its face value. He stated that no endorsement was made by the receiver from whom he purchased it because the note was made payable to the maker thereof and because the attorney for the receiver guaranteed its payment and on this account it was not considered necessary for the receiver to endorse the note. Williamson further testified that he paid full value for the note and placed the amount to

the credit of the receiver in order to enable the latter to have funds with which to take care of and pay for certain motor cars; that at the time the bank purchased the note neither it nor its officers and agents had any notice whatever of any defect in the note or that there was any defense to it. Williamson's testimony in this respect was uncontradicted. It was reasonable and consistent with itself, and there was no fact or circumstance introduced in evidence which tended in any way to contradict it. Therefore, whatever may be the rule elsewhere, under the principles of law decided in the case of the *Bank of Monette* v. *Hale,* 104 Ark. 388, the court should have directed a verdict for the plaintiff. In that case the amount which the bank paid for the note was placed to the credit of the insurance company in whose favor the note was executed and the proceeds remained in the bank for a period of one year. On the next day after the bank purchased the note it was notified by the maker thereof that he had a valid defense to the note and did not intend to pay it. Although the amount which the bank had paid for the note was then in the bank placed to the credit of the corporation in whose favor the note was executed, the court held that the undisputed evidence showed that the bank was a *bona fide* purchaser for value in due course of business and was entitled to recover.

It follows that the court erred in not directing a verdict for the plaintiff. For that error the judgment will be reversed, and, inasmuch as the case has been fully developed, judgment will be entered here for the amount of the note with interest thereon at 6 per cent per annum from the 29th day of August, 1912.

AUTREY v. STATE.

Opinion delivered June 8, 1914.

1. APPEAL AND ERROR—INSTRUCTION—HARMLESS ERROR.—An erroneous instruction will not call for a reversal of a cause, when no prejudice resulted from the giving of the same. (Page 351.)

2. LARCENY—SUSPICIOUS CIRCUMSTANCES—QUESTION FOR JURY.—Where there were suspicious circumstances surrounding defendant's conduct, and defendant undertook to show that, although the crime of larceny had been committed, that he had no guilty part in its commission, it is the province of the jury to determine whether or not any of these statements were false, contradictory or improbable, and, if so, the jury may consider that fact in determining the guilt or innocence of the accused. (Page 351.)

3. INSTRUCTIONS—ISSUE COVERED IN OTHER INSTRUCTIONS.—It is not error to refuse to give a correct instruction, where the question is covered by another correct instruction given by the court. (Page 351.)

4. LARCENY—ASPORTATION.—Driving a steer from the field of the owner into a lot where it was subsequently killed, is a sufficient asportation to constitute an element of the crime of larceny. (Page 352.)

5. LARCENY—SUFFICIENCY OF EVIDENCE.—Evidence that defendant drove a steer into a lot for the purpose of killing it, which was done under cover of darkness, and that defendant was present at the killing, and if he did not do it, advised that it be done, and encouraged and assisted those who did it, is sufficient to warrant a verdict of guilty of larceny. (Page 352.)

6. EVIDENCE—RES GESTAE—INTENT—PROOF OF OTHER ACTS.—On the question of intent, or of the *res gestae*, proof of the stealing of other property than that for which the defendant is on trial may be admissible, and in a prosecution for the theft of a steer, evidence of the theft of a hog at the same time is admissible, as showing the intent of the defendant. (Page 352.)

Appeal from Franklin Circuit Court, Ozark District; *Jeptha H. Evans,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant was convicted of the offense of grand larceny, under an indictment charging him with stealing a certain steer, the property of one D. Jordan. The evidence in the case was circumstantial, and its sufficiency is challenged upon this appeal.

The evidence upon the part of the State was substantially as follows: That Mr. Jordan missed his steer and began an investigation to locate it, and found where the animal had been killed 300 or 400 yards inside of a field belonging to appellant's father. He found there a head, foot and some entrails up in an uncleared piece of ground. This was the next day after he had learned that one of his cattle had been killed. He went to Mulberry to see if he could find any trace of his animal and learned that the appellant had been to Mulberry in company with a man named Masterson and another named Mankins, who were jointly indicted with appellant for the larceny of this animal. While at Mulberry he learned that these men had sold a certain hide, and, upon examination of it, found the marks, brand and color to correspond with the animal he had lost. The proof shows the animal to have been killed some time between Saturday night and Tuesday morning, as it had rained Saturday night, and all of the tracks, and other signs about the place where the animal was found, appeared to have been made since the rain. The proof on the part of the State further tended to show that appellant had driven this steer into his father's field, together with a number of other cattle, on Sunday night, and that about the time this animal was butchered a hog belonging to a Mr. Brammer was also killed, and that both the steer and the hog were loaded in a wagon belonging to Mankins and Masterson, and that these men, with appellant, drove the wagon into Mulberry and there sold the hog and the hide of the steer; and that they thereafter peddled the beef. There is no proof that any money was actually paid appellant; but he rode in the wagon containing the meats and was present at the sale of some of it. And the proof further tends to show that when he left home he had only twenty-five cents, but after the sale of this meat he went to Fort Smith, and upon his return had two quarts of whiskey which he purchased while there. But he stated that this whiskey had been bought for his mother, who had given him the money for that purpose.

Near the place where the beef had been butchered there was found a hand saw belonging to Masterson, which was bloody and had evidently been used in butchering the beef, and both Mrs. Masterson and Mrs. Mankins, who lived together, testified that their husbands and appellant left their home early Monday morning before breakfast, and that shortly after their departure appellant returned and secured the saw.

Appellant admits driving the steer into his father's field on the Sunday preceding the killing of an animal in that field, but he said that this was done because the animal was with other cattle belonging to his father, which he had been ordered to turn into the field, and that he was unable to separate this steer from the other cattle, and it was only on that account that it was turned into the field.

At the trial appellant requested the court to give the following instructions, numbered, respectively, 1, 2 and 3.

1. Before you can find the defendant guilty of the charge brought against him by the indictment, you must find from the evidence beyond a reasonable doubt that the defendant was present at the time the animal was stolen. If this does not appear from the evidence beyond a reasonable doubt, then it becomes and is your duty to return a verdict of not guilty.

2. Before you can find the defendant guilty of the charge brought against him in the indictment, you must find that there was some movement or asportation of the steer mentioned in the indictment by the defendant with the felonious intent to convert the said steer to his own use. If this does not appear from the evidence beyond a reasonable doubt, then you will return a verdict of not guilty.

3. Should you believe from the evidence that the defendant killed the steer for the purpose of stealing it, then under this indictment it becomes and is your duty to return a verdict of not guilty.

But the court refused to give any of these instructions.

The court gave, over appellant's objection, an instruction numbered 8, which read as follows:

8. If there are suspicious circumstances against the defendant, developed in the evidence, and if the defendant has made false, contradictory or improbable statements in explaining or attempting to explain such circumstances, then the jury may consider such false, contradictory or impossible statements, if the defendant made such statements, in determining the guilt or innocence of the accused of this charge.

And the court also gave an instruction, No. 7, as follows:

7. If defendant did not himself steal the steer and was not present when the same was stolen, if the steer was stolen, aiding, advising, abetting, encouraging or assisting in such stealing, then the defendant is not guilty and should be acquitted.

Upon the verdict of the jury appellant was sentenced to imprisonment in the penitentiary for a period of one year, and has appealed from that judgment.

Sam R. Chew, for appellant.

1. The verdict is wholly unsupported by the evidence. Possession of the beef is not sufficient. 102 Ark. 331; 34 *Id.* 443; 91 *Id.* 933; 44 *Id.* 39.

2. The court erred in its charge to the jury. 69 Ark. 134; 96 *Id.* 206; Kirby's Dig., § 1627.

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

There is no error in the instructions and the verdict is supported by the evidence.

SMITH, J., (after stating the facts). Appellant complains of instruction No. 8, set out in the statement of facts, and says that it was erroneous and prejudicial because it contains a comment upon the evidence. We think the instruction was an improper one, but we can not say that it was prejudicial, as there were circum-

stances which were not only suspicious but which are, in our opinion, legally sufficient to sustain a verdict of guilty; and, as the defendant undertook to explain away these circumstances and to show that, although the crime of larceny had been committed, that he had no guilty part in its commission, it was the province of the jury to determine whether or not any of these statements were false, contradictory or improbable, and, if so, the jury had the right to consider that fact in determining the guilt or innocence of the accused. This instruction did not tell the jury the weight to attach or the effect to give to their finding, if one was made, that defendant had made false, contradictory or improbable statements, but told them merely that if they so found, they might consider that fact; and we conclude, therefore, that the instruction was not prejudicial.

The instruction No. 1, requested by appellant, was a proper instruction under the allegations of the indictment, and might very well have been given, but the purport of this instruction was to charge the jury that it was necessary to find that the defendant was present at the time the animal was stolen, and if that fact did not appear from the evidence beyond a reasonable doubt, that they should return a verdict of not guilty. But the instruction numbered 7, given by the court, so stated the law to be, and the jury could have been left in no doubt that they must find, before they could convict the defendant, that if the defendant did not himself steal this steer, he must have been present when the same was stolen, aiding, abetting and assisting in such stealing.

The second and third instructions requested by appellant deal with the question of asportation, and were both refused by the court. The court gave an instruction in the language of the statute, defining the crime of larceny. And under the facts of this case, we think there was no error in refusing to give the requested instructions, if they were conceded to be correct declarations of law, because they were abstract. Appellant does not deny driving the steer into his father's lot; and this was,

of course, a sufficient asportation to constitute the crime of larceny. It is true, he says, there was no connection between that act and the subsequent killing of the animal; but that was the chief question at issue in the trial, and the verdict of the jury is conclusive upon that question of fact. The jury must have found that appellant drove the animal into the lot for the purpose of subsequently killing it, and that this was done under the cover of darkness at the first favorable opportunity, and that he was present when it was killed, and that, if he did not himself kill it, he advised that it be done, encouraged and assisted those who did it, and this evidence, if true, is sufficient to sustain the allegation of asportation.

Appellant also complains of the action of the court in refusing to exclude the testimony of the witness, Charles Brammer, in regard to the loss of a certain hog owned by him. But, as has been stated, the proof shows that the hog was killed and butchered at about the same time and near the same place that the steer was, and that both animals were loaded into the wagon and taken to Mulberry, and this evidence is competent as bearing upon the question of appellant's intent. In Rapalje on Larceny and Kindred Offenses, § 200, it is said: "On the question of intent, or if of the *res gestae,* proof of the stealing of other property than that for which the defendant is on trial may be admissible. Thus, in a prosecution for the theft of a horse, it is not error to admit testimony as to the contemporaneous theft of a saddle and other articles, in the same neighborhood, where the court charges the jury that such evidence can not be considered as tending to show the theft of the horse, but only as tending to show the intent of defendant in whatever action they may find from the evidence was done by him. And on trial for cattle theft, evidence of the theft of others than those charged may be considered, if alike involved in the *res gestae,* to show guilty knowledge and intent."

And in section 201 of the same text, it was further said: "Under an indictment for larceny, evidence of the

subject-matter of another indictment for larceny may be admitted where the two offenses are so connected as to be parts of the same transaction; as where two horses belonging to different persons are stolen by conspirators in pursuance of a previous design."

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

RUSSELL v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered June 8, 1914.

1. RAILROADS—INJURY TO PERSON ON TRACK—LOOKOUT STATUTE.—Under the lookout statute, a railroad company is liable for an injury to any person on its tracks, caused by the operation of a train, whether trespassers or not, if the injury was caused by the failure of the trainmen to maintain a lookout, when, if a proper lookout had been kept, the injury could have been avoided. (Page 357.)
2. RAILROADS—INJURY TO PERSON ON TRACK—LOOKOUT—SUFFICIENCY OF EVIDENCE.—The mere proof of an injury to a person by the operation of a train is insufficient to establish liability under the lookout statute, for there must be proof sufficient to warrant the finding that the presence of the injured party could and would have been known to the operatives of the train and the injury averted, by the keeping of the lookout, and the exercise of care after discovering his presence. (Page 358.)
3. RAILROADS—INJURY TO PERSON BY OPERATION OF TRAIN—NEGLIGENCE—CONJECTURE.—Where a person was found dead beside a railroad track and there was no evidence as to how he was killed, a peremptory instruction in favor of the defendant is proper, since it would be mere conjecture to say that deceased could have been seen and the injury averted, had a proper lookout been kept. (Page 358.)
4. EVIDENCE—CONJECTURE—PROOF.—Conjecture and speculation, however plausible, can not supply the place of proof. (Page 359.)

Appeal from Columbia Circuit Court; *George W. Hays,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant's intestate, S. Z. Kimball, was killed by a north-bound passenger train upon appellee's railroad, at

the station of Waldo, at which place the railroad tracks run practically east and west, and the train which killed him was running east.

The last seen of deceased prior to his death was at the Skinner Hotel, about ten minutes before the arrival of the train. This hotel is situated about fifty feet north of the depot, but to reach the depot from this hotel one must go west, on a sidewalk, for about 100 or 125 feet to the street which intersects the street running north and south and crosses the railroad tracks. Deceased was expecting to meet some parties on this train, as he stated to the proprietor of the hotel just before leaving there, and he walked west down this sidewalk to the street crossing the railroad tracks. There is a sidewalk on this street crossing the railroad tracks which leads to the store of a Mr. Ficklin on the opposite side of the railroad right-of-way. Just west of the point where this sidewalk crosses the right-of-way three tracks converge, and they diverge from that point across this street toward the depot until the tracks are from five to six feet apart. It is 360 feet from this street crossing to the depot, and deceased's hat was found forty feet east of the crossing leading from the Skinner Hotel to Ficklin's store; his body was found about 200 feet east of the depot, or 520 feet from the place where his hat was found. His papers were scattered from where his body was found back to within ten or fifteen feet of where his hat was found; his hat was of felt and was lying against the passing track eight feet from the main line track. His body was lying just about where the engine usually stopped and his head was cut off eight or ten feet west of where his body was found. There were indications that his body had been dragged, and the condition of the ground between the ties indicated that he had been dragged from about where the last papers were found sixty or seventy-five feet east of the west crossing to where his body was found. This crossing passes through a cut four and one-half to five feet deep and seventy feet wide, being thirty-five feet from the center of the main track each way.

The right-of-way, both inside and outside of this cut, was perfectly open and unobstructed and the track was straight for a distance of three miles west of the depot.

All witnesses who testified as to the aspect of the track and right-of-way, including the fireman and engineer, say there was nothing to have prevented the discovery of the deceased, if he had been on the track, or on the right-of-way. The evidence showed that deceased had no business at the Skinner Hotel and was there merely to pass away the time, and it was shown that he frequented Ficklin's store on the opposite side of the track. It was Sunday, and other business houses were closed, but he had found company at Ficklin's store before he went to the hotel, and it is appellant's theory that he left the hotel with the intention of going to this store, from which place he could see the train in time to get to the depot before its arrival. What happened thereafter, until his body was found, no one knows; but appellant advances the theory and argues that the evidence supports the view, that as deceased approached the right-of-way he either saw the train headlight or heard it whistle and decided to go down the track to the depot; that it was night, and, in attempting to follow the diverging tracks from the crossing, in going toward the depot, deceased mistook the line of the north track for the middle or main track, and, while he knew the train was approaching, he thought himself on the north track and out of danger.

But it must be admitted that this is a mere matter of conjecture.

The proof upon appellee's part is that deceased had recently lost his wife and had been left with the care and responsibility of a large family, in which there were several small children, and that he was in poor health and was apparently very despondent.

Appellant contends that there is some evidence to show that deceased was struck by the pilot of the engine and that his presence could have been discovered by the

trainmen, had a lookout been kept, in time to have avoided the injury.

But the only circumstances to support this view are that the body of deceased was dragged several hundred feet from where the hat was found, and that the body was found after the train moved beyond the station lying off the south side of the railroad track, at a point about where the engine stopped. Appellant advances the theory that the body must have been dragged by the locomotive and that when the motion ceased the body dropped; that if it had been hanging from some other part of the train it would have been held during the time the train was stopped at the station and then have been released after the train started again. But, as has been said, this is mere theory or conjecture, and opposed to it is the evidence of both the engineer and firemen, who testified that they were unaware of having struck any one at Waldo until the train had arrived at McNeil or at Camden, at one of which places they received a telegram advising them that their train had killed a man at Waldo, and that immediately upon receipt of this telegram they made a careful inspection of their engine, but that they failed to find any blood or other evidence of having struck any one. The engineer and fireman both testified that they were looking ahead down the track when approaching the station from the west, and that this lookout was continued until the train made the stop at the station, and that no man got on or was on the track ahead of the engine. A number of other witnesses, who were waiting at the depot for the arrival of the train, testified that they observed the train's approach to the station and that a bright headlight was burning, which would have distinctly disclosed any object upon the track in front of the train, and that they so observed the train from a point west of the public crossing until the locomotive passed them where they stood at the station, and that if any one had been on the track, or had gotten on, they could and would have seen him, but that they did not see any one at all between them and the locomotive.

At the conclusion of the evidence the court directed the jury to return a verdict in favor of the railway company, and from the judgment rendered upon that verdict this appeal has been duly prosecuted.

Warren & Smith and *C. W. McKay,* for appellant.

1. Negligence may be shown by circumstantial evidence. 156 S. W. 174. The jury are not bound to accept the positive statements of employees if circumstances warrant the conclusion that they are not true. 74 Ark. 478.

2. The law of this case is well defined in 158 S. W. 139, where the court construed the lookout statute. Acts 1911, p. 275.

S. H. West and *Gaughan & Sifford,* for appellee.

This case is settled by 155 S. W. 512.

SMITH, J., (after stating the facts). We think the verdict was properly directed in this case. It is true that, under the lookout statute, approved May 26, 1911, it is made the duty of all persons running trains to keep a constant lookout for persons and property upon the track of any railroad, and if any person or property shall be killed or injured by the neglect of any employee of any railroad to keep such lookout, the company operating such railroad is liable and responsible for all damages resulting from the neglect to keep such lookout; and this is true, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employees in charge of such train could have discovered the peril of the person injured in time to have prevented the injury, by the exercise of reasonable care after the discovery of such peril; and this act devolves upon the railway company the burden of proof to establish the fact that this duty to keep such lookout has been performed.

This act has been construed in a number of recent cases. *St. Louis, I. M. & S. Ry. Co.* v. *Gibson,* 107 Ark. 431; *Burch* v. *St. Louis, I. M. & S. Ry. Co.,* 108 Ark. 396; *Chicago, R. I. & P. Ry. Co.* v. *Gunn,* 112 Ark. 401, 166 S.

W. 568; *Chicago, R. I. & P. Ry. Co.* v. *Bryant,* 110 Ark. 444, 162 S. W. 51.

These cases construe the lookout statute to mean that "upon proof of injury to such person by the operation of its trains under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided, if a lookout had been kept, that a *prima facie* case is made." But there must be some evidence, and not mere conjecture or speculation, which would reasonably warrant the inference to be drawn by the jury, that the presence of the person injured upon the track could and would have been discovered by the operatives of the train by keeping a constant lookout, and that had such lookout been kept the injury could have been averted by the exercise of reasonable care thereafter; and if the jury finds the facts so to be, a recovery of damages will not be defeated on account of the contributory negligence of the party injured. But this presumption and right to recover does not arise upon mere proof of injury; but, upon the contrary, there must be proof sufficient to warrant the finding that the presence of the party injured could and would have been known to the operatives of the train and the injury to him averted by the keeping of this lookout, and the exercise of care after discovering his presence. Here there is nothing but conjecture as to the manner in which deceased was killed by the train, and various theories are offered in explanation of that occurrence; but the only positive evidence is that the engineer and fireman were keeping a lookout as the train approached from the west, but neither of them saw the deceased nor was aware that they had struck him; and the evidence upon the part of the citizens standing at the depot that they observed the train's approach to the station and did not see any one upon the track in front of the train. Under these circumstances, it would be mere conjecture to say that deceased could have been seen, had a lookout been kept, and that the injury could have been averted by the exercise of care after discovering his presence on the track.

But conjecture and speculation, however plausible, can not be permitted to supply the place of proof. *St. Louis, I. M. & S. Ry. Co.* v. *Hempfling,* 107 Ark. 476, and cases there cited. The judgment of the court below is, therefore, affirmed.

WYANDOTTE & SOUTHEASTERN RAILWAY COMPANY *v.* WILSON.

Opinion delivered June 8, 1914.

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.—Plaintiff, an employee of a railroad company, was injured while unloading ties from a moving train by reason of a tie striking a tree a few feet from the car and bounding back and injuring him; *held,* plaintiff assumed the risk of injury, if the danger was so obvious that he had no right to rely on the assumption that he could safely unload the ties in the manner in which he was doing, without devoting attention to his surroundings and the proximity of the trees. (Page 362.)
2. MASTER AND SERVANT—ASSUMED RISK.—A servant has the right to assume that he may safely obey the master's directions in the performance of his duties, and he is not bound to inspect the place where he is working to see if it is safe, nor to experiment to ascertain if the master has adopted a safe method for doing his work. (Page 362.)
3. MASTER AND SERVANT—ASSUMED RISK.—Where a servant is directed to perform a dangerous employment, but realizes before he enters upon it that it is dangerous, and appreciates the danger, then he will be held to have assumed the risk, but if the danger of obeying his master's command is not open and patent, then he can not be held to have assumed a risk which he did not appreciate, and of which he had no knowledge. (Page 363.)

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

STATEMENT BY THE COURT.

Appellee was the plaintiff in the trial below, and alleged in his complaint that he was on one of appellant's railroad cars, assisting in distributing ties along its tracks, for the purpose of repairing the tracks, and was working with one of appellant's other servants in

the performance of that duty; that appellant had negligently so constructed the track as to leave a number of trees standing near the track, some of them being within three feet, and that while appellee was so engaged and working with his back toward the engine and toward the direction in which the train was going, throwing ties from the car, which was being run at about the rate of fifteen miles per hour, and that while appellee could not see in front of him, and did not know the condition of the track and the proximity of the trees thereto, and unaware of the danger of throwing the ties from the train, and while appellant was aware of these conditions, the end of one of the ties which was thrown from the car struck against a tree, which was about three feet from the track; that the running of the train at the time the tie was thrown caused the other end of the tie to be thrown around against appellee, striking him in the stomach and side and knocking him a distance of about fifteen feet to the ground and inflicting serious injuries. It appears to be undisputed that appellee was injured in a manner substantially as alleged, except that the proof on the part of the appellant shows that the speed of the engine did not exceed three or four miles an hour.

Appellant alleged in its answer, and offered proof tending to show, that appellee's injury was caused by a negligent and inattentive discharge of his duties in failing to observe the tree before throwing off the ties, and that appellee was fully aware of the danger incident thereto. The proof shows that there were a number of trees near the track and that appellee had worked for appellant long enough to be thoroughly familiar with that fact. That the car from which the ties were being unloaded was in front of the engine, which was in charge of a Mr. Ray, who was the foreman, and directed the throwing off of the ties; and that if he wanted ties thrown off fast he would hold up his whole hand, and that if he wanted one tie thrown off he would hold up one finger and two fingers held up would indicate two ties to be thrown off, and so on. Appellee testified that he had re-

ceived a signal to throw off ties rapidly, and that he was doing so, with his back toward the direction in which the train was moving, and that while so employed the end of a tie hit a tree which was within a few feet of the track and injured him.

The instructions dealt chiefly with the question of the negligence of appellant in having trees standing in close proximity to the track, and with the question of the assumption of risk. Appellee recovered judgment for substantial damages, and this appeal is prosecuted from that judgment.

H. T. Harrison and *T. D. Wynne,* for appellant.

Appellee assumed the risk. 53 Ark. 117; 39 *Id.* 17; 90 *Id.* 407; 77 *Id.* 367; *Ib.* 458; 82 *Id.* 11; 41 *Id.* 542; 90 *Id.* 387; 109 Ark. 29.

D. D. Glover, for appellee.

Appellee was guilty of no negligence whatever, and did not assume the risk. 102 Ark. 640; 79 *Id.* 53; 87 *Id.* 396; 205 U. S. 1; 91 Ark. 337; 103 *Id.* 66; 95 *Id.* 291; 95 *Id.* 296; 77 *Id.* 376; Bailey on Personal Injury (2 ed.), 292-3; 78 Ark. 505; 6 Thompson on Neg., 4254, 4275-6.

SMITH, J., (after stating the facts). The evidence having shown clearly and without contradiction that appellee was familiar with the location of the trees, he must be held to have assumed the risk incident to their proximity; and in this view of the case it becomes immaterial whether appellant was guilty of negligence in so constructing its roadbed as to have the trees standing near thereto or not. In the case of *Emma Cotton Seed Oil Co.* v. *Hale,* 56 Ark. 232, it was said: "It is well settled that when one enters the service of another, he takes upon himself the ordinary risks of the employment in which he engages. On the other hand, the employer takes upon himself an implied obligation to provide the person employed with suitable instruments and means with which to do his work, and to provide a suitable place in which such person, when exercising due care himself, can perform his duties safely, or without exposure to

dangers that do not come within the obvious scope of his employment. But the servant can dispense with this obligation. If, having sufficient knowledge to enable him to see and appreciate the dangers to which he will be exposed, he knowingly assents to occupy a place set apart to him by the master and does so, he thereby assumes the risks incident thereto, and dispenses with the obligation of the master to furnish him with a better place. It is then no longer a question whether such place could not with reasonable care and diligence be made safe. Having voluntarily accepted the place occupied by him, he can not hold the master liable for injuries received. See *Davis* v. *Railway,* 53 Ark. 117; *Fones* v. *Phillips,* 39 Ark. 17."

But appellee testified that his time was occupied and his attention engaged in discharging the directions given him by his foreman in unloading the ties, and that while so employed he could not observe his surroundings and was unaware of the presence of the tree against which he threw the tie that injured him. Appellant's proof was to the effect that the danger was open and obvious and would have been apparent to appellee but for his inattention to his surroundings and the negligent manner in which he discharged his duties. While this may have been the case, we can not say that the undisputed evidence shows that such was the fact. The servant has the right to assume that he may safely obey the master's directions in the performance of his duties, and he is not bound to inspect his place to see if it is safe, nor is he required to experiment to ascertain if the master has adopted a safe method of doing his work. Of course, if he is directed to perform a dangerous employment, but realizes before he enters upon it that it is dangerous, and appreciates the danger, then he is held to have assumed the risk; but if the danger of obeying the master's commands is not open and patent, then he can not be held to have assumed a risk which he did not appreciate, and of which he had no knowledge. It is not alleged that appellee was an inexperienced servant, and this case was

not tried upon the theory that there was any duty to instruct on that account.

Under the facts of this record appellee will be held to have assumed the risk of injury if the jury shall find that the danger was so obvious that appellee had no right to rely on the assumption that he could safely unload the ties in the manner in which he was doing, without devoting attention to his surroundings and the proximity of the trees. If the jury shall find that the master's directions to throw off ties hurriedly carried with it the assurance, under the circumstances, that this might be safely done without giving attention to the proximity of the trees, then appellee did not assume the risk of injury therefrom; otherwise, he did. The negligence alleged in the complaint consisted in leaving standing trees near the track and the speed of the train in connection therewith; but proof was offered, without objection, showing that appellee had received orders to throw the ties from the train under the circumstances stated; and upon the remand of the cause he may, if he so elects, amend his complaint to allege negligence in that particular.

We have not discussed the instructions which were given or refused, as we have here stated our view of the law of the case, and upon the remand of the cause, which is here ordered, it will be submitted to the jury in accordance with the views here expressed.

FELLOWS v. MCHANEY.

Opinion delivered June 8, 1914.

1. IMPROVEMENT DISTRICTS—LEVEE AND DRAINAGE DISTRICTS—CONFLICTING STATUTES.—The Act of 1911, page 479, Special Act 183, creating the Fourche Levee District, does not conflict with the act of 1907, page 1112, creating the Fourche Drainage District. (Page 369.)
2. IMPROVEMENT DISTRICTS—CONFLICTING TERRITORY—ASSESSMENTS.—A levee district may include the same territory covered by a drainage district, and a tract of land may be benefited by both, and it is proper to assess the land for the benefits received by each dis-

trict, the assessment being ascertained by the respective agencies making the assessments. (Page 370.)

3. IMPROVEMENT DISTRICTS—REPEAL OF FORMER ACT VALIDATING FORMER ASSESSMENT.—The Legislature may repeal an act under which a drainage district was organized, and at the same time declare that the assessment made under the former act was proper and valid, and such action is beyond judicial review, in the absence of a showing that the assessment was improperly made, or that no benefit could possibly accrue to the property to be taxed. (Page 370.)

4. IMPROVEMENT DISTRICTS—ASSESSMENTS—VALIDITY—JUDICIAL REVIEW. Where a complaint attacking an assessment of benefits under a statute creating a drainage district, simply contends that an assessment validated by the Legislature, is unequal and unjust, the allegations are not sufficient to authorize the court to review the legislative assessment. (Page 370.)

5. IMPROVEMENT DISTRICTS—IMPROPER ASSESSMENTS—REMEDY—REPEAL OF STATUTE.—Where an assessment of benefits was made under Acts 1907, page 1112, creating a drainage district, a land owner does not acquire any vested rights in the remedy provided for the review of the assessment, when the act was repealed and the assessments already made validated by the Legislature. (Page 371.)

6. IMPROVEMENT DISTRICT—ASSESSMENT—REPEAL.—When an act creating an improvement district is repealed after the assessment of benefits has been made, the Legislature may provide for the payment of accrued debts of the district from the assessments. (Page 371.)

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

STATEMENT BY THE COURT.

The General Assembly of 1907 passed an act creating the Fourche Drainage District (Acts of 1907, page 1112), and among other things said act provided for a board of assessors to assess the benefits, and provided any person aggrieved by the assessments of said board of assessors should have the right within twenty days to appeal to a court of competent jurisdiction for the correction of any erroneous or unjust assessment.

Appellants were owners of land in said drainage district and were aggrieved at the assessments made against their lands, and had resisted these assessments and had

appealed from the action of said board sitting as a board of equalization, under the authority of the act creating the said district; and in their complaint, which was filed originally to enjoin the collection of the assessments which had been made for the purpose of constructing the improvement, it was alleged that before the beginning of the construction of this improvement, the General Assembly passed an act approved April 11, 1911, entitled, "An Act to create, lay off and establish a Levee District in Pulaski County, Arkansas, to be known as Fourche Levee District." (See Special Acts of 1911, page 479.) And that by said last named act, certain persons were appointed directors and entered upon their duties as such, and are now such directors; that by the terms of said act the directors were empowered to construct levees, necessary for the protection of the lands in the levee district, to make necessary arrangements to that end, to exercise the right of eminent domain, to appoint a board of assessors, to appoint officers, agents and servants, to make necessary contracts to carry out said improvements, to borrow money and to issue bonds, to pledge the revenues of the district, and to do everything necessary for the building of levees in said district, and further by terms of the said act, the directors were required, and it was made their duty to do everything necessary for the "purpose of dredging, digging, widening, strengthening, and maintaining any ditch or removing any levees in the construction of said improvement." It was alleged that said levee district was formed after the property owners had failed to get any relief from the said drainage district, and that the powers granted to, and the duties imposed upon, the directors of this last district are directly and irreconcilably in conflict with the powers and authority conferred upon the said Fourche Drainage District; and the act creating said levee district being later in time and specifically repealing "all laws and parts of laws in conflict therewith" must prevail over the act of 1907 creating the Fourche Drainage District, and that thereafter the board of directors of the drainage district had no

power or authority over the land situated in the levee district.

The complaint further alleged that much of the lands owned by the appellants is of an inferior quality, and the levying and draining of them would not make them at the very best worth more than one-tenth of the assessed benefit, and that their property was assessed in excess of any benefit that will accrue thereto, and result in the taking of their property without compensation; that said assessment is unjust, discriminatory and not uniform—that the assessor did not attempt to determine any particular benefits, but simply ascertained from the board of directors the estimated cost of the improvement contemplated, and then spread out said amount over the district arbitrarily and without regard to any benefits that would accrue to any special piece of property. That in assessing real estate within the city of Little Rock, they arbitrarily placed an assessment of two and one-half per cent on the assessments by the county assessor for general taxation without regard to whether the said assessment for general purposes was equitable and just or not, and that in order to make up the deficit caused by this small levy on the city property, they placed an arbitrary and excessive value of benefits upon the lands lying immediately in the neighborhood of Fourche Bayou and outside the city limits, so that said pretended benefits would be many times the value of the lands after the improvement was made, and thus deprive plaintiffs of their property without compensation and without due process of law.

The original complaint was filed September 26, 1912, but an amended complaint was filed February 10, 1913, in which it was alleged that the board of assessors had acted upon the petitions for reduction of assessments, and their report readjusting the assessments was filed January 22, 1913; but it was alleged that the assessments as readjusted were still unjust, illegal and confiscatory, although it does not appear from the pleadings to what extent the assessments were revised.

This original suit involved the validity of the assessments made by the assessors of this drainage district, and was pending and undisposed of when the General Assembly of 1913 passed an act repealing the act of 1907. See Acts 1913, page 534. Section 2 of the repealing act reads as follows:

"Jurisdiction is hereby conferred on the Pulaski Chancery Court to wind up the affairs of said district, and to that end all persons having claims against the district are required to present the same to said court for adjudication within three months after the passage of this act. Said court shall adjudicate said claims, and shall appoint its receiver to collect upon the assessment of benefits heretofore made, a sum sufficient to pay all claims found to be due, the tax necessary for the payment thereof to be divided into five installments, as near equal as possible."

Appellants insist that the act creating the Fourche Levee District operated to repeal the act creating the Fourche Drainage District, and it is further insisted that the property owners in the drainage district have a vested right to have the validity of their assessments, made under the authority of the act of 1907, passed upon in the manner there provided for, and that the act of 1913 is not a legislative assessment of said property, and does not take away the right of the chancellor to hear the cases which were filed in due time, and were pending in his court at the time of the passage of the act of 1913, repealing the act of 1907.

A demurrer was interposed to the complaint, first, because the court had no jurisdiction to grant the relief prayed for, and, second, because the complaint did not state a cause of action entitling the plaintiffs to the relief prayed for, and this demurrer was sustained, and the complaint being dismissed for want of equity, this appeal has been duly prosecuted.

In accordance with the directions of the act of 1913, a receiver was appointed by the chancery court, who heard the evidence and made a finding as to the indebted-

ness of the district which had been dissolved. The chancery court undertook to apportion the indebtedness against the lands of the district in proportion to the assessment of betterments against said land, and this action of the court constitutes the present assessment which the appellants now complain against.

Ratcliffe & Ratcliffe, for appellants.

1. The later act repeals the former and took the lands entirely from under the control of the drainage district. 100 Ark. 504-507; 41 *Id.* 149; 92 *Id.* 266; *Ib.* 600. The later act covers the whole subject and was intended as a substitute for, and to place the lands in, a separate district, and entirely from under the control of the Fourche Drainage District.

2. The assessment is iniquitous and the act of March 3, 1913, Acts, p 534, never validated such an assessment, nor did the Legislature so intend. The chancery court had no jurisdiction. 63 Ark. 543-546; 44 *Id.* 273; Kirby's Digest, § 7798.

3. The suit pending at the time the act of 1913 was passed prevented the Legislature from validating the assessment. Cases *supra.*

Rose, Hemingway, Cantrell & Loughborough, Carmichael, Brooks, Powers & Rector and *Moore, Smith & Moore,* for appellee.

1. The appeal should be dismissed. The lands were not taken out of the district by the Fourche Levee District Act. 103 Ark. 452.

2. The assessment is not open to attack. 83 Ark. 54-60; 98 *Id.* 113; 81 *Id.* 562; 104 *Id.* 425; 72 *Id.* 126; 103 *Id.* 132; 83 *Id.* 344; 100 *Id.* 369; 97 *Id.* 322.

3. The claim of appellants that by bringing suit, they acquired vested rights has been often repudiated. 43 Ark. 421; 83 *Id.* 348; 90 *Id.* 601; 58 *Id.* 122; 30 *Id.* 282.

Frank H. Dodge, of counsel; *Bradshaw, Rhoton & Helm, amici curiae.*

SMITH, J., (after stating the facts). We think there is no conflict between the acts creating the drainage dis-

trict, and the act creating the levee district. The former was organized for the purpose of draining a large territory and free it, not merely from overflow, but from the existence of a sluggish stream, while the levee district was organized for the purpose of affording protection from overflows to a much smaller section of country. From the description of the two districts, it is apparent that a much smaller area was contained in and protected by the levee district than was contained in and benefited by the drainage district. That the drainage district was larger than the levee district is of no significance, as it is a matter of common knowledge that there are levee districts in the State which contain many drainage districts, and it may be the drainage may not become entirely effective without levee protection. Here the levee district was organized to protect the land against overflows of the Arkansas River. This drainage district was organized principally to protect that district against the inundations of Fourche Bayou and from the diseases which it engenders. It is true that these acts resulted in a double assessment against numerous tracts of land; but a tract of land may be benefited by two drainage districts or by drainage and levee districts, and, if so, there is no want of authority to assess it for the benefits received by each district, the assessment being ascertained by the respective agents making the assessments. *Wilson* v. *Compton Bond & Mortgage Co.*, 103 Ark. 452.

It is true the act of 1907 provided a method for the assessment of benefits against the lands therein situated, and further provided a method by which any land owner who felt himself aggrieved might have his assessment reviewed. And it is true that these appellants were proceeding under the authority of this act at the time of the passage of the repealing act of 1913. But the Legislature might in the first instance have made this assessment without the interposition of any board of assessors, in which event its action would have been final and subject only to the right of the courts to review for an arbitrary and manifest abuse of that power, and having this power

in the first instance, it could afterward exercise it at its pleasure, and it has done so. By this act of 1913, the Legislature ascertained and declared that the assessment previously made was a proper one and validated it, and its action in so doing is beyond judicial review in the absence of a showing that the assessment so validated was arbitrarily made regardless of benefit; or a showing that no benefit could possibly accrue from the improvement sought to be made to the property sought to be taxed.

These are questions of very great importance, but they have been raised and considered and decided in numerous recent cases by this court. *Moore* v. *Board of Directors of Long Prairie Levee District,* 98 Ark. 113; *St. Louis S. W. Ry. Co.* v. *Board of Directors of Red River Levee District No.* 1, 81 Ark. 562; *Board of Directors of Jefferson County Bridge Dist.* v. *Collier,* 104 Ark. 425; *St. Louis S. W. Ry. Co.* v. *Grayson,* 72 Ark. 126; *St. Louis, I. M. & S. Ry. Co.* v. *Board of Directors of Levee District,* 103 Ark. 132; *Sudberry* v. *Graves,* 83 Ark. 344; *Salmon* v. *Board of Directors,* 100 Ark. 369; *Alexander* v. *Board of Directors, Crawford County Levee District,* 97 Ark. 322. It does not appear from the pleadings how the assessors revised the assessments which were attacked in the original complaint, but it is alleged that they are still unjust, illegal and confiscatory.

In *Moore* v. *Board of Directors of Long Prairie Levee District,* it was said: "Nor can the courts review merely on general allegations that the assessments are 'arbitrary, excessive and confiscatory.' Facts must be pleaded which show that the decision of the lawmakers was not merely erroneous, but that it was manifestly outside of the range of the facts, so as to amount to an arbitrary abuse of power; for nothing short of that will authorize a review by the courts."

It was not alleged here that appellants' lands would not have been benefited at all by the improvement. They simply contend that the assessment validated by the Legislature, is unequal and unjust, and these allegations are

not sufficient to authorize the court to review a legislative assessment.

Nor do we think that appellants acquired any vested rights in the remedy provided for the review of their assessments by the act of 1907, creating the drainage district; because one must pursue whatever remedy is provided by law for the redress of his grievances. *Green* v. *Abraham,* 43 Ark. 421; *Sudberry* v. *Graves,* 83 Ark. 348; *Pelt* v. *Payne,* 90 Ark. 601; *Sidway* v. *Lawson,* 58 Ark. 122; *Johnson* v. *Richardson,* 44 Ark. 372; *Vaughan* v. *Bowie,* 30 Ark. 282.

It is insisted that the Legislature did not intend to foreclose the right of appellants to proceed under the authority of the act of 1907, because there was no final assessment for the Legislature to validate; and that there could be no final assessment until all errors had been corrected and all inequalities adjusted. But the Legislature determined these matters for itself, when it conferred jurisdiction upon the Pulaski Chancery Court to wind up the affairs of the district, and to adjudicate the claims against it, and to direct its receiver "to collect upon the assessment of benefits heretofore made a sum sufficient to pay all claims found to be due, the tax necessary for the payment thereof to be divided into five installments, as near equal as possible." Three months were given for the adjudication of the claims against the district, and it is manifest that the Legislature having ascertained what the assessment of benefits should be, required only that the indebtedness of the district be ascertained, and then, by calculation, that indebtedness should be divided into five installments.

This assessment is based upon prospective benefits, which can not be realized because of the repeal of the acts creating the district, but such assessments may be made. *Board of Directors, Crawford County Levee Dist.* v. *Dunbar,* 107 Ark. 285; *Davies* v. *Chicot County Drainage Dist.,* 166 S. W. 170.

The decree of the court below sustaining the demurrer is therefore affirmed.

Ex parte WHITLEY.

Opinion delivered June 15, 1914.

1. PRACTICE—TRANSCRIPT OF PROCEEDINGS—RULE ON STENOGRAPHER.—The Supreme Court has no power to grant a rule on the stenographer of a circuit court to compel him to furnish a transcript of the proceedings had in the trial in the circuit court. (Page 372.)
2. PRACTICE—TRANSCRIPT.—The Supreme Court has power to compel the clerk of a trial court to send up a transcript of the record of that court. (Page 373.)

Appeal from Prairie Circuit Court, Northern District; *Eugene Lankford,* Judge; rule denied.

J. G. & C. B. Thweatt, for petitioner.

PER CURIAM. The petitioner was, it appears, convicted below of a felony, and prayed an appeal to this court, and was given time to prepare a bill of exceptions. The oral proceedings were taken down by the court stenographer, and petitioner alleges that that officer refused to furinsh a transcript of the proceedings. He applies to us now for a rule on the stenographer to compel him to furnish a transcript of the proceedings so that the same may be incorporated in the bill of exceptions.

This court has no power to grant any such relief. It has power to compel the clerk of the trial court to send up a transcript of the record of that court (In re *Barstow,* 54 Ark. 551), for the clerk of a trial court is to that extent amenable to the orders of this court. Our powers are, however, limited to compelling the clerk to send up such record as has been made in his court, and do not extend to making the record of the trial court. The duties of the court stenographer are limited to making a record for the trial court, and as he is not an officer of this court for any purpose, and does not certify the record filed in this court, he is not within our reach.

The completion of the records of the circuit court falls exclusively within the jurisdiction of that court, and it would be an assumption of original jurisdiction for us to attempt to control the action of officers of that court.

When the record is once made there, we have, as before stated, authority to require the clerk to make a certified transcript and to send it up to this court; but we have no power to compel the officers of the court to discharge their duties in making up the record. Elliott on Appellate Procedure, § 206; *States* v. *Cromwell,* 104 N. Y. 664; *Thom* v. *Wilson, Excr.,* 24 Ind. 324. "We can not make a record for any of the lower courts," said the Supreme Court of Indiana in the case above cited. "That is their province, and all applications must be made to them."

Application denied.

PRUDENTIAL INSURANCE COMPANY *v.* WILLIAMS.

Opinion delivered June 15, 1914.

1. PARTIES—PARTIES PLAINTIFF.—Two parties may be joined as plaintiffs in an action on a policy of insurance, where both claimed an interest in the same, and it does not appear that any one else had any interest in the policy. (Page 376.)
2. INSURANCE—LIFE INSURANCE—INTEREST OF BENEFICIARY—WAGERING COTRACT—ASSIGNMENT.—A contract of insurance, taken out in the name of one who has no insurable interest in the life of the person insured, is a wagering contract and void, but any person may procure insurance on his own life and afterward assign the policy to another, provided it is not done by way of cover for a wager policy, even though the assignee has no insurable interest in the life of the insured. (Page 376.)
3. INSURANCE—LIFE INSURANCE—ASSIGNMENT.—Where deceased took out a policy of insurance on his own life, payable to his executor, administrator or assigns, and afterward assigned the policy to a third party, the assignment will be held valid. (Page 378.)
4. INSURANCE—LIFE INSURANCE—RIGHT TO ASSIGN.—Where a policy of life insurance is valid in the hands of the insured, who took out the policy, he has the legal right to assign the policy to a third person, even though the latter has no insurable interest. (Page 378.)
5. INSURANCE—WAGERING CONTRACT.—A policy of life insurance is not rendered void by an unexecuted wagering contract, merely because the agreement between the insured and a third party would, if performed, have constituted a wagering contract. (Page 379.)

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

S. S. Hargraves and *Rose, Hemingway, Cantrell & Loughborough,* for appellants.

1. There was a misjoinder of parties plaintiff. The policy of insurance was an instrument for the payment of money, and was assignable, on which the assignee should sue alone. 98 Ark. 340; 37 *Id.* 556; 47 *Id.* 541; Kirby's Dig., § § 509-600. The demurrer and motion to strike was the proper practice to reach the error. 19 Ark. 602; 21 *Id.* 186; 25 *Id.* 327; 33 *Id.* 497-501; 93 *Id.* 215.

2. The rule is that where error is made, prejudice is presumed, unless it affirmatively appears that no prejudice has resulted. 105 Ark. 205; 144 Fed. 614.

3. The proof was undisputed and was clearly sufficient to show that the transaction was a pure wagering contract with Terry, and subsequently assigned to Rolfe. 77 Ark. 60; 98 *Id.* 340; 98 *Id.* 52; 105 *Id.* 228.

4. Rolfe was not entitled to recover at all; he had no interest in the life of Price, and was simply a speculation. 98 Ark. 52; 105 *Id.* 283; 117 U. S. 591; 77 Ark. 60; 104 U. S. 775; 76 Ala. 187; 88 *Id.* 246; 75 Tex. 351; 18 Kan. 93; 67 N. H. 119.

5. There was error in admitting the testimony of Doctor Pool. 117 U. S. 591, and in the court's charge. Cases *supra.*

R. J. Williams, J. W. Morrow and *S. H. Mann,* for appellees.

1. There was no misjoinder of parties. 98 Ark. 340; 37 *Id.* 556; 47 *Id.* 541; 154 S. W. 205. But, if so, no prejudice resulted.

2. The verdict settles the facts, and there is no error in the court's charge. 77 Ark. 60; 98 *Id.* 340; 44 L. R. A. 304.

3. The assignment was good as collateral security. 117 U. S. 591.

4. This was not a wagering contract. 98 Ark. 52; 105 *Id.* 281; 32 S. E. 475; 25 Am. St. 114.

McCULLOCH, C. J. This is an action on a policy of insurance issued by defendant company on the life of one W. L. Price. The policy was payable to the "executor, administrator or assigns" of Price, and was assigned in writing by Price to E. A. Rolfe a few days prior to the former's death, but the assignment was not presented to the company and accepted by it prior to Price's death.

The suit is prosecuted jointly by Rolfe and by Williams as administrator of Price's estate. It was alleged in the complaint and proved at the trial that Rolfe held Price's note for the sum of $4,500, and that is the amount which Rolfe claims under the policy.

The court instructed the jury that it was unnecessary to find the amount due to Rolfe, and the verdict was in favor of the plaintiffs for the full amount of the policy without specifying the amount due to each plaintiff.

The surety of the company was joined as defendant.

Objection was made to the joinder of the two plaintiffs in the one action, on the ground that there was no community of interest, and that they could not be properly joined in a suit on the policy. The court overruled the objection, and the case proceeded as a joint action by the two plaintiffs.

That feature of the case may be disposed of by saying that inasmuch as both plaintiffs claimed an interest, and it does not appear that any one else had an interest in the policy, no prejudice could have resulted in joining the two together in one action. *Kansas City So. Ry. Co.* v. *Mixon-McClintock Co.*, 107 Ark. 48; *Sims* v. *Halliburton*, ms. op.

The company defended on the ground that Price obtained the policy upon false and fraudulent representations concerning his occupation and health; and also on the ground that the policy was a wagering contract, and, therefore, void.

The first defense mentioned above was submitted to the jury upon sufficient evidence, and must be treated as eliminated from the case by the verdict of the jury; in

fact, it is not insisted upon here as a defense upon which reversal of the judgment should be ordered.

It is earnestly insisted, however, that the other defense is one which was established by the undisputed evidence, and also that the issues on that branch of the case were not properly submitted to the jury.

Price resided in St. Francis County, Arkansas, and presented his application to the company in January, 1913, the application being accepted and policy issued by the company on January 25, 1913, and forwarded to its soliciting agent at Forrest City to deliver. Price assigned the policy to Rolfe on February 11, 1913, which was only a short time before Price's death, the precise date of his death not being stated, but it is stated that it occurred some time within the month of February, 1913.

The theory of the defendants is that the policy was procured from the company pursuant to an agreement between Price and one Terry to the effect that Terry was to pay the premiums and take four-fifths of the policy, leaving one-fifth to the estate, and that an assignment of the policy was to be subsequently executed by Price to Terry; that Terry died before the assignment to him could be executed, and that Rolfe thereupon took Terry's place in the arrangement, and that Price assigned the policy to him pursuant to the original agreement with Terry. The contention is, in other words, that this arrangement was merely intended as a cloak for a wagering contract, which the law will disregard and treat the policy as void on that account.

Now, out of the conflict of authority on the question of wagering contracts of insurance, this court has taken the position in former decisions that a contract of insurance, taken out in the name of one who has no insurable interest in the life of the person insured, is a wagering contract and void (*McRae* v *Warmack,* 98 Ark. 52), but that "any person has a right to procure insurance on his own life, and afterward to assign the policy to another, provided it be not done by way of cover for a wager policy, even though the assignee has no insurable interest in

the life of the insured." *Page* v. *Metropolitan Life Ins. Co.*, 98 Ark. 340.

In *McRae* v. *Warmack, supra,* we said: "The assignment of a policy of insurance to one having no insurable interest in the life of the insured, though issued to one having such interest, will be ineffective and invalid if such assignment was made in pursuance of an agreement made at the time of the issuance of the policy."

According to these decisions, the assignment to Rolfe was valid, even though he had no insurable interest in the life of Price, provided it was not done pursuant to such an agreement, entered into at the time of the issuance of the policy, as would render it a wagering contract. There is very little, if any, testimony tending to show that Rolfe had anything to do with the issuance of the policy or at that time was in any manner interested in it. But that question was submitted to the jury, and the verdict settles it in favor of the plaintiffs. The court properly instructed the jury that if Price took out the policy on his own life, payable to his executor, administrator or assigns, and afterward assigned it to Rolfe, the assignment was valid.

Defendants asked the court to give the following instruction, which was refused:

"No. 5. If you find from the evidence that the insurance in this case was taken out by an understanding between Wm. L. Price and Bonner Terry, with the understanding and agreement that the premiums should be paid by Bonner Terry and the policy assigned to him, said Bonner Terry taking a part of the insurance in the event of the death of the said Price, and the balance being paid to the estate of said Price, the said Bonner Terry at the time having no insurable interest in the life of Price, and you further find that the policy was issued in furtherance of this arrangement; then you are instructed that the policy was a wagering contract, and was unlawful and void, and your verdict will be for the defendants, even though you should find that plaintiff, E. A. Rolfe, did not

participate in the arrangement for the issuance of the policy, between Terry and Price."

The effect of that instruction was to tell the jury that the alleged agreement between Price and Terry avoided the policy, even though nothing was done after the issuance of the policy to effectuate that agreement. Such is not the law. If the policy was valid in the hands of Price, he had the legal right to assign it to Rolfe, even though the latter had no insurable interest.

The question, therefore, is whether the policy, at the time of the assignment to Rolfe, was a valid one in the hands of Price.

If Price had assigned the policy to Rolfe pursuant to the original agreement with Terry, it would have amounted to a mere cloak or subterfuge to cover up a wagering contract, and the law would declare it invalid; but this instruction declared the policy to be invalid, even though it was never assigned to Terry nor to Rolfe pursuant to the agreement with Terry. The testimony on this point can not be said to be undisputed. The soliciting agent testified that when he received the policy, he delivered it to Price in the presence of Terry, but he explained further that he did not actually hand the policy to Price, but kept it in his possession for Terry's benefit. He states that Price told him at the time not to deliver the policy to Terry. There is also some confusion in the testimony of the soliciting agent as to whether the premium was paid to him by Price, or by Terry. The agent actually kept the policy in his possession, but he stated that he had delivered it to Price. We think his testimony is undoubtedly sufficient to show that there was a sufficient delivery to make a binding contract on the part of the company. The agent who obtained the policy retained it until after the death of Terry and until the assignment was executed by Price to Rolfe, when he turned the policy over to the latter. The jury might have found that Price never did anything toward carrying out his alleged agreement with Terry to assign the policy to him. They might have found that he never intended to do so,

or that he borrowed the money from Terry to pay the premium, and, at most, only intended to assign the policy to Terry, as security for the debt, which he had a right to do without invalidating the policy.

Whether the delivery of the policy to Terry, or its remaining in the hands of the agent for the benefit of Terry with Price's consent without formal assignment in writing, would have been sufficient to constitute a wagering contract we need not decide, for, as before stated, the testimony is not undisputed on that point, and this instruction does not submit that issue to the jury. It merely tells the jury that if such an agreement had been entered into between Price and Terry, it would have rendered the policy void, even though nothing was done toward carrying out that agreement, and the policy was subsequently assigned to Rolfe without any participation on his part in that agreement. It certainly is not the law that the policy could be rendered void by an unexecuted agreement between Price and Terry merely because that agreement would, if performed, have constituted a wager contract. Something had to be done in performance of the agreement in order to render the policy void as a wager contract, and if Price did nothing in performance of his alleged unlawful contract with Terry, the policy issued to him by the company was valid, and he had the right to assign it to some other person. The instruction, therefore, was clearly incorrect, and the court properly refused to give it.

Our conclusion, therefore, is that the case was properly submitted to the jury, and that the verdict should stand.

Te jury did not determine how much of the policy should go to the administrator and how much to Rolfe, nor need we decide that matter here. Judgment affirmed.

KIRBY, J., dissents.

THOMPSON v. SOUTHERN LUMBER COMPANY.

Opinion delivered June 15, 1914.

1. JUDGMENTS—PARTIES—CONCLUSIVENESS.—A judgment is conclusive only between the parties and their privies. (Page 382.)
2. JUDGMENTS—PARTIES—PRIVIES.—A person who is neither a party nor a privy to a suit is not bound by the judgment rendered therein. (Page 383.)
3. DEATH BY WRONGFUL ACT—PLEADING—PARTIES.—In an action for damages for wrongful death under Kirby's Digest, § § 6289, 6290, it is an indispensable prerequisite to the maintenance of the suit that the widow and heirs of the person killed by the wrongful act shall be made parties. (Page 383.)
4. DEATH BY WRONGFUL ACT—ACTION—PARTIES.—An action for damages for death by the wrongful act of defendant, can not be maintained under Kirby's Digest, § § 6289, 6290, unless the widow and all the heirs at law are joined. (Page 384.)
5. APPEAL AND ERROR—CORRECT JUDGMENT—REASONS THEREFOR.—The Supreme Court will not reverse a judgment that is right upon the undisputed facts presented in the record, although the trial court may have based its ruling upon an erroneous reason, and a misconception of the law. (Page 384.)

Appeal from Bradley Circuit Court; *H. W. Wells,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant instituted this suit against the appellee in the Bradley Circuit Court, alleging that Mattie Thompson was the mother of Gladys Thompson, a girl child of the age of five years; that Gladys Thompson was the daughter of Tom Thompson, deceased, and his surviving heir at law; that Tom Thompson was, on the 27th day of October, 1910, an employee of the appellee lumber company, and was injured and killed by the negligence of the lumber company, setting out in detail the acts alleged as negligence. Appellant prayed judgment against the appellee in the sum of $10,000.

Appellee filed a plea of *res adjudicata,* alleging that at a former term of the Bradley Circuit Court, Mattie Thompson, for herself, Pebble Thompson, Verdie Thompson and Tom Thompson, minors, instituted suit for the collection of damages against the appellee for the alleged

negligent killing of Tom Thompson; that at his death the said Tom Thompson left surviving him the plaintiff as his widow and Pebble, Verdie and Tom Thompson, his children and heirs at law; that a trial was had and a verdict rendered in favor of the appellee and judgment was entered in its favor, from which an appeal was taken to the Supreme Court and the judgment affirmed; that the cause of action in this suit was the same as that set forth in the complaint in the present suit; that the present appellant, for Gladys Thompson, had no other or greater cause of action against the appellee than plaintiffs had in the former suit, and that this cause therefore had been formerly adjudicated. Appellee made as exhibits to its plea the complaint, answer and judgment and verdict in the former suit.

The appellant filed a response to appellee's plea, denying that the same issues were raised in the cause formerly adjudicated; denying that the parties to the former suit were the same, and denying that Gladys Thompson, for whom the present suit was instituted, was a party to the former suit, and setting up that the record did not disclose that Gladys Thompson was a party to that suit, and averring that as a matter of fact she was not made a party, and that as she was an infant, she could not act for herself and make herself a party to that suit, and that therefore the court, in the former suit, had no jurisdiction over Gladys Thompson to hear and determine any rights that she might have had in the trial of that cause; that the reason Gladys Thompson did not become a party to that suit was because of an oversight and mistake of counsel representing the plaintiff, who had no personal knowledge of the existence and being of Gladys Thompson, minor, or her rights in the premises, which mistake and oversight she was not responsible for.

The court, after hearing the testimony on the issue thus raised, sustained appellee's plea and entered a judgment dismissing appellant's complaint and adjudging costs against her, from which she duly prosecutes this appeal.

Mehaffy, Reid & Mehaffy, for appellant.

Plaintiff is not estopped by the former judgment, nor was she concluded by the doctrine of *res adjudicata.* Personal judgments conclude only parties and their privies. Bigelow on Estoppel, 127; Herman on Estoppel & Res Adjudicata, Vol. 1, p. 140; 73 S. W. 96; 17 Ark. 203; 20 *Id.* 91; 82 *Id.* 419; 96 *Id.* 454; 20 *Id.* 629; 23 *Id.* 338; 64 *Id.* 330; 75 *Id.* 1; 77 *Id.* 477; 96 *Id.* 409; 105 *Id.* 86.

Wynne & Harrison and *Fred S. Purcell,* for appellee.

There was but *one cause* of action from the alleged wrongful death, and that was settled in 104 Ark. 196. The matter is *res adjudicata.* 79 Ark. 62; 52 Fed. 371; 83 Ark. 545; 117 Ill. App. 512; 70 S. W. 1109; 28 *Id.* 83; 28 W. Va. 794; 86 Ky. 128; 107 Fed. 597; 85 Mo. App. 659; 118 N. Y. 163; 51 So. 529.

WOOD, J., (after stating the facts). It appears from the pleadings and the evidence that Gladys Thompson, who was one of the children of Mattie Thompson and Tom Thompson, and an heir of Tom Thompson, was not a party to the suit that had been formerly instituted in the Bradley Circuit Court by Mattie Thompson, for herself as widow and as next friend for her children, Pebble, Verdie and Tom Thompson, against the appellee for damages alleged to have been sustained by them on account of the alleged negligent killing of Tom Thompson.

"A judgment is conclusive only between the parties and their privies." *Biederman* v. *Parker,* 105 Ark. 86; *Doss* v. *Long Prairie Levee District,* 96 Ark. 454; *Cleveland-McLeod Lbr. Co.* v. *McLeod,* 96 Ark. 409; *Updegraff* v. *Marked Tree Lbr Co.,* 83 Ark. 157; *Albie* v. *Jones,* 82 Ark. 419.

The judgment as set up in the plea of former adjudication, was a personal judgment, and could only bind the parties to that record and their privies. Bigelow on Estoppel, p. 127. Gladys Thompson was not a privy in interest to any of the parties to that suit. Whatever damages she might have been entitled to recover for the alleged negligent killing of her father were given to her by the statute (Kirby's Digest, § 6290), and her proportion-

ate part of those she would receive by virtue of the statute, independent of the widow or any of the other heirs of her father, Tom Thompson. She was not connected with any of these in any way as to her part of whatever damages the widow and heirs at law of Tom Thompson might have been entitled to recover. She was therefore not a privy in interest to any of them. As she was neither a party nor a privy to the former suit, she was not bound by the judgment therein.

It does not follow, however, that because she is not bound by the proceedings in the former suit, that she is is entitled to recover in this action. In *St. Louis, I. M. & S. Ry. Co.* v. *Needham,* 52 Fed. Rep. 371, the circuit court of appeals, through Judge Sanborn, construing the above statute, held, that the widow and all other persons entitled to share in the distribution of the personal estate of the one killed by the wrongful act of another, are heirs at law, and when the widow, in the absence of personal representatives, brings a suit under the act, she must join all persons having an interest in the subject-matter therein.

And in *McBride* v. *Berman,* 79 Ark. 62, following the construction of the court of appeals, we said, construing the same statute (Kirby's Digest, § § 6289, 6290): "Manifestly these statutes did not intend this splitting of the cause of action, and contemplate this multiplicity of actions for one act of negligence resulting in death. The statute (commonly called Lord Campbell's Act) intends one action to be brought for the death sued on. This action must be brought by the personal representative, if there be administration. If there is no administration, then the action must be brought by the heirs at law of such deceased person. While the wife is not technically an 'heir at law,' yet she is specifically named in this statute as a beneficiary in such action for the recovery for 'pecuniary injuries,' resulting from the death of the husband, and the term 'heir at law' is used in the broader sense of one receiving a distributive part of the estate and a beneficiary of the action created by these acts. * * *

"In default of a personal representative an action brought under Lord Campbell's act must make the widow (if there be one) and the heirs at law parties thereto."

It follows from these decisions as an indispensable prerequisite to the maintenance of a suit under the statute *supra,* that the widow and heirs of the person killed by the wrongful act of another shall all be made parties.

It appears as an undisputed fact in this record that Mattie Thompson was the widow of Tom Thompson, and that he had other children who were his heirs at law, and none of these were made parties. As the making of the widow and other heirs parties was a condition precedent to the maintenance of the suit by the appellant as next friend for Gladys Thompson, the court did not err in dismissing her complaint, although it gave the wrong reason therefor. While the plea of *res adjudicata* was not technically sustained because the rights of Gladys Thompson had never been adjudicated in any former suit, nevertheless the judgment of the court dismissing her complaint was correct for the reason we have stated. This court can not reverse a judgment that is right upon the undisputed facts presented in the record, although the trial court may have based its ruling upon an erroneous reason and a misconception of the law.

The judgment of the court dismissing appellant's complaint and thereby abating the present suit is correct and it is affirmed.

HART, J., and KIRBY, J., dissent.

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

Opinion delivered June 15, 1914.

1. RAILROAD COMMISSION—POWERS—RELOCATION OF RAILWAY STATIONS.—Under the act of May 17, 1907, which confers upon the railroad commission power to hear and consider petitions for "depots, stations, spurs," etc., and "to determine the amount, degree and character of construction, equipment, changes, enlargement of stations

and depots," the railroad commission has power to establish a depot or station in the first place, and to change the location of depots that have been formerly established. (Page 393.)

2. RAILROAD COMMISSION—RELOCATION OF STATION—PETITION.—Under the act of May 17, 1907, a petition for the establishment, discontinuance or relocation of a railway station, is necessary to give the commission jurisdiction of the matter. (Page 394.)

3. RAILROAD COMMISSION—RELOCATION OF RAILWAY STATION—DISCRETION.—A petition emanating from at least fifteen *bona fide* citizens residing in the territory sought to be affected, setting forth that they desire the establishment of a depot or station, or a discontinuance thereof at one point and a relocation of the same upon the right-of-way of any railway, in this State, is sufficient to give the commission jurisdiction to act in the premises, whether the exact point for the location or establishment or relocation, of the depot or station is precisely designated and defined, or not, and the railroad commission may establish the new station at any point "within the territory to be affected," which is found to be most conducive to the public welfare, considering also the welfare of the railroad company and the convenience of the general public. (Page 395.)

4. RAILROAD COMMISSION—RELOCATION OF STATION—REASONABLENESS OF ORDER.—Where the railroad commission ordered a railroad company to change the location of its depot or station, *held*, under the facts, that the order was reasonable and did not amount to a taking of property without compensation. (Page 396.)

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

STATEMENT BY THE COURT.

More than fifteen citizens of the town of Benton, Saline County, Arkansas, presented a petition to the Railroad Commission of Arkansas, in which they stated that they were shippers and patrons of the St. Louis, Iron Mountain & Southern Railway Company, and that the depot of said company at Benton had been recently destroyed by fire; that the company was preparing to build a new depot on the old site, which was on the extreme edge of the city, and not accessible to travelers without passing a distance of 1,500 or 1,700 feet along the right-of-way of the company and between its tracks where travel was made extremely dangerous by the passage of trains on the main line and switches of the railway. They

urged the commission to require the railway company to build its depot at a point immediately south of where its line known as the Little Rock & Hot Springs Western was intersected by East Street and Main Street.

The commission took the petition under consideration, visited the town of Benton, examined the location mentioned in the petition, heard many witnesses, and concluded that it would be unwise to require the railway company to build its new depot at the point named in the petition. But it issued an order requiring the railway company to build its new depot building at a point between where its depot had been located and the location asked by the petitioners, which it described in the order as follows: "Commence on the east line of East Street between tracks of the Iron Mountain main line, and tracks of the Hot Springs Western branch of the Iron Mountain railway, with the platform, run thence east with platform 340 feet and build passenger station according to plans, which show length of new station to be 188 feet, then continue eastward with the platform 340 feet on the east or north side of the depot."

The company was ordered to begin construction work on its new depot building on or before July 15, 1913.

The appellant St. Louis, Iron Mountain & Southern Railway Company (hereafter, for convenience, called company), instituted this suit against the appellees to enjoin them from enforcing the above order, setting up that the railroad commission (hereafter called commission), did not have authority under the act of May 17, 1907 (under which it claimed to be acting) to make the order; that no petition asking that the passenger depot be located at the point designated by the commission, was filed as the statute requires; that the location designated in the petition that was filed was several hundred feet west of the location selected by the commission; that the order was void because it imposed an unnecessary and unreasonable burden and expense upon the company in requiring it to remove its station from a point where it had acquired station grounds which were adequate for all purposes, and which had been fully prepared for depot purposes

at great expense, and that to place the depot at the point designated by the commission would require the company to obtain and improve other lands, to readjust and change its numerous tracks, to cut down the grade of its line at various points at an enormous expense, and thereby deprive the company of its property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law; that the order was unreasonable and void for the reason that it required the company to place its depot at a point where its lines passing same would be upon a curve and upon a grade, making it exceedingly dangerous to operate its trains at said station; that the order was in violation of section 22, of article 2, of the Constitution of Arkansas, which provides "that the right of property is above and higher than any constitutional sanction, and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor;" that the order was in violation of section 9, article 2, of the Constitution of Arkansas, which prohibits the imposition of cruel and unusual punishment and excessive fines.

The appellees answered, denying that the order was void, as set up in the allegations of the complaint, and that the order imposed any unreasonable burden upon the company, or that the company would be irreparably injured by the enforcement of the order. They further set up, as reasons why the company should be required to obey the order of the commission, the following: "That the site at which plaintiff desires to build its new depot is way off at one side of the city, has no streets leading to or from it; that it is located between the tracks of the defendant company, same being the main line of the St. Louis, Iron Mountain & Southern Railway Company on the south, and the Little Rock & Hot Springs Western Railway on the north; that said tracks are located about 100 feet apart, where plaintiff has maintained its depot, and about 200 feet apart at the point where said tracks

are crossed by Main Street; that from Main Street to the site where plaintiff maintains its depot is a distance of more than one-fourth of a mile; that practically all of the travel from the city to said station is by way of Main and East Streets, until the line of the Little Rock & Hot Springs Western Railway is crossed, and then between the tracks to said station; that in going from Main and East streets to said station, it is not only necessary to cross the railroad track of the Little Rock & Hot Springs Western Railway, but also to travel for a distance of 1,500 feet from Main Street, and 1,200 feet from East Street between the said tracks of the plaintiff company, and also to cross a connecting track that connects the Little Rock & Hot Springs Western Railroad track to that of the main line of the St. Louis, Iron Mountain & Southern Railway Company; that the land lying between the tracks, and over which it is necessary for the public to travel, belongs to the plaintiff company; that the city owns no street which approaches said station nearer than approximately 1,200 feet; that because of the location of said station at the place where plaintiff now contends that same remain located, it is very dangerous and inconvenient for people of Benton and vicinity to go to and from said depot," etc.

The answer then proceeds to enumerate at length the causes and conditions existing at the place where the company proposes to build the new depot that would make the same dangerous and inconvenient for the people of Benton. Appellees averred that for twenty-six years and until about the year 1901, "the plaintiff company operated its depot at a point between Main and Market streets, on a curve much greater than that at the point designated by the commission; that it was only after the building of the Little Rock & Hot Springs Western Railway and the acquirement by gift from the people of Benton of the forty-acre tract of land which now lies immediately north of the site where said depot was burned that plaintiff moved its depot to the site where it now claims the same should be permanently located; that

neither the curve nor grade at the point designated by the commission for said depot is such as to make it more dangerous or hazardous for the plaintiff company to operate its trains than it would be with the station located at the point contended for by said company; that it is necessary for the convenience and safety of the public, who are patrons of the plaintiff, using its depot at Benton that said depot be moved to a point as far west as that designated by the commission.

An intervention was filed by various citizens, adopting the allegations of appellant's complaint, protesting against the removal of the depot to the place designated by the commission, and setting up that they were engaged in business near the location of the site selected by the railway company, and that the change in the location of the depot would render their property of little or no value; that their property was acquired with the understanding that the depot would remain where located, and that if they had not understood that the depot would remain there, they would not have invested their money in the property. They joined in the prayer for an injunction against the enforcement of the order of the commission.

The chancery court, after hearing the evidence, which was adduced *ore tenus* and taken down by a stenographer and afterward transcribed and made a part of the record of the chancery court, found that the commission had authority to make the order; that the petition presented by more than fifteen citizens was sufficient to authorize the commission to make the order of which appellant complains; "that the old location where the depot was burned is a better location for the depot building than the location mentioned in the order of the Railroad Commission;" but the court was of the opinion that it had no authority to set aside the order made by the commission unless there was no reason therefor, and the court was of the opinion that there was a reason for the commission to make the order, and therefore entered a decree dis-

missing appellant's complaint for want of equity. Other facts stated in the opinion.

E. B. Kinsworthy and *T. D. Crawford,* for appellant.

1. The statutes do not empower the Railroad Commission to relocate stations. See Act May 17, 1907, section 1. The question presented here is not the power of the railroad commission to establish a depot, but the power to require the railway company, at great expense, to abandon a depot already established, and to establish another depot at another location. The commission is not empowered, either expressly or by implication, to alter or change the location of stations already established. 31 Fla. 482, 34 Am. St. 39; 2 L. R. A. 195; 2 Elliott on Railroads, 684, and note; *Id.* 66; 36 Ark. Law Rep. 156; 112 Pac. 120; 130 Ill. 175; 132 Ill. 471; 74 Neb. 77; 142 U. S. 492; 110 U. S. 667; 61 Miss. 725, 20 Am. & Eng. Railroad Cases, 303; 64 Ill. 414, 16 Am. Rep. 564; 132 Ill. 559, 22 Am. St. 556.

2. There was no petition for the location of the depot where it was ordered to be located.

If it be conceded that "the territory sought to be affected" by the location of a depot includes the town most directly affected by the establishment of the station, still, a petition asking to have a station established at a particular point does not authorize the commission to locate a station at another and intermediate point.

3. The order No. 825 of the commission required appellant to remove its station from the point where it has acquired and improved station grounds to a new point which would require appellant to procure and improve other grounds at great expense, destroying the value of property already improved and causing great and unnecessary expense in the acquirement and improvement of other property, without any proportionately compensating advantage to the public.

The order is unreasonable and invalid as a taking of appellant's property without due process. 217 U. S. 196.

4. The order is unreasonable in requiring appellant to locate its depot at a place where its main line will be

upon a curve, and its branch line upon a grade. 67 Minn. 385; 87 Ia. 644; 74 Neb. 77; 87 Miss. 679; 31 Okla. 509.

Appellant's witnesses fully explained the difficulties incident to locating the station upon a curve, as follows: (1) The difficulty in starting a train on a curve; (2) the difficulty in coupling cars when on a curve, and (3); the difficulty trainmen experience in seeing signals when the train is on a curve. This testimony is entirely uncontradicted, and demonstrates the unreasonableness of the order.

The burden is on the appellees to show that appellant abused its discretion in locating the site of its station. 68 Miss. 653. The discretion of a railroad company in establishing and maintaining its stations should not be interfered with, except where public necessity requires it. 85 Neb. 818, 26 L. R. A. (N. S.) 444-450; 57 Ark. 359; 97 Ark. 89.

Where a railroad commission is given statutory authority to require a railroad company to erect and maintain depots at places selected by the commission, it can not exercise such power arbitrarily and in disregard of public need or necessity. 114 S. W. (Tex.) 192.

W. R. Donham, for appellee.

1. The statute intended to give to the railroad commission as much authority over the matter of establishment, enlargement, equipment and changes in depots as was vested in the State prior to the passage of the act. See sections 1 and 2 of the act of May 17, 1907.

It is not the duty of the courts to defeat the will of the people expressed through their representatives, but rather to enforce it unless some vested right or provision of the Constitution has clearly been invaded. Moreover, the necessity for such legislation being primarily a question for legislative determination, the courts will not interfere unless that power of determination has been exercised arbitrarily and without reason. 25 Ark. 298; 85 Ark. 12; 97 Ark. 473; 206 U. S. 7; 99 Ark. 1.

2. Appellant's contention that there was no petition for the location of the depot at the place where it was

ordered to be located, is a mere quibble. To say that the railroad commission must locate a depot upon the exact spot designated in the petition, is unreasonable.

3. There is no merit in the contention that the commission's order No. 825 is unreasonable and invalid as taking appellant's property, without due process.

The record does not bear out appellant's statement in support of this contention. There is nothing in the record to show that appellant would have to acquire any additional ground, or that the value of its present improved premises would be decreased. The order does not deprive appellant of its property without due process, neither is it unreasonable. 85 Ark. 112; 99 Ark. 18; 91 Ark. 358; 85 Ark. 181; 54 Ark. 112; 156 U. S. 649; 142 U. S. 449; 109 La. Ann. 263; 13 Cyc. 140-144, 145; 3 Wood on Railroads, § 287; *Id.* 495; 179 U. S. 428; 206 U. S. 1; 22 Wall. 136; 176 Ill. 512; 48 So. 236; 207 U. S. 88; 32 L. R. A. 857; 52 N. E. 292; 103 Mass. 254; 115 N. W. 757; 107 U. S. 285.

4. The location of the depot in this case is not open to the objection that it is unreasonable because it is upon a curve. The evidence is positive that unless the curve is sharp, as much as four degrees, it is not objectionable; and that the curve at this point is only one and one-half degrees. Appellant's engineer testified that appellant has many stations located on one and one-half degree curves.

WOOD, J., (after stating the facts). Appellant contends:

First. That the statutes did not empower the railroad commission to relocate stations.

The statute provides: "Section 1. That the Railroad Commission of Arkansas be and the same is hereby authorized, empowered and required to hear and consider all petitions for train service, depots, stations, spurs, sidetracks, platforms and the establishment, enlargement, equipment and discontinuance of the same along and upon the right-of-way of any railroad in this State; *provided,* said petition shall be signed by at least fifteen *bona fide*

citizens residing in the territory sought to be affected by said petitioners.

"Sec. 2. The said Board of Railroad Commissioners shall, within thirty days after the filing of said petition, proceed to make a personal inspection of the conditions complained of and investigate the object sought to be accomplished by said petitioners, and shall have the right to summon and swear witnesses, which summons shall be served by any sheriff, constable or deputy having legal jurisdiction; whereupon, the said Board of Railroad Commissioners shall determine the amount, degree and character of construction, equipment, changes, enlargements of stations and depots which should be supplied by such railroad company, its lessee, or operator, and shall have the power and authority to require a reasonable train service for each and every such railroad station and depot within the State of Arkansas, and their finding shall be binding upon all such railroads within the State of Arkansas." Act 149, p. 356, Acts 1907.

The power conferred upon the commission by the above statute to hear and consider petitions for "depots, stations, spurs, sidetracks," etc., and "to determine the amount, degree and character of construction, equipment, changes, enlargement of stations and depots," is sufficiently comprehensive to enable the commission to establish a depot or station in the first place, or to change the location of depots that have been formerly established. The act, in express terms, gives the commission power to hear and consider petitions for the "discontinuance" of depots, stations, spurs, etc., "as well as for their establishment."

While the word "relocate" is not used, yet the terms employed in the act are broad enough to include the relocation of a depot or station. A discontinuance of a depot or station at one location and the establishment of it at another is but a relocation. Therefore, the power to "discontinue" and to make "changes" of stations and depots necessarily includes the power to relocate.

Second. Under the statute, a petition for the establishment of depots, stations, etc., or the discontinuance of the same at one point and a relocation and establishment thereof at another, is necessary to give the commission jurisdiction of the subject-matter. But, while a petition "signed by at least fifteen *bona fide* citizens residing in the territory sought to be affected by said petition" is essential to give the commission jurisdiction, the commission, in the matter of locating or establishing a depot or station, is not required to order the same built or established upon the exact spot designated in the petition. The statute does not require that the petition shall designate the precise point where the depot shall be established, and if the petitioners do define the place for the location of the depot, the commission is not bound to establish the same upon the exact spot and according to the limits set forth in the petition. The commission is only required to consider "the territory sought to be affected," and, of course, would be precluded from establishing a depot beyond the territory sought to be affected. But, as we have stated, there is nothing in the act requiring the exact location to be defined, nor circumscribing the authority of the commission to those precise limits where they have been set forth in the petition. A petition emanating from at least fifteen *bona fide* citizens residing in the territory sought to be affected, setting forth that they desire the establishment of a depot or station, or a discontinuance thereof at one point and a relocation of same along and upon the right-of-way of any railway in this State is sufficient to give the commission jurisdiction to act in the premises, whether the exact point for the location or establishment, or relocation, of the depot or station is precisely designated and defined or not. Here "the territory sought to be affected" was the city of Benton, and the petition was signed by more than the requisite number of *bona fide* citizens of that territory. This was such a petition as the statute contemplates, and it gives the commission jurisdiction of the subject-matter, and it was then within the power of the commission to discontinue

the old station and establish the new depot along the line of appellant's railroad at any point "within the territory to be affected," which was found to be most conducive to the public welfare, taking into consideration, of course, the interests of the railway company, and also the convenience of the general public that was to be subserved by the granting of the petition.

It can not be said that because the commission did not direct the establishment of the new depot at the exact point described in the petition, that it acted without a petition, and therefore had no authority to make the order. There was a petition signed by more than the prescribed number of *bona fide* citizens, and it was requested at the hearing that if the commission did not see fit to locate the new depot at the site designated in the petition, that it be placed as near that site as practical.

Every requirement of the law was met in the matter of the petition.

Third. Appellant contends that the order under review is unreasonable and invalid because taking its property without due process of law. Appellant, in this connection, says: "The effect of the order is to destroy the value of the property owned by it and to compel it to acquire and improve other property at great and unnecessary expense without any proportionately compensative advantage to the public."

Appellant was given an opportunity to be heard before the commission, and was heard. The commission had before it the testimony adduced by the appellant showing the difference between the cost of rebuilding the new depot and the necessary houses and the arrangement of the tracks at the place designated by the commission, and the cost of rebuilding and rearranging the tracks, freight houses, etc, at the place of the old station. These were questions of fact addressed to the commission, and it could serve no useful purpose to set out in detail and discuss the evidence bearing upon these issues. The difference in the expense of establishing and maintaining a station at the point designated by the commission is

greater, as shown by the testimony of witnesses for appellant, than the expense of building a new depot and maintaining the station at its present location, but it can not be said that this difference is so great as to amount to a confiscation of appellant's property. The difference in the cost of the establishment and maintenance between the two locations is not so great as to make the order of the commission unreasonable and arbitrary. This was a matter addressed primarily to the commission, and after a careful consideration of the evidence bearing upon this issue, we are of the opinion that the order of the commission was not arbitrary and unreasonable.

However much we may differ from the finding of the commission, upon the evidence in this record, as to the wisdom and expediency of its order, on acconut of the increased cost to the appellant in making the necessary expenditures to comply with its order, nevertheless a fair consideration of all the testimony adduced on this issue does not convince us that the order was arbitrary and unreasonable. The order of the commission, under the act, and the facts adduced by this record, was not a taking of property without due process of law. *St. Louis, I. M. & S. Ry. Co.* v. *State,* 99 Ark. 1.

Fourth. It is next contended that the order was unreasonable in requiring the appellant to locate its depot at a place where its main line will be upon a curve and its branch line upon a grade.

In *Louisiana & Ark. Ry. Co.* v. *State,* 85 Ark. 12, we said: "When the Legislature passes a special act requiring the doing of a certain thing, such as the establishment and maintenance of a station at a given place by a railroad corporation, there may be a judicial question presented whether or not a real necessity exists for the doing of the thing in order to reasonably serve the public convenience. It is a question primarily for legislative determination, and that determination should not be disturbed by the court unless the power has been exercised arbitrarily and without reason. In other words, the legislative determination should be, and is conclusive, unless

it is arbitrary and without any foundation in reason or justice. There may be cases where the power is exercised so arbitrarily and unreasonably that the court should declare, as a matter of law, that the Legislature exceeded its power, and that the legislative determination should be disregarded."

We further said: "The utmost force must be given to the legislative determination of the necessity for a station and the reasonableness of requiring the company to erect and maintain one."

And, in *St. Louis S. W. Ry. Co.* v. *State,* 97 Ark. 473, we held (quoting syllabus): "The Legislature has primarily the right to determine whether the public necessity and convenience require the establishment of a railway depot at a given point, and the courts will not disturb their determination unless it is clearly shown that such requirement is unreasonable and arbitrary."

In *St. Louis, I. M. & S. Ry. Co.* v. *State, supra,* the court had under consideration the power of the railroad commission, under this statute, to order the construction of a spur track, and we said: "The Legislature had the right to require the construction of this spur track, and, having it, could delegate the power to the railroad commission, as it has done by said act of 1907. If it had made the requirement directly by statute instead of conferring the power upon the railroad commission to make it, its action would have been subject to judicial review only as being so arbitrary and unreasonable as to cause it to be void for want of power. The order of the railroad commission, made under the authority delegated to it, is subject to legal review for the same cause."

These principles doubtless were in the mind of the chancery court when passing upon the facts on the issue as to whether or not the order of the commission was so arbitrary and unreasonable as to render the same void. The court was correct in its conclusion. It can not be said that the order of the commission was "arbitrary and without any foundation in reason and justice."

Appellant contends that the order was unreasonable because the testimony adduced by it showed that the location of the station under the order of the commission was on a curve on the main line; that being on a curve there was difficulty in starting trains, in coupling the cars and in seeing signals, all of which rendered the operation of trains far more difficult and dangerous than it would be on a straight track, like the one at the old station or place at which the appellant proposed to erect its new depot building.

The undisputed testimony showed that the station under the order of the commission would be located on a curve on the track of appellant's main line that was one and one-half degrees. There was much testimony on behalf of appellant tending to show that the difficulty, as well as the hazards, of operating the trains on this curve would be greatly increased; that if the station was located according to the order of the commission, on the branch line the engine would stand upon a one per cent grade, which would make it very difficult to handle long, heavy trains, whereas, at the old station there was a straight track on the main line and the grade of the branch line was of sufficient distance to permit the proper handling of trains. The testimony also tended to show that if the appellant undertook to straighten the curvature at the station under the order of the commission, and to reduce the grade on the branch line so as to enable it to properly handle the trains it would cost about $55,000. It was shown that a larger number of passenger trains passed through Benton than any other town in the State except Little Rock. This fact was because of the numerous passengers to Hot Springs.

It was shown that an effort was once before made before the railroad commission for the removal of the depot from its present location, which was unsuccessful, and likewise an unsuccessful effort was made to have the Legislature pass a special act requiring the removal of the depot from its present location. On the other hand, there was testimony tending to show that the site where

the station is now located, and the site where it would be located under the order of the commission were so nearly identical that either would make a good location; that the curve at the station of the Rock Island railroad at Benton was greater than would be the curve at the station under the commission's order; that a curve is objectionable if sharp, that is, if over four degrees; that while it is preferable always to have the stations located on a straight track, nevertheless appellant had quite a number of stations located on curves of one and one-half degrees.

It was shown that the appellant owned sufficient land between the two tracks to make a straight track south for five or six hundred feet; that it had room to straighten its tracks without getting off its right-of-way; that from the old station it had 522 feet of straight track; that it had plenty of room to carry the straight track 522 feet south of the new location.

It was shown that the cost of erecting the depot building at the station ordered by the commission and at the old station where the depot building had been burned would be approximately the same; and there was evidence tending to show that the convenience to the people of Benton as a whole would be far greater at the station ordered by the commission than at the old station, and that the danger and difficulty in operating trains at the station as ordered by the commission would be no greater than at the old location.

Without going into further detail concerning the facts, it suffices to say that it was shown that a majority of the commission visited the location, heard the testimony *pro* and *con*, and, after making a thorough investigation and giving the parties full opportunity to be heard, made the order now challenged by the appellant.

Under the principles already announced by this court as to the power delegated by the Legislature to the commission, we are of the opinion that the court was correct in holding that the order of the commission, under the facts adduced, was not arbitrary and unreasonable.

The decree, therefore, dismissing the appellant's complaint for want of equity, is in all things affirmed.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN v. CRAVENS.

Opinion delivered June 15, 1914.

1. FRATERNAL INSURANCE—CONTRACT—CONSTITUTION AND BY-LAWS.—The constitution and by-laws of a fraternal order become a part of a contract of insurance with it, and are binding on the order unless inconsistent with the terms of the benefit certificate. (Page 403.)
2. BENEFIT INSURANCE—PROVISIONS—RIGHT OF HOLDER—"CONSUMPTION CLAUSE."—A benefit policy provided that the holder of the policy was entitled to the amount of the same if he became afflicted with consumption in its last stage. *Held*, when the holder became afflicted with consumption in its last stage the right to the amount of the benefit certificate vested in him, and when he asserted that right by suit, it survived after his death to his estate, and the beneficiary named in the certificate was excluded. (Page 403.)
3. APPEAL AND ERROR—EVIDENCE—WEIGHT—LEGAL SUFFICIENCY.—On appeal a judgment will not be disturbed when there is any legally sufficient evidence to sustain the verdict. (Page 403.)

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

STATEMENT BY THE COURT.

W. E. Cole was a member of the order of Brotherhood of Locomotive Firemen and Enginemen (the appellant), a fraternal organization doing business in this State on a lodge basis, and maintained by the assessment of its members. W. E. Cole held a benefit certificate or policy for $1,500, which at his death was payable to J. C. Moss, a half-brother. A clause of the constitution and by-laws of the order provides: "If a beneficiary member in good standing shall become afflicted with consumption of the lungs in its last stage he shall be entitled to the amount of his benefit certificate. Cole in his lifetime sued the appellant, setting up his certificate and alleging that he was afflicted with consumption of the lungs in its last stage, and under the constitution, that he was entitled to be paid the amount of his certificate, he having complied with the by-laws of the order in furnishing proof of his affliction. The answer admitted that Cole was a mem-

ber of the order and held a certificate as alleged, but alleged that it did not know whether Cole was suffering with consumption of the lungs in its last stage, and called for strict proof thereof. It set up by way of affirmative defense that the application to become a member contained this question: "Do you use wine, spirituous or malted liquors?" and that Cole answered it "No." That the answer under the terms of the application, which was a part of the certificate, and, of the contract under which Cole was insured, was made an express warranty; that the answer given was material and was false in that Cole was and had been for some time an habitual drinker, and that if afflicted with consumption as alleged, it was brought on by his habitual excessive use of intoxicating liquors. Upon these issues the cause was heard in the circuit court the first time, and on appeal to this court the judgment was reversed and the cause remanded for new trial. See, *Brotherhood Locomotive Firemen and Eng.* v. *Cole,* 108 Ark. 527. Cole died before the second trial, and the cause was revived in the name of Ben Cravens, special administrator. The appellant moved the court to have J. C. Moss made a party, setting up that he was the sole beneficiary of the policy since the death of Cole, and was threatening to sue appellant thereon. The court overruled this motion. The cause was sent to the jury. The testimony showed that Cole, before this suit was instituted, had consumption of the lungs in its last stage. The trial resulted in a verdict and judgment for the estate, and this appeal has been duly prosecuted.

W. S. Chastain, for appellant.

1. The refusal to make Moss, the beneficiary, a party to the suit, was reversible error. The statute is mandatory and can not be ignored. Kirby's Dig., § 6011; 74 Ark. 54, and cases cited. Cole died before he acquired a vested right. When the case was reversed on former appeal, the matter stood as though no judgment had ever been rendered, and no final judgment had been rendered at the time of his death. 47 Ark. 359.

2. There is no evidence of substantive force sufficient to sustain the verdict. The testimony of five witnesses establishes the fact that Cole was a habitual and customary user of intoxicating liquor, and the probative force of the testimony of those disinterested is so great that it is not weakened by the testimony of Cole himself (there is no other evidence contradicting them), the effect of whose testimony was an admission that he was a customary, as well as an occasional, user of intoxicants. The court should have directed a verdict for appellant. 32 Ark. Law Rep. 663; 26 *Id.* 257.

Cravens & Cravens, for appellee.

1. "The constitution and by-laws of a fraternal order become a part of the contract insuring its members, and, if not inconsistent with the terms of the certificate, will be binding as part of the contract." 105 Ark. 140.

The constitution of appellant provides that when a member becomes afflicted with consumption in its last stages, *he shall be entitled to the amount of his beneficiary certificate.* Availing himself of this provision of the constitution of the order, Cole demanded, and pressed his suit, for the amount of the certificate up to the time he died; therefore, the amount of the policy belongs to his estate, and the court did not err in refusing to make Moss a party to the suit. 97 Ark. 50; 91 Ark. 377; Kirby's Dig., § 6298. Moss had no vested interest in the benefits under Cole's policy. 96 Ark. 154. See, also, 97 Ark. 425.

2. There is legally sufficient evidence to sustain the verdict. This court will not disturb a jury's verdict, unless it is entirely unsupported by the evidence. 100 Ark. 629; 89 Ark. 321; 70 Ark. 136.

WOOD, J., (after stating the facts). 1. Appellant contends that Moss was a necessary party, and that the court erred in overruling its motion to have him made a party. The constitution and by-laws of a fraternal order become a part of the contract of insurance and are binding on the order unless inconsistent with the terms of the benefit certificate. *Supreme Royal Circle of Friends of the World* v. *Morrison,* 105 Ark. 140. The clause of the

Constitution entitling the member to the amount of his certificate when he became afflicted with consumption in its last stage, is not in conflict with any provision of the benefit certificate sued on. Therefore, Cole was entitled to the amount of his certificate when he became afflicted with consumption in its last stage. Under the terms of the contract with appellant, the right of Cole to the amount of his benefit certificate vested the moment he became afflicted with consumption in its last stage. If Cole had died without claiming the amount of his certificate under the "consumption" clause, this would have been a waiver by him of his rights under that clause. In that event, Moss would have been entitled to claim the amount of the certificate. But Cole having the right to the amount and having asserted such right, by suit, at his death the right survived to his estate. Therefore, the court did not err in overruling appellant's motion to make Moss a party. Under the provisions of section 6298, of Kirby's Digest, the court properly designated a special administrator to represent the estate and to continue the litigation for its benefit. Moss, the beneficiary named in the certificate, had no vested interest in the amount of Cole's certificate. Cole had the right under the by-laws to change the beneficiary at any time, and his act in claiming the amount for himself, under the "consumption clause," excluded any rights that Moss otherwise would have had at Cole's death. See, *Ross* v. *Rogers,* 96 Ark. 154; *Brotherhood of Locomotive Firemen & Enginemen* v. *Aday,* 97 Ark. 425.

2. The issue as to whether or not Cole had violated the terms of the warranty by the habitual use of intoxicating liquors was submitted to the jury upon instructions in conformity with the law as announced in *Metropolitan Life Ins. Co.* v. *Shane,* 98 Ark. 132. The appellant contends that there was no evidence to support the verdict on this issue. While the preponderance of the evidence was against the finding of the jury, it can not be said that there was no evidence to sustain the verdict. The question for us is not whether the verdict is against the weight of the evidence, but whether there is any le-

gally sufficient evidence to sustain it. *St. Louis & S. F. Rd. Co.* v. *Kilpatrick,* 67 Ark. 47; *St. Louis, I. M. & S. Ry. Co.* v. *Wilson,* 70 Ark. 136; *Scott* v. *Moore,* 89 Ark. 321; *F. Kiech Mfg. Co.* v. *Hopkins,* 108 Ark. 578-591. There was such evidence. The judgment is therefore affirmed.

HEISEMAN *v.* LOWENSTEIN.

Opinion delivered June 15, 1914.

1. WILLS—TRUSTS—EQUITY—JURISDICTION.—Where a trust is created by a will, a court of equity has jurisdiction to construe the will. (Page 413.)
2. WILLS—INTENTION OF TESTATOR—CREATION OF A TRUST.—Where a testator left an estate consisting of real estate and stock in corporations, and provided simply for the payment of cash legacies to his relatives, it will be held that the will created a trust. (Page 414.)
3. ADMINISTRATION—EXECUTORS—POWER TO SELL OR MORTGAGE.—An executor has no power to sell the land of his testator unless directed to do so by the will, either expressly or by necessary implication. (Page 416.)
4. ADMINISTRATION—RIGHT OF EXECUTOR TO SELL REAL ESTATE.—Because the testator has a right to dispose of his real estate as he sees fit, if he directs that to be done by his executors, which necessarily implies that the estate is first to be sold, a power is given by implication to the executors to make such sale and execute the requisite deeds of conveyance. (Page 416.)
5. ADMINISTRATION—TRUSTS—POWER OF SALE.—No particular form of words is necessary to create a power of sale. Any words which show an intention to create such power, or any form of instrument which imposes duties upon the trustee that he can not perform without a sale, will necessarily create a power of sale in the trustee. (Page 416.)
6. TRUSTS—POWER TO MORTGAGE.—A mere power of sale does not include a power to mortgage. (Page 416.)
7. WILLS—POWER TO MORTGAGE REAL ESTATE.—When a testator by his will bequeathed only legacies in money, and directed his executors to close up his estate as quickly as possible, it will not be held that the executors have power to mortgage any of the testator's property. (Page 416.)

8. ADMINISTRATION—POWER TO LEASE.—Executors of an estate may lease the real property of the testator, for such time as may be necessary, until they exercise their authority under the will, to sell the same. (Page 417.)

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

STATEMENT BY THE COURT.

Appellants, as executors of the will of Abe Stiewel, deceased, instituted this action in the chancery court against appellees, who are devisees and legatees under the will. The object of the complaint is to have a construction of the will and the directions of this court as to the duty and power of the executors in selling, mortgaging, and leasing the lands of their testator. Abe Stiewel died in Little Rock, Pulaski County, Arkansas, on the 25th day of August, 1913, and the will was duly admitted to probate and appellants qualified as executors under the will. The will is as follows:

"1. I desire that all of my debts shall be paid in full.

"2. It is my desire that my sister, Mrs. Emilie Lowenstein, in addition to insurance for one thousand ($1,000) dollars in the order of B'nai B'rith, which she holds on my life and money she has on deposit with me, shall receive from my estate the sum of twenty thousand ($20,000) dollars and interest in the manner herein provided for, as follows, towit: That is to say, the executors of my will shall cause to be deposited in a proper and solvent trust company the sum of twenty thousand ($20,000) dollars at the best rate of interest they can obtain therefor to the credit of said Emilie Lowenstein, conditioned that she shall not draw exceeding the sum of two hundred ($200) dollars per month as long as she may live, or the said fund may last; said money to be so deposited as soon as an order, if required, can be obtained from the probate court having jurisdiction of my estate to do so.

"2. Should my said sister die before the said sum is exhausted, then her son, Julius Frank, if living, shall receive five thousand ($5,000) dollars of said sum so re-

maining to be paid to him in like manner, that is, at the rate of two hundred ($200) dollars per month by said trust company, and the remainder of said sum of twenty thousand ($20,000) dollars shall be disposed of as hereinafter set forth.

"3. It is my desire that my sister, Mrs Fannie Shield, shall receive from my estate the sum of fifteen thousand ($15,000) dollars, and interest, in the following manner, towit: That is to say, the executors of my will shall cause to be deposited in a proper and solvent trust company the sum of fifteen thousand ($15,000) dollars, at the best rate of interest they can obtain therefor, to the credit of said Fannie Shield, conditioned that she shall not draw exceeding the sum of two hundred ($200) dollars per month so long as she may live, or the said fund may last, said money to be deposited as aforesaid as soon as an order, if required, can be obtained from the probate court having jurisdiction of my estate to do so, and if any part of said fund shall remain on hand at my sister's death, it shall be disposed of as hereinafter set forth.

"4. It is my desire that my sister, Mrs. Julius Meyer, shall receive from my estate the sum of fifteen thousand ($15,000) dollars free from the claims or control of her husband or her sons; said sum to be forwarded by my said executors to Rudolph Richard, of Selma, Alabama, son-in-law of said Mrs. Julius Meyer, as soon as the order, if required, of said probate court can be obtained so to do, conditioned that said Rudolph Richard shall deposit said money in some solvent trust company at a fair rate of interest, and that my sister, Mrs. Julius Meyer, shall not draw exceeding the sum of two hundred and fifty ($250) dollars per month so long as she may live or the said fund may last. Should my sister die before the said sum is exhausted, then her four (4) daughters named Lillian, Sadie, Gertie and Hulda, are to be the recipients of the two hundred and fifty ($250) dollars per month in lieu of their mother, until their death, or the fund is exhausted.

"5. It is my desire that my brother, H. I. Stiewel, in addition to any indebtedness he now owes me (which I hereby remit), shall receive from my estate the sum of ten thousand ($10,000) dollars, and interest, to be paid to him by my executors as follows, towit: That is to say, they shall pay to him the sum of five hundred ($500) dollars in cash and the sum of nine thousand, five hundred ($9,500) dollars shall cause to be deposited in a proper and solvent trust company at the best rate of interest they can procure therefor, to the credit of said H. I. Stiewel, conditioned that he shall not draw exceeding the sum of one hundred and fifty ($150) dollars per month so long as he may live or the said fund may last; said sum to be so deposited as soon as the order, if required, of said probate court can be obtained so to do. Should any of the said sum of nine thousand five hundred ($9,500) dollars and interest remain on hand on the date of his death, it shall be disposed of as hereinafter set forth.

"6. It is my desire that my nephew, Julius Frank, shall receive from my estate in addition to the legacy referred to in the second paragraph of this will the sum of one thousand ($1,000) dollars from my said executors as soon as an order, if required, can be obtained from said probate court to do so.

"7. It is my desire that my nephew, Albert Shield, and my niece, Carrie Shield, shall respectively receive from my estate the following sums, towit: Albert Shield, one thousand ($1,000) and Carrie Shield two thousand five hundred ($2,500) dollars, from my executors as soon as an order, if required, can be obtained from said probate court to do so.

"8. It is my desire that my executors shall pay the following amounts respectively to my nephews and nieces hereinafter named in this paragraph as soon as the order, if required, of said probate court can be obtained to do so, towit: One hundred ($100) dollars each to my niece, Edna Shield, my nephew, Julius Shield, my nephew, Morris M. Meyer, my nephew, Arthur Meyer, my niece, Elsie Richard (*nee* Meyer).

"9. I desire that my executors shall pay over to my niece, Elsie Richard (*nee* Meyer) for her three (3) children the sum of five hundred ($500) dollars as soon as they obtain the order, if required, of said probate court to do so.

"10. It is my desire that my nieces, Gertie Meyer, Lillian Meyer, Sadie Meyer, and Hulda Meyer, shall each receive from my estate the sum of twenty-five hundred ($2,500) dollars to be paid by my executors to Rudolph Richard, of Selma, Alabama, in trust for them, conditioned that he shall pay over said sum in such installments or manner as to him may seem best calculated to meet their needs. But in any event to be paid over on the marriage of each of them; in the event either of said nieces shall die before the said legacy shall be paid to her, the same shall go to the surviving ones among my said nieces. In the event of the marriage of any of said nieces, their husband shall have no control over said amount; should any of said nieces die before me, the sum so devised shall go as hereinafter provided.

"11. It is my desire that my niece, Carrie Mothner (*nee* Richard), shall receive from my estate the sum of twenty-five hundred ($2,500) dollars and interest in manner following, towit: My executors shall, as soon as an order, if required, of said probate court shall be obtained so to do, cause to be deposited in a proper and solvent trust company to her credit at the best rate of interest they can obtain the said sum conditioned that she may draw not exceeding one hundred ($100) dollars per month thereof so long as she may live or said fund shall last, and her husband shall have no control over the same, and if any of said amount is still on hand at her death, it shall be given to her children as if she was living.

"12. To my nephew, Morris S. Richard, I bequeath fifteen hundred ($1,500) dollars in addition to the indebtedness he now owes me (which I remit), and to my nephew, Sidney Richard, I also bequeath fifteen hundred ($1,500) dollars, which said sums my executors, as soon as an order can be obtained, if required so to do, shall cause to be deposited in some proper and solvent trust

company at the best rate of interest they can obtain in the names of said nephews, respectively, conditioned that neither of said nephews shall draw exceeding fifty ($50) dollars per month of said fund, so long as they may respectively live or said fund may last. Should any part of either of said sums remain on hand at the death of either of my said nephews, it shall be disposed of as hereinafter set forth.

"13. My executors shall cause to be paid out of my estate to my sister-in-law, Mrs. Hattie Stiewel, in trust for her three children, the sum of twenty-five hundred ($2,500) dollars as soon as they can get an order, if required, of the said probate court so to do; in addition to said sum they shall cause to be deposited in some proper and solvent trust company the sum of ten thousand ($10,000) dollars at the best rate of interest they can obtain, and the said sum shall be paid *pro rata* to my nieces, Theresa and Sadie Stiewel, and my nephew, Morris Stiewel, so that each shall receive a third thereof when they shall become of age or marry; and if either before date of distribution shall die one before the other, the share of such one shall go to the others, the interest, however, accumulating on said amount may be used to defray expenses of the support and education of such children and may be paid over to their guardian or mother for this purpose.

"14. My executors shall, as soon as an order, if required, of said probate court can be obtained so to do pay to my four nephews, Harry Vernon Stiewel, Robert Stiewel, Louis Stiewel, and Roy Julian Stiewel, two hundred and fifty ($250) dollars each.

"15. If any legatee shall die before me the legacy left him or her by this will shall lapse.

"16. All sums or amounts not required to pay debts, cost of administration, executors and other expenses and all amounts or parts of my estate not above specifically devised, shall go to my heirs to correspond in the distribution thereof to the proportion which the several legacies above given bears to the entire value of my estate.

"17. I nominate as executors of this will and testament, A. M. Heiseman, Jacob Niemeyer and Morris M. Cohn, and in case of death, or other disqualification or refusal of either of said persons to act as such, then the remaining two may act, and selecting a third person to act with them as such executor, or two may act, but not less than two executors shall act, and the sum of $5,000 is hereby set apart to be and constitute full compensation for all services performed by said parties *as such* executors; if they desire to charge that sum or any part thereof. I desire that the said persons may act as such executors without being required to give bond as such as it is my desire that said executors shall close up the estate committed to their charge as speedily as possible, so that the creditors of my estate, if they are any, and my legatees may promptly receive what is due to them.

"18. Should my estate be insufficient in amount to pay all of the legacies above mentioned after payment of expenses, debts, and executors and costs, the legacies shall be proportionately reduced."

The following facts were proved: The appraised value of the estate left by the testator is about two hundred thousand dollars. The debts owed by the estate amount to about one hundred thousand dollars. The testator left very little cash, and his estate comprised both real and personal property, but consisted chiefly of real estate. His personal property consisted chiefly of stocks in certain corporations. He owned 3,150 shares of Arkansas and Arizona Copper Company stock; 326½ shares of stock in the National Copper Mining Company; 70 shares of stock in the Ozark Diamond Company; and 310 shares of stock in the Southern Trust Company of Little Rock. The evidence shows that this stock could not be disposed of to advantage by public sale, as required by statute. Part of the real estate owned by the testator is situated on Second and Main streets, in the city of Little Rock, for which he paid seventy-five thousand dollars. The present value of it is estimated at one hundred and thirty-five thousand dollars. On the day Mr. Stiewel

died, he made an agreement with the Bankers' Trust Company, whereby he agreed to give it a lease of that property for a period of thirty years at a rental of 6 per cent; on a one hundred and fifty thousand dollar valuation for the first ten years, 6 per cent; on a valuation of one hundred and sixty thousand dollars for the next ten years; and 6 per cent on a valuation of one hundred and seventy thousand dollars for the third ten years. By the same document he gave the bank an option to buy the property for the sum of one hundred and fifty thousand dollars, provided it exercise the option within one year. It was also provided that Stiewel should have the right to sell to any other purchaser if he desired to do so, with the privilege to lessee of having the right to buy at the same price. After Stiewel's death, his heirs and legatees named in his will, who are appellees in this action, executed a document whereby they ratified and carried into effect the said agreement. The evidence shows that this property can not be sold to advantage at public sale. It also shows that the other real estate mentioned in the will can not be sold to advantage at public sale.

The chancellor sustained a demurrer to the complaint of appellants, and the case is here on appeal.

Morris M. & Louis M. Cohn, for appellants.

1. The court should construe the will. A suit of this character comes properly within the jurisdiction of a court of equity. The proposition that where a trust is created by a will, a court of equity has jurisdiction to construe the same, is a principle well established and long recognized by this court. 97 Ark. 588-590; 38 Ark. 435; 4 Ark. 302; 88 Ark. 5; 104 Ark. 439; 78 Ark. 111-114, and cases cited; 84 Ark. 557; 95 Ark. 434-437. See, also, 187 Mass. 524; 73 N. E. 546; 1 L. R. A. 80, note.

2. The will invested the executors with power to sell, mortgage or lease or otherwise manage the said estate, as they might deem most beneficial. It provides for the payment of the legacies in *cash,* and contemplates a general distribution in *cash* of any balance or surplus remaining after the payment of the specific legacies.

The rule is to construe a will so as to give effect to what appears to be the intention of the testator, in view of all the provisions of the will, and when ascertained, this intention will be carried out unless it is contrary to law or against public policy. 13 Ark. 513-518; 90 Ark. 152-154; 31 Ark. 580-588; 98 Ark. 553-561.

No particular form of words is required to give rise to a power, if the intention to create or reserve one can be ascertained in the instrument upon which the claim of power is rested. 6 Ala 550; 9 Pa. Co. Ct. Rep. 119; 33 Grat. 97; 3 Brewst. 438; 76 Mo. 498; 36 N. J. Eq. 376; 1 Wharton, 252; 44 N. Y. S. 19; 2 Dem. Sur. (N. Y.) 243; 96 Ill. App. 38, and cases cited *infra.* A power of sale, coupled with a trust, arises where the duties under the trust can not be performed without making a sale. Implied power to sell will arise where necessary in order that the terms of the will may be carried out. 115 Ill. 591, 4 N. E. 257; 178 Ill. 46, 52 N. E. 1048; 193 Ill. 641, 61 N. E. 1056; 30 Me. 523; 16 Pick. 107, 26 Am. Dec. 645; 20 Pick. 25; 8 Gray 392; 72 N. J. Eq. 651, 66 Atl. 903; 18 Abb. (N. C.) 82; 47 Hun, 285; 113 N. Y. 232, 21 N. E. 70; 37 Hun, 19; 62 Hun, 445; 16 App. Div. 395; 49 *Id.* 400; 5 N. Y. 136; 160 N. Y. 278; 53 S. W. 1101; 49 Wash. 288; 135 Wis. 60.

It follows that a power of sale along with a trust must be implied from the terms of a will which contemplates that a sale shall be made and the proceeds distributed by the executors, or contemplates a mixed fund out of which debts or legacies are to be paid. In other words, where the duty of the executors will bring them into control of the proceeds of land, then, since there is a responsibility imposed upon them in regard thereto, a power supported by a trust will necessarily rest in them. 187 Mass. 524; 85 Neb. 60; 66 Wis. 366; 50 N. J. Eq. 635; 102 Mass. 268; 45 N. Y. Supp. 57; 19 N. J. Eq. 121; 90 N. C. 607; 73 Ark. 589; 43 Ark. 504; 18 Ark. 85; 65 Ark. 129; 95 N. C. 131; 115 Ill. 591; 2 D. & B. Eq. 209; 30 Me. 523; 68 N. C. 68; 95 Fed. 585.

This is true especially where there is a simple, sweeping provision in the will whereby legacies and debts are broadly directed to be paid, as in this case. 6 Ala. 550; 17 N. J. Eq. 126; 38 N. J. Eq. 126; 29 *Id.* 396; 36 Ill. 293; 15 Ill. 103; 29 Ill. 116; 2 Johns. Ch. 254; 42 N. J. Eq. 127; *Id.* 504; 6 N. J. Sup. Ct. 374; 25 Hun 7; 5 Wharton 524; 34 Am. Dec. 572; 13 Grat. 587.

3. The executors have power to mortgage the real estate, if they deem the same wise and for the best interests of all concerned.

The "legal conveyance" theory of a mortgage is in force in this State. 7 Ark. 310; 18 Ark. 166; 32 Ark. 478; 34 Ark. 346.

Under this theory a mortgage is no more than a deed or conveyance of property upon condition subsequent, and, as such, power to execute has often been held to be included within a general power, whether express or implied, to sell and dispose of property for the payment of debts and legacies. 36 N. J. Eq. 169, and cases cited; 75 Ga. 130; 42 Pa. St. 263; 73 *Id.* 182; 38 *Id.* 118; 87 Iowa, 255; 1 Rawle, 236; 6 Tex. 102-111; 1 Watts, 386; 4 W. & S. 100; 4 Myle & A. 267; 9 Barb. 585; 9 Baxt. 466; 15 La. Ann. 386.

They have power under the will to execute warranty deeds, that power being included in the power of sale. 1 J. J. Marsh, 285; 19 Am. Dec. 92; 15 Vt. 155; 8 How. 451. A power of sale also includes the power to execute leases. 5 Johns. Ch. 163; 3 Day, 388; 1 Disn. 434; 1 Wheat. 166; 1 Gray, 333; 7 Wend. 446.

HART, J., (after stating the facts). In the case of *Williamson v. Grider*, 97 Ark. 588, the court said:

"Where a trust is created by a will, a court of equity has jurisdiction to construe the will. The power is incident to the jurisdiction which courts of chancery have over trusts. And this upon the theory that 'as chancery will compel the performance of trusts, so it will assist trustees and protect them in the due performance of the trusts, whenever they seek the aid and discretion of

the court as to its establishment, management, and execution."

So, also, in the case of *Davis* v. *Whittaker,* 38 Ark. 435, the court said:

"Such suits are within the ordinary jurisdiction of courts of quity. They are commonly entertained as the suits of the trustees or executors seeking the aid, advice, and protection of the court in the execution of the trust," etc.

In regard to the construction of wills, in the case of *Parker* v. *Wilson,* 98 Ark. 553, the court said:

"The power of one, legally competent to make a will, to dispose of his property as he sees fit, subject to the restrictions provided by the statutes, is a legal incident to ownership. In construing the provisions of a will, the intention of the maker is first to be ascertained, and, when not at variance with recognized rules of law, must govern. The intention of the testator must be gathered from all parts of the will, and such construction be given as best comports with the purposes and objects of the testator, and as will least conflict." See, also, *Gregory* v. *Welch,* 90 Ark. 152.

Tested by these principles, we think the will in question created a trust. The testator was a business man of long experience and knew the extent of his indebtedness and the amount and kind of property held by him. He knew that he had very little cash on hand, and that his estate consisted for the most part of real property, and the balance of personal property of speculative value. After the payment of his debts, he directed that legacies should be paid by his executors to certain of his relatives; that these legacies should be paid in cash, and the amount thereof should be deposited in trust companies to be paid to the legatees in the manner directed by the will. The seventeenth clause of his will provided that his excutors "shall close up the estate committed to their charge as speedily as possible so that the creditors of my estate, if there are any, and my legatees may promptly receive what is due to them." The testator also recognized that his whole estate might be insufficient for the purpose of

paying his debts and the specific legacies provided in the will; for the last clause of his will provides: "Should my estate be insufficient in amount to pay all of the legacies above mentioned after payment of expenses, debts, and executors and costs, the legacies shall be proportionately reduced." This brings us to the question of whether the executors were given the power in the will to sell, mortgage or lease the property. It is well settled that an executor has no power to sell the land of his testator unless directed to do so by the will either expressly or by necessary implication. In this case the will does not give the executors express authority to sell the real estate. It is equally well settled that, because the testator has a right to dispose of his real estate as he sees fit, if he directs that to be done by his executors, which necessarily implies that the estate is first to be sold, a power is given by implication to the executors to make such sale and execute the requisite deeds of conveyance. *Going* v. *Emery,* 16 Pick. (Mass.) 107; *Lippincott's Executors* v. *Lippincott,* 19 N. J. Eq. 121. In the latter case the court held:

"The appointment of one as executor of a will that directs lands to be sold, does not, of itself, confer on him the power to sell. But if the executor is directed by the will, or bound by law, to see to the application of the proceeds of the sale, or if the proceeds, in the disposition of them, are mixed up and blended with the personalty—which it is the duty of the executor to dispose of and pay over—then a power of sale is conferred on the executor by implication." See, also, *May et al.* v. *Brewster et al.,* 73 N. E. (Mass.) 546.

In 2 Perry on Trusts (4 ed.), § 776, the author says:

"No particular form of words is necessary to create a power of sale. Any words which show an intention to create such power, or any form of instrument which imposes duties upon the trustee that he can not perform without a sale, will necessarily create a power of sale in the trustee."

Tested by these legal principles, we think the will conferred upon the executors the power to sell the lands of the testator. As we have already seen, the bulk of his estate consisted of real property, and several legacies were left which the testator directed to be paid in cash. His directions in this respect could not be complied with unless the executors had the power to sell the real estate left by him. He directed his executors to close up the estate committed to their charge as speedily as possible, so that his creditors might be promptly paid and the legatees promptly receive what is due them.

We now come to the question as to whether a power of sale includes a power to mortgage. There is some conflict in the authorities on this question, but we believe that the better reasoning, if not the weight of authority, is to the effect that a mere power of sale does not include a power to mortgage. *Stokes* v. *Payne,* 58 Miss. 614; *Bloomer* v. *Waldron,* 3 Hill (N. Y.) 361; *Perry* v. *Laible,* 31 N. J. Eq. 566; *Willis* v. *Smith,* 66 Tex. 31; *Hubbard* v. *German Congregation,* 34 Ia. 34; *Cumming* v. *Williamson,* 1 Sanford's Chancery (N. Y.) 17. This results from the fact that a mortgage is regarded as a security for debt rather than a conditional estate, and hence its execution is regarded as creating an encumbrance rather than as transferring the title. That is to say, a mortgage is treated as a mere security for a debt, and the legal estate can only be used for the purpose of enforcing the payment of the debt secured. The cardinal principle that governs in the construction of powers is to effectuate the intention of the donor; but we can not gather from the terms of the will any intention on the part of the testator looking to a mortgage of his estate. The will does not in express terms authorize the executors either to borrow money or to mortgage the real estate. By the terms of the will, the executors were directed to close up the estate as speedily as possible, and to pay the debts of the testator and the legacies named in the will promptly. The testator anticipated that the whole estate might be necessary to pay all the legacies and to pay his debts. There-

fore, in the last clause of his will he provided that if his estate was not sufficient to pay all the legacies after the payment of his debts, the legacies should be proportionately reduced. All this precludes the supposition that a mortgage was ever within the intention of the testator. See, *Williamson* v. *Grider, supra.* And, as we have already seen, a power of sale does not include the power to mortgage except in those States where a mortgage is characterized as a conditional sale instead of being regarded as a security for a debt.

We do not deem it necessary to decide whether or not the executors have the power to make a lease for a long term of years as it does not seem to us that it will be necessary for the executors to do this. It appears from the allegations of the complaint that before his death, Stiewel executed a lease for the term of thirty years to the Bankers Trust Company on the property at the corner of Second and Main streets in the city of Little Rock, and, of course, any sale of that property by the executors will be made subject to the rights of the lessee under the lease. It may be said, however, that the will places the control and management of the estate in the hands of the executors, and they will have power to make leases for such length of time as may be necessary until they exercise the authority to sell and dispose of the land. It follows that the decree will be reversed and the cause remanded with directions to the chancellor to enter a decree in accordance with this opinion.

KIRBY, J., did not participate.

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

Opinion delivered June 15, 1914.

1. EVIDENCE—BEST EVIDENCE.—The object and purpose of legal investigation is to ascertain the truth, and the best evidence attainable should be offered. The testimony of witnesses must be confined to that which is within their personal knowledge, and hearsay evidence must be excluded. (Page 424.)

2. EVIDENCE—HEARSAY—ADMISSIBILITY.—The admission of hearsay testimony may be rendered proper by the difficulty of obtaining other proof and owing to the peculiar circumstances under which the declarations were made. (Page 424.)

3. EVIDENCE—HEARSAY—ADMISSIBILITY.—For hearsay testimony to be admissible the declaration must be made before disputes or litigation arise, so that it is made without bias on account of the existence of a dispute or litigation which the declarant might be disposed to favor, and the declarant must have had peculiar means of knowledge not possessed by others. (Page 424.)

4. EVIDENCE—BEST EVIDENCE—HEARSAY.—In an action for damages for wrongful death caused by the operation of a railroad train, defendant sought to prove when the train left a certain station by the testimony of the operator at another station, to whom the information was telegraphed by the operator at the station in question. *Held*, the testimony was inadmissible as hearsay, and because the operator who sent the message could be summoned as a witness and his testimony would be the best evidence. (Page 426.)

5. RAILROADS—INJURY TO TRESPASSER—DUTY TO MAINTAIN LOOKOUT.—Where proof has been introduced by the plaintiff of an injury caused by the operation of a train under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a lookout had been kept, then the burden is shifted to the railway company to show that such lookout was kept. (Page 428.)

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

STATEMENT BY THE COURT.

Appellee sued appellant to recover damages for the wrongful death of her husband, O. E. Gibson. This is the second appeal in the case, and the opinion on the first appeal is reported in 107 Ark. 431, under the style of *St. Louis, I. M. & S. Ry. Co.* v. *Gibson*. The facts, as proved by the appellee, are substantially as follows:

O. E. Gibson was seen sitting on the cross-ties on appellant's line of railway, a short distance south of Hope, on the afternoon of January 27, 1912. About twenty-five minutes thereafter he was run over and killed by a fast northbound passenger train consisting of an engine and eight cars. The track south of where Gibson was killed was perfectly straight for two miles, and a person stand-

ing on the track 1,350 feet from where he was killed could see a man lying on the track at that point. Gibson was killed some time between 5 and 6 o'clock in the afternoon. Some of appellee's witnesses say that it was between sundown and dark, and others say it was nearly dusk. Most of them say that it was light enough for him to have been seen at a distance of 1,350 feet. The electric headlight on the engine was burning, but no bell was ringing or whistle sounded before the train struck decedent. Gibson had been drinking some during the day, but several of appellee's witnesses testified that he was not drunk. One of them stated that he had talked with Gibson about 4:30 o'clock in the afternoon on that day, and that he was perfectly sober at that time.

On behalf of the railway company, the engineer and fireman of the train that ran over decedent, testified that they were keeping a lookout; that they first noticed an object on the track about 500 feet distant, but supposed it was a tie thrown down by the track by the section hands while repairing it; that when they got within 150 or 200 feet of the object, they discovered it was a man; that the engineer immediately applied the brakes in emergency and stopped the train as quickly as he could; that the engine was pulling eight cars that day, and that the train ran five or six hundred feet after the emergency brake was applied before it could be stopped; that it ran the length of the train beyond where the man was struck; that each of the eight cars was sixty-two feet long, and that the engine was seventy feet in length; that the train was behind the schedule time, and that it was running at the rate of thirty-eight or forty miles an hour when the emergency brake was applied; that the bell was ringing at the time; that the accident occurred at 5:33 p. m.; that the train was delayed about ten minutes on account of the accident, and that it stopped at the station of Hope three or four or five minutes.

Other evidence adduced by the appellant, by expert witnesses, tended to show that the train could not have been stopped in a shorter distance than that testified to by the engineer and fireman. Evidence was also adduced

by appellant tending to show that decedent was very drunk on the night before he was killed, and had been drinking heavily on that day.

The jury returned a verdict in favor of appellee; and to reverse the judgment rendered, appellant prosecutes this appeal. Other evidence will be referred to in the opinion.

E. B. Kinsworthy, R. E. Wiley and *T. D. Crawford,* for appellant.

1. The rejected portion of Whitworth's testimony was competent and material as tending to show when the accident occurred. It was based upon a book of original entries kept by him and was admissible as such. 108 Mo. 277; 111 Mo. 205; 160 Ill. 101; 72 Mo. App. 534; 2 Enc. of Ev. 626; 63 Ark. 562; 130 Mich. 449; 158 Mass. 450, 33 N. E. 583; 103 Ark. 153; 27 Wash. 169, 56 L. R. A. 772; 122 Ky. 269, 3 L. R. A. (N. S.) 1194; 138 N. C. 42, 107 Am. St. 500; 36 L. R. A. 693, 100 Ia. 204; 24 Okla. 691; 68 W .Va. 506; 7 Tex. Civ. App. 169; 42 *Id.* 85; 191 Fed. 720; 169 Ala. 389; 203 Fed. 407; 108 Minn. 470; 138 N. C. 42; 74 Mich. 713; 39 O. St. 327.

2. According to the holding of this court on former appeal, a *prima facie* case is not made, and the burden is not shifted to the railway company to show the keeping of a lookout, until proof has been introduced of the injury to a person by the operation of a train under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a lookout had been kept: 107 Ark. 431, citing 151 S. W. 246.

Steve Carrigan, Jr., and *Mehaffy, Reid & Mehaffy,* for appellee.

1. The rejected testimony of Whitworth's was not only not prejudicial, but proper.

It was wholly immaterial as tending to prove the speed of the train, because, while a calculation might be made from the time the train cleared the blocks, and the time the accident occurred, which would show the *average* speed of the train, it would show nothing further, it

would not show the speed of the train, whether it was going fast or slow, at the time of the accident. If the evidence was immaterial or incompetent, its exclusion was not only harmless, but proper.

Before such testimony would be admissible, there must be either a statute authorizing its introduction, or it must be shown that it was a contemporaneous act and a part of the *res gestae*. There is no statute authorizing it, and there is not only no showing that the act was contemporaneous and a part of the *res gestae*, but the facts in the case negative that idea.

Finally, it is a well known rule that parties who make entries, telegraph them in or communicate them in any way, are the proper witnesses of those facts, and must be called to testify in relation thereto. This case was tried in the county in which Hope is situated. Appellant's operator at that place should have been called to testify to these facts.

2. Instruction 4 is correct. However, if the clause therein complained of was open to objection, it should have been pointed out by specific, not a general, objection. 81 Ark. 187; 66 Ark. 264; 70 Ark. 563; 74 Ark. 355.

Where the whole charge to the jury is more favorable to the complaining party than he is entitled to, and when the judgment is right upon the testimony, it will not be reversed for the giving of an erroneous instruction. 89 Ark. 154; 92 Ark. 392; *Id.* 6; 99 Ark. 226; 103 Ark. 352; 98 Ark. 259; 101 Ark. 34; 93 Ark. 457; *Id.* 589; 90 Ark. 524.

HART, J., (after stating the facts). The principal question raised by the appeal is whether the court erred in rejecting certain testimony of one Whitworth, who was appellant's station agent and telegraph operator at Fulton on January 27, 1912, the day Gibson was killed.

The railroad was operated by what was called the "block system." Whitworth testified that he kept a record of the movements of the trains on the block south of Fulton and the one north of it; that the block south of Fulton was from Clear Lake Junction to Fulton, and that the block north of Fulton was from Fulton to Hope; that

his records show that the train which killed decedent entered the block south of Fulton at 5:03 P. M. on January 27, 1912; that it passed Fulton at 5:17 P. M.; that it cleared the block at Hope at 5:50 P. M., and that this information was given him by the operator at Hope; that when a train passed Fulton going northward, no other train would be permitted to enter that block until after it had been reported to him that the first train had cleared the block; that these records were kept by him to show the movements of the train in order that a train might not enter one block until the train ahead of it had passed out of that block.

Counsel for appellee objected to the testimony of this witness to the effect that the train cleared the block at Hope at 5:50 P. M., and the court sustained the objection of counsel thereto. Counsel for appellant contend that the testimony was competent and material because it tended to show when the accident occurred. Other testimony introduced by appellant tended to show that Hope was thirteen and one-half miles north of Fulton, and that the train ran from Fulton to Hope at the rate of about thirty-eight or forty miles an hour.

To sustain their contention, counsel for appellant rely on the cases of *Donovan* v. *Boston & Maine Rd. Co.*, 158 Mass. 450, 33 N. E. 583, and *Louisville & Nashville Ry. Co.* v. *Daniel*, 122 Ky. 269, 3 L. R. A. (N. S.) 1194, and other cases of like character.

In the first mentioned case, plaintiff sued the railroad company for injuries received at a crossing, and his evidence was that he was injured near the station at a designated time by an incoming train, and that his view of the train was obstructed by another train which was delivering passengers at the station. To show that no train was delivering passengers there at that time, defendant introduced in evidence the entries on a telegraphic train report sheet kept in its train dispatcher's office at that station, showing the time all trains passed the several stations enroute, and the court held that the evidence was

competent. The train dispatcher made the record from reports sent him by the operators at the various stations along the line of railroad, and his testimony was objected to on the ground that the testimony of the operators who sent in the reports would be the best evidence. The court said that every interest of the railway company demanded that the entries, when made, should be true, and that no reason could be conceived why the defendant should procure or permit a false or incorrect entry of the movement of its trains; that there was no reason why the operators who sent in the information could have any interest to misstate the facts; that the record made by the train dispatcher from the information sent in by the operator was an act rather than a declaration; that the train sheet, with its entries, and the messages from which they were made, were acts done before any controversy had arisen, when all concerned had no interest except to know and to state the truth.

In the last mentioned case, according to the testimony of the plaintiff, he rode to the station where he was injured on one of defendant's trains by permission, and after he had debarked from the train he saw another engine coming down the track, and after it had passed he undertook to cross the track and was hit by a car making a flying switch. It was the theory of the railway company that the plaintiff was stealing a ride on the train from which he debarked, and that there was no other engine at that station at the time. Defendant offered to prove by its train dispatcher that he kept an accurate record of the movements of all trains on that division of its road, and that this record was made up from his own orders, upon which all trains on that division moved, and from telegraphic reports transmitted to him from the stations along the line as each train arrived and departed. The court said that in the conduct of a modern railroad system it is indispensable that in the movement of trains an exact knowledge should be had at a central point of observation and direction of the location of each train in operation over a given line, or between given

terminals, and that this knowledge should accompany each movement of each train until it had arrived at its destination; that in order to avoid collision it was necessary that the train dispatcher who directed the movements of the train over his division should maintain, as it were, a bird's eye view of the whole system under his control; that he could only do this by receiving telegraphic reports from the operators along the line, and that the conditions under which these reports were made, and the grave importance of them, are the strongest possible guaranty to their accuracy; that the record was made up of details furnished by persons widely apart and all acting under a high incentive for accuracy; that under these circumstances no motive exists for the various operators to knowingly make a false report, and that the reports are made under such circumstances that the person making them has no interest or incentive whatever to fabricate them.

We do not think the rules announced in the two cases just referred to are applicable to the facts of the present case. Always the object and purpose of legal investigation is to ascertain the truth, and in doing this the best evidence attainable should be offered. The general rule is that witnesses, in testifying, must be confined to that which is within their personal knowledge, and that which is but hearsay must be excluded. 1 Greenleaf on Evidence (16 ed.), § 98; 1 Elliott on Evidence, § § 315-320. These learned authors, as well as the adjudicated cases, recognize certain exceptions to the general rule. One of the grounds is that hearsay evidence is sometimes rendered necessary by the difficulty of obtaining other proof, and owing to the peculiar circumstances under which the declarations were made, there is a guaranty of their reliability because the declarant was disinterested, and there was no motive for him not to speak the truth. Then, too, the declaration must be made before dispute or litigation so that it is made without bias on account of the existence of a dispute or litigation which the declarant might be disposed to favor. Lastly, the declarant must

have had peculiar means of knowledge not possessed by others. *Sugden et al.* v. *St. Leonard,* 1 Law Rep. (English) Probate Division (1875, 1876), page 154, at 241.

The facts of the present case do not bring the excluded evidence within these exceptions. It will be remembered that the excluded evidence was the report of the time the train left the block at Hope, which had been made by the operator at Hope to the operator at Fulton, and had been made a record by the latter. Thus it will be seen that the declaration of the operator at Hope was the testimony sought to be admitted. According to the testimony of the operator at Fulton, the railroad was operated by the block system; that part of the railway system south of Fulton to Clear Lake Junction constituted one block, and the agent at Fulton was required to keep a record of the time the train entered, and left the block. Again, from Fulton to Hope was another block, and he was required to keep a record of the arrival and departure of the trains on that block. The time the train left the block at Hope was given him by the operator there. In the operation of the system the agent at Fulton, after the train going north had passed there, would not permit another train to pass Fulton until he had been informed by the agent at Hope that the northbound train had left the block there. It was just as necessary for the operator at Hope to keep a record of the arrival and departure of the trains from his block as it was for the operator at Fulton to keep such a record. The record kept by the operator at Hope was just as accessible and just as easy to obtain as that kept by the operator at Fulton. Hope was situated in the county where the case was tried, and no reason is shown why the operator at Hope was not examined and used as a witness to prove the time the train in question left the block at Hope going north. He could have testified of his own personal knowledge as to that fact, and could have used the record kept by him to have refreshed his memory in the event it was necessary to do so. The declaration made by him to the operator at Fulton as to the time the train in question left the

block at Hope was made after Gibson had been killed, and so was made at a time when there might have been occasion for him to have made a false declaration. He knew that Gibson had been killed and knew that litigation might arise with the railroad company on account of his death. Then it can not be said that his declaration to the operator at Fulton was made without bias. Counsel for appellant contend that the testimony excluded was a material part of his case, and it may be said that the operator at Hope appreciated this fact. In any event, it does not appear from the record that he did not realize the importance of his declaration, and did not know that it would be favorable to the railroad company in any subsequent litigation it might have relative to the death of Gibson. As we have already seen, no reason is shown why the operator at Hope was not introduced as a witness, and, under the circumstances and for the reasons given, we are of the opinion that the court properly excluded the evidence as being hearsay.

Counsel for appellant also assign as error the action of the court in giving instruction No. 4, which is as follows:

"You are instructed that it is the duty of all persons running trains in this State upon any railroad to keep a constant lookout for a person or property upon the track of any and all railroads; and if any person or property shall be killed or injured by the negligence of any employee of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible to the person injured for all damages resulting from the neglect to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril, and the burden of the proof shall devolve upon such railroad to establish the

fact that this duty to keep such lookout has been performed."

In the opinion on the former appeal in this case, the court said: "We think the construction there placed upon the act applies to persons alike, and that the railroad company now owes the same duty to keep a lookout to avoid injuring the trespasser upon its tracks, and that, upon proof of injury to such person by the operation of its trains under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a lookout had been kept, a *prima facie* case is made, and the burden of proof then devolves upon the railroad company to show that a proper lookout was kept as required by the statute, and that it used ordinary care to prevent the injury to the person after his discovery in a perilous position in order to escape liability for such injury." *St. Louis, I. M. & S. Ry. Co.* v. *Gibson,* 107 Ark. 431.

Counsel contend that the instruction given does not conform to the ruling of the court on the former appeal; but we do not agree with them in this contention. The effect of our holding in the former opinion is that where proof has been introduced by the plaintiff of an injury to a person by the operation of a train under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a lookout had been kept, then the burden is shifted to the railway company to show that such lookout was kept. The instruction complained of does not place the burden on the appellant in the whole case. It only places the burden of proof on the appellant to show that the lookout required by the statute was kept.

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

"The court instructs the jury that the mere fact that Mr. Gibson was killed by the train does not under the law entitle the plaintiff to recover damages for his death; before the plaintiff can recover, it must be proved to you by the testimony in this case that the railway company's

enginemen were negligent in failing to keep a constant lookout, or in failing to use reasonable care to keep from striking deceased after they discovered, or could have by the use of ordinary care, discovered his peril. And the burden is upon the plaintiff to prove by the testimony, facts sufficient to raise a reasonable inference that the danger might have been discovered and the injury prevented by the trainmen if a lookout had been kept. And, if the plaintiff has proved such facts sufficient to raise such inference, your verdict should still be for the defendant, if you find from a preponderance of the testimony that a constant lookout was kept by the enginemen, and that they used ordinary care to prevent the injury after actually discovering that deceased was in peril."

The giving of this instruction shows conclusively that the court did not intend to place the burden upon the defendant in the whole case, but it in express terms told the jury that the mere fact that Mr. Gibson was killed by the train did not entitle appellee to recover damages for his death, and that before appellee could recover she must make out a *prima facie* case by the introduction of proof from which the jury might have inferred that the danger to Gibson might have been discovered and his death avoided if the lookout required by the statute had been kept and that when this *prima facie* case was made by appellee, then the burden devolved upon the defendant to show by a preponderance of the evidence that such lookout was kept.

The testimony on the part of appellee tended to show that Gibson was lying on or near the track at the time he was killed; that the track was straight for a distance of two miles or more in the direction from which the train was approaching, and that a person could have been discovered lying on the track for a distance of 1,350 feet; that if a proper lookout had been kept, appellant's servants could have discovered decedent in time to have avoided killing him. While this testimony was contradicted by the witnesses for appellant, who all testified that they were keeping a proper lookout and stopped

the train as quickly as they could after discovering that the object lying near the track was a person, still this conflict in the testimony has been settled by the verdict of the jury, which is binding upon us, and we are of the opinion that there was sufficient evidence to warrant the verdict.

Other assignments of error in the giving of instructions are pressed upon us for a reversal of the judgment; but we do not deem it necessary to discuss them separately. It is sufficient to say that the instructions given by the court are in conformity to the rules of law laid down in our opinion on the former appeal in this case; and we find no error in the record. Therefore, the judgment will be affirmed.

SNODGRASS v. SHADER.

Opinion delivered June 15, 1914.

1. SURETYSHIP—CONTRACT—CHANGES OF TERMS—RELEASE OF SURETY.—Any material alteration in the terms of a contract, whereby a surety is bound, discharges the surety if he has not consented to the change, and this is so even if the alteration be for the benefit of the surety. (Page 432.)
2. SURETYSHIP—CHANGE IN TERMS OF CONTRACT—RELEASE OF SURETY.—Although the principals may change their contract to suit their pleasure or convenience, they can not bind the surety thereto without his consent, and, as the new contract abrogates the old, the surety is discharged from all liability unless he has consented to the alteration. (Page 432.)
3. SURETYSHIP—CHANGE IN CONTRACT—RELEASE.—Defendants were sureties upon a bond to secure the payment of $100 rent per month on two store buildings. The lessor, without the consent of the sureties, released the lessee from the lease on one of the stores, and reduced the lessee's rent to $50 per month. *Held*, the sureties were released from all liability. (Page 432.)

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

STATEMENT BY THE COURT.

This suit was brought by the appellee to recover of the sureties upon a bond of Pat W. Snodgrass, lessee, the rent for certain premises in Little Rock which he had failed to pay. Appellee was the owner of buildings Nos. 717 and 719 on Main Street in the city of Little Rock, and on January 6, 1910, leased the first floors of these buildings as store rooms to Pat W. Snodgrass for a period of three years from January 1, 1910, for the monthly rental of $100, in advance, and on January 6, 1910, Pat W. Snodgrass, with L. K. Snodgrass and Wm. A. Snodgrass, as sureties, appellants herein, executed and delivered to appellee a bond to secure the payment of said rent conditioned as follows: "The conditions of the above bounden obligation are such that whereas Pat W. Snodgrass has entered into a written lease for the term of three years, beginning January 1, 1910, and ending January 1, 1913, for the lower floors or store rooms at 717 and 719 Main Street, Little Rock, Arkansas, for the monthly rent of one hundred dollars per month, payable on the first day of each and every month in advance.

"Now, therefore, if the said Pat W. Snodgrass shall promptly pay the rent as set out herein, then this obligation to be null and void; otherwise to remain in full force and effect for any and all amounts up to the face of this bond for arrearages for rent. No obligation to become fixed as against this bond until there is default in payment of rent."

On November 1, 1910, the appellee, the lessor, and the lessee, Pat W. Snodgrass, made another contract whereby the lessor paid to him the sum of $250 for which he released and surrendered to her store room No. 719, and he retained the other store room at a reduced rental of $50 per month. The lessor immediately rented the store room surrendered to her to another person for $75 per month. This release of the store room 719 to the lessor was not known of nor consented to by the sureties.

Thereafter the lessee defaulted in the payment of five months rent, the months of June, July, August, Sep-

tember and October, of 1912, at $50 per month, and suit was brought against him and his sureties therefor, and the sureties claim to have been discharged from liability because of the material alteration of the contract without their consent. Upon the trial judgment was recovered against them, to reverse which, this appeal is prosecuted.

Horace Chamberlin, for appellants.

Any material alteration in the contract between the lessor and lessee made without the knowledge and consent of the sureties discharges them from liability. The new contract abrogates the old. 65 Ark. 550; 93 Ark. 472; 98 N. E. (Ind.) 886; 181 Mo. 300, 136 S. W. 9; 61 Atl. 36; 9 Wheaton (U. S.) 702.

Marshall & Coffman, for appellee.

The obligation of the sureties to pay certain sums at certain times was not changed except the reduction in amount due, and, therefore, they were not released. 6 L. R. A. (Ind.) 686; 4 Words & Phrases 3181; 8 *Id.* 6810; 60 Pac. (Mont.) 587-589; 34 Fed. 104-106; 39 Pac. (Cal.) 20, 21; 110 Fed. 577, 578; 4 Wis. 190-193; 20 Cyc. 1462-1465; *Id.* 1400, 1401; 52 L. R. A. (Mass.) 782; 15 Ore. 28. See, also, 1 Hilton (N. Y.) 313; 9 W. Va. 373; 34 N. W. (Mich.) 279; 99 N. W. (Ia.) 144; 50 N. W. (Dak.) 125; 88 Mass. 230; 64 U. S. 149; 70 Ark. 197.

KIRBY, J., (after stating the facts). The only question presented for consideration is whether appellants have been discharged from liability on the bond, executed by the lessee to the lessor for securing the payment of the rent, upon which they are sureties. It is conceded that before the end of the first year of the term of the lease, the lessee agreed with the lessor to, and did surrender, one of the store rooms and release it to the lessor for the consideration of $250 paid by her, and that she immediately thereafter leased said store room for $75 per month. This was done without the knowledge or consent of the sureties upon the bond. It was a material alteration of the terms of the contract without their consent, and released them from the further performance of it. They

may have been perfectly willing to have been bound for the payment of $100 rent for the two store rooms, and had a right certainly to rely upon their principal paying his rent out of the entire property leased. If he had abandoned it, they could have taken his place and would have been in much better condition to save themselves a loss with both the store rooms. The one released was immediately thereafter rented for $75 per month, and the two store rooms might have been more easily rented together than separately. The courts have long held that any material alteration in the terms of a contract, whereby a surety is bound, discharges the surety if he has not consented to the change, and this is so even if the alteration be for the benefit of the surety; for, although the principals may change their contract to suit their pleasure or convenience, they can not bind the surety thereto without his consent, and, as the new contract abrogates the old, the surety is discharged from all liability unless he has consented to the alteration. *O'Neal* v. *Kelley*, 65 Ark. 550; *Singer Manufacturing Company* v. *Boyette*, 74 Ark. 601; 1 Brandt on Suretyship, § 427; *Hubbard* v. *Reilly*, 98 N. E. 886; *Warren* v. *Lyons*, 9 L. R. A. 353; *Stern* v. *Sawyer*, 61 Atl. 36; *Miller* v. *Stewart*, 9 Wheaton 702; *Penn* v. *Collins*, 5 Rob. (La.) 213. In *Berman* v. *Shelby*, 93 Ark. 479, the court said, "For 'a surety will be discharged by any material and unauthorized alteration of his contract, and it is immaterial that the principal assured the obligee that the alteration would not affect the original contract, or that he failed to carry out the contract as altered."

Appellants were only sureties for the payment of the rent in accordance with the terms of their bond and the lease in case of the lessee's failure to pay, and the contract having been materially changed without their consent, they were thereby released from further liability. The judgment is reversed and the cause dismissed.

HARGIS v. EDRINGTON.

Opinion delivered June 15, 1914.

1. SPECIFIC PERFORMANCE—VENDEE IN POSSESSION.—A vendee in possession is not barred from suing for specific performance, by delay for any period, in bringing his action, his possession being the continuous assertion of his claim; he may rest in security until his title or right of possession is attacked. (Page 436.)
2. SPECIFIC PERFORMANCE—ABANDONMENT BY VENDEE.—H. agreed to purchase land from E. in 1893. H. died in 1896 without paying for the land. *Held*, the widow and heirs could not maintain a suit for specific performance against E. in 1910, where the evidence showed an actual abandonment of the sale by both parties, and a restoration of the property to the vendor, E., notwithstanding H. and his heirs held possession of a small portion of the land. (Page 437.)
3. SPECIFIC PERFORMANCE—PROMPT ASSERTION OF RIGHT—RESCISSION.—It is the duty of the vendee of real estate to assert his intention to perform his contract of purchase within a reasonable time, when he sees that the vendor is treating the sale as having been rescinded, otherwise he can not require the vendor to specifically perform. (Page 437.)

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

STATEMENT BY THE COURT.

J. T. Edrington executed a bond for title to J. A. Hargis for sixty acres of land on April 25, 1893, for the consideration of $40 in cash and a promissory note due November 1, 1893, for $70 bearing interest at the rate of 10 per cent per annum from date until paid. Hargis owned a tract of land adjoining that described in the bond for title, of which he had cleared a small part, and in addition he cleared two acres of the Edrington land, and some time before his death he placed some lumber on this land for the purpose of erecting a residence, but after his death the members of his family used this lumber in building a residence on land to which Mr. Hargis had a deed.

Mr. Hargis died in February, 1896, without having paid anything on his note, and no part of this note has since been paid. But it appears that soon after the death

of Mr. Hargis, his eldest son spoke to Mr. Edrington about an extension of time in which to pay the note and secure a deed, and it is undisputed that this extension was given; but it is also undisputed that this extension was upon condition that interest should be paid at the rate of 5 per cent, and no interest was ever paid.

Mr. Edrington testified that nothing further was said to him about the purchase of the land, and that no interest was paid, and that he waited until 1903 to give the Hargis heirs an opportunity to comply with the contract of their ancestor for the purchase of the land; and that since that time he continuously paid the taxes until August 7, 1907, at which time he conveyed the land to W. T. St. John, one of the appellees herein, who sold the pine timber on the land to the Bradley Lumber Company, another appellee. St. John began to pay taxes on the land after his purchase and continued to do so until the sale of it to his son before the institution of this suit. This son of St. John cleared a portion of the land and began to cultivate it, and was occupying it prior to the time of the institution of this suit on July 9, 1912. St. John, appears also, prior to the institution of this suit, to have borrowed a sum of money, and to have given a deed of trust to this land. The lumber company cut and removed the timber from the land, and its representative, as well as Mr. St. John, claim that they had no notice or knowledge of the claims of the Hargis heirs prior to their purchase.

On January 14, 1910, the children of J. A. Hargis, who were then minors, obtained an order from the circuit court, removing their disabilities of nonage for all purposes, and they were authorized by the court to transact all business as though they were of full legal age, and on the 14th of April, 1911, they traded, in conjunction with the adult heirs, a portion of the land to which their father had a deed, for six acres of the land described in the bond for title, and the six acres thus conveyed to them included the two acres which their ancestor cleared and put in cultivation. All the heirs signed the deed to St.

John, and requested that St. John make his deed to W. C. Hargis, which was done.

The proof shows that at the time of the execution of the bond for title, the land was worth only about the sum Mr. Hargis agreed to pay for it, but that it has since gradually enhanced in value. This W. C. Hargis, who was the eldest son of J. A. Hargis, made a tender in the spring of 1912 to Mr. Edrington for himself and the other Hargis heirs of the balance of unpaid purchase money, with interest thereon, but the tender included only the amount of the note and interest and was declined. Whereupon this suit was brought by the widow and heirs of J. A. Hargis to enforce the specific performance of the bond for title. The court found that the Hargis heirs were estopped from setting up any claim to the land in suit, and were barred of any rights of recovery by reason of estoppel and laches and ordered that the complaint be dismissed for want of equity, and this appeal was prosecuted from that decree.

E. E. Williams, for appellants.

Appellants are not barred by estoppel. 91 Ark. 148; 33 Ark. 465; 85 Ark. 556.

They are not barred by laches. The evidence shows that they had continuous possession of the land under bond for title until April 24, 1911, and this suit was filed July 19, 1912. 130 S. W. 968; 146 S. W. 135; 81 Ark. 296; 83 Ark. 154; 73 Ark. 491.

D. A. Bradham, for appellee Bradley Lumber Company.

While time would not be considered of the essence of the contract because there is some evidence of a waiver on the part of Edrington to enforce the contract, yet this would not, and should not, give Hargis nor his estate an indefinite time in which to pay the note and demand a deed from Edrington. 77 Am. St. Rep. 848; 68 Am. Dec. 87.

A mere oral promise to extend time is not binding upon the vendor. 117 Am. St. Rep. 625.

Appellants were required not only to perform their part of the contract within a reasonable time, but also to show good cause for delay in not making a reasonably prompt payment. 25 Ark. 143.

Under the changed conditions brought about by the failure of Hargis and his estate to perform his part of the contract, and in view of the fact that appellees, especially Bradley Lumber Company, could not be placed *in statu quo,* it would be inequitable to require Edrington to make title to appellants. 104 Am. St. Rep. 275.

J. R. Wilson and *B. L. Herring,* for appellees Edrington and St. John.

Ten years elapsed from the date of the bond for title before Edrington took the land back and began paying taxes on it, and after he sold to St. John, the latter continued to pay the taxes. By the exchange of land with St. John, whereby they acquired title to a portion of the land in question, appellants recognized the rescission of the old contract, and the St. John and Edrington title. Appellants estopped themselves from any further claims to the land. Cases cited by appellants, 91 Ark. 148, and 33 Ark. 465, but strengthen appellees' position.

In the matter of specific performance, although time is not ordinarily essential, yet, as a general rule, it is material, and in order that the default may not defeat a party's remedy, the delay which occasioned it must be explained and accounted for. Appellants are barred by their own laches. 4 Pomeroy, § 1408; 146 S. W. 495.

SMITH, J., (after stating the facts). We think the chancellor properly dismissed the complaint in this cause for the want of equity. It is true that a vendee in possession is not barred from suing for specific performance by delay for any period in bringing his action, his possession being the continuous assertion of his claim. He may rest in security until his title or right of possession is attacked. *Wright* v. *Brooks,* 130 Pac. 968. Nor is time of the essence of this contract. But the evidence shows that the appellants did nothing toward the performance of their contract. They offered evidence to the effect

that an extension of time was given, and that they were to pay interest at the rate of 5 per cent; but Edrington's evidence was that only a reasonable time was given in which the payment was to be made at this rate of interest. The original note bore interest at the rate of 10 per cent. Appellants failed to pay the interest, and had apparently abandoned their claim to the land and ceased paying taxes upon it, and for five years these taxes were paid by Mr. Edrington. Appellants stood by and saw Mr. Edrington sell the land to St. John, and permitted St. John's vendee to remove considerable timber from the land, and they saw St. John's son enter upon the land and clear and improve portions of it, and after the disabilities of the minors had been removed, they made a trade with St. John, the consideration for which was a deed conveying to W. C. Hargis a portion of the land described in the bond for title, which included the only part of the land which the Hargis heirs had actual possession of. From 1903, when Edrington took possession of the land until the spring of 1912, when the tender was made, there was no assertion of title to any of this land except such as resulted from the occupancy of the two acres, which they do not claim because of their conveyance to St. John, which included it.

During this time, the situation of the parties had changed to some extent. Portions of the land have been cleared and improved and rendered more valuable, and these improvements were induced by the nonassertion of any claim upon the part of the Hargis heirs. Moreover, the tender which was made did not include the taxes which had been paid since Mr. Edrington took possession of the land in 1903, and since that date no taxes have been paid by the Hargis heirs, and Edrington and his vendees exercised all the acts of ownership over the land, of which it was capable, except the small clearing of two acres.

We think the evidence fairly shows an actual abandonment of the sale by both parties and a restoration of the property to the vendcr, notwithstanding the pur-

chaser's possession of a small portion of the land. It was their duty to assert their intention to perform their contract of purchase, within a reasonable time, when they saw their vendor was treating the sale as having been rescinded. "Specific performance is relief which the courts will not give unless in cases where the parties seeking it come as promptly as the nature of the case will permit." *Uzzell* v. *Gates,* 103 Ark. 191, and cases cited. The decree is therefore affirmed.

MORPHIS v. STATE.

Opinion delivered June 22, 1914.

1. SEDUCTION—MARRIAGE OF PARTIES—SUSPENSION OF PROSECUTION.—Kirby's Digest, § 2044, providing for the suspension of a prosecution for seduction after marriage between defendant and the female alleged to have been seduced, does not apply after a judgment of conviction has been entered in the circuit court. (Page 439.)
2. APPEAL—STAY OF PROCEEDINGS UNDER JUDGMENT.—An appeal does not vacate a judgment, but only serves to stay proceedings thereunder. (Page 439.)

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

W. P. Strait, for appellant.

Wm. L. Moose, Attorney General, for appellee.

PER CURIAM. Appellant was convicted of the crime of seduction, and his appeal from that judgment is pending in this court, the case not being yet ready for submission.

He now presents a motion for suspension of further proceedings under a statute which provides that "if any man, against whom a prosecution has begun, either before a justice of the peace, or by an indictment by a grand jury, for the crime of seduction, shall marry the female alleged to have been seduced, such prosecution shall not then be terminated, but shall be suspended; provided,

that if at any time thereafter the accused shall wilfully and without such cause, as now constitutes a legal cause for divorce, desert and abandon such female, then at such time said prosecution shall be continued,'' etc. Kirby's Digest, § 2044.

He exhibits with his motion satisfactory evidence of his intermarriage with the injured female since the judgment of conviction was rendered.

The question presented is whether or not the statute applies to cases pending in this court on appeal.

We are of the opinion that the statute does not apply. The prosecution ends when the judgment of conviction is entered, and the purpose of the statute is to provide for a suspension of the proceedings at any time before the rendition of the judgment. There is no authority for suspending proceedings under the judgment. The appeal does not vacate the judgment, but only serves to stay proceedings thereunder, and it, therefore, does not continue the prosecution within the meaning of the statute. *Miller* v. *Nuckolls,* 76 Ark. 485.

The statute contemplates that, when the accused shall wilfully and without cause desert and abandon his wife, the court shall be required to ascertain that fact before reviving the case, and there is no indication, from the language employed in the statute, that the lawmakers intended to confer any such authority upon this court. This affords the best of reasons for holding that the statute was not intended to apply after judgment of conviction. *St. Louis, I. M. & S. Ry. Co.* v. *Hambright,* 87 Ark. 242. The motion is, therefore, overruled.

LITTLE ROCK CHAMBER OF COMMERCE *v.* PULASKI COUNTY.

Opinion delivered June 22, 1914.

1. COUNTY PROPERTY—SALE OF REAL ESTATE—AUTHORITY OF COUNTY COURT.—The control and management of all county property is

placed in the county court, and the county court has authority to sell and to cause to be conveyed any real estate or personal property belonging to the county. (Page 441.)

2. COUNTY PROPERTY—SALE OF REAL ESTATE—FRAUD—INADEQUATE CONSIDERATION.—The county court has authority to sell the property of the county, and nothing short of fraud, or such grossly inadequate consideration as will amount to fraud, will invalidate the order of the county court in directing a conveyance. (Page 442.)

3. COUNTY PROPERTY—SALE OF REAL ESTATE—CONSIDERATION.—The consideration for the sale of county property may be something other than money, and the county court in exercising its power may determine what is to the best interests of the county. (Page 443.)

4. SALES — CONSIDERATION—ADEQUACY—FRAUD.—Mere inadequacy of consideration is not sufficient to establish fraud. (Page 444.)

5. COUNTY PROPERTY—SALE OF REAL ESTATE—CONSIDERATION—AUTHORITY OF COUNTY COURT.—The county court being clothed by statute with the authority to sell and dispose of county property not dedicated to a specific use, it may sell a tract of land belonging to the county and it may determine what consideration shall be accepted, and unless there is fraud shown, the judgment of the county court will not be disturbed. (Page 445.)

6. COUNTY COURT—SALE OF REAL PROPERTY—CONSTITUTIONAL LIMITATION.—The right of the county court to order the sale of county property for such a consideration as it deems proper does not conflict with § 5, art. 12, Const. of 1874, which prohibits a county from becoming a stockholder in any corporation, and from loaning money or its credit to any corporation, etc. (Page 445.)

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

Coleman & Lewis, for appellant.

1. The county court did have authority to transfer the land for the consideration named in the deed. Kirby's Digest, § 992; 50 Ark. 447.

2. The mere fact that the county could have gotten more cash money from some other source does not render the transfer fraudulent. The disposition of real estate of the county is solely within the discretion of the county court. 73 S. E. 706; 11 Cyc. 462; 103 Ind. 306; 2 N. E. 544; 61 S. E. 23; 130 Ga. 23.

Terry, Downie & Streepey, for appellee.

1. No question is raised as to the right to bring this suit. 73 Ark. 526; 2 Am. St. 89.

2. No county judge can give away the county's property. Kirby's Digest, § 992, contemplates a *sale.* 50 Ark. 447-452; 29 S. W. 56; 2 Dill. Mun. Corp., § 578; 29 S. W. 549-553; 2 Am. St. 85-89. The county judge exceeded his power; his action is *void.*

McCULLOCH, C. J. Appellant is a domestic corporation organized by numerous citizens of the city of Little Rock for the purpose of encouraging public improvements of all kinds and assisting therein, and, particularly, in inducing the location in this city and county of factories and other business concerns.

The county of Pulaski owned a certain tract of land by purchase, and same was conveyed by a commissioner of the county court, under its orders, to appellant. The land was unoccupied and not in use for county purposes. The deed recites a consideration of $1 "and benefits to accrue to said county from the expenditure by said Chamber of Commerce of the fund raised for industrial and development purposes for the above described land."

Appellant instituted this action to quiet its title, alleging, in substance, that it had accumulated large sums of money and property by gifts from citizens and property owners, and was expending the same for public benefit in inducing the location of factories and other business enterprises in Pulaski County; that it had thus induced certain large manufacturing plants to locate here, and thereby increase the population of the said county and the revenues from taxation. It is alleged in the complaint that the benefit to be derived by the county from increased revenues will amount to more than the value of the property conveyed. It is alleged that certain taxpayers are challenging the validity of the conveyance, and the aid of the court is asked in quieting the title.

The court sustained a demurrer to the complaint, and an appeal has been duly prosecuted.

Under the statutes of this State the control and management of all county property is placed in the county

court, and authority is conferred on that court "to sell and cause to be conveyed any real estate or personal property belonging to the county." Kirby's Digest, § 1375.

Another section of the statute reads as follows:

"The county court may, by an order to be entered on the minutes of said court, appoint a commissioner to sell and dispose of any real estate of the county, and the deed of such commissioner, under his hand, for and on behalf of such county, duly acknowledged and recorded, shall be sufficient, to all intents and purposes, to convey to the purchasers all the right, title, interest and estate whatever which the county may then have in and to the premises to be conveyed." Kirby's Digest, § 992.

The conveyance involved in this controversy was made pursuant to, and in strict compliance with, the terms of the statute above quoted. This conveyance is in the form of a sale, and the present attack relates only to the consideration.

It must be conceded that the statute confers abundant power upon the county court to sell and convey property of the county not held in trust for specific purposes.

The county court having the power to direct the sale, the consideration can only be inquired into for the purpose of establishing fraud. Now, there is no charge of fraud involved in this case, for the decision below turned upon the sufficiency of the allegations of the complaint.

Counsel for appellee rely upon the case of *State* v. *Baxter*, 50 Ark. 447, where the county court leased property of the county for a term of ninety-nine years for a grossly inadequate consideration. The lease was attacked for fraud, and this court held that the transaction was fraudulent upon its face, for the reason that the consideration was grossly inadequate, and, being without any other consideration, it stamped the transaction as a species of favoritism.

There is no element of favoritism or unfairness in the present case, for there is nothing to indicate, so far as the allegations of the complaint show, that the trans-

action was inspired by other than the best motives and purposes on the part of those who participated therein.

There is no limitation placed upon the county court, by statute or otherwise, in the exercise of its judgment as to the consideration upon which the disposition of the county's property must be based; therefore, nothing short of fraud, or such gross inadequacy as will be equivalent to fraud, is sufficient to invalidate the order of the county court directing the conveyance.

The consideration may be other than in money, and the county court, in exercising its power, may determine what is to the best interests of the county.

The case of *Roberts* v. *Northern Pacific Railroad Co.* 158 U. S. 1, is an instructive one. A county in the State of Wisconsin had donated certain lands to the railroad, the consideration being increased taxation. It was contended that, while the county court had the power of disposition over the lands belonging to the county, it could not make a donation to a railroad. The Supreme Court of the United States, in disposing of that contention, said:

"In the first place, the transaction between the county of Douglas and the Northern Pacific Railroad Company did not involve the exercise of the taxing power of the county. The county did not issue bonds, or seek to subject itself to any obligation to raise money by taxation. The case, as already stated, was that of a sale. The county authorities had ample powers to sell and convey such of its lands as were not used or dedicated to municipal purposes. * * * It is, indeed, urged that the county authorities could only sell its lands for money. We do not accede to this proposition. If they possessed the power to sell for money, we are pointed to no express provision of law that restricts them from selling for money's worth. * * * It is straining no principle of law or of good sense to regard the payment of an annual tax as equivalent, for the purpose of our present inquiry, to the payment of a rent. The amount, as well as the nature of the consideration received by the county in exchange for its lands, if it had the power to sell them, was

a matter that concerned the county only. * * * It may, perhaps, be said that what is forbidden is a resort to the taxing power where the municipality has received no consideration. But, as we have shown, the county in the present case paid no money and issued no bonds requiring any exercise of the taxing power. It was the case of a sale, in consideration of money paid down and to be paid in the form of taxes, in addition to the great advantages to inure to the public."

Now, the principle involved in that case is the same as in this. While the railroad company paid some money consideration, the main consideration was the increased revenues and the great advantages to inure to the public through the construction of the railroad.

If the county has the power to take the public advantage into consideration at all, it has the right to base the conveyance entirely upon that as the moving consideration.

The same principle is announced in the case of *Keatley* v. *County Court,* 70 W. Va. 267, where the county court, for a consideration of $5,000, attempted to convey a piece of property worth $12,000 to the United States Government for the purpose of erecting a public building thereon. The court of appeals of that State decided that the county court had the right to take into consideration the other benefits to accrue, besides the actual money consideration.

So, in the present case, we are of the opinion that where the county court is by statute clothed with power to sell and dispose of the county property not dedicated to specific use, it may determine what consideration shall be accepted, and unless there is fraud shown, the judgment of the county court will not be disturbed.

Mere inadequacy of consideration is not sufficient to establish fraud.

Nor does this view conflict with the provision of the Constitution that "No county, city, town or other municipal corporation, shall become a stockholder in any company, association or corporation, or obtain or appropriate

money for, or loan its credit to any corporation, association, institution or individual." Const. 1874, § 5, art. 12.

The disposition of real estate owned by the county is not an appropriation of money within the meaning of the Constitution, nor, as was said by the Supreme Court of the United States in the case cited above, is the taxing power involved in any way in the transaction.

Our conclusion is that the allegations of the complaint were sufficient, and that the conveyance made under the order of the county court is valid, and that the court erred in sustaining the demurrer. Reversed and remanded with directions to overrule the demurrer.

KIRBY, J., dissents.

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

Opinion delivered June 22, 1914.

1. MASTER AND SERVANT—RAILWAY HOSPITAL—DUTY TO EMPLOYEES.—A railway company which provides a hospital for its employees, out of funds gratuitously collected for that purpose, is held only to the exercise of ordinary care in the selection of competent and skilful physicians and surgeons to administer relief and provide attention to the sick and injured employees. (Page 448.)
2. MASTER AND SERVANT—RAILWAY HOSPITAL—RULES AND REGULATIONS.—The rules of the hospital department of a railroad company, conducted for the benefit of sick and injured employees, is not a contract between the company and the employees. (Page 448.)
3. RAILROADS — INJURED EMPLOYEES — HOSPITAL — TRANSPORTATION.—Where a railroad company undertook to provide its employees, when injured or afflicted, with free transportation to the railroad hospital, and with an order admitting such employee to the hospital, any violation of this obligation will render the company liable for any damages which ensued. (Page 448.)

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

E. B. Kinsworthy, McCaleb & Reeder and *T. D. Crawford*, for appellant.

1. The company is not responsible for negligence of physicians and surgeons at the hospital, if it used ordi-

nary care in selecting them. Instruction No. 1 for plaintiff was error. 98 Ark. 399; 106 *Id.* 442.

2. The company did not fail nor refuse transportation when requested, nor was it liable for not so doing. 79 Ark. 484.

3. The book of rules of the hospital department should not have been admitted as evidence. It had no tendency to prove any issue. Its admission misled the jury.

Norwood & Grant, for appellee.

1. The company was liable for medicines, etc., obtained elsewhere, having failed to furnish them at the hospital. 65 Ark. 31; 98 *Id.* 399; 100 Ark. 107. The latter cases are not in point.

2. It was liable for transportation. 79 Ark. 484.

3. The book of rules was competent evidence.

McCULLOCH, C. J. On or about the 1st day of November, 1910, the plaintiff was working for defendant railway company as a section hand in this State, and became sick, his ailment being diagnosed by a local physician as a case of pneumonia. At the close of the day's work, when he found that he was sick, plaintiff called upon his immediate superior, the section foreman, for a pass over the company's line to Little Rock, and for a permit to enter the hospital. The section foreman promised to comply with his request, but neither the pass nor the permit came until after a delay of about ten days, and in the meantime plaintiff remained at his home at Sulphur Rock, Independence County, Arkansas, and was so sick that he was compelled to have a physician to visit him twice a day. When the pass was delivered to him, he came to Little Rock to the hospital, and he alleges that he was not given proper treatment, and that after a stay at the hospital for about ten days, he was compelled to return to his home, where he languished on the sickbed for a considerable length of time, and that his health was seriously impaired by the failure to get proper treatment while at the hospital.

Plaintiff instituted this action against the defendant to recover damages, alleging that the defendant contracted to furnish him hospital accommodations and medical attention, medicine, etc., and that on account of its failure to do so, he suffered injuries, for which he seeks damages for the various items of alleged injury, aggregating the total sum of $8,431.81.

On the trial of the case, plaintiff was awarded damages in the sum of $750 by the verdict of the jury, and subsequently a remittitur was entered down to $450, and the defendant, after its motion for a new trial was overruled, appealed to this court.

The undisputed evidence shows that defendant company "assumed gratuitously to collect and preserve such funds and provide hospital accommodations and competent physicians and surgeons to operate it, without any profit or gain or hope of it therefrom," and under those circumstances we held that the company "can only be considered a trustee for the proper administration and expenditure of such fund, and should be held only to ordinary care in the selection of competent and skillful physicians and surgeons to administer relief and provide attention to sick and injured employees." *Arkansas Mid. Rd. Co.* v. *Pearson,* 98 Ark. 399, 106 Ark. 442.

There is nothing in the evidence to show that the company undertook to do anything more than to "collect and preserve such funds and provide hospital accommodations and competent physicians and surgeons to operate it, without any profit or gain," and the court erred in submitting to the jury the question of a contract on the part of the company to furnish physicians and hospital facilities.

The plaintiff relied upon the book of rules and regulations with respect to the hospital department, which was introduced in evidence, and particularly that part of rule 1, which reads as follows:

"All the officers and employees of the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, and all employees of such other corporations operated and connected therewith,

resident within the jurisdiction of the hospital staff and who are assessed in accordance with the rules, are entitled to the benefits provided by the Missouri Pacific-Iron Mountain Hospital Department under the regulations and restrictions herein prescribed."

This is merely one of the rules of the hospital department, and does not amount to a contract on the part of the railway company to furnish those facilities.

The railway company was, therefore, not responsible for the refusal or failure of those in charge of the hospital to give plaintiff proper service.

It is not contended that there was any negligence on the part of the defendant in its selection of physicians and others in charge of the hospital.

The evidence does show, however, that defendant company undertook to provide its employees, when injured or afflicted, with free transportation to the hospital, and also to furnish an order or permit which would admit such ill or injured employee to the hospital. This being so, any violation of its obligation in that respect would render it liable for any damages which ensued. The evidence in the case tends to establish the fact that plaintiff called for a pass and a permit, but there was a negligent delay of about ten days in furnishing the same to him. In the meantime, he was compelled to call in a local physician, who treated him and charged him $2 a visit for fourteen visits, making a total bill of $28. The evidence also shows that he was compelled to spend $5 for medicine. This expense of medical attention and obtaining medicine would have been avoided if there had been no delay in procuring the pass and permit. The evidence, therefore, putting it in its light most favorable to plaintiff's cause of action, establishes damages which he is entitled to recover in the sum of $33, and no more, for the delay in furnishing him transportation and an order or permit authorizing him, as an employee, to enter the hospital. The judgment of the circuit court will, therefore, be reversed and judgment will be entered here for plaintiff for damages in that sum.

O'BARR v. SANDERS.

Opinion delivered June 22, 1914.

1. DELINQUENT TAXES—COLLECTION—REMEDY.—Act 235, Acts 1909, did not abolish any causes of action that had accrued and that were then in existence for the collection of delinquent taxes prior to that year, but it did furnish the remedy that should be pursued for the collection of all delinquent taxes, no matter for what year the same had accrued. (Page 453.)
2. TAXES—DELINQUENT TAXES—CHANCERY DECREE—COLLATERAL ATTACK. Lands were ordered sold for delinquent taxes, the court having jurisdiction, and the proceedings being regular. *Held*, the decree can not be overcome and set aside by collateral attack, in an action to invalidate the sale made under the decree. (Page 453.)
3. DELINQUENT TAXES—TAX SALE—PAYMENT—REMEDY.—Act 235, Acts 1909, provides a remedy for the land owner who has paid drainage taxes, when the lands have been sold as delinquent. (Page 453.)

Appeal from Clay Chancery Court, Eastern District; *Charles D. Frierson,* Chancellor; reversed in part; affirmed in part.

STATEMENT BY THE COURT.

On August 13, 1912, G. W. Sanders and J. F. Ogles filed their complaint against W. H. O'Barr and C. C. Jarrett; on August 31, 1912, D. V. Glover and Paul M. Will filed their complaint against the same defendants; and on September 8, 1912, Alvis Hogan, Russ Howerton, Charley Hayden, W. R. Winn and Albert Vincent filed their complaint against the same defendants, all in the chancery court for the Eastern District of Clay County, Arkansas, to quiet title to several tracts of land, described in their respective complaints. Sanders and others claimed to own lots 10, 11 and 12 in block 1, Wright's Addition to the town of Rector, Arkansas. Glover and others claimed to own the north half of the northwest quarter of section 31, township 19 north, range 8 east. Vincent and others claimed to own the east half of the northwest quarter of section 33, township 19 north, range 8 east.

The complainants set up that the several lots and tracts of land owned by them respectively were sold on June 4, 1910, under an order of the chancery court condemning the lands for sale for delinquent drainage taxes, penalty and costs, for the years 1905, 1906 and 1907; that the lands were bought by O'Barr; that the deeds executed to O'Barr and approved by the court, making the sale, were void, and were clouds on plaintiffs' title, for the following reasons: (Here seventeen different grounds were given as reasons for avoiding the sale made for the drainage taxes.) The eleventh reason was as follows: "The commissioner's deeds are void because the taxes for which said lands were condemned and sold were not delinquent, but had been paid."

It is unnecessary, in the view we take, to set forth the other grounds alleged.

The defendants answered, denying specifically each of the alleged grounds of invalidity set up in the complaints, and averring that the decree of the chancery court and all the proceedings thereunder condemning the lands to be sold, were in all things regular and valid.

The decree condemning the lands to be sold was rendered at the April term, 1910, of the Clay Chancery Court, and the deeds were approved on November 22, 1911.

Glover testified that he paid drainage taxes, and exhibited receipts showing the payment of such taxes for the years 1905, 1908, 1909, 1910 and 1911, on the north half of the northwest quarter of section 31, township 19 north, range 8 east.

One Seitz testified that he was secretary of the St. Francis Drainage District during the years 1905, 1906, and 1907, and that the taxes for 1905, 1906 and 1907 were all in the same book. The two years taxes of 1906 and 1907 were made out together and levied together; the taxes were assessed jointly for the two years. This book shows that the assessment for the year 1905 of $4 on above tract was paid November 18, 1906. The assessment of 1905 was also paid on the east half of the northwest

quarter of section 33, township 19 north, range 8 east, on October 23, 1906.

The assessment for 1906 and 1907 on the above tracts of land as shown by the list or book, was not paid. This book was the only book furnished the treasurer, and contained the only list showing what lands were assessed and the amount of the assessments. It also showed that the assessment against lots 10, 11 and 12, Wright's Addition to the town of Rector for the years 1905, 1906 and 1907 had not been paid. If the taxes for the years specified had been paid, the books would show it.

Witness Hogan testified that he paid taxes on the east half of the northwest quarter of section 33, township 19 north, range 8 east, both general and special, for the year 1907. He got the receipt. He paid the drainage taxes, and the receipt for this was separate from the general tax receipt. His attention was called at the time to pay his drainage taxes, and the collector was there at Rector and he went in and paid them. The tax receipt was deposited in the Rector Bank. When he went to get the receipts, some of his papers had been misplaced, and he could not get them.

The above was substantially the evidence on behalf of plaintiffs below, appellees here.

The evidence on behalf of the defendants below, appellants here, consisted of the record of the proceedings of the chancery court for the Eastern District of Clay County in the case of St. Francis Drainage District against delinquent lands, in which the lands in controversy were condemned and sold for the delinquent drainage taxes for the years 1905, 1906 and 1907. The record showed the complaint against the lands in controversy, the notice, proof of publication, the decree, the commissioner's report showing the sale of the lands, and the approval thereof, and the deeds to O'Barr and the approval thereof by the chancery court.

The decree in the present case recites that the three cases were consolidated and tried together, and the chancellor found in favor of the plaintiffs below and entered

a decree cancelling the commissioner's deeds to O'Barr, giving him a lien for the taxes, penalty and costs that had been paid by him. To reverse that decree, this appeal has been duly prosecuted.

Johnson & Burr, for appellants.

1. These suits are a collateral attack upon a final decree. A suit to cancel a commissioner's deed as a cloud upon title is a collateral attack upon the decree of foreclosure and sale. 94 Ark. 519; 101 *Id.* 390; 94 *Id.* 588, etc.

2. Neither the attorneys nor the chancellor have pointed out any jurisdictional defect in the decree. None of the seventeen objections set out in the complaint are tenable. 83 Ark. 54; 94 *Id.* 588; 93 *Id.* 490; Acts 1905, p. 433; Acts 1909, p. 706, 710-714. The entire record is regular and valid, and the decree is conclusive on collateral attack. Cases *supra.*

L. Hunter, J. W. Brawner, Huddleston, Fahr & Futrell and *Holifield & Harrison,* for appellees.

1. No personal judgment could be rendered against a resident owner of lands. The act of 1909 is not retrospective. The action is not at common law, and can not survive the repeal of the act creating the right to sue. Acts 1905, No. 172; Acts 1909, No. 235. The latter act repeals the former. 80 Ark. 411; 88 *Id.* 324; 82 *Id.* 302; 105 *Id.* 77.

2. The decree is void on collateral attack for jurisdictional defects. Cases *supra.*

WOOD, J., (after stating the facts). 1. This suit, as to all the grounds alleged for invalidating the deeds of the commissioner except that the taxes were paid, was a collateral attack on the decree of the chancery court condemning the lands to be sold. See, *Hall* v. *Morris,* 94 Ark. 519; *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390; *Beck* v. *Anderson-Tully Co.,* 113 Ark. 316.

The record of the proceedings of the chancery court under which the lands in controversy were condemned and sold for delinquent drainage taxes shows that those proceedings were in all things regular and according to

Act No. 172 of the Acts of 1905, as amended by Act No. 235 of the Acts of 1909. There is nothing on the face of the proceedings, as shown by this record, evidencing a want of jurisdiction in the chancery court to decree a sale of the lands in controversy. It is clear that Act No. 235 of the Acts of 1909 did not intend to abolish any causes of action that had accrued and that were then in existence, for the delinquent taxes of prior years. But the act of 1909 was intended to furnish the remedy that should thereafter be pursued for the collection of all delinquent taxes, no matter for what year the same had accrued. Since the proceedings of the chancery court condemning the lands in controversy were regular on their face, and did not show any want of jurisdiction in the chancery court, all the matters alleged in the complaints of the appellees as grounds for invalidating the sale made under the order of the chancery court and the deed of the commissioner in pursuance thereof, can not avail here. Because the chancery court had jurisdiction, its decree, as to all things necessary for adjudication before the rendition thereof, can not be overcome and set aside by this collateral attack. See, *Lumber Co.* v. *McDougal, supra.*

2. However, Acts No. 235 of the Acts of 1909 contains this provision: "Provided, that at any time within three years after the rendition of the final decree under which the sale is made, the owner of the land may file his petition in the court rendering the decree, alleging the payment of the taxes on the lands for the year for which they were sold, and that upon the establishment of that fact, the court shall vacate and set aside the decree," etc.

It will thus be seen that the act itself provides a direct method for an attack on the decree of the chancery court condemning the lands for sale where the "taxes have been paid on the lands for the year for which they were sold." Under this provision appellants were entitled to have the decree set aside, and the deeds made in pursuance thereof cancelled, as to those tracts of land

where they showed that the taxes were paid for the years for which they were sold.

The chancellor was warranted in finding, under the testimony set forth in the statement, that the taxes were paid on the east half of the northwest quarter of section 33, township 19 north, range 8 east, for the years 1905, 1906 and 1907. But as to the other tracts in controversy, there is no testimony to contradict or rebut the testimony of the witness to the effect that the taxes on these tracts were not paid for all the years for which they were sold.

The decree of the chancery court therefore, will be affirmed as to the east half of the northwest quarter of section 33, township 19 north, range 8 east; but as to the other tracts, it will be reversed and remanded with directions to enter a decree dismissing the appellee's complaints for want of equity.

HALL v. STATE.

Opinion delivered June 22, 1914.

1. HOMICIDE—SELF-DEFENSE—DEFENSE OF HOME.—In a prosecution for murder, instructions held to cover the right of defendant to defend his person, the inmates of his house, and his house itself from outside violence. (Page 460.)
2. HOMICIDE—SELF-DEFENSE—DEFENSE OF HOME.—In a prosecution for murder, it is proper to refuse to give a requested instruction which tells the jury, as a matter of law, that the right given a man to defend his home extends to the premises surrounding it, regardless of whether the assailant intended to enter the dwelling or not. (Page 460.)
3. HOMICIDE—SELF-DEFENSE—DEFENSE OF HOME—COMMON LAW RULE.—At common law an assault upon a man's house was an assault upon himself, and he could therefore repel such an assault by the force necessary to meet it. (Page 461.)
4. HOMICIDE—SELF-DEFENSE—APPREHENSION OF DANGER—DWELLING.—In order to justify a killing in defense of one's home, or the inmates thereof, it is not necessary that there should be actual danger, provided the defendant acts upon a reasonable apprehension of danger. (Page 461.)
5. HOMICIDE—DEFENSE OF HOME.—It is the duty of a householder to prevent an entry therein, by means not fatal, if he can do so with means consistent with his own safety. (Page 461.)

6. HOMICIDE—SELF-DEFENSE—DEFENSE OF HOME.—If defendant kills in self-defense or defense of his home, where there are no reasonable grounds of apprehension of danger, it is manslaughter, and if deceased is attempting to enter defendant's dwelling house unlawfully, if the killing is with malice and ill will, and not for self-protection or the protection of the home, it is murder. (Page 462.)
7. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence held sufficient to warrant a verdict of guilty of murder in the second degree. (Page 463.)
8. APPEAL AND ERROR—BILL OF EXCEPTIONS—ERRORS NOT SET OUT IN BILL OF EXCEPTIONS.——It is the office of the bill of exceptions to bring upon the record matters which do not appear upon the record proper, and errors which do not appear in the bill of exceptions can not be reviewed on appeal, although set out in the motion for a new trial. (Page 463.)

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

STATEMENT BY THE COURT.

The defendant, Charley Hall, was indicted for the crime of murder in the first degree, charged to have been committed by shooting John Williams.

Lee Rhodes, for the State, testified: John Williams, a white man, and Layton Fulton, a negro, had a difficulty about some stock, and the negro knocked him down with a stick. Williams left the scene of the difficulty, and came on down to a neighbor's house and got a shotgun. I approached him and tried to get him not to go back. He was angry and would not stop. I went with him and got him to give me his knife, but was unable to get him to give me the gun. As we were going along a road which ran between the defendant Hall's house and lot and barn, the defendant came out into the road and stopped us. Williams told the defendant to go back; that we were not going to bother him, but were after Layton Fulton and were going to the house of a man named Cross, who lived some distance beyond there. The defendant told Williams that he would have to get back and get off of his premises. Williams insisted that he was going to Cross's and was not going to the defendant's house, and that he did not intend to harm the de-

fendant. The defendant, Hall, walked up to Williams, took hold of his gun and wrested it away from him, extracted the shells from it, and handed it to a negro named Steve Whitley, who was with him. The defendant abused Williams and myself, cursing us and telling us to get back, that we could not mistreat him, and finally threw his own gun down on Williams, which had been handed to him by Steve Whitley after the defendant had taken Williams's gun away from him. When the defendant drew his gun on Williams, Williams grabbed the gun and both he and myself begged the defendant not to shoot and said that we did not intend to harm him. Steve Whitley then took hold of the gun which the defendant, Williams and myself were scuffling over, and jerked it out of Williams's hand. Williams then started to whirl and run, and the defendant threw the gun down on him again and shot him, killing him instantly. The deceased fell in the road where the difficulty took place. There was no fence around the yard and house of the defendant, but there were indications of where an old fence had been. There was a road running by the defendant's house between his yard and the barn, and it was in this road that the difficulty and subsequent killing took place. The road in question was not a public road, but was one that had been traveled by those living in the neighborhood for several years. The killing took place about fifteen steps from where the yard fence had formerly been. After the defendant shot the deceased, I cut him with Williams's knife and then dropped the knife down on the ground.

Other witnesses for the State testified that they heard the defendant talking in an angry tone of voice and came to the scene of the difficulty. They corroborated the testimony of Lee Rhodes, and one of them said that just as he came up the defendant said: "You God damned son-of-a-bitch, get back out of here and get away. I have got a damned good notion to kill both of you."

All of the witnesses for the State say that the defendant told the deceased to go back; that he would kill

him and those with him if he did not; that the deceased told the defendant that he was not after him, and was going on up the road. They all stated that the killing took place in the road a short distance beyond the pump and between the pump and the house. An officer who arrested the defendant stated that the next morning after the killing, the defendant told him that he did not kill the deceased but that Steve Whitley had shot him.

The defendant, Charley Hall, testified in his own behalf as follows: I have lived down in the bottom for twenty years, and never had any trouble with the white people before. I had been away from home on the day of the killing and met John Williams on my return home. He told me that some of the negroes had hit him and that he was going home and kill them all. There had never been any hard feeling between us up to this time. I went on home and telephoned to Plumerville for an officer, telling him there was going to be trouble and that I wanted protection. Layton Fulton had taken refuge in my house. Shortly after I returned home I saw John Williams and Lee Rhodes coming up the road toward my house with a gun. I took my gun and started out to meet them. On second thought, I handed my gun to Steve Whitley, who was with me, and started ahead of him to meet Williams and Rhodes. There is an open way between my house and the lot and garden which was usually traveled by the neighbors. I met Williams and Rhodes near my pump and tried to persuade them to go back. After I had taken Williams's gun away from him they advanced on me, and either Williams or Rhodes stabbed me. I then brought up my gun, which Steve Whitley handed to me, and shot Williams in order to save my own life. I was trying to keep them from going into my house and to keep them from stabbing me when I shot the deceased. The deceased was not in my yard when I shot him, but he was in the road right by it and was going toward my house.

Steve Whitley corroborated the testimony of the defendant, and further stated that the deceased was the

one who stabbed the defendant; that it was nearly dark at the time. Whitley also said that when he saw Williams and Rhodes approaching he told them that Layton Fulton was not in the defendant's house.

The jury returned a verdict of guilty of murder in the second degree and fixed the punishment of the defendant at twenty-one years in the State penitentiary. From the judgment of conviction the defendant has duly prosecuted an appeal to this court.

W. P. Strait, for appellant.

1. The facts do not justify a conviction.

2. Remarks of counsel were prejudicial. 68 Ark. 481; 72 *Id.* 469; 75 *Id.* 577; 70 *Id.* 307; 65 *Id.* 619; 87 *Id.* 464; 74 *Id.* 279; 62 *Id.* 536; 65 *Id.* 389; *Ib.* 475; 69 *Id.* 648; 71 *Id.* 415; 73 *Id.* 453; 74 *Id.* 210.

3. Defendant had a right to act upon the facts and circumstances *as they appeared to him,* exercising his reason and judgment and viewing them from his standpoint, and the court erred in refusing to so charge the jury. 69 Ark. 649; 59 *Id.* 132; 75 *Id.* 350; Wharton on Hom. (3 ed.), § 340; 55 Ark. 593; *Ib.* 604.

4. Defendant had the right to interpose *both* the right of self-defense and defense of his home. 55 Ark. 606; *Ib.* 601; 119 Pa. 287.

5. A man's dwelling (home) includes the property immediately surrounding it and used in connection therewith, such as yard, garden, etc. 58 N. H. 609; 2 Atl. 539; 8 Johns. (N. Y.) 59; 76 Ind. 467. "Habitation" includes surroundings, whether fenced or not. 25 Am. St. 17; 105 Ala. 26; 33 Ore. 110; 1 Shannon (Tenn.) 505; 93 Mech. 609; 94 Ala. 4.

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

1. The remarks of counsel were not prejudicial. *Wolfe* v. *State,* 107 Ark.

2. The instructions cover every phase of murder, and have been approved. 76 Ark. 515.

3. The trial was fair and impartial and the evidence sufficient.

HART, J.; (after stating the facts). The court gave the following instruction at the request of the defendant:

"No. 5. You are instructed that if defendant had reason to believe he or any one at his house would probably be attacked, then as a matter of law he had a perfect right to arm himself and prepare not only for his own defense, but that of his home and all persons being therein at the time; and if deceased, either alone or with others acting with him, advanced upon defendant's home for the purpose of renewing a difficulty with or attacking any person therein, defendant would not be required to retreat, but may stand his ground and meet force with force, and if necessary to prevent either himself or any person in his home from receiving great bodily injury at the hands of the deceased, or him and those with him and acting with him, either or all of them, or if situated as he was, viewing the facts and circumstances as they appeared to him, and from his standpoint he had reason to believe and did believe he or any person at his house was in imminent and immediate danger of losing his life or receiving some great bodily injury at the hands of the deceased or him and those acting with him, any or either of them, and in good faith, without fault or negligence on his part, he shot and killed the deceased, then such killing would in law be justified, and you should acquit the defendant, although you may believe such killing unnecessary or that such danger did not exist."

Counsel for defendant also asked the court to give additional instructions with reference to the defense of his habitation, and error is assigned because the court refused to give them. Counsel contends that instruction No. 5, above set out, limited the right of defendant to shoot the deceased to the defense of his own person or some inmate of his house, but omitted to charge the jury with reference to the right of the defendant to defend his home.

We do not think this instruction restricted or limited the defendant to a defense of his own person or some inmate of his house. It went further, and, in plain and express terms, also submitted to the jury the law of justifiable homicide in the defense of the defendant's home. In addition to instruction No. 5, the court, at the request of the defendant, read to the jury sections 1795 and 1796 of Kirby's Digest, which are as follows:

"Section 1795. Every man's house or place of residence shall be deemed and adjudged, in law, his castle."

"Section 1796. A manifest attempt and endeavor, in a violent, riotous, or tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein shall be a justification of homicide."

It is next insisted that the court erred in refusing to give instruction No. 3, at the request of the defendant. The instruction is as follows:

"You are further instructed that the right given a man to defend his home against invasion and violence extends to and includes the immediate premises surrounding and environing the house, whether the same is fenced as a yard or not. If you believe from the evidence in this case that deceased, either on his own initiative or with others acting with him, entered the yard or immediate territory surrounding defendant's house and in close proximity to the house and a part of the house premises, in a violent, riotous or tumultuous manner with intent to offer personal violence to any person in or about the house, or thought to be there, and defendant situated as he was, and viewing the facts and circumstances from his standpoint, acting as a reasonable person, believed it necessary to slay the deceased to prevent such invasion and violence, and so believing he shot and killed the deceased, then in law such killing would be justified, and you should acquit the defendant."

We do not think the court erred in refusing to give this instruction. The first sentence of the instruction, in effect, told the jury, as a matter of law, that the rights

given a man to defend his home extended to the premises surrounding it, regardless of the fact of whether the person intended to enter the dwelling house or not. At the common law an assault upon a man's house was an assault upon himself, and he could therefore repel such an assault by the force necessary to defeat it. In discussing sections 1795 and 1796 of Kirby's Digest, in the case of *Brown* v. *State,* 55 Ark. 593, Mr. Justice MANSFIELD, speaking for the court, said:

"Following the doctrine of the common law, the statute regards the violent attempt to enter the house as equivalent to an assault upon the person to be injured; and when it is obviously about to be made, he may at once put himself in an attitude to repel the aggressor. It was not practicable to give a rule applicable to all cases for determining what acts or conduct will constitute the actual attempt to enter a house. But it must be a 'manifest' attempt; and we take this to mean one so plainly made that no reasonable doubt will exist as to the purpose of the aggressor. At what point the effort to enter the house was begun, and how far it may be permitted to proceed with safety to the life or person of the individual assailed, must be determined by the circumstances of each case. And these are questions more of fact than of law."

In the case of the *State* v. *Patterson,* 45 Vt. 308, 12 Am. Rep. 200, the court said:

"The idea that is embodied in the expression that a man's house is his castle, is not that it is his property, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his offices, or his barn. The sense in which the house has a peculiar immunity is, that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant or members of his family, and, in order to accomplish this, the assailant attacks the castle in order to reach the inmates.

In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape from being injured by the assailant, but he may meet him at the threshold, and prevent him from breaking in by means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault."

It is next insisted by counsel for defendant that the evidence is not sufficient to warrant a verdict of murder in the second degree. In the case of *Brown* v. *State, supra,* the court held that an attack upon a man's dwelling is regarded in law as equivalent to an assault upon his person, and that in order to justify a killing in defense of one's house, or of the inmates thereof, it is not necessary that there should be actual danger, provided the defendant acts upon a reasonable apprehension of danger. But the court further said that it is the duty of the householder to prevent the entry by means not fatal, if he can do so consistently with his own safety. So it may be said that if the defendant kills where there are no reasonable grounds of apprehension of danger it is manslaughter; and if the killing is done with malice, express or implied, it is murder. Even though the deceased is attempting at the time unlawfully to enter the defendant's dwelling house, if the killing is with malice and ill will, and not for self-protection or the protection of the house, it is murder. See *State* v. *Scheele,* 57 Conn. 307, 14 Am. St. Rep. 106. For, as it is there said, "the law of self-defense, or the defense of one's domicile, does not require the giving to evil-minded persons an opportunity to take the life of another on such easy terms." Of course, if the testimony of the defendant is to be believed, he shot the deceased at the time the latter was violently attacking him with a knife, and the killing was done in self-defense. On the other hand, according to the evidence adduced by the State, the defendant had taken the gun away from the deceased and had extracted

the shells therefrom. The deceased was unarmed, and was not in any way resisting the defendant or endeavoring to do him bodily harm. When the defendant drew his gun on deceased he begged defendant not to shoot him, and grabbed the gun in an effort to prevent the defendant from shooting him. The defendant, with the assistance of Steve Whitley, jerked the gun away and immediately drew it on the deceased and killed him. The deceased at the time was begging him not to shoot him, and had several times insisted that he was not going to harm the defendant or try to enter his house. The defendant was talking in a loud and angry manner and applying vile epithets to the deceased and his companion, telling him that they would have to turn back and not travel the road any further. If the jury believed this testimony, there is nothing from which it might reasonably have inferred that the deceased intended violence to the person of the defendant or that he was attempting to enter defendant's dwelling house. The jury might have found that the killing was without provocation and that the defendant was moved by a depraved mind, regardless of human life, without the specifically formed design to take human life essential to murder in the first degree. Under such circumstances, the defendant would be guilty of murder in the second degree, and the evidence was sufficient to warrant the verdict. It was the peculiar province of the jury to weigh the testimony of the witnesses, and this court is not at liberty to reduce the punishment, even though we might think it too severe.

Finally, it is contended by counsel for defendant that the judgment should be reversed on account of certain prejudicial remarks made by the prosecuting attorney in the course of his argument. The remarks of the prosecuting attorney do not appear in the bill of exceptions, but are only set out as exhibits to the motion for a new trial. It is the office of the bill of exceptions to bring upon the record matters which do not appear upon the record proper, and errors which do not appear in the

bill of exceptions can not be reviewed on appeal, although set out in the motion for new trial. *Wolfe* v. *State,* 107 Ark. 29, and cases cited.

We find no prejudicial error in the record, and the judgment will be affirmed.

OVERSTREET GRAIN COMPANY *v.* FORD.

Opinion delivered June 22, 1914.

CHATTEL MORTGAGES—SUFFICIENT DESCRIPTION—MULES.——A mortgage on two mules which described them as, "two black mules, two and four years old, the same being now in the possession of * * * W., * * *," *held,* when recorded, sufficient to put a purchaser of the mules upon notice of the mortgage.

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

McNemer & McNemer, for appellant.

1. The description in the deed of trust, as against a third person, is not sufficiently definite. Kirby's Dig., § 5407; 6 Cyc. 1022; 52 Ark. 278; 57 *Id.* 152; 41 *Id.* 70; 43 *Id.* 350; 140 N. W. 401; 71 S. W. 713; 66 N. Y. S. 665; 7 Oh. St. 197; 7 Col. 426; 4 Pac. 45; 76 Ia. 553; 41 N. W. 310; 77 Ga. 365; 37 Ia. 374; 58 Miss. 126.

2. A bond for costs should have been filed. Kirby's Dig., § § 959-61.

J. P. Kerby, for appellee.

The property was sufficiently described. 39 Ark. 394; 6 Cyc. 1022; note 25; 127 N. C. 508; 55 Ia. 421; 7 N. W. 675; 108 Mich. 114; 65 N. W. 604; 52 Ark. 278; 57 *Id.* 152; 54 Ark. 158; 51 *Id.* 410; 52 *Id.* 278; 42 Minn. 151; 43 N. W. 849; 66 Ala. 258; 7 Ind. App. 475; 34 N. E. 30; 26 Neb. 181; Jones on Chat. Mort. (2 ed.), § 54; 161 S. W. 183.

HART, J. S. H. Ford, instituted this action in the chancery court against R. P. Wilson and the Overstreet Grain Company to foreclose a mortgage on two mules.

R. P. Wilson borrowed two hundred dollars from S. H. Ford, and on the 23d day of December, 1908, executed a mortgage to him on two black mules to secure this amount. The property is described in the mortgage as follows:

"The following lands and personal property, situated in the County of Columbia, and State of Arkansas, towit: Two black mules, two and four years old, the same being now in the possession of the party of the first part, R. P. Wilson; and also all of the cotton and corn which the said part.. of the first part shall make, or cause to be made, this year, in said county," etc.

The mortgage was filed for record in Columbia County on the 20th day of February, 1909. At the time of the execution of the mortgage, and at the time it was filed for record, Wilson resided in Columbia County, and had the mules in his possession there. At the time the mortgage was executed Wilson had two other black mules, but they were older than the ones described in the mortgage. In May, 1909, Wilson left his home in Columbia County, and moved to Little Rock, in Pulaski County, bringing the two mules described in the mortgage with him. Subsequently, he sold the mules to the Overstreet Grain Company, and the testimony shows that the grain company did not have any actual notice that the mules were mortgaged to Ford. One of the mules sold to the Overstreet Grain Company is admitted to be a black horse-mule, and its age corresponds to one of the mules described in the mortgage. The other mule purchased by the Overstreet Grain Company is a mare mule, whose age corresponds to the one described in the mortgage, but, according to the testimony introduced by the defendant, the color of the mule is dark bay. The testimony on the part of the plaintiff tends to show that this mule is a black mule, and that it is sometimes difficult to distinguish between the color of a dark bay mule and a black one. The chancellor found in favor of the plaintiff, and entered a decree of foreclosure. The defendant, Overstreet Grain Company, has appealed.

It is contended by counsel for the Overstreet Grain Company, the vendee of the mortgagor, that the mortgage is void as to it because the description of the property is too vague and indefinite; but we do not agree with them in this contention. In *Lightle* v. *Castleman,* 52 Ark. 278, it was held that a mortgage which describes the property as "one black mare mule, six years old, in the mortgagor's possession in White County," states facts by the aid of which third persons could identify the mortgaged property, and is a good description. The general rule is that the description is sufficient if it will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property. Jones on Chattel Mortgages (2 ed.), § 54; 6 Cyc. 1022.

When the mortgage in question was executed, the mortgagor resided in Columbia County and had in his possession two black mules, two and four years old. It is true he had two other black mules at the time, but they were older than these two mules, and the Overstreet Grain Company could have readily ascertained these facts by making proper inquiries. The mortgage was executed in December, and at that time something was said about whether one of the mules should be described as a bay mule or a black one, and it was finally determined to describe it as a black mule. The witnesses for the Overstreet Grain Company say the mule was a bay mule, but they were testifying as to the color the mule appeared to be several years after the mortgage was given and at a different season of the year. It is well known that the shade of color between a dark bay mule and a black one is somewhat indistinct and that different persons might describe the color as one or the other. As above stated, if the Overstreet Grain Company had made inquiry they could have readily ascertained that the two mules which they were about to purchase from Wilson were the ones described in the mortgage. The mortgage itself put them on notice that Wilson had mortgaged to Ford two black mules, two and four years old, which at the time the mortgage was given were in

his possession in Columbia County, Arkansas, and any inquiry made would have shown that these were the only two mules of that age which he owned at the time. Therefore, we think that the description of the mules in the mortgage was sufficient to put the Overstreet Grain Company on notice by its record that the mules mortgaged were the same as those purchased; and this was all that was required. It follows that the decree must be affirmed.

PERSON v. WILLIAMS-ECHOLS DRY GOODS COMPANY.

Opinion delivered June 22, 1914.

1. CONFLICT OF LAWS—GARNISHMENT—EXEMPTIONS.—A citizen and resident of this State may subject to the payment of his debt, by garnishment, the money due the debtor, a resident of another State, from an insurance company which also does business in this State, for a loss under a fire insurance policy issued in that State upon the debtor's homestead and household effects, all of which were exempt from seizure and sale for the payment of the debt in that State where the judgment, upon which this suit was brought, was obtained. (Page 469.)
2. CONFLICT OF LAWS—GARNISHMENT—SITUS OF DEBT.—The situs of a debt, for purposes of garnishment, is not only at the domicile of the debtor, but in any State in which the garnishee may be found, provided the law of that State permits the debtor to be garnished, and provided the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the State. (Page 470.)
3. EXEMPTION LAWS—LEX FORI.—Exemption laws are not a part of a contract but pertain to the remedy, and the law of the forum relative thereto governs. (Page 470.)
4. EXEMPTION LAWS—EXTRA-TERRITORIAL EFFECT.—Exemption laws have no extra-territorial effect. (Page 470.)
5. EXEMPTION LAWS—NONRESIDENT.—A nonresident can not claim the benefit of the exemption laws of this State. (Page 470.)

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

STATEMENT BY THE COURT.

The appellee, a domestic corporation, with its principal place of business at Fort Smith, Arkansas, brought suit in the circuit court of Sebastian County against appellants to recover upon a judgment obtained against W. C. Person and others in Oklahoma for $1,553.22. A garnishment was issued and served upon the Westchester Fire Insurance Company, and the garnishee answered, admitting that it owed W. C. Person, one of the appellants, $950, but alleged that it was for insurance upon a house and household goods that were exempt from seizure for his debts under the laws of the State of Oklahoma. The appellants admitted the recovery of the judgment, and that it had not been paid. They alleged that they were citizens and residents of Oklahoma and that the money owing by the garnishee was due upon an insurance policy for loss of their homestead and household effects by fire, and was exempt from garnishment and seizure for such debt under the laws of Oklahoma, where the judgment was recovered, and asked that it be declared exempt from the payment of it in this State, and that appellee be enjoined from any further proceeding to collect and subject it to the payment of their judgment. Appellee demurred to the answer and the demurrer was sustained, and, upon appellants declining to plead further, judgment was rendered for the full amount of the debt and the garnishee having paid the amount due on the policy into court, $950, it was paid to the appellee and the garnishee discharged. Appellants prosecute this appeal to reverse the judgment.

George F. Youmans, for appellants.

It is patent that this suit was brought in this State to evade the exemption laws of the State of Oklahoma. The debt of the garnishee to appellants was payable in Oklahoma, and the garnishee could have been reached by the process of the courts of that State. 33 Mo. App. 110; 24 Mo. App. 91. Appellants being entitled to the benefit of the exemption laws of Oklahoma, the court

below should have given effect thereto. 7 Kan. App. 47; 51 Pac. 972; 44 Fed. 556.

Kimpel & Daily, for appellee.

1. Appellee had the right to sue and garnish in the courts of its domicile, even though the effect of doing so might be to deprive appellants of the benefit of the exemption laws of Oklahoma. 53 Ark. 71.

2. Exemption statutes are no part of a contract, and have no extra-territorial effect. In determining questions of exemptions, the law of the forum governs. 79 Ark. 382, and cases cited; 59 Ark. 287-291; 21 Ala. 261; 83 Ala. 462; 3 Am. St. 755; 74 Pa. St. 52; 8 Ia. 140; 60 Ia. 355; 2 Ill. App. 361; 83 Ill. 365; 115 S. W. 275; 110 Pac. 356.

KIRBY, J., (after stating the facts). Can appellee, a citizen and resident of this State, subject to the payment of his debt, by garnishment, the money due appellants, residents of the State of Oklahoma, from an insurance company, which also does business in this State, for a loss under a fire insurance policy issued in that State upon their homestead and household effects, all of which were exempt from seizure and sale for the payment of the debt in that State, where the judgment upon which this suit is brought was obtained?

This proceeding was instituted by a citizen and resident of this State to collect a debt due it from a resident of the State of Oklahoma, and the garnishment was served upon a corporation doing business in this State, and, if it be conceded that the debt due from the garnishee to appellants was exempt from seizure and garnishment in the State of Oklahoma, it in no wise affects the creditor's right to subject the garnished debt to the payment of his judgment here.

The garnishee became indebted to the insured under a policy of insurance upon a loss, for the payment of the amount due thereunder, and could have been sued by the insured, its creditors, in the courts of this State where it also does business, and it is liable to process

of garnishment here, notwithstanding the debt was contracted in another State, for, as was stated in *Stone* v. *Drake,* 79 Ark. 386, quoting from *Kansas City, P. & G. Ry* v. *Parker,* 69 Ark. 401, "The *situs* of a debt, for purposes of garnishment, is not only at the domicile of the debtor, but in any State in which the garnishee may be found, provided the law of that State permits the debtor to be garnished, and provided the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the State." See also *Chicago, R. I. & P. Ry. Co.* v. *Sturm,* 174 U. S. 710; *Harris* v. *Balk,* 198 U. S. 215; *L. & N. Ry. Co.* v. *Deer,* 200 U. S. 176; *Bristol* v. *Brent,* 110 Pac. 356; *Missouri, K. & T. Ry.* v. *Swartz,* 115 S. W. 275.

Exemption laws are not a part of the contract and pertain to the remedy, and the law of the *forum* relative thereto governs. *Stone* v. *Drake, supra;* 18 Cyc. 1376. Only residents of the State of Arkansas are entitled to claim the benefit of our exemption laws. Art. 9, § § 1, 2, 6, 10, Constitution of 1874; § § 3882, 3903-3905, Kirby's Digest. The appellants are not residents of the State of Arkansas, but of the State of Oklahoma, and can not claim the benefit of our laws, being nonresidents, nor can they avail here of the exemption laws of Oklahoma, which have no extra-territorial effect. Nor do we agree with appellants' contention that this proceeding is such an attempt to evade the exemption laws of the debtor's domicile as will be relieved against. It is only when a creditor attempts to evade the exemption laws of his own State by resort to attachment proceedings in the court of another State against the property of a debtor who is a resident of the State of the creditor's domicile that he will be enjoined by the courts of the latter State from prosecuting his suit in the foreign jurisdiction. *Griffith* v. *Langsdale,* 53 Ark. 73; *Cole.* v. *Cunningham,* 133 U. S. 107; *Greer* v. *Cook,* 88 Ark. 95.

If appellee was a resident of the State of Oklahoma and had resorted to the courts of this State to collect his claim in evasion of the laws of his own and his debtor's

residence, our court would not lend its aid; but this proceeding is by a resident of this State in the courts thereof, to collect a claim against a nonresident debtor by garnishment, subjecting to its payment money due to such nonresident in the hands of the garnishee within this jurisdiction; and can not be said to be an attempt to evade the exemption laws of another State since a citizen of every State has a right to proceed under the forms of law of his own State in the collection of his claims under the method provided by the laws thereof.

The court properly sustained the demurrer to the answer, and the judgment is affirmed.

WEBER v. WEBER.

Opinion delivered June 22, 1914.

1. ALIENATION OF AFFECTION—SUFFICIENCY OF EVIDENCE—DAMAGES.—In an action for damages by a wife for the alienation of her husband's affections, the evidence held sufficient to warrant a verdict in favor of the plaintiff, and a verdict of $2,500 held not to be excessive. (Page 474.)
2. ALIENATION OF AFFECTIONS—RIGHT OF MARRIED WOMAN TO SUE.—A married woman may maintain an action in her own name under Kirby's Digest, § 6017, against a defendant for alienating the affections of her husband. (Page 485.)

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

STATEMENT BY THE COURT.

This suit was instituted to recover damages against appellants, for the alleged alienation of the affections of the appellant's husband, Joe Weber. The appellee married Joe Weber, the only child of appellants, in the city of Little Rock, on the 22d day of November, 1910, and they lived and cohabited together as husband and wife, until the 30th day of August, 1911, when there was born to them a male child. Thereafter appellee was taken seriously ill, and to such an extent that she lost the control of her mental faculties, and, at the instance and recommendation of the family physician, was, by proper

order of the Pulaski County Court, adjudged insane and placed in the State Hospital for Nervous Diseases, for treatment.

Appellee and her husband, at the time of the birth of the child, and during their married life, lived immediately adjoining appellants, and her husband worked for them. Appellee was released from the hospital as cured, and soon thereafter disagreements arose between appellee and appellants, and the evidence is sharply conflicting as to the causes of these disagreements, and is especially so as to the extent to which appellants were responsible for the separation of appellee and her husband. According to appellee's version, appellants, without legal justification or excuse, brought about the separation, as a result of which appellee's husband took away their child, when it was only seven weeks old, since which time appellee had never been permitted to see the child. She recovered judgment in the sum of twenty-five hundred dollars, and, a motion for a new trial having been overruled, this appeal has been duly prosecuted.

Gus Fulk, for appellants; *E. B. Buchanan,* of counsel.

1. From the evidence, it is unreasonable and absurd to say that either of the appellants alienated, or attempted to alienate, the appellee's husband's affections from her.

Notwithstanding a verdict was rendered on conflicting evidence, this court will reverse where the verdict is so clearly and palpably against the weight of evidence as to shock the sense of justice of a reasonable person. 70 Ark. 385, and cases cited; 83 Ark. 340; 89 Ark. 321.

Where a plaintiff under the evidence, and inferences deducible therefrom, is not entitled to recover, it is proper for the court to direct a verdict for the defendant. 105 Ark. 526; 88 Ark. 510; 97 Ark. 425; 82 Ark. 334; 75 Ark. 407.

2. Appellee has no right to maintain this action. The gist of the action is not for the loss of services, but the loss of the comfort and society, the *consortium* of the

husband. Neither by the common law, nor by any statute of this State, is a married woman given any right of action. Willes, 581; Peake, N. P. Case, 82; *Id.* 7; 5 T. R. 357; 39 Hun, 40; Cooley on Torts, 224; 47 Barb. 120; 3 Shars., Blackstone's Com., star pp. 142, 143; Kirby's Dig. 623; 36 Wis. 344; 26 Fed. 13; 1 Chitty, Pl. 72; L. R. Q. B. Div. 436; 24 Ont. App. 665; 168 Mass. 312; Schouler, Husband & Wife, § § 61, 143; 1 Bacon, Abr. 66; 2 Ld. Rayon, 938; 67 Barb. 544; 76 Wis. 374; 21 Ohio St. 191.

Can the loss of *consortium* of the husband be construed to come within the meaning of section 6017, Kirby's Digest, relied on by appellee, in the face of the well established rule of construction that a statute will not be taken in derogation of the common law, *unless the act itself* shows such to have been the intention of the Legislature? 1 Ark. 568; 44 Ark. 265; 9 Allen (Mass.) 176. The rule that remedial statutes must be liberally construed, does not apply where such remedy is given in derogation of the common law. In such case the rule of strict construction must apply. 11 Ark. 196; 1 Ark. 388; Lofft's Rep. 438; Dwarres, Statutes, 257; 3 Dallas, 365. Such statutes can not be extended beyond their terms. The wife remains subject to such disabilities as are not expressly removed by the law. 91 Ind. 384; 105 Ind. 410; 41 Me. 405; 3 Allen, 128; 102 Tenn. 439; 1 Barb. 65.

Our Legislature in passing the above statute, intended only to give the wife certain and definite proprietary rights, and did not intend to affect the marital relations of husband and wife. The principle of the unity of husband and wife has been frequently recognized by this court. 56 Ark. 296; 44 Ark. 401; 102 Ark. 352.

Beyond the express provisions of statutory enactments, married women are no more *sui juris* than they were before such acts were passed. 36 Pa. St. 414; 37 Ala. 375; 64 Ark. 389; 5 Mackey, 421.

The word "property" was used in the statute in the sense of something tangible, but even if it was not so

used, this action could not be based upon the idea that a wife's right to the society and aid of her husband, is property. 24 Ont. App. Rep. 653; 67 Barb. 544; 21 Ohio St. 191; 43 Wis. 35; 13 N. Y. 333; 4 Denio, 82; 17 Johns. 283; 6 Bims, 94; 1 N. Y. 24.

Henry C. Reigler and *W. T. Tucker,* for appellee.

1. This court will not interfere with the verdict of a jury for want of evidence to sustain it, unless there is a total lack of evidence upon a material point, or the evidence so completely fails to support it that it must have been the result of prejudice or partiality. 46 Ark. 142; 51 Ark. 467; 56 Ark. 297; 17 Ark. 385. Nor where the evidence is conflicting. 57 Ark. 191; 84 Ark. 406. Nor where the case is fairly submitted under proper instructions. 49 Ark. 122.

2. Appellee is entitled to maintain this action. Our Legislature by the act of April 28, 1873, Kirby's Dig., § 5214, removed the common law disability of coverture. 47 Ark. 561.

The Legislature has also expressly given a married woman the rights here contended for. Kirby's Dig., § 6017, subdiv. 2. See also 6 L. R. A. 553; *Id.* 829; 13 Kan. 112; 19 Kan. 285; 26 Fed. 14; 34 Ohio, 621; 1 Crim. Sup. Ct. Rep. 418; 4 L. R. A. (N. S.) 643, and authorities cited in note, pp. 644, 645; Cooley on Torts, 227.

SMITH, J., (after stating the facts). A number of exceptions were saved at the trial both to the admission of evidence and the giving of instructions, and these exceptions have been considered by us; but we do not find any prejudicial error, or question of sufficient importance to require discussion. It is also earnestly insisted that the evidence is insufficient to support the verdict, but when appellee's evidence is given its highest probative value, as we must give it, when testing its legal sufficiency to support the verdict, we can not say that the evidence is legally insufficient to sustain the verdict, nor can we say the amount recovered is excessive.

A question is raised, however, which is one of first impression in this State, and which has received our earnest consideration. This question is the right of the wife to maintain an action for damages for the alienation of the affections of her husband.

There is conflict among the authorities as to whether this right of action existed in favor of the wife, or not, at common law, and although there are numerous cases which hold that she had no such right, the better view appears to be that she did. Common law causes of action for a personal injury to a married woman belonged to her; but the husband was required to sue with her to recover compensation because of her disability to sue. The husband's right of action abated at the death of the wife; but the cause of action survived to the wife and could be maintained by her after the death of her husband. Her right of action existed, but could not be set in motion unless her husband joined, and, by reason of the disability of coverture, it remained in abeyance, and could not be prosecuted in her own name. *Bennett* v. *Bennett,* 116 N. Y. 584; *Smith* v. *Smith,* 38 S. W. 439.

The case of *Bennett* v. *Bennett, supra,* is a leading authority on this subject, and the opinion in that case reviewed the authorities upon this question, and in upholding a judgment in favor of the wife, it was there said: "We think the judgment appealed from should be affirmed, upon the ground that the common law gave the plaintiff a right of action, and that the Code gave her an appropriate remedy."

In 1 Cooley on Torts (3 ed., p. 475), it was said: "At least twenty States now hold that such an action may be maintained, some basing their conclusion upon common law principles and some, more or less, upon the various enabling statutes in favor of maried women, which have been passed in recent years."

A number of cases support the wife's right to recover for the alienation of the affection of her husband, as an invasion of her personal rights, while other cases regard the wife's right to the *consortium* of her husband

as a property right. One of the leading cases taking this latter view is that of *Jaynes* v. *Jaynes,* 39 Hun. 40, in which case it is there said: "These reciprocal rights may be regarded as the property of the respective parties, in the broad sense of the word property, which includes things not tangible or visible, and applies to whatever is exclusively one's own." And it is there further said: "But as at common law, the husband and wife were regarded as one person, and her personal rights were suspended or incorporated with his, during coverture, so that if she were injured in her person or property, she could bring no action for redress without her husband's concurrence, and in his name as well as her own, she was practically precluded from suing for damages caused by alienating the affections of her husband and enticing him away. * * * Her disability in that respect, we think, has been removed in this State by legislation. A married woman may now, while married, sue and be sued in all matters having relation to her sole and separate property or for any injury to her person or character the same as if she were sole, and it is not necessary or proper to join her husband with her as a party in any action or special proceedings affecting her separate property. If we are correct in holding that the right which the plaintiff alleges was invaded by the defendant in this action was her separate property, the case is within the statutes referred to. If it be not property in the sense in which the word property is used in the statutes cited, it is a personal right, and, as the statutes extend to all injuries, whether to property, person or character, it seems sufficiently comprehensive to embrace an injury to the right in question."

In the case of *Warren* v. *Warren,* 89 Mich. 123, the wife's right to sue and recover damages for the alienation of the affections of her husband was said to exist under the statute which was set out in the opinion. It was there said: "Under the statutes of this State relative to the rights of married women, and the decisions of our own courts in relation thereto, the right of the

wife to bring this action, as well as all other suits to redress her personal wrongs, seems to me to be perfectly clear. The statutes provide: 'That the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterward become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her, in the same manner and with the like effect as if she were unmarried.' How. Stat., p. 6295.

" 'Actions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried; and in cases where the property of the husband can not be sold, mortgaged, or otherwise incumbered without the consent of his wife, to be given in the manner prescribed by law, or when his property is exempted by law from sale on execution or other final process issued from any court against him, his wife may bring an action in her own name, with the like effect as in cases of actions in relation to her sole property as aforesaid.' How. Stat. 6297.

"Under these statutes it has been held that a wife is entitled to and may sue for and recover in her own name damages for her personal injuries and suffering from assault and battery (*Berger* v. *Jacobs,* 21 Mich. 215; *Hyatt* v. *Adams,* 16 *Id.* 180-198), and for injuries to her person through the negligence of another (*Mich. Cent. Rd. Co.* v. *Coleman,* 28 Mich. 440); also for slander (*Leonard* v. *Pope,* 27 Mich. 145). If the damages in such cases are her individual property, as expressly held in *Berger* v. *Jacobs,* I can not see why, in reason and on principle, the damages arising from the loss of the society and support of her husband are not also her individual property. Surely, the support and maintenance which she is entitled to from her husband, and which she loses by his abandonment, is capable of ready and accu-

rate measurement in dollars and cents, and can be said to be a property right, which she has lost by the wrongful interference of the defendants. The loss of the society of her husband, and her mental anguish and suffering, are not easily ascertained when compensation is sought, and to be gauged by a money standard; but damages for such anguish and suffering are given, as best the jury can, and are permissible, in most actions of tort. * * *

"There has never been any reason urged against the right of the husband to sue for the loss of the *consortium* of his wife, and if, as shown, the wife is now, under either the liberal letter or spirit of our marriage laws, entitled, as of her own property, to the damages arising from her personal injuries—the injuries of her body or mind—there can be no good reason why she can not sue for and recover damages for the loss of the *consortium* of her husband that does not equally and as well apply to the suit of the husband on account of the loss of her society. The wife is entitled to the society, protection and support of her husband as certainly, under the law, and by moral right, as he is to her society and services in his household. * * *

"It is an old maxim, and a good one, that the law will never 'suffer an injury and a damage without redress.' Will the law aid the husband, and not help the wife in a like case? Not under the present enlightened views of the marriage relation and its reciprocal rights and duties. The reasoning that deprives the wife of redress when her husband is taken away from her by the blandishments and unlawful influences of others is a relic of the barbarity of the common law, which, in effect, made the wife the mere servant of her husband, and deprived her of all right to redress her personal wrongs except by his will."

In the case of *Bennett* v. *Bennett, supra,* the court discussed the nature of this action and treated it as of the nature of a personal injury to the wife, and it was there said: "An injury to the person within the mean-

ing of the law includes certain acts which do not involve physical or personal injury. Thus, criminal conversation with the wife has long been held as personal injury to the husband, and the seduction of a daughter a like injury to the father." And it was there further said: "The basis of the action is the loss of *consortium,* or the right of the husband to the conjugal society of his wife. It is not necessary that there shall be proof of any pecuniary loss in order to sustain the action. *Hermance* v. *James,* 32 How. P., p. 143; *Rinehart* v. *Bills,* 82 Mo. 534. Loss of service is not essential but is merely a matter of aggravation and need not be alleged or proven. *Bigaouette* v. *Paulet,* 134 Mass. 125." Cooley says that the gist of the action is the loss of *consortium,* which inincludes the husband's society, affections and aid. 1 Cooley on Torts, p. 478.

In the case of *Anna Nolin* v. *Marion Pearson* (Mass.), 4 L. R. A. (N. S.) 643, which was a suit by the wife for the alienation of the affections of her husband, the right of the wife to maintain the suit was upheld and many cases are cited in the opinion of the court and in the briefs of counsel; other cases are collected in the foot note, and after a review of the American cases, the following statement is made by the editor of the foot note: "In the United States, Wisconsin, Maine and New Jersey seem to stand alone in denying to the wife the right to sue for the alienation of her husuband's affections and enticing him away from her, thus depriving her of his support, under statutes giving her the right to sue and be sued in her own name." But New Jersey can no longer be classed among the States which deny the right of the wife to maintain this cause of action.

In the case of *Sims* v. *Sims,* 29 L. R. A. (N. S.) 842, 76 Atl. 1063, an appeal was taken from the order of the trial court sustaining a demurrer which was interposed upon the general ground that a suit would not lie, which was instituted to recover damages for maliciously enticing away the plaintiff's husband and thereby alienating his affections. The opinion in that case recited that

plaintiff based her right to sue upon an act entitled "An Act for the Protection and Enforcement of the Rights of Married Women." This act provided that any married woman may maintain an action in her own name and without joining her husband therein, for all torts committed against her or her separate property, in the same manner as she lawfully might if a *feme sole;* provided, however, that this act shall not be so construed as to interfere with or take away any right of action at law or in equity now provided for the torts above mentioned. The second section provided that "Any action brought in accordance with the provisions of this act may be prosecuted by such married woman separately in her own name, and the nonjoinder of her husband shall not be pleaded in any such action." The Court of Appeals of New Jersey reversed the action of the trial court in sustaining the demurrer, and in doing so used the following language in construing the act above quoted: "The question, therefore, presented in this case, in the light of the act of 1906, is *res nova,* and the conclusion we have reached is supported by the great weight of authority. That this act was intended to confer the power upon a married woman to protect and enforce her rights is the specific announcement contained in its title. The body of the act declares that she may maintain an action, as a *feme sole* might lawfully do, and without joining her husband therein, for all torts committed against her or her property. Keeping in mind the old law and the existing mischief, it becomes manifest that the legislative intent which inspired this remedial measure could have been only a desire to confer upon the married woman that equality of remedy as an independent suitor, which would enable her to vindicate her right in person for a tort committed against her, and thus remedy the inequality to which she was subjected by the common law."

It will be seen that our statute giving married women the right to sue, which will later be set out, is broader and more comprehensive than the New Jersey

statute, which the Court of Appeals of that State said was sufficient to authorize the maintenance of a suit by the wife such as we have here.

In the case of *Gernerd* v. *Gernerd,* 185 Pa. 236, involving the question here under consideration, the Supreme Court of that State said: "When the wife has been freed from her common law disabilities and may sue in her own name and right for torts done her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her. Generally, this right has been recognized and sustained in jurisdictions where she has the capacity to sue." One of the earliest American cases holding the wife has the right to sue for the loss of *consortium* of her husband, is the case of *Westlake* v. *Westlake,* 34 Ohio Stat. 627-633, and this has become one of the leading cases, and is cited in many of the subsequent cases on this subject. It was there said: "If, in this State, the common law dominion of the husband over the property and personal rights of the wife has been taken away from him and conferred upon her, and remedies in accordance with the spirit of the civil law have been expressly given to the wife for the redress of injuries to her person, property, and personal rights, all of which I hope to show has been done, then it must follow that she may maintain an action in her own name for the loss of the *consortium* of her husband against one who wrongfully deprives her of it, unless the *consortium* of her husband is not one of her personal rights. * * *

"Is the right of the wife to the *consortium* of the husband one of her personal rights? If it is, then the statute makes the right of action growing out of an injury to the right, the separate property of the wife, for which the Code gives her a right to sue in her own name. Before marriage the man and woman are endowed with the same personal rights. If under no disability, each is competent to contract. When the agreement to marry is entered into, but, before its consummation, each has the same interest in it, and either may sue for a breach

of it by the other. In this State, neither the husband nor wife unconditionally surrenders their personal rights by consummating the contract of marriage. On the contrary, each acquires a personal as well as legal right to the conjugal society of the other, for the loss of which either may sue separately."

In the third edition of Cooley on Torts, volume 1, page 477, the case of *Foot* v. *Card,* 58 Conn. 1, is quoted from at length with approval, and we find there the following quotation from that case: "Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society; the husband to the wife all that the wife owes to him. Upon principle this right in the wife is equally valuable to her as property, as is that of the husband to him. Her right being the same as his in kind, degree and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him. But from time to time courts, not denying the right of the wife in this regard, not denying that it could be injured, have nevertheless declared that the law neither would nor could devise and enforce any form of action by which she might obtain damages. In 3 Blackstone's Commentaries, 143, the reason for such denial is thus stated: 'The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; therefore, the inferior can suffer no loss or injury.' Inasmuch as by universal consent it is of the essence of every marriage contract that the parties thereto shall, in regard to this particular matter of conjugal society and affection, stand upon an equality, we are unable to find any support for the denial in this reason, and the right, the injury, and the consequent damage, being admitted, there comes into operation another rule, namely, that the law will permit no one to obtain redress for wrong except by its instrumentality, and it will furnish a mode for obtaining adequate redress for

every wrong. This rule, lying at the foundation of all law, is more potent than, and takes precedence of, the reason that the wife is in this regard without the pale of the law, because of her inferiority."

In this case of *Foot* v. *Card, supra,* a recovery was permitted without reference to any enabling act authorizing the wife to sue alone. The complaint had been demurred to upon the ground that the wife could not alone maintain this action but that her husband was a necessary party to the action, if any cause of action existed. That contention was disposed of in the following language: "Wherever there is a valuable right, and an injury to it, with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will make the most complete reparation. A technicality must not be permitted to work a denial of justice. The defendant has no possible interest in requiring the husband to be co-plaintiff, other than that she should have security for her costs in the suit, and be protected from a second judgment upon the same cause of action in his name. As she is in no danger of a second judgment, and can compel the plaintiff to give security for costs, it is simply an empty technicality which she here interposes. There are good reasons for the rule that the husband should join in a complaint for damages resulting from an injury to the person, property, reputation or feelings of the wife in every case other than before us. Whenever in any of these she suffers, presumably he suffers. He has a direct pecuniary interest in the result and the defendant is entitled to protection from a second judgment. But in the case before us, it is the pith and marow of the complaint that in alienating the husband's conjugal affection from the wife, in inducing him to deny his conjugal society, in persuading him to give his adulterous affections and society to the defendant, the latter has inflicted upon the plaintiff an injury by which from the nature of the case it is impossible for the husband to suffer injury; for which it is impossible for him to ask redress either for himself

or his wife. * * * In a case of this kind, the wife can only ask for damages by and for herself. The law can not make redress otherwise than to her solely, apart from all others, especially apart from her husband; for no theory of the law as to the merger of the rights of the wife in those of the husband could include her rights to his conjugal affection and society. Although all other debts and rights to her might go to him, there yet remained this particular debt from him to her absolutely alone, and beyond the reach of the law of merger."

We are not called upon to approve all that we have here quoted from this Connecticut case; but the significance of that opinion is that a recovery was permitted without reference to any enabling act permitting the wife to sue alone.

Many other cases are cited in the cases we have quoted from; but those quoted from show upon what theories and under what circumstances recoveries have been permitted. The absurdity and cruel injustice of the common law fiction of the identity of husband and wife has long been recognized, and the tendency of all modern legislation has been toward the emancipation of the wife. But this amelioration of the wife's condition must come through the legislative function, and her disabilities at the common law exist, except in so far as they have been removed by constitutional conventions, or legislative enactments. Some of the disabilities under which the wife still labors, as the result of the common law fiction of the legal unity of the husband and wife, are pointed out in the opinion in the case of *Kies* v. *Young,* 64 Ark. 381. But while she still labors under the disabilities there recited, we think the Legislature has clearly manifested its purpose to manumit her, so far as maintaining an action to enforce any legal right she may have, or to secure redress for any actionable wrong inflicted upon her, where the recovery would inure to her benefit. "Where a married woman is a party, her husband must be joined with her except in the following cases:

"*First.* She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this State.

"*Second.* She may maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character or property.

"*Third.* Where the action is between herself and her husband, she may sue and be sued alone." Kirby's Digest, § 6017.

These words, person, character or property, are of the broadest signification and import, and would appear to include any cause of action which could arise in favor of a married woman, out of any relation which she can legally occupy. Although she still labors under some disabilities, she is given by this statute the power to enforce in her own name any right which she legally possesses. While it appears from a study of the cases, which hold that a wife may sue for the alienation of the affections of her husband, that in some of the States, where the courts so hold, the statutes have entirely manumitted the wife from her common law disability with reference to suing in her own name, it will also appear, from cases which we have cited, and from other cases therein cited, that the right of action has been upheld in the wife's favor where the enabling acts were not as broad as that of this State.

So that, whether this cause of action be denominated a personal right or a property right, the wife, under the laws of this State, may sue if it is either, and the judgment of the court below is therefore affirmed.

AMERICAN INSURANCE COMPANY v. MCGEHEE LIQUOR COMPANY.

Opinion delivered June 29, 1914.

1. JUDGMENT—ASSIGNMENT.—There is no statute authorizing an assignment of a judgment of the Supreme Court. (Page 488.)
2. JUDGMENTS—ASSIGNMENT—TITLE—ENFORCEMENT.—The rights of a judgment-creditor may be transferred to another, so as to carry the right to enforce the judgment, such assignment does not vest the legal title in the assignee, but he can enforce the judgment in the name of his assignor. (Page 488.)
3. JUDGMENTS—ASSIGNMENT—NEGOTIABILITIES.—A judgment is not negotiable and the assignee takes the assignment subject to all the equities between the parties to the judgment. (Page 488.)
4. JUDGMENTS—POWER OF COURT—PAYMENT—REMEDY.—The Supreme Court has power over its own judgment and process, and upon proof of the payment of the judgment, it will issue an order quashing and process erroneously issued thereon. (Page 489.)
5. JUDGMENT—ENFORCEMENT—JURISDICTION OF CHANCERY COURT.—The chancery court has jurisdiction to prevent the enforcement of a judgment of the Supreme Court, where the petitioner, against whom it was rendered, establishes grounds for equitable relief. (Page 490.)

Appeal from Pulaski Circuit Court; *John W. Blackwood,* Special Judge; motions denied.

Cockrill & Armistead, for petitioners.

Kerby & Floyd, for respondent.

PER CURIAM. This is a proceeding, instituted here, by two judgment-debtors, moving the court to quash an execution issued by the clerk of this court, on the ground that the judgment has been satisfied. They also ask that assignments of the judgment by the original judgment-creditor, and its assignee, be stricken from the files.

The American Insurance Company was doing business in Arkansas and gave bond, in accordance with the statute, signed by petitioner A. B. Poe and certain others.

The McGehee Liquor Company sustained a loss under a policy, which was adjusted, and the adjuster gave

a draft on the home office in another State, and the draft was endorsed by petitioner Poe and John B. Driver. Before the draft could be presented for collection, the insurance company became insolvent and passed into the hands of a receiver. The policy holder instituted an action against the company and the endorsers on the draft, and also against the sureties on the bond, and recovered judgment in the trial court against all of them. A supersedeas bond on appeal to this court was executed, and petitioners A. B. Poe and A. J. Graham signed the bond as sureties. When the case was heard here the judgment against the sureties on the original bond of the insurance company was reversed and the cause was dismissed as to them, but the judgment against the insurance company and Poe and Driver as endorsers of the draft was affirmed, and judgment was also rendered against Poe and Graham as sureties on the supersedeas bond. *American Ins. Co.* v. *McGehee Liquor Co.*, 93 Ark. 62.

The petitioners, Poe and Graham, allege in their petition or motion, now filed, that shortly after the affirmance of the judgment an execution was sued out by the judgment-creditor, but that said execution was paid, either by the American Insurance Company or by one of the sureties on the bond. In a supplemental petition it is alleged that the payment was made by W. B. Calhoun and that the judgment was assigned to him by the plaintiff, and that he assigned it to the German Investment Company. It is further alleged that one of the attorneys for the judgment-creditor, instead of having the execution returned satisfied, "caused the same to be returned unsatisfied, and then proceeded to secure the said McGehee Liquor Company to assign said judgment to the corporation named, the German Investment Company, and that this was done * * * for the purpose of defrauding the petitioner" and preventing him from enforcing his right of subrogation against the sureties for amounts that he had paid out for the insurance company on other

judgments. There are other allegations in the motion unnecessary to recite.

The response contains a general denial that the judgment has been satisfied, and contains also denials of the other allegations of the petition except the written assignment set forth therein. But it contains the statement also that, after the case had been appealed to this court and before the reversal of the judgment as to the sureties a writ of execution was issued from the Pulaski Circuit Court to the sheriff of Mississippi County against W. B. Calhoun, and that Calhoun, "to prevent the levy or sale of his property, satisfied said execution and the judgment was assigned to him, * * * as appears upon the margin of the record of said judgment." The records of this court show the assignment made by the plaintiff to the German Investment Company and the subsequent assignments.

It is argued in the first place that the assignments should be stricken from the files because there is no statutory authority to assign a judgment of this court, or to place an assignment upon the files of this court.

It is quite true that there is no statute authorizing an assignment of a judgment of this court, the only statute on the subject of assignment of judgments being one which relates to the assignment of causes of action as well as of judgments rendered thereon. Kirby's Digest, § 4457.

We have held that that statute has no reference to cases pending in this court. *St. Louis, I. M. & S. Ry. Co.* v. *Hambright,* 87 Ark. 242.

But aside from any statute on the subject, the rights of a judgment-creditor can be transferred to another so as to carry the right to enforce the judgment. Such assignment does not vest the legal title in the assignee, but he can enforce the judgment in the name of his assignor. 2 Black on Judgments, § § 940 and 948; 2 Freeman on Judgments, § 421.

A judgment is not negotiable, and, of course, the assignee takes the assignment subject to all the equities

between the parties to the judgment. 2 Freeman on Judgments, § 427.

It would not, therefore, be proper to strike out the assignments unless it is shown that the judgment has been satisfied.

There is, as before stated, an allegation in the petition to the effect that the judgment has, in fact, been paid and satisfied; but that is denied, and the record shows an assignment of the judgment by the judgment-plaintiff.

This court has power over its own process, and it would be proper for this court, upon proof of payment of the judgment, to make an order quashing any process erroneously issued thereon. That is not the exercise of original jurisdiction, but is merely the exercise of powers which courts inherently possess in the control of their own judgments and process. 17 Cyc., p. 1135.

That is as far, however, as this court can go, because it would be an exercise of original jurisdiction for this court to attempt to adjust the equities between the sureties on the bond of the defendant insurance company. If there exists any equities between the parties to be adjusted, a remedy must be sought in a court of original jurisdiction. The admission that Calhoun satisfied the execution issued from the Pulaski Circuit Court and caused the judgment to be assigned to him, and later, to the German Investment Company, raises a question of fact which relates only to the alleged equities between petitioners and Calhoun and those who claim under him, for the judgment of this court was not rendered against Calhoun. The effect of the admission is merely that Calhoun purchased an assignment of the judgment, and the question whether he had a right to do so is one for investigation in a court of original jurisdiction. It is alleged in the petition that the petitioners have instituted an action in the chancery court of Pulaski County against all of the parties claiming an interest in the judgment, and they are seeking to have the petitioners' rights of contribution enforced and the judgment stayed until that

can be done. The sheriff of Pulaski County, to whom the execution was delivered, is also made a party to that suit.

Now, it would be improper to undertake to decide, in advance, the questions involved in that case; but it is not improper to say at this time that, if a cause of action on behalf of the petitioners to prevent enforcement of this judgment against them be established, the chancery court, acting *in personam,* has the power to prevent the enforcement of the judgment, even though it be a judgment of this court. The court can not coerce the officers of this court, but when it acquires jurisdiction of the persons of those who are parties to the judgment, it has the power to prevent them from taking any steps toward the enforcement of the judgment. This, of course, is dependent upon there being a statement of grounds for equitable relief.

The motion of petitioners is, therefore, overruled without prejudice to their rights to seek relief in a court of competent jurisdiction.

FORT SMITH PAPER COMPANY v. TEMPLETON.

Opinion delivered June 29, 1914.

1. CIRCUIT COURTS—APPEAL FROM JUSTICE COURT—JURISDICTION.—If the justice court is without jurisdiction of the subject-matter of an action, the circuit court can not acquire jurisdiction on appeal. (Page 491.)
2. JUSTICES COURT—CONTRACTS—JURISDICTION AS TO AMOUNT.—The jurisdiction of justices of the peace is limited by the Constitution, in matters of contract, to controversies where the amount involved does not exceed the sum of three hundred dollars, exclusive of interest. Const., 1874, art. 7, § 40. (Page 492.)
3. JUSTICES COURT—CONTRACTS—JURISDICTION.—Where there are separate causes of action upon distinct contracts, each for a sum within the jurisdictional amount of a justice of the peace, they may be joined in one action, even though the aggregate amount exceeds the jurisdictional amount. (Page 492.)
4. JUSTICES COURT—RENT INSTALLMENTS—JURISDICTION.—A justice's court is without jurisdiction in a single action upon six install-

ments of rent, each for $100, aggregating a sum of $600, as the suit upon all the installments constitutes but a single cause of action. (Page 492.)

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

Winchester & Martin, for appellant.

1. The circuit court had no jurisdiction, because the justice of the peace had none. The amendment stated an entirely different cause of action. 35 A. L. R. 581; 24 Ark. 177; 10 *Id.* 326.

2. The burden was on defendant to establish its counter claim. The court erred in modifying instruction 1, as asked. Further, the court's instructions were contradictory.

A. A. McDonald, for appellee.

1. When the question of jurisdiction was raised in the circuit court it was proper to permit appellee to amend. 35 Ark. 445; 85 *Id.* 213; 78 *Id.* 595; 83 *Id.* 372.

2. This action was upon a written contract. 24 Ark. 177. The court properly instructed the jury.

McCULLOCH, C. J. Appellant is lessee of a building owned by appellee in the city of Fort Smith under written contract for a term of five years. The contract specifies a "yearly rental of $1,200 for the term," payable in monthly installments "on the first day of each and every month." Appellant moved out of the building and defaulted in the payment of rent for six months, and this is an action instituted before a justice of the peace by appellee against appellant to recover the six installments of $100 each, aggregating the total sum of $600.

The case was tried in the circuit court on appeal from the justice of the peace, and appellant, in addition to other defenses, raised the question of jurisdiction.

If the justice of the peace was without jurisdiction of the subject-matter of the action, the circuit court, of course, acquired none on appeal.

The jurisdiction of justices of the peace is limited by the Constitution, in matters of contract, to controver-

sies where the amount involved does not exceed the sum of $300, exclusive of interest. Constitution 1874, § 40, art. 7.

Where there are separate causes of action upon distinct contracts each for a sum within the jurisdictional amount of a justice of the peace, they may be joined in one action, even though the aggregate amount exceeds the jurisdictional amount. *Berry* v. *Linton,* 1 Ark. 252; *American Soda Fountain Co.* v. *Battle,* 85 Ark. 213; *Modern Laundry* v. *Dilley,* 111 Ark. 350.

It is contended on the part of appellee that each monthly installment of rent due under the contract constitutes a separate cause of action and fixes the jurisdictional amount.

That contention is unsound. All of the separate installments due under the contract constitute a single cause of action, for the contract is not separable, as where the obligations are represented by different instruments of writing. It is true that an action may be maintained upon each installment as it becomes due, the same as upon different items of an account in the course of accrual; but when the enforcement of the right of action is postponed until succeeding installments become due a suit upon them all constitutes a single cause of action.

In *Gregory* v. *Williams,* 24 Ark. 177, 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 parties, are each separate demands, and can be sued upon as such."

The weakness of the contention of appellee is in treating each installment as a separate obligation. It is, in fact, one obligation, evidenced by a single instrument, but payable in installments, and the jurisdiction of the court is fixed according to the aggregate amount.

We are of the opinion, therefore, that the circuit court did not acquire jurisdiction on appeal from the justice of the peace. The judgment of the circuit court is reversed and the cause dismissed.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. FORT SMITH & VAN BUREN BRIDGE DISTRICT.

Opinion delivered June 29, 1914.

1. IMPROVEMENT DISTRICTS — ASSESSMENTS — LEGISLATIVE DETERMINATION.—The Legislature, in passing the act of 1909, creating the Fort Smith and Van Buren Bridge District, did not undertake to determine the amount of benefits, but left the matter to the board of assessors. (Page 496.)
2. IMPROVEMENT DISTRICTS—ASSESSMENTS—SUFFICIENCY OF EVIDENCE.—On appeal from the finding of the circuit court upon the issue of the assessment of benefits of railway property by the building of the Fort Smith and Van Buren bridge, the evidence held sufficient to sustain the finding of the circuit court as to the extent and value of the benefits. (Page 496.)
3. IMPROVEMENT DISTRICTS—ASSESSMENT OF BENEFITS—RAILROAD PROPERTY.—Benefits may be assessed against the property of a railroad company, by reason of the construction of a bridge by a bridge improvement district, and although the result of the construction of the bridge is to create competition for the railroad company. (Page 496.)
4. IMPROVEMENT DISTRICTS—ASSESSMENT OF BENEFITS—BASIS OF ASSESSMENT.—The amount of benefit which an improvement will confer upon particular land, or whether it will be a benefit at all, is a matter of estimate, and, to some extent, speculative, and on the question of benefits, the present use is not conclusive. (Page 496.)

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

W. F. Evans, B. R. Davidson and *Thos. B. Pryor,* for appellants.

1. The construction of the bridge has been a detriment and has not been an advantage to the railroad company's property. Local assessments rest solely on special benefits to the property assessed. 50 Ark. 116; 64

Id. 555. If not benefited, property is not subject to assessment. 68 Ark. 376; 69 *Id.* 68-73. Any statute authorizing an assessment greater than the special benefit to property is unconstitutional. 71 Ark. 17-27; 86 *Id.* 1-8; 96 *Id.* 410-416; 97 *Id.* 322-331; 98 *Id.* 543-9; 90 Am. Dec. 634-41-2-3-4; 71 Atl. 819-824; 68 Am. St. 714, note; 18 Am. Rep. 729; 111 S. W. 364; 172 U. S. 269.

2. Railroad property being dedicated to public use is not peculiarly and specially benefited by an improvement of this character. 4 Am. Rep. 63; 20 Atl. 105; 21 *Id.* 763; 30 N. E. 1036; 51 S. W. 848; 59 Atl. 1031; 61 *Id.* 474; 72 *Id.* 455; 20 A. & E. R. R. Cas. (N. S.) 269-271; 76 Atl. 450. The act takes away passenger traffic and gives it to another and forces these lines to contribute toward paying their fare for forty-five years. 89 Wis. 506; 197 Ill. 344; 107 *Id.* 105; 106 Mich. 13; 54 Mo. App. 265.

3. The commissioners took the assessment made by the railroad commission, multiplied it by two and assessed the railroad on a mileage basis as an entirety, including terminals in other States and also the franchise. 64 Ark. 432; 68 *Id.* 376; 154 U. S. 439; 4 Am. Rep. 63-70. No deduction was made for loss of business.

4. The assessment is contrary to section 1, article 2, Const., 64 Ark. 555; 71 *Id.* 17-27; 85 *Id.* 422-4; 3 Am. Rep. 615. To tax in excess of benefits, special and peculiar, is to take property for public use under guise of taxation. 51 S. W. 848; 172 U. S. 269, and cases *supra.*

Hill, Brizzolara & Fitzhugh, for appellee.

1. The finding of the court is conclusive. 157 S. W. 384.

2. It is too late to reopen the question of the legislative determination of benefits. 100 Ark. 366; *Board Assessors, etc.,* v. *Crawford Co. Bank,* 108 Ark. 419, June 2, 1913; 197 U. S. 430; 81 Ark. 652; 2 Elliott on Railroads, § 786; 181 U. S. 394.

3. Railroads are subject to local assessment. Page & Jones on Assessments, § 594; 181 U. S. 394; 2 Ell. on R. R., § 786.

4. It is true that benefits are largely speculative and prophetic. 197 U. S. 430.

5. The franchise was not assessed. Act No. 251, Acts 1911.

6. There are no concrete facts of inequality. 99 Ark. 508.

7. Assessments are for the future. 197 U. S. 430.

McCULLOCH, C. J. This case involves separate appeals of two railway corporations from assessments of benefits for taxation in support of the Fort Smith & Van Buren Bridge District, an improvement district created by a special act of the Legislature of 1909, authorizing the construction of a bridge across the Arkansas River. Benefits were assessed by the board of assessors, and each of appellant companies prosecuted an appeal to the board of commissioners, thence to the county court, as provided by the statute, and thence to the circuit court.

The assessments made by the board of assessors were sustained by the circuit court. The case was heard by the circuit court upon oral testimony.

The case is argued here by counsel for appellee on the theory that the assessments constitute a legislative determination of the amount of benefits.

This is an unsound contention, for the Legislature, in passing the statute, did not undertake to determine the amount of benefits. That was left to the board of assessors, and the act creating the district authorizing an appeal. This proceeding is, therefore, a direct, and not a collateral, attack upon the assessments.

The case having been heard *de novo* in the circuit court, the question here is whether or not the evidence is sufficient to support the findings of that court. *Schuman* v. *Sanderson,* 73 Ark. 187.

We are of the opinion that the evidence is sufficient to sustain the finding of the circuit court as to the extent

and value of the benefits. The testimony is conflicting and consists mainly of the opinions of witnesses who qualified themselves by showing that they had knowledge of the values of property in the district and the estimated benefits to accrue from the construction of the improvement. Anything like an extensive analysis of the testimony would serve no useful purpose.

It is contended on the part of each of the appellants that the showing made as to loss of earnings of railroad companies during the short period since the bridge was completed and put into operation is conclusive evidence of the fact that no benefits will accrue to the property of the companies on account of the improvement. It is shown that the earnings from passenger traffic have decreased on account of the fact that the interurban trolley line between Fort Smith and Van Buren has created competition in that traffic, which will in the future, as it has done in the past, prove a detriment, instead of a benefit, to the railway companies.

That does not necessarily follow, for the estimated growth of population in the locality may reasonably be expected to increase the traffic, even with the additional competition.

The decrease of earnings in freight traffic is accounted for in the testimony of witnesses by showing poor crops during the year since the bridge was put into operation.

The assessment of future benefits is largely a matter of estimate and to some extent speculative. As said by Mr. Justice Holmes in the case of *Louisville & Nashville Rd. Co.* v. *Barber Asphalt Co.,* 197 U. S. 430, "the amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate, and on the question of benefits, the present use is simply a prognostic and plea of prophecy."

We must depend largely upon the opinions of men of sound judgment and reasonable information on the subject, to determine what the future benefits will prob-

ably be. If it were necessary to find an exact standard, a measure of benefits in advance would be impossible. That view of the matter would necessarily lead to the conclusion that benefits must be enjoyed before there can be an assessment to pay for the improvement, which would be a contradiction in itself. *Salmon* v. *Board of Directors,* 100 Ark. 366.

We are not prepared to say that the evidence in this case, as it appears in the record, preponderates in favor of the amount of benefits found by the assessors and by the circuit court; but we are not called upon to pass upon the weight of the evidence. The question of its legal sufficiency is all that we need pass upon, and we are of the opinion that there is competent testimony of a substantial nature sufficient to base the finding upon as to the amount of benefits fixed.

The judgment of the circuit court is therefore affirmed.

LITTLE v. MCGUIRE.

Opinion delivered June 29, 1914.

1. WILLS—INCONSISTENT PROVISIONS—CONSTRUCTION.—Where different parts of a will are totally irreconcilable, the last overthrows the former part; but this rule is resorted to only to escape total inconsistency. (Page 500.)
2. WILLS—TRUST ESTATE.—Deceased's will, devising certain lands to one M. held to create a trust, where the language, "and * * * I hereby appoint R. N. * * * trustee, to have and to hold the legal title to the property hereinbefore bequeathed to M.," was used, and that M. did not take the legal title under the will, but his rights in the property were those of *cestui que trust.* (Page 501.)
3. TAX SALES—INSANE PERSON—REDEMPTION—CESTUI QUE TRUST.—Where one M., an insane person, under a will, acquired only the rights of *cestui que trust* in certain property, his interest is not such as to bring him within the terms of Kirby's Digest, § 7095, allowing an insane person to redeem after the lapse of more than two years after sale. (Page 501.)

4. LIMITATION OF ACTIONS—RIGHTS OF CESTUI QUE TRUST.—Whenever the right of action of a trustee is barred by limitations, the right of the *cestui que trust*, thus represented, is barred also. (Page 501.)

5. REDEMPTION—CONSTRUCTION OF STATUTES.—Redemption laws will be liberally construed. (Page 501.)

Appeal from Jackson Chancery Court; *George T. Humphries,* Chancellor; reversed.

Hawthorne & Hawthorne, for appellant.

1. An insane person who holds the *legal* title to lands may redeem within two years, but the statute is not broad enough to extend the right to an insane person who only has an equitable title, where the title is in a trustee. Kirby's Dig., § § 7095, 5056.

2. When the trustee is barred by limitation, the *cestui que trust* is also barred. The trustee was barred by the seven years statute of limitations. 53 Ark. 358; Wood on Limitation, § 208; 25 Cyc. 1010; 68 Tex. 150; 51 Ga. 139; 100 U. S. 564; 14 Pac. 874; 20 S. W. 1065; 39 Tenn. 641; 26 S. E. 675; 48 Ky. 423; 55 S. W. 1029.

3. The legal title was in the trustee under the will. 78 N. E. 147; 77 *Id.* 142, and cases *supra.*

Stuckey & Stuckey, for appellee.

1. Appellee had the right to redeem within two years as an insane person. Kirby's Dig., § 7095; 97 Ark. 456; Kirby's Dig., § 7812; 39 Ark. 509. The case, 53 Ark. 358, is not analogous.

2. The statute having never commenced to run against McGuire, an insane person, he is clearly entitled to redeem.

MCCULLOCH, C. J. This is an action instituted on behalf of a person of unsound mind to redeem lands from tax sale under a statute of this State which provides that "all lands, city or town lots belonging to insane persons, minors or persons in confinement, and which have been, or may hereafter be, sold for taxes, may be redeemed within two years from and after the expiration of such disability." Kirby's Digest, § 7095.

Redemption from tax sales is allowed generally for a period of two years after sale, and the above quoted statute is an exception in favor of persons under disability.

The lands in controversy were sold for taxes in the year 1881, and this action was instituted on April 24, 1913, by a person of unsound mind, William E. McGuire, suing by his next friend.

The language of the statute is clear and explicit, and the question involved is whether or not appellee, who is conceded to be a person of unsound mind, was the owner of the land, within the meaning of the statute, at the time it was sold for taxes.

Appellee derives his rights by devise from one Elizabeth Crow, who died in the year 1880, leaving a last will and testament whereby she devised to appellee a beneficial interest in the lands in controversy for and during his life. There are several clauses of the will of Elizabeth Crow with reference to devises of property to appellee, who was her nephew. The language of each is as follows:

"I devise and bequeath to my nephew, William Ed McGuire, for the period of his natural life, all the lands owned by me (describing them), to hold the same for the period of his natural life, and at his death to descend to the heirs of his body lawfully begotten."

The instrument concludes with the following clause:

"It is further my will that all the property hereinabove decreed to my nephew, William Ed McGuire, shall be held, managed and controlled during the life of the said William Ed by the trustee hereinafter named, it not being my intention that he, the said William Ed, shall have the power to alien or to encumber the estate in the property I have bequeathed to him, and for this purpose I hereby appoint Robert Neill, of Batesville, trustee, to have and to hold the legal title to the property hereinabove bequeathed to said William Ed McGuire, with full power to control, rent, lease, and, if necessary, to sell and convey, the life estate of said William Ed

McGuire in the property bequeathed to him, and to apply the proceeds to the support and maintenance of said William Ed McGuire so long as he shall live."

It is our duty to construe the whole will together for the purpose of ascertaining the true intent of the testatrix; and, when this is done, it is clear that the instrument conveys the legal title to the trustee for the benefit of appellee as beneficiary during his natural life, and it does not devise the legal title to appellee. When thus construed, the different clauses of the will are not in conflict with each other.

If any conflict exists, it would be our duty to construe the last provision as controlling, but where all the provisions can be construed together, without doing violence to the language of either, it is the duty of the court to do so.

The rule is that, where different parts of a will are totally irreconcilable, the last overthrows the former; but that rule is never resorted to except for the purpose of escaping total inconsistency. *Cox* v. *Britt,* 22 Ark. 567; *McKenzie* v. *Roleson,* 28 Ark. 102.

The case of *Parker* v. *Wilson,* 98 Ark. 553, is decisive of the present case on the point now under discussion. That case involved the construction of the will of a testatrix, whereby property was, in terms, conveyed to the son of the testatrix, but the clause was followed by another appointing her husband as guardian with authority to take entire charge of the property and manage the same and to bargain, sell and convey the property. We held that that conveyed the legal title to the husband in trust, and that the property did not fall to the guardian of the son, and in the opinion it was said:

"In the application of the rules of construction above announced, we are of the opinion that, under the terms of the will, the testatrix intended something more than to make her husband guardian of her minor children; or to give him power to manage her property, but that she intended to place her property in trust for her children during their minority. She does not stop with

directing him to manage the property, but goes further and uses the word 'hold,' which has a technical meaning as expressing tenure. He is given power to bargain, sell and convey. Hence, instead of merely intending to appoint her husband guardian of her children and to give him power to manage the property for them, we are of the opinion that, by direct and express terms, she made him trustee of her property during their minority, with power to sell same, and that the legal title thereto during the trust term was in him as trustee."

It follows, therefore, that the legal title to the property in controversy was in the trustee, and that, he, and not the *cestui que trust,* was the owner thereof.

Pursuing the inquiry, it further follows that appellee's rights in the property as *cestui que trust* did not bring him within the terms of the statute giving the right to redeem.

In *Chase* v. *Cartright,* 53 Ark. 358, it was held that the statute of limitations ran against a cause of action for the recovery of lands held by trustees and that *cestuis que trust* under disability of minority did not come within the exceptions which permitted infants to prosecute actions after removal of disabilities. The court said:

"Seven years' adverse possesion was sufficient to bar the right of the trustees, they being under no disability; but whenever the right of action in the trustees is barred by limitation, the right of *cestuis que trust* thus represented is also barred."

The cases cited on the brief of appellant abundantly sustain that proposition.

Reasoning by analogy, it is clear that appellee is not entitled to invoke the exemption prescribed by the statute in favor of persons under disability, for he was not the owner of the property within the meaning of the statute and was represented by the trustee, who held the legal title.

Redemption laws are liberally construed, and this court has adhered to that policy. Appellee had such an

interest in the property that gave him the right to redeem during the period allowed by the general statute, but as that time has expired, before redemption can be permitted the person under disability seeking to redeem must be shown to have been the owner of the land at the time of the sale.

Our conclusion is that appellee had no right of redemption, and that the chancellor erred in rendering a decree in his favor. The decree is, therefore, reversed, and the cause remanded, with directions to dismiss the complaint for want of equity.

GRAND LODGE ANCIENT ORDER UNITED WORKMEN v. WOOD.

Opinion delivered June 29, 1914.

1. BENEFIT INSURANCE—SUICIDE—EVIDENCE.—Evidence held sufficient to warrant a finding by the jury that deceased, the holder of a benefit certificate, died as a result of the accidental taking of carbolic acid, and not by suicide. (Page 506.)
2. SUICIDE—QUESTION FOR JURY.—In an action on a benefit certificate of insurance, the jury has the right, in weighing the evidence, to draw inferences from the human instinct of self-preservation in determining whether death resulted from suicide, or resulted from accident; and this is so regardless of the question of where the burden of proof rests. (Page 506.)
3. EVIDENCE—EXPERT TESTIMONY—HYPOTHETICAL QUESTION—OPINION ON ALL THE EVIDENCE.—Parties to a trial have the right to take the opinion of experts upon questions involved in the case which can only be answered by those who have expert knowledge on the subject; but it is improper to submit to an expert all the evidence in the case and take his opinion upon that issue, for that amounts to an invasion of the province of the jury. (Page 507.)
4. EVIDENCE—BENEFIT INSURANCE—EXPERT WITNESS—TESTIMONY OF.—In an action on a benefit insurance certificate, when the issue of suicide is involved, it is proper to ask the opinion of an expert witness concerning the effect of swallowing carbolic acid, in a given quantity and under given circumstances, but it would be highly improper to permit this witness to sum up all the evidence in the case, in matters not exclusively within his knowledge of an expert, and give his opinion thereon. (Page 507.)
5. JUROR—INSANITY—DISQUALIFICATION.—Although a juror may be technically disqualified from jury service by reason of his having

once been adjudged insane, and his not having been legally emancipated from the disability of insanity, when the proof shows that he was not, in fact, mentally disqualified from performing jury service, and that no prejudice resulted from his being accepted on the jury, the verdict will not be disturbed. (Page 508.)

6. JURORS—DISQUALIFICATIONS—OBJECTIONS.—An objection to a juror, on the ground of disqualification, if made after verdict, comes too late. (Page 508.)

Appeal from Ouachita Circuit Court; *W. E. Patterson,* Judge; affirmed.

Carmichael, Brooks, Powers & Rector, for appellant.

1. Where the defense is suicide within two years from date of policy, proofs of death showing that the cause of death was suicide is *prima facie* evidence thereof. Best on Ev., § 273; 44 N. E. 1099; 64 Atl. 903; 27 S. E. 29; 120 Fed. 475; 130 Wis. 61; 22 Wall. 793; 181 U. S. 49; 84 Cal. 570; 79 Fed. 46.

2. Self-destruction means suicide. 105 Fed. 172; 150 U. S. 468; 29 Ill. App. 437.

3. Doctor Newton's report was a part of the proof of death and admissible. 44 N. Y. Supp. 581; 15 N. E. 220; 80 Ark. 196; 81 Hun, 287.

4. The juror, Romack, was insane. Kirby's Dig., § § 4506-8; 64 Conn. 161; 29 Ark. 111; 2 Ill. (1 Scam.) 476. "Jury" means a jury of twelve men. 16 Ark. 384-410; 8 *Id.* 436; 47 *Id.* 568; 32 *Id.* 17-25; 41 Tex. 93.

Creed Caldwell and *H. S. Powell,* for appellee.

1. No objections were saved to the giving and refusal of instructions. 35 Ark. 412; 94 *Id.* 147; 96 *Id.* 379; 104 *Id.* 375.

2. Suicide is never inferred—it must be proven. The jury are the judges of the facts. 61 Ark. 549; 80 *Id.* 190.

3. Doctor Newton's testimony was immaterial.

4. Expert testimony would not have thrown any light on the question. 55 Ark. 593; 62 *Id.* 70.

5. Objection to a juror after verdict comes too late. Kirby's Dig., § 4494.

McCULLOCH, C. J. This is an action to recover the amount of a benefit certificate or policy issued by appellant, a fraternal benefit society, to one of its members, William L. Wood, who died on June 10, 1913. The policy was payable to appellee, who is the infant son of the member.

The application, which formed a part of the contract, contained the following provision:

"I further agree that if, within two years after the date of my taking or receiving said Workman degree, my death should occur by suicide, whether sane or insane, except in delirium resulting from disease, or while under treatment for insanity, or after a judicial declaration of insanity, then the only sum which shall be paid, or which is payable to my beneficiary in my benefit certificate, shall be the amount which I may have paid into the beneficiary fund of the order during my term of membership."

The dead body of William L. Wood was found in a bedroom adjoining his store in Camden in the early morning of June 10, 1913, and the evidence tends to show to a certainty that his death was caused by swallowing carbolic acid.

The sole issue of fact presented in the trial below was whether the acid was taken by accident or whether with suicidal intent.

No exceptions were saved to the instructions of the court. Therefore, the only question presented here is whether or not the evidence was sufficient to sustain the verdict.

Deceased was in the grocery business in Camden, Arkansas, and resided with his wife and son, the appellee herein, in that city. The evidence, as abstracted, does not show how far it was from his store to his residence. He and his wife occupied the same room but separate beds, and she testified that the last she saw of him was when he retired the night before his body was found in the room at the store. She testified that she did not know when he left the room, but when she was summoned

to the store early next morning about 6 o'clock she found the body still warm, as if death had ensued only a short time before. The body was found lying across the bed, in a small bedroom next to the store, about 5 o'clock in the morning. The body was face downward, stretched across the bed, and the cover was partly turned down. The hands of deceased were extended forward and reached slightly over the edge of the bed. There was a strong odor of carbolic acid in the room and a broken bottle containing a little of the acid was found on the floor over behind the bed. The mouth of deceased gave indications that he had swallowed some of the acid. It was a six-ounce bottle, and one of the broken ends of the bottle contained a small amount of the acid. The evidence tends to show that Wood purchased the bottle of carbolic acid a few days before his death for the purpose of administering treatment to a horse which was worked to his delivery wagon. There were a number of other bottles on a shelf in the room, among others a bottle of chill tonic and a bottle of pepsin. A physician testified that Wood suffered with indigestion and the use of pepsin had been prescribed for that ailment.

There was some testimony adduced by appellant to the effect that Wood brooded over the death of his little daughter, which occurred about a year before his death, and that he had become to some extent morose, and thus formed a suicidal intent, which he carried out by swallowing the carbolic acid.

Other testimony adduced on behalf of appellee tended to show that deceased maintained a cheerful disposition up to the time of his death, and that his conduct displayed no disposition on his part to shorten his life.

Several physicians were introduced as witnesses, who testified as experts on the question whether carbolic acid in sufficient quantity to produce death would likely have been unintentionally swallowed by deceased, or whether it would have been expelled from the mouth without swallowing it if there had been no intention to take the dose. There was a conflict in the testimony on

that question. One of the physicians testified that it was possible for a person to take, by mistake, carbolic acid out of a bottle in quantity sufficient to produce death.

We are of the opinion that the evidence was sufficient to warrant the jury in finding that deceased's death resulted from accident in taking the carbolic acid by mistake, and not from taking it with suicidal intention.

The human instinct of self-preservation raises a presumption against suicide, and, as it was not conclusively shown that deceased came to his death as the result of an act committed with suicidal intent, the jury had the right to draw the inference that death resulted from accident, and not as the result of the use of carbolic acid with suicidal intent. *Grand Lodge, etc.,* v. *Banister,* 80 Ark. 190.

The evidence shows that the mother and guardian of appellee, the beneficiary under the policy, in making out proof of loss, stated that the death of deceased resulted from suicide, and appellant cites authorities to the effect that, in a suit on the policy, this constitutes *prima facie* evidence of suicide.

That question is not presented, for, as has already been stated, there were no exceptions saved to the instructions, and we have only before us, for decision, the question of the sufficiency of the evidence.

Whether the statements in the proof of loss changed the burden of proof, we need not decide, but, aside from that question, the jury had the right, in weighing the evidence, to draw inferences from the human instinct of self-preservation in determining whether or not death resulted from suicide, or resulted from accident. This is so, regardless of the question where the burden of proof in the case rests.

Error is assigned in the ruling of the court in refusing to permit counsel for appellant to propound the following hypothetical question to an expert witness:

"Assuming that there is a shelf six inches wide, and four or five bottles on it, one bottle of ink, and a bottle of liniment, and a bottle of antiseptic, and a bottle of

essence of pepsin, and one of chill tonic, and a bottle of pure carbolic acid, and one of coal oil, and a party was found with a lot of carbolic acid that had run out of his mouth and had run down his cheek, enough to burn it, and there was a splotch of carbolic acid on the floor, and a splotch over behind the bed, and a man was lying in repose on his left arm, the cover practically undisturbed, or rather smooth, and the bottle was broken behind the bed, and the odor of carbolic acid being pronounced, in your opinion, would you say death resulted from suicide, or whether it was accidental?"

That witness, as well as others introduced by appellant, were permitted to testify as experts as to the effect of swallowing carbolic acid; but it will be observed that this question submitted to the witness the issue to be determined by the jury, namely, whether all the evidence in the case showed that the acid was taken with suicidal intent, or by mistake.

The parties had the right to take the opinion of experts upon questions involved in the case which could only be answered by those who have expert knowledge on the subject; but it was improper to submit to an expert all the evidence in the case and take his opinion upon that issue, for that would amount to an evasion of the province of the jury. *Castaine* v. *United Railways Co.*, 249 Mo. 192.

It was entirely proper to ask the opinion of the witness concerning the effect of swallowing carbolic acid in a given quantity and under given circumstances, but it would have been highly improper to have permitted this witness to sum up all the evidence in the case, in matters not exclusively within the knowledge of an expert.

There is one other question in the case properly raised, and that relates to the qualifications of one of the jurors who sat in the trial of the case. The juror in question was a member of the regular panel, and was accepted by the parties as one of the jurors in this case. Several months before the trial, he had been adjudged insane and sent to the State Hospital for Nervous Dis-

eases, and confined there for a short period, when he was paroled. He was regularly selected on the jury, probably without knowledge on the part of those who selected him, and served throughout the term of the court. The sheriff and some of the other officers about the court knew of this fact, but it appears not to have been within the knowledge of the attorneys on either side of this case. Appellant's attorneys ascertained the status of the juror after the trial of the case and incorporated the point of his incompetency as one of the grounds for a new trial. A number of affidavits produced by appellee—those of the sheriff and quite a number of jurors who served with the one in question—all state that he was perfectly sane and in normal mental condition, and that they discovered nothing wrong with him throughout his service of about three weeks on the jury.

If it be conceded that the juror was technically disqualified from jury service by reason of his not having been legally emancipated from the disability of insanity, the proof shows with reasonable certainty that he was not, in fact, mentally disqualified from performing jury service, and that no prejudice resulted from his being accepted on the jury.

The statute provides that "no verdict shall be void or voidable because any of the jurymen fail to possess any of the qualifications required." Kirby's Digest, § 4494.

Pursuant to that statute, we have held that objection after verdict, on the ground of disqualification of a juror, comes too late. *James* v. *State,* 68 Ark. 464.

We are of the opinion that there was no error in refusing to grant a new trial on account of the technical disqualification of the juror.

There are other assignments, but nothing else which we deem it necessary to discuss. Judgment affirmed.

ARMSTRONG v. UNION TRUST COMPANY.

Opinion delivered June 29, 1914.

1. EVIDENCE—WRITTEN CONTRACT—PAROL EVIDENCE TO VARY.—Parol evidence is inadmissible to vary, qualify or contradict, to add to or to subtract from the absolute terms of a valid written contract containing no ambiguity. (Page 517.)
2. LEASES—WRITTEN CONTRACT—PAROL EVIDENCE TO VARY.—Appellant entered into a written lease with appellee, the lessor; *held*, in the absence of a showing of any false representations by appellee, upon which appellant relied to his damage, appellant will not be permitted to rescind the lease on the ground that appellee violated an oral agreement between the parties not to let other portions of the leased premises, for certain purposes. (Page 518.)
3. CONTRACT OF LEASE—COMPLETE IN ITSELF—PAROL EVIDENCE TO VARY.—Where a lease, as set forth in plaintiff's complaint, shows a complete contract includes all the particulars necessary to make a perfect contract, and where there is nothing on its face to indicate that it was not designed to express the whole agreement between the parties thereto, parol testimony to vary the same is inadmissible. (Page 518.)
4. CONTRACTS—CONSIDERATION—PAROL EVIDENCE.—Parol testimony is always admissible for the purpose of showing what the real consideration is, in a deed or other writing evidencing a contract; but it can not be introduced to show that there was no consideration, or to show a consideration that would have the effect to render the deed or writing void. (Page 519.)
5. CONTRACTS—PAROL EVIDENCE TO VARY.—It is improper to show by parol any agreement or assurance, contractual in its nature, to be performed in the future by the lessor of certain premises, and which was not expressed in the written contract of lease, and which necessarily tends to vary, alter and contradict the terms of the written lease, by showing different obligations and covenants on the part of the appellee from those expressed in the written contract. (Page 519.)
6. LEASES—COVENANTS—LEASE FOR IMMORAL PURPOSE—LICENSED SALOON.—The leasing of a building for a licensed saloon is not *per se* leasing for an immoral purpose in a legal sense. (Page 520.)

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

STATEMENT BY THE COURT.

On August 5, 1913, the Union Trust Company, as trustee for A. D. Cohn, brought suit in the Pulaski Cir-

cuit Court against W. F. Armstrong, doing business under the firm name of Armstrong Shoe Company. We shall hereafter designate the Union Trust Company, appellee, as lessor, and W. F. Armstrong (the Armstrong Shoe Company), appellant, as the lessee.

The lessor alleged that it rented a certain store room in the city of Little Rock to the lessee for a term of five years from April 15, 1912, at the rate of $1,800 per annum for the first three years of said lease and at the rate of $2,400 per annum during the remaining two years, all of said rents to be paid monthly in advance during the continuance of the lease. It alleged that the lessee had paid his rent up to April 15, 1913, and had refused to pay any further; that the sum of $600 was due, for which it prayed judgment.

On August 11, 1913, the lessee brought suit in the Pulaski Chancery Court against the lessor. The lessee set up in his complaint the written lease; alleged that a material consideration for the obligations entered into under the lease was an agreement and assurance on the part of the lessor that in consideration of the obligations assumed by the lessee the lessor would not allow any whiskey sold or saloon operated in the building; that it would not rent any of the store rooms of said building at less than $100 and $125 per month; that the lessee accepted the obligations of the lease upon his part upon the above express agreements of the lessor, which agreements were not contained in the written lease, but were vital considerations to the lessee in the acceptance of the lease with its obligations on his part; that these oral agreements were intended to be a part of the contract as well as if they had been expressed in the written contract of lease; that the lessor had violated the above agreement by renting various store rooms in the building to different parties at a lower rate of rental per month than it had contracted with the lessee to do. The lessee alleged that the violation of the agreement in regard to the rental of the other store rooms in the building was inimical to the business of the lessee and was a fraud that entitled the

lessee to be relieved from the obligations assumed by him under the lease. He set up that he had not paid the rents for three months past; that he gave up the possession of the property and tendered the same to the lessor, which was refused, and he offered in court to surrender the possession of the property, and prayed that, pending the hearing, the same might be rented under the orders of the court, and asked that the court cancel the lease. Later he amended his complaint, setting up that the lessor itself held the property under a lease for ninety-nine years, which provided that the property should never be used for any immoral purposes; that the lessee relied on the provisions of that lease in accepting his sub-lease of the store room involved; that in violation of such provision the lessor had rented two rooms of the building to saloons of a low order, where immoral practices were indulged by negro men and negro women and white men who resorted there.

The lessee filed a motion in the circuit court to transfer the case pending there to the chancery court, setting up that he had brought suit in the chancery court to cancel the lease under which the lessor had brought suit for rents and surrendered the possession of the property to the chancery court, and asked that the circuit court transfer the cause to the chancery court where he could make his equitable defense and where one suit would terminate the entire contention between the parties. The circuit court granted the motion, and by agreement the two causes were consolidated and heard as one in the chancery court.

The lessor demurred to the complaint of the lessee asking for the cancellation of the lease, on the ground that it did not state facts sufficient to constitute a cause of action. It also answered, denying specifically the allegations of the complaint with reference to the oral agreements and assurances, and setting up that the written lease attached contained the entire agreement of the parties relative to the leasing of the premises; that it

was a complete agreement, and that it could not be varied or its terms added to by parol testimony.

By way of cross complaint, it set up that the lessee owed for rent covering a period from April 15 to November 15, 1913, which he refused to pay, and asked that the lessee's complaint be dismissed for want of equity, and that it have judgment for the rents due up to and including November 15, 1913.

The lessor, also, in an amendment to its answer, denied the allegations of the lessee's amendment to his complaint. It alleged that the alleged oral agreements and assurances relative to the rental of the store room were unenforceable because not in writing, and also because they sought to charge the lessor upon a lease of land for a longer term than one year, and because there was no memorandum, note or writing signed by the party to be charged, and the lessor therefore plead the statute of frauds.

The lessor also demurred to the amendment to the complaint of the lessee, in which it set up the lease from Bishop Morris to the lessor, because the amendment did not state facts sufficient to constitute a cause of action.

After the testimony was all adduced the lessor moved to strike out all the testimony of the witnesses for the lessee relative to the alleged oral agreements and also all the testimony relative to the provisions of the lease from the bishop to the lessor, alleging that all such testimony was incompetent.

The chancellor found that the lease in controversy is valid and free from fraud and should not be cancelled or set aside, and that the lessor had not violated or broken any agreements relative thereto, and dismissed the complaint of the lessee for want of equity, and rendered a decree in favor of the lessor for the amount of the rents due under the contract at the time of the rendition of the decree. To reverse that decree this appeal has been duly prosecuted.

Mehaffy, Reid & Mehaffy and *Baldy Vinson,* for appellant.

1. This is not an attempt to vary a written contract by parol, but is a contention that the consideration for entering into the contract in the first instance has been so flagrantly denied that it amounts to an eviction. A collateral parol agreement may exist independent of the written lease and may be proved by parol. 5 Elliott on Cont., § 4549; 87 Ind. 1; 44 Am. Rep. 747; 61 N. Y. Supp. 235; 106 Mass. 201; 132 *Id.* 367; 74 Am. Dec. 108; 66 Mich. 326; 33 N. W. 502; 14 How. Pr. 155; 35 Pac. 748; 5 Houst. 135.

2. The building should not be used for immoral purposes says the lease. This is a covenant running with the land. 46 Ga. 241; 86 Ky. 156; 3 Edw. Chy. 96; 2 Pa. Dist. Rep. 785; 6 Pick. 26.

Cockrill & Armistead, for appellee.

1. Where a contract is reduced to writing no parol testimony is admissible to change, contradict, or add to, the writing. 21 A. & E. Enc. 1090; 21 *Id.* 1096; 12 Oh. St. 201; 15 Ark. 543; 24 *Id.* 210; 29 *Id.* 544; 35 *Id.* 156; 29 *Id.* 67; 30 *Id.* 186; 80 *Id.* 505; 95 *Id.* 135; 38 Ark. 344, our leading case.

2. The election to rescind came too late. 17 Ark. 228; 35 *Id.* 483.

3. There was no constructive eviction. 8 Mo. App. 329; Taylor, Landlord & Tenant, § 509; 12 Wend. 532; 5 Hill, 54. But if there was, it was waived. 24 Cyc. 1130, 1152-5; 24 *Id.* 1134; 56 N. W. 423.

WOOD, J., (after stating the facts). So far as appellant is concerned, this suit must be treated as an effort on his part to cancel a written lease, which he sets out in his complaint, and to escape its obligations by showing that at the time the lease was entered into and as a consideration which induced appellant to enter into the contract appellee made certain verbal agreements, not expressed in the contract, to the effect that it would not rent other store rooms in the same building below certain

prices, and would not permit them to be used for immoral purposes, which verbal agreements and assurances appellee had not complied with.

The appellee is resisting this effort of appellant, and, on its part, is seeking to have the contract as written enforced. The issue, therefore, presented by the pleadings is whether or not the lessee can escape the obligations of the lease on his part or have the same cancelled by parol testimony tending to prove the oral agreements alleged. To sustain his contention that such testimony is admissible, appellant cites and relies upon the case of *Welz* v. *Rhodius,* 87 Ind. 1. In that case the defendant sold to the plaintiff certain hotel furniture and fixtures for the sum of $6,000. The contract was in writing. It was alleged, among other things, in the complaint in that case, that at the time of purchasing the furniture and leasing the hotel by plaintiff from the defendant the latter agreed "that she would not at any time thereafter permanently establish, open or keep, or cause to be kept, a hotel in the city of Indianapolis," and further agreed "to remain and board at said hotel and to use her influence to aid in retaining the guests of the house and their patronage for the plaintiff at said hotel," and, "but for such understanding and agreement the plaintiff would not have purchased the furniture nor opened a hotel in Indianapolis." It then alleged that the defendant had violated her agreement by erecting another hotel close to the hotel she had leased to plaintiff, and had thus drawn away customers from the plaintiff, who would otherwise have become guests of the plaintiff's hotel, whereby plaintiff's business had been greatly injured, to his damage in the sum of $20,000.

The second paragraph, after setting up the main facts as set forth in the first, alleged "that the defendant, to induce him to buy the furniture and take the lease, falsely and fraudulently represented that she wished and intended to retire from business and remain in the hotel and live on her income, and did not intend to and would not carry on a hotel if the plaintiff would buy

the furniture and lease the hotel, and that he should have the benefit of her good will and influence; that he believed her statements to be true and fully relied thereon and closed the transaction, without which he would not have done so; that soon after plaintiff took possession under the contract of lease defendant left her hotel and opened another adjacent thereto, and used all her endeavors to and succeeded in withdrawing to herself the customers and patrons of the hotel which defendant had leased to the plaintiff, to his damage," etc. The court held that the first paragraph of the complaint stated a cause of action, among other things, saying: "The case before us, however, does not, strictly speaking, involve proof of an additional consideration for the written lease beyond that expressed therein. On the contrary, the consideration of the parol promise sued on is shown to have been the lease itself and the purchase by the appellant of the hotel furniture and fixtures. In the language of the complaint, 'In consideration that the plaintiff would purchase said furniture and lease said property, the said defendant agreed to and with the plaintiff verbally,' etc. This is clearly a collateral undertaking, which in no manner restricts or enlarges any stipulation of the lease, or any obligation of either party, in respect to the subject-matter of that instrument. If, at the same time the lease was made, the parol agreement had been reduced to writing, in a separate instrument, and signed by the parties, it would be regarded as a collateral contract, not necessary to be referred to in any pleading based upon the lease; and it is no less a separate and collateral contract because made by parol. * * * If the agreement not to keep another hotel is merged in the lease, it may just as well be said that the contract for the sale of the furniture is likewise merged. That such collateral agreement may be enforced has been often judicially declared."

Further along in the opinion the court said, concerning the lease: "That instrument seems to be as the parties intended to make it, and the alleged parol agreement,

is so far separate that either may be enforced without effect upon the other."

It thus appears that in the case relied upon the plaintiff, who was the lessee, was not seeking to cancel the written lease under which he held, nor to escape its obligations, but he based his suit upon a parol collateral agreement which he alleged was a consideration and inducement for the written lease, and that he was damaged on account of the violation of the terms of this parol agreement. The opinion is too long to quote in full, but the above excerpts show clearly that the basis for holding that the first paragraph of the complaint stated a cause of action was that it set up a parol agreement that was collateral to the written lease, and based the action for damages growing out of a violation of the terms of this collateral agreement. On this theory the court held, of course, "that the parol contract declared on is a separate contract, collateral only to the lease, in no manner tending to modify or affect any stipulation in the lease or right or obligation created by it; that the parol promise of the defendant was made in consideration that the plaintiff would purchase the hotel furniture and accept the lease of the hotel itself on the terms named in the writing, and, otherwise than this, is an independent contract."

Now, if this were a suit for damages by appellant against the lessor, appellee, upon a parol contract, the consideration for which was the written lease in controversy, and collateral to such lease, and for a violation of which collateral agreement appellant was seeking to recover damages, and to restrain appellee, the case would be analogous to the case of *Welz* v. *Rhodius, supra.* But here appellant is seeking to cancel a written contract or lease entered into by him with the appellee on the ground that there was a parol agreement made in connection with, and as a consideration for it, to the effect that appellee promised to do certain things in the future which it had not done, and which rendered the lease contract void for fraud.

There is no allegation in appellant's complaint to the effect that the appellee made any false representations as to existing or past facts by which appellant was deceived and upon which he relied, and that the contract was entered into upon the strength of such representations, which afterward proved to be false. In other words, there are no allegations sufficient to show that the appellee perpetrated a fraud upon appellant in inducing him to enter into the contract. The appellant does not allege matters sufficient to show intentional false and misleading representations such as would have constituted a tort outside of the written contract and which he could have proved by parol. See *Hanger* v. *Evins,* 38 Ark. 334.

We see nothing, therefore, in the allegations of appellant's complaint to take it out of the familiar rule announced by this court in *Delaney* v. *Jackson,* 95 Ark. 135, as follows: "Parol evidence is inadmissible to vary, qualify or contradict, to add to or subtract from, the absolute terms of a valid written contract containing no ambiguity."

Chief Justice Shaw aptly states the rule as follows: "The rule of law is well established that parol evidence can not be admitted to alter, vary or control a written contract nor to annex thereto a condition or defeasance not appearing on the contract itself. The rule is founded on the long experience that written evidence is so much more certain and accurate than that which rests in fleeting memory, only that it would be unsafe when parties have expressed the terms of their contract in writing to admit weaker evidence to control and vary the stronger and to show that the parties intended a different contract from that expressed in the writing signed by them." *Underwood* v. *Simonds,* 12 Metc. 275.

Our court has over and over again announced the rule. See cases cited in appellee's brief.

In 21 A. & E. Enc. Law, 1091, it is stated: "When the writing does not purport to disclose the complete contract, or if, when read in the light of the attendant facts

and circumstances, it is apparent that it does not contain the stipulation of the parties on the subject, the rule does not apply, for when it thus appears that a part of a complete oral contract, not within the statute of frauds, has been reduced to writing, parol evidence is always admissible to show what the rest of the agreement was, otherwise the contract would not be brought before the court."

Here the lease as set forth in the appellant's complaint shows a complete contract. It includes all the particulars necessary to make a perfect contract, and there is nothing on its face to indicate that it was not designed to express the whole agreement between the parties thereto. There is nothing in the written contract itself, therefore, that would authorize or call for the admission of parol testimony.

In *Kelly* v. *Carter,* 55 Ark. 112, some negroes were about to build a church on a certain lot owned by them. Kelley, who owned land adjacent to this lot, purchased the same from the negroes, agreeing to pay them $500 therefor, and upon the additional consideration that the negroes would not build their church upon any lot in the vicinity. The deed was executed to Kelley and the consideration therein named was $500, but the consideration in regard to not building the church in the vicinity was not mentioned in the deed. The negroes were about to build the church house on a block in the vicinity of the lots owned by Kelley and he brought suit to restrain them, setting up the above facts. In that case we held, that it might be established by parol testimony that Kelley purchased the lot from the negroes, and that as part of the consideration therefor they were not to build their church house on lands in the vicinity of the land owned by Kelley. In that case the court, after announcing the general rule as to the inadmissibility of parol testimony to alter or vary the terms of a written instrument, said: "But the evidence in this case did not contravene that rule. Its tendency was not to contradict, vary or modify

the terms of so much of the contract as was reduced to writing, but to show what the entire contract was."

That case was correctly decided, but it is clearly distinguishable from the case at bar, and does not conflict with the rule here announced. The language of a deed showing the consideration paid is not contractual; it is a mere recital of a past fact as to what was paid, and is not a promise to pay or an agreement to perform certain mutual covenants or conditions. Parol testimony is always admissible for the purpose of showing what was the real consideration in a deed or other writing evidencing a contract; but it can not be introduced to show that there was no consideration or to show a consideration that would have the effect to render the deed or writing void.

In this case, according to the allegations of appellant's complaint, he is seeking to show by parol testimony certain alleged agreements or assurances, contractual in their nature, and which were to be performed in the future, and which were not expressed in the written contract of lease, and necessarily tended to vary, alter and contradict the terms thereof by showing different obligations and covenants on the part of the appellee from those expressed in the written contract.

In the case of *Hanger* v. *Evins, supra,* we said: "Written instruments are held to contain everything of a contractual character which the parties finally intended should be binding, regardless of all previous negotiations."

The view we have expressed on the above issue of law makes it unnecessary to set out the evidence, and to discuss the issue of fact raised by the complaint and answer as to whether or not there was such an oral agreement as appellant alleged. Also the issue as to the statute of frauds passes out.

In a lease from the owner of the property to the lessor of the lessor of appellees is a provision to the effect that the "lessee agrees not to use the premises for immoral purpose or any other act or acts in violation of

the laws of the United States, the State of Arkansas or the ordinances, rules and regulations of the city of Little Rock. Conceding without deciding that this is a covenant running with the land, yet the leasing of a building for a licensed saloon is not *per se* an immoral purpose in a legal sense. See *Com.* v. *McDonough,* 13 (Allen), Mass. 581. Besides there is no forfeiture declared in the original lease nor the lease in suit for a violation of this provision.

The lease contract being valid, there is no controversy as to the correctness of the amount found due under it for which the court rendered judgment in favor of the appellee.

The judgment dismissing appellant's complaint for want of equity and rendering judgment in favor of the appellee on its complaint for the amount of rents alleged and found to be due and unpaid is in all things correct, and it is affirmed.

TAYLOR v. STATE.

Opinion delivered June 29, 1914.

1. SEDUCTION—CHASTITY OF FEMALE—DEFENSE.—A lack of chastity in the female constitutes a perfect defense to the charge of seduction under Kirby's Digest, § 2043. (Page 527.)
2. SEDUCTION—CONDITIONAL PROMISE OF MARRIAGE.—Sexual intercourse accomplished on a promise of marriage conditioned on pregnancy resulting, is not within a statute, making seduction under promise of marriage a criminal offense. (Page 527.)
3. SEDUCTION—CONDITIONAL PROMISE OF MARRIAGE—QUESTION FOR JURY. —In a prosecution for the crime of seduction, *held* it was a question for the jury, under the evidence, as to whether the sexual intercourse was obtained with no other promise than that defendant would marry the prosecutrix in the event that she became pregnant. (Page 527.)
4. SEDUCTION—PROMISE OF MARRIAGE.—Defendant will be held guilty of the crime of seduction, where he and the prosecutrix were engaged to be married, and that while engaged he induced the prosecutrix to have sexual intercourse with him, by promising that if she became pregnant, that he would marry her immediately, and

when she submitted to him because of her engagement and promise, provided that prior to said intercourse, she was chaste. (Page 528.)

5. CRIMINAL LAW—INDICTMENT AS EVIDENCE.—The indictment in a criminal action is of itself a mere accusation or charge against the defendant, and is not, of itself, any evidence of the defendant's guilt. (Page 529.)

6. CRIMINAL LAW—REASONABLE DOUBT—INGENUITY OF COUNSEL.—An instruction is properly refused which instructs the jury to acquit if a reasonable doubt as to defendant's guilt is raised in the minds of the jury by the ingenuity of counsel. (Page 529.)

7. EVIDENCE—SEDUCTION—LETTERS OF ACCUSED—ADMISSIBILITY.—In a prosecution for seduction, letters from defendant to prosecutrix expressing love and affection for her, are admissible in evidence, when identified by the prosecutrix, and her identification corroborated by another witness. (Page 529.)

8. SEDUCTION—IMPEACHING EVIDENCE—PROMISE OF MARRIAGE.—Affidavits made by certain witnesses that defendant told them that he was engaged to marry prosecutrix, in a trial for seduction, are admissible for purposes of impeachment. (Page 529.)

9. SEDUCTION—EVIDENCE—HARMLESS ERROR.—It is harmless error to admit in evidence, in a prosecution for seduction, affidavits made by certain witnesses that defendant told them that he was engaged to the prosecutrix, when the witnesses testified to the same facts. (Page 529.)

Appeal from Fulton Circuit Court; *Eugene Lankford,* Judge, on Exchange; affirmed.

STATEMENT BY THE COURT.

The appellant was convicted of seduction. The prosecutrix testified that she was nineteen years old. She had known appellant since she was ten or eleven years old. They were sweethearts. He first began going with her in the summer or fall of 1910, and continued to do so until November, 1912. She and Taylor were engaged to be married in February, 1912. Taylor asked her to be his wife and she agreed to do so. They discussed the marriage often after their engagement, but no definite date was set when the marriage should take place. It was to be some time in the fall. Taylor had intercourse with her first in May, 1912. The reason she let him have intercourse with her was that they were

going to marry, and he said if anything got the matter with her that they would marry right away. He tried two months before their engagement to have intercourse with her and tried often. She discovered that she was pregnant in July, 1912, and informed Taylor of that fact and he wanted her to take medicine and destroy the child. He refused to marry her, and went to Oklahoma. The child was born and was Taylor's child.

The record shows the following:

Q. Is it not a fact that he promised to marry you if you became pregnant, and that is why you had intercourse with him?

A. He promised when we first had intercourse that he would marry me if anything happened.

Q. Had you ever refused him before this?

A. I had refused him a great many times.

Q. Would you have had intercourse with him the first time if he had not promised to marry you if anything happened?

A. No, sir.

Q. Then the reason you had intercourse with him was because he promised to marry you if you became pregnant, was it?

A. Yes, sir; we were already engaged, and he said if I became pregnant we would marry right away.

She was asked further: "Would you have made any complaint against Hogan Taylor if you had not got in a family way?" and answered, "No; I would not have complained if I had not got in a family way."

The court refused to allow counsel for Taylor to ask the prosecutrix the following question: "Would you like to see this defendant go to the penitentiary?" Appellant saved exceptions to the ruling of the court.

It was shown by the father and mother of Mary Trulson (prosecutrix) that Taylor kept company with their daughter for about a year, and was at their home almost every Sunday in the summer of 1912. "They went together to church, signings and other places often." Mrs. Trulson testified that Taylor courted her daughter

from January, 1912, through most of the year and had kept her company some before that; that they were in Missouri in 1911 and Taylor wrote to her daughter Mary while they were there.

It was shown that Taylor was wearing a ring that he said Mary Trulson gave him.

Witness I. E. Taylor testified, on behalf of the State, that he was a brother of the defendant; that Hogan told him in 1912 that he intended to marry Mary Trulson if he got her pregnant. He was asked if he made an affidavit before Squire Dotson, and admitted that he had. Stated that the affidavit was true, and that what he testified to was true.

Annie Taylor testified that she was the wife of I. E. Taylor and a sister-in-law to the defendant; that she heard Hogan tell her husband that he would marry Mary Trulson if he got her pregnant; that they were engaged to be married if he got her that way. She also stated that she signed an affidavit before Squire Dotson, which was true, and stated that it was also true that he said he would marry her if he got her pregnant. This witness further testified as follows: "Mary Trulson asked me if I thought Hogan would be as good as his word. She said she had missed, 'and if this is what is the matter with me, do you reckon Hogan will be as good as his word?' I told her I did not know what he would do."

While Mary Trulson was on the witness stand several letters were handed her by the prosecuting attorney, which she identified as letters she had received from Taylor while she was in Missouri.

Delcie Burton testified that she addressed two letters for Hogan Taylor to Mary Trulson. Stated that she guessed she would know Taylor's handwriting. She was asked if she had seen his writing and whether she was familiar with it, and replied: "Yes, sir; I have seen his writing." She was then handed certain letters and asked whether or not, to the best of her knowledge, these letters were written by the defendant, and replied in the affirmative. She was asked, on cross examination,

whether all the writing in these letters was the writing of the defendant, and answered that one page did not look like his writing. She was asked whether or not she knew Taylor's handwriting, and answered, "I would not swear to it." She did not know whether the letters then in the envelopes were the letters that were in the envelopes when she addressed them and when they were mailed or not. She didn't know that the letters were in Taylor's handwriting.

The prosecuting attorney, over the objection of appellant, was permitted to read certain letters, which were numbered from 1 to 5, inclusive. The letters were alleged to be the letters of Hogan Taylor to Mary Trulson, and they were full of expressions of love and of a desire of the writer to see his sweetheart and to be in her company, and to have her return to him, to send her picture, and expressing his desire to go to see her, etc. The appellant excepted to the ruling of the court in permitting the letters to be read.

The prosecuting attorney, over the objection of the appellant, was permitted to read the affidavits of I. E. Taylor and Annie Taylor made before Squire Dotson, justice of the peace, on the 31st of March, 1913, in which they stated that Hogan Taylor told them that he was engaged to Mary Trulson in the fall of 1912; that he had promised to marry her at that time. The appellant excepted to the ruling of the court admitting these affidavits.

On behalf of the appellant, several witnesses testified that the general reputation of Mary Trulson for truth and morality was bad. Testimony was also introduced tending to prove that she had made contradictory statements.

Among other instructions, the court gave the following:

"3. If you find from the evidence that the defendant and prosecuting witness, Miss T., were engaged to be married, and that while engaged, the defendant induced said Miss T. to have sexual intercourse with him

by promising that if she became pregnant he would marry her at once, and she submitted to him because of her engagement and promise, you should convict him, provided that prior to said intercourse she was chaste."

Among other prayers for instructions, the appellant offered the following, which was refused:

"16. The court instructs you that if you find the defendant had intercourse with the prosecuting witness under a conditional promise of marriage, and the conditions were that the defendant would marry the prosecuting witness in the event that she became pregnant, then such a conditional promise would not be an express promise of marriage, and you should return a verdict of not guilty."

The appellant also asked the following prayer for instruction:

"10. The jury are instructed that the indictment in this case is of itself a mere accusation or charge against the defendant, and is not, of itself, any evidence of the defendant's guilt (and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of the indictment in this case)." The court amended the instruction by striking out that part in parentheses, and gave the same as thus amended.

Appellant also asked the following prayer for instruction:

"15. The court instructed the jury that upon a trial of a criminal cause, if a reasonable doubt of any fact necessary to convict the accused is raised in the minds of the jury, by the evidence itself, or by the ingenuity of counsel, upon any hypothesis reasonably consistent with the evidence, that doubt is decisive in favor of the prisoner's acquittal."

This instruction was also refused.

To the rulings of the court in giving and refusing prayers for instructions appellant duly excepted.

The jury returned a verdict of guilty, and from a judgment sentencing appellant this appeal has been duly prosecuted. Other facts stated in the opinion.

Watson & Chesnut and *C. E. Elmore,* for appellant.

1. Instruction No. 3 is not the law, but No. 16 for defendant is the law, and should have been given. The only promise made was a conditional one. This does not constitute seduction. Kirby's Dig., § 2043; 22 L. R. A. 840; 39 N. E. 343; 11 A. & E. Enc. Law, 248; 12 Me. 71; 42 Ga. 289; 43 Tex. 402; 16 Tex. App. 34; 20 Cent. Law Jour. 123.

2. Handwriting can not be proven by opinion of nonexperts. 6 Enc. Ev. 423; 33 N. E. 657; 9 Okla. 569; 59 Kan. 172; 30 Oh. St. 600. The letters were incompetent. 77 Ark. 16.

3. In criminal cases neither depositions nor *ex parte* affidavits can be introduced. 14 Enc. Ev. 580; 48 Mich. 54; 66 S. W. 1098; 77 S. W. 3.

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

1. Instruction No. 3 was properly given. 109 Ark. 130.

2. The statute was designed to protect chaste females from devices, tricks and artifices by which a lover, on promise of marriage, violates their persons. 38 S. E. 341; 68 L. R. A. 107; 138 N. W. 521.

3. Affidavits may be used to impeach a witness. 108 Ark. 316.

WOOD, J., (after stating the facts). 1. Counsel for appellant contends that the only promise of marriage made by appellant to the prosecutrix was the conditional one to the effect that he would marry her in the event that she became pregnant, and that the sexual intercourse was obtained by appellant with the prosecutrix upon such promise, and that sexual intercourse obtained on a conditional promise is not seduction under our statute. Appellant's contention as to the law is sound.

The most effective snare which the licentious fowler could set in the way of chaste and unsuspecting females to draw them from the path of virtue is in the form of a false or feigned express promise of marriage. Doubtless more innocent and confiding girls and women have been caught in that trap than any other. Hence, the Legislature enacted our statute making it a penitentiary offense to obtain carnal knowledge of any female by virtue of any feigned or express promise of marriage. (Kirby's Digest, § 2043.) But the statute was leveled at the particular crime of obtaining carnal knowledge of a chaste female through an express promise of marriage. Its purpose was to protect virtuous womanhood, and not to prevent sexual intercourse with a female who was already unchaste. A lack of chastity in the female constitutes a perfect defense to the charge of seduction under this statute. See *Polk* v. *State,* 40 Ark. 482; *Puckett* v. *State,* 71 Ark. 62; *Walton* v. *State,* 71 Ark. 398; *Caldwell* v. *State,* 73 Ark. 139; *Rucker* v. *State,* 77 Ark. 23; *Wilhite* v. *State,* 84 Ark. 67; *Oldham* v. *State,* 99 Ark. 175.

If a woman consents to the act of sexual intercourse upon a promise of the man to marry her only in the event that pregnancy results from it, then the promise is based upon a condition that might not arise. Where a woman yields to sexual embraces upon such promise she is not sacrificing her virtue alone because of a desire to marry the man to whom she yields, but, in such case, she is indulging her lustful passion and is resting upon the promise of marriage only for protection and assistance when her disgrace shall have been discovered. But this statute can only be invoked by the female who to the very time of her fall had held her virtue, so to speak, as "the immediate jewel of her soul," and who was only induced to surrender it through the promise of the man whom she trusted to marry her and solely from a desire to have him keep that promise. The woman who yields her virtue for sexual pleasure and uses the promise of marriage only as a cloak or subterfuge to hide her disgrace is not

within the pale of the protection of this particular statute. As was aptly said by the Supreme Court of Oregon in construing a similar statute: "Its design is to protect the chaste woman from the assaults of a wicked and designing man who makes use of the most potent of all seductive arts to win the love and confidence of a woman by professions of love and marriage, and not one who is willing to gratify her own lustful desire." *State of Oregon* v. *Adams,* 22 L. R. A. 840.

In the latter case it was held that sexual intercourse accomplished on promise of marriage conditioned on pregnancy resulting is not within a statute making seduction under promise of marriage a criminal offense. The same was held in *People* v. *Van Alstyne,* 39 N. E. 343. See, also, *People* v. *Duryea,* 30 N. Y. Supp. 877.

But we do not agree with the learned counsel for appellant in his contention to the effect that the undisputed evidence shows that carnal knowledge of the prosecutrix was obtained solely on the conditional promise that appellant would marry her in the event that she became pregnant. It was a question for the jury, under the evidence, as to whether the sexual intercourse was obtained with no other promise than that appellant would marry the prosecutrix in the event that she became pregnant. True, the evidence shows conclusively that he promised to marry her if she became pregnant, but the jury were warranted in finding from her testimony, taken as a whole, that the intercourse was had on an express promise of marriage and that the condition as to pregnancy was only intended to hasten the marriage. The prosecutrix testified that appellant had tried often to have sexual intercourse with her before their engagement and she had persistently refused, but after they were engaged he said if she became pregnant "he would marry her right away." They had designated some time in the fall for the marriage to take place.

In *Cherry* v. *State,* 38 S. E. 341, the facts were similar, and the court held: "If a single woman allowed a married man to have sexual intercourse with her solely

because of a promise by him to marry her in the event she became pregnant it was purely a meretricious transaction and not a case of seduction. But if an engagement to marry at a designated time in the future already existed between a marriageable man and woman, and she, on the faith thereof, and because of the fact that he had won her affection and confidence, and under the influence of persuasions and entreaties, accompanied by a promise to immediately consummate the marriage in the event of pregnancy, to submit to his lustful embraces, it was a case of seduction."

It follows that the law announced by the court in instruction No. 3 was correct. The court did not err in refusing prayer No. 16, for the reason that it ignored the testimony tending to show that the sexual intercourse was obtained by an absolute promise on the part of appellant to marry the prosecutrix, but to be consummated "right away" in the event of pregnancy.

2. The court did not err in refusing that part of instruction No. 10 included in the parentheses. The part given was complete without this. The part refused was but cautionary, and, in effect, argumentative.

There was no error in refusing appellant's prayer No. 15. This was fully covered by instruction No. 11*, which the court gave. Besides, the prayer was erroneous because it warranted the jury in entertaining a reasonable doubt that might be created in their minds not from the evidence, but merely "by the ingenuity of counsel."

The court did not err in permitting the letters to be read in evidence. These were sufficiently identified by the prosecutrix. Her testimony as to the identification was sufficiently corroborated by the testimony of Delcie Burton.

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*Instruction No. 11.—You are instructed by the court that, in this case, the burden of proof rests upon the prosecution to make out and prove to the satisfaction of the jury, beyond a reasonable doubt, every material allegation in the indictment, and unless that has been done, you should find the defendant not guilty.

There was no prejudicial error to appellant in permitting the affidavits of the Taylors to be read in evidence. These affidavits were admitted by them, and the witnesses stated that the facts stated therein were true. It was for the jury to say whether or not these facts were in conflict with the testimony given by these witnesses at the trial. The court told the jury that the affidavits could only be considered for the purpose of impeachment. They were competent for that purpose. Moreover, if the facts set forth in the affidavits were true, as the witnesses stated, it was harmless error to allow the jury to consider them. It was but a repetition of the same facts, and the testimony was competent and relevant.

There was no reversible error in allowing the sheriff to testify that he went to Bristow, Oklahoma, to get the defendant. The sheriff was merely stating what he did through his deputy, stating it as a fact which he knew.

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

SCHOOL DISTRICT OF OGDEN v. SMITH.

Opinion delivered June 29, 1914.

1. SCHOOL DISTRICTS—CONDEMNATION OF LANDS.—The power conferred upon school districts under Act 376 of the Acts of 1911, as amended by Act 238 of the Acts of 1913, to condemn private property for school purposes, is similar to the power of eminent domain conferred upon railroad corporations. (Page 535.)
2. SCHOOL DISTRICTS—CONDEMNATION OF LANDS—DAMAGES.—The owner of lands which have been condemned for school purposes, is entitled to have his compensation from the time that the district filed its petition to condemn his land. (Page 536.)
3. SCHOOL DISTRICTS—CONDEMNATION OF LANDS—RIGHT TO POSSESSION.—Where a school district has condemned lands under Act 376, Acts of 1911, as amended by Act 238, Acts 1913, the right to the possession of the property becomes absolute in the district upon the payment of the compensation into court as prescribed by the statute, and when the order of court was made vesting title in the district, it relates back to the date of the filing of the petition for condemnation. (Page 536.)

Appeal from Little River Circuit Court; *Jefferson T. Cowling,* Judge; reversed.

STATEMENT BY THE COURT.

At the July term, 1913, of the Little River Circuit Court, the School District of Ogden, acting under the authority of Act 376 of the Acts of 1911, as amended by Act 238 of the Acts of 1913, filed its petition to condemn 8.14 acres of land owned by Frank Smith. The cause was tried on the 18th of July, 1913, and the jury assessed the compensation to be paid by the school district at the sum of $2,500. On the 9th of December, 1913, the school district instituted this suit against Frank Smith, and on the 8th of January, 1914, filed an amended and substituted complaint, which, in substance, is as follows: That plaintiff is a special school district (naming its directors), and that since the 26th day of July, 1913, it has been the owner of the following described land situated in the district (here follows a description of the 8.14 acres of land condemned); that it had title to said land under and by virtue of a judgment of the circuit court made on the 18th day of July, 1913, in a case wherein the school district was plaintiff and Frank Smith was defendant, for the condemnation of the above land; that the compensation assessed by the jury and the judgment of the court in that cause was fixed at the sum of $2,500; that on the 26th day of July, 1913, the school district paid the sum mentioned to A. T. Collins, sheriff of Little River County, in satisfaction of the judgment; that upon the payment of the sum named the title and right to the possession of the lands vested in the school district; that Frank Smith was, upon that day, notified of the payment made to the sheriff; that on the 3d day of September, 1913, the sheriff paid over to Ed Jones, clerk of the court, the above sum of $2,500, and that on the 13th day of October, 1913, the clerk paid the same to Frank Smith; that the court took an adjournment from the July term, 1913, until the 13th day of October, 1913, and on that day the circuit court rendered judgment vesting the title to the

above land in the school district; that the title and the right to possession of the land and all premises thereon, and appurtenances thereunto belonging were vested in the plaintiff on the 26th day of July, 1913, when it paid the compensation to the sheriff for the land; that if the title and right to possession did not vest in the plaintiff at that time, that it did vest and become absolute in the plaintiff on the 3d day of September, 1913, when the compensation was paid to the clerk; that possession of the land and premises was demanded of the defendant on the 26th day of July, 1913, and also on the 3d day of September, 1913, and was refused; that between July 26, 1913, and October 13, 1913, or between September 3 and October 13, 1913, there was situated upon the land potatoes, apples, peaches and corn which were a part of said premises and realty and which belonged to the school district, which were between said dates converted and removed by the defendant, after the school district had paid the compensation; that the defendant, after the compensation was paid, used and kept for himself and his tenants four dwelling houses situated upon the land which were the property of the school district; that for the use of these houses the defendant is due to the school district the reasonable rental value thereof for the time held. Then follows an itemized statement of the amount of the rents claimed, as well as the value of the potatoes, corn, apples, peaches, etc., claimed by the school district, of the total value of $300, for which plaintiff prayed judgment.

The judgment of July 18, 1913, was made an exhibit, and it recites that complaint was filed by the plaintiff against Frank Smith and Henry Moore, Sr., who held a mortgage upon the property, for condemning the 8.14 acres (which is described), and recites that the $2,500 compensation found by the jury as the value of the land condemned shall, within sixty days from the date of the judgment, be paid by the school district to the clerk of the court or the owner of the land, and that the title to the property "shall then be by proper order of the court

vested in the school district, otherwise the title to remain in Frank Smith and Henry Moore, Sr., as their interests may appear, and this cause is continued until the further order of this court, as to the vesting of the title to said property in said school district, and the distribution of said funds as between said Frank Smith and the said Henry Moore, Sr."

The judgment of October 13, 1913, was also made an exhibit, and it recites "that on the 18th day of July, 1913, this cause was tried and submitted to a jury for the assessment of the damages or compensation to be paid by the plaintiff to the defendant for the land sought to be condemned; that the jury assessed the damages or compensation at $2,500, which was by the plaintiff school district paid to the clerk of this court within sixty days from July 18, 1913." It contained the further recital that the mortgage of Henry Moore, Sr., had been satisfied. It concluded with this recital: "It is, therefore, considered, ordered, adjudged and decreed that the following described property (here describing the tract of land in question) be and the same is hereby condemned under the right of eminent domain as vested in said school district by law, and the title to the same is hereby vested in said school district, free from all incumbrances whatsoever, together with all tenements, hereditaments and appurtenances thereunto belonging; and if necessary to secure said premises for said plaintiff, a writ of possession shall issue upon behalf of said plaintiff."

The defendant demurred to the amended and substituted complaint, setting up: First, the same does not state facts sufficient to constitute a cause of action; second, it is shown by the complaint and the decree of the circuit court of Little River County, Arkansas, which is specially referred to in the complaint and made part thereof (which decree was rendered on the 13th of October, 1913); that title to the property did not vest in the plaintiff until said 13th day of October, 1913;" and, therefore, plaintiff "has no cause of action against this defendant."

The court sustained the demurrer, and, plaintiff declining to plead further, its complaint was dismissed, and judgment for costs entered in favor of the defendant.

A. D. DuLaney, for appellant.

Act 376, Acts 1911, is based on § 22, art. 8, Constitution. Acts 1913, Act No. 238, § § 4, 5, 6. School districts have the same authority and right of eminent domain as railroads. Appellee was paid for the land upon the value at the time of condemnation. 54 Ark. 140; 88 *Id.* 533; 15 Cyc. 926-1023; 16 L. R. A. (N. S.) 543, 538; 25 Mo. 277. The court erred in sustaining the demurrer. A corporation does not acquire title until the compensation is paid. Cases, *supra.*

Henry Moore, Jr., for appellee.

1. The title does not vest in the district until confirmation of the award. 60 N. Y. 319; 25 Mo. 515; 66 Kan. 233-9; 28 L. R. A. (N. S.) 91.

2. The title did not vest until the damages have been paid. 59 Ark. 174; 78 *Id.* 184; 99 *Id.* 62.

WOOD, J., (after stating the facts). Section 4 of the act under which the condemnation of the property was obtained by the appellant provides, among other things, that "if the use or enjoyment of the property is needed forthwith for the construction of any building or proper carrying on of any school," the district may "request the court, or the judge thereof, at a convenient day, notice of such application being given such owner, to fix a proper sum of money to be deposited as security for the payment of such damages as may be assessed, whereupon they shall have authority to take immediate possession of such premises for uses as set up in their petition."

Section 5 of the act provides, "If the damages or proper compensation for such property are not agreed upon before the case is called for trial in its regular order, a jury shall be empanelled who, after hearing all the testimony, shall fix the compensation to be paid by such district, not exceeding the actual value of the land taken," etc.

And section 6 provides: "After the compensation is so fixed by the jury, as in the preceding section provided, the school district shall, within sixty days thereafter pay to the owner of said property, or to the clerk of the court wherein such verdict was rendered, the amount of such verdict, and the court shall thereupon enter an order condemning said property and vesting the title in the same for school purposes in said district; provided, either party shall have the right of appeal from any such order or judgment."

It thus appears that the power conferred upon school districts under the above act to condemn private property for school purposes is similar to the power of eminent domain conferred upon railroad corporations. See Kirby's Digest, § § 2947 and 2951 to 2957 inclusive.

In *Kansas City Southern Railway Co.* v. *Boles,* 88 Ark. 533, we held that the value of the land taken for right-of-way purposes was to be estimated as of the time when the petition for condemnation was filed. So here, appellee was entitled to have his compensation from the time that the appellant filed its petition to condemn his land and the jury, in awarding damages, estimated the value of the land at the time the petition was filed. Their award included the value of the land and all appurtenances thereon and the value of all crops growing thereon. It was tantamount to a sale from appellee to appellant with the surrender of the immediate possession to appellant, for this statute contemplates that the school district shall have the right to the immediate possession of the premises upon complying with the provisions of the statute in securing the compensation therefor to the owner, and, while the title to the property is not divested out of the owner and vested in the school district until the court shall have made an order condemning the property and vesting the title to same in the school district, nevertheless the district is entitled to the possession from the time it pays the amount of the award to the owner of the property or to the clerk of the court wherein the verdict was rendered for the owner's

benefit. The purpose of the statute was to give the school district the right of immediate possession upon the payment of the amount of compensation awarded by the jury, if possession had not been previously taken by order of the judge of the court upon securing the amount of such damages under section 4. The right to take immediate possession is conferred upon the school district when these damages are secured by a deposit as provided in section 4, and, if this is not done, then, construing the whole act, we are of the opinion that it was the purpose to give the district the right to the possession as soon as the compensation was paid, whether the order of the court condemning the property and vesting the title was immediately made thereafter or not.

If the school district pays into court the amount awarded as fixed by the jury, it is entitled to possession of the property from that time, the same as if it had purchased the same outright with a contract for immediate delivery, and if the owner, upon demand of possession by the district, refuses to surrender the same, whatever damages in the meantime may result to the district by reason of the refusal of the owner to surrender possession accrue to the district and the owner is liable to the district for the same.

The right to the possession of the property became absolute in the district upon the payment of the compensation into court as prescribed by the statute, and when the order of court was made vesting the title in appellant it related back to the date of the filing of the petition for condemnation. If the owner continues in possession after the compensation has been paid into court he, from that time on, is a mere tenant by sufferance. 15 Cyc. 926 and 1023. See, also, *Fort Wayne & S. W. Traction Co.* v. *Fort Wayne & Wabash Ry. et al.,* 16 L. R. A. (N. S.) 543.

It follows that the complaint stated a cause of action, and the court erred in sustaining appellee's demurrer

thereto and in dismissing the complaint. The judgment is, therefore, reversed, and the cause will be remanded with directions to overrule the demurrer.

HAHN & CARTER v. GOULD SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered June 29, 1914.

1. DRAINAGE DISTRICTS—DITCHES UNDER RAILROAD TRACK—DUTY TO BUILD CROSSING.—Under Act 279, Acts 1909, the general drainage act, it is the duty of a railroad company to build, at its own expense, the crossing over a ditch, carried under or through its track. (Page 539.)
2. DRAINAGE DISTRICTS—"BRIDGE" DEFINED.—The term "bridge," as used in section 28, Act 279, Acts 1909, means "build a crossing over." (Page 540.)
3. DRAINAGE DISTRICTS—CONSTRUCTION OF CROSSING—PAYMENT—RECOVERY OF VOLUNTARY PAYMENT.—Appellants were constructing a drainage ditch, which passed under appellee's roadbed. In order to expedite the work, appellants paid appellee the cost of building the crossing over the ditch; *held*, the appellee railroad company being required to construct the crossing at its own expense, and appellants' payment to it, not being voluntary, appellants were entitled to recover the same from appellee. (Page 541.)

Appeal from Lincoln Circuit Court; *Antonio B. Grace,* Judge; reversed.

STATEMENT BY THE COURT.

Appellants, plaintiffs below, instituted this suit against the appellee, defendant, alleging that they had a contract for digging a ditch with the Kirsh Lake Drainage District; that "it became necessary to carry one of the drainage ditches through the track of the defendant, and the directors of the district and the plaintiffs called upon the defendant to permit the ditch to be constructed through its track, the same to be bridged at the expense of the defendant, as provided in section 28 of the act, approved May 22, 1909. That the defendant wrongfully refused to allow the plaintiffs or the said district to cut the ditch through its track, except upon the payment of the sum of $150; that the ditch had, at the time, been

constructed up to the said track, and it would have cost the district and said plaintiffs much more than said sum to have delayed the work until the rights of the parties could be adjudicated in the courts, and, therefore, the plaintiffs paid the sum under protest and under the following agreement:

"This agreement made and entered into by and between Hahn & Carter, parties of the first part, and the Gould Southwestern Railway Company, parties of the second part:

"*Whereas*, Hahn & Carter have made contract with the Kirsh Lake Drainage District for the doing of the construction work in that district, and in the prosecution of said work it is necessary that the present crossing of the Gould Southwestern Railway Company, near the station of Gould, section 35, township 38, range 5, Lincoln County, Arkansas, be removed and a new crossing put in that corresponds with the improvements in said drainage district; and,

"*Whereas,* The second party claims that it is not properly chargeable with said expense and that it must be borne by either the said drainage district or the first party, but that if the first party will pay the expense of removing the present crossing and putting in the new one, the work will be done by the second party; and,

"*Whereas,* The first party claims that the said expense of installing the new crossing should be borne by the second party;

"*Now Therefore,* To save time in the construction of said crossing, it is agreed that the first party shall deposit with the second party the expense of installing the new crossing, amounting to $150, but that said payment is not an admission that said charge should not be borne by the second party, and that the first party shall have the right to sue for said payment, as having been made under protest and by compulsion of the circumstances. And, if the court shall decide that the said expense should have been borne by the second party, then the first party

shall be entitled to judgment against the second party for said payment, amounting to $150."

(Here signature of parties.)

Plaintiffs say that said demand of the defendant was exorbitant, unlawful, and that said sum was paid under compulsion and that it has been received by the defendant to the use of the plaintiffs; and the plaintiffs therefore pray judgment for the amount thereof, with interest and costs.

The appellee demurred to the complaint. Its demurrer was sustained, and from a judgment dismissing their complaint appellants have duly prosecuted this appeal.

Rose, Hemingway, Cantrell & Loughborough and *A. H. Rowell,* for appellant.

It is the duty of railroads to construct and keep in repair all crossings of public roads, and the appellee is liable. Acts 1909, p. 850; 75 Ark. 532; 166 U. S. 226; 202 *Id.* 562. See also *C. M. & St. P. Ry. Co.* v. *City of Minneapolis,* ms. op. U. S. Sup. Ct., April 1, 1914.

E. W. Brockman, E. B. Kinsworthy, T. D. Crawford and *W. T. Wooldridge,* for appellee.

The railroad company is not liable, and the demurrer was properly sustained. Statutes should be so construed as to render them constitutional. 66 Ark. 466. The taking of a portion of a railroad track for public use without compensation is unconstitutional. 166 U. S. 241; 200 *Id.* 561; 15 Cyc. 696; 16 N. Dak. 313; 76 Neb. 396; 75 Ark. 534; *Ib.* 530.

WOOD, J., (after stating the facts). The question is, Was appellee liable to appellant for the expense of installing a new crossing for appellee's railroad over the ditch which appellant was under contract to construct?

Section 28 of the General Drainage Act of 1909, Act 279, under the authority of which the drainage district and appellant entered into the contract for digging the ditch, provides in part as follows:

"Such ditches shall also be carried under or through any railroad track or tramway, and the owner thereof shall have no claim for damages on that account, but shall bridge such ditch at its own expense."

The term "bridge," as used in the clause of the act quoted, means "build a crossing over." Under the express terms of the act, therefore, the appellee had to build the crossing over the ditch "at its own expense."

The question is not presented here as to whether or not the drainage district or appellants could acquire the right-of-way for the ditch under appellee's railroad without compensation for such right-of-way, and we do not decide that question.

As already stated, the only question presented by this record is whether or not appellee is liable for the expense of installing the new crossing that became necessary in constructing the ditch under its track.

The allegations of the complaint and the contract set forth therein, upon which appellants base their cause of action, show clearly that the question as to whether or not appellee is entitled to compensation for the right-of-way of the ditch under its track or roadbed is not involved.

Section 6681 of Kirby's Digest provides that where any public road or highway shall cross any railroad, such railroad shall construct the crossing. And Judge RIDDICK, speaking for the court in construing this statute in *Southwestern Railway Company* v. *Royall,* 75 Ark. 532, said:

"We think it may well be inferred from the language of this statute that no compensation was intended to be paid the company, either for constructing the crossing or for keeping it in repair.

"When a highway is established across a railroad track in this State, it becomes its duty under this statute to construct the crossings and keep them in repair. This is a police regulation, and similar provisions are found in the statutes of other States. As nothing is said in the act about compensating the company for this burden,

which the law places upon it, we think none can be implied. It seems plain to us that none was intended, for it is not usual to allow compensation for the expense of obeying a police regulation. * * *

"For this reason we are of the opinion that the circuit court correctly held that the company was entitled to no compensation for constructing the crossing and keeping it in repair." See also *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago,* 166 U. S. 226; *Chicago, Burlington & Quincy Railway Co.* v. *Drainage Commissioners,* 200 U. S. 562.

In the recent case of *Chicago, Milwaukee & St. Paul Railway Co.* v. *City of Minneapolis,* it is held:

"The expense of constructing and maintaining the necessary railway bridge over the gap in a railway right-of-way, made by the municipal construction across it of a canal or waterway, with footpaths on each side connecting two lakes, used for public recreation, may be cast upon the railroad company, without denying it the due process of law guaranteed by the Federal Constitution." See 232 U. S. 430.

The statute in regard to railway companies being required to construct crossings over roads or highways, construed in *Railway* v. *Royall, supra,* is precisely similar to the clause of the act under consideration. The principles announced in the above case are controlling here, and it follows that, under the law and the contract between the appellants and appellee, as set up in the complaint, the appellee is liable to appellants in the sum of $150. Under the contract, the payment of this sum by the appellants was not voluntary, and appellants are, therefore, entitled to have judgment for the same against appellee.

The court, therefore, erred in sustaining appellee's demurrer to appellants' complaint and dismissing the same.

The judgment is therefore reversed, and judgment will be entered here in favor of the appellants against appellee for the sum of $150.

FLENNIKEN v. HARMON.

Opinion delivered June 29, 1914.

CONTRACTS—AGREEMENT TO PAY DEBT OF ANOTHER—STATUTE OF FRAUDS.—Appellant orally promised the sheriff, who had a prisoner in custody, that he would pay the prisoner's fine and the costs, in the event that the prisoner did not pay them himself. The sheriff then released the prisoner, who disappeared. The sheriff paid the fine and brought an action against appellant on his promise, to recover the same; *held*, appellant's promise was to discharge the prisoner's obligation, and was within the statute of frauds.

Appeal from Union Circuit Court; *Geo. W. Hays*, Judge; reversed.

STATEMENT BY THE COURT.

Frank Daniels was convicted in the Union Circuit Court of a misdemeanor, and the judgment for the fine and costs amounted to $41.10. The appellant was one of Daniels's attorneys in the circuit court. After the conviction of Daniels, the deputy sheriff was taking him to jail, whereupon appellant stopped the deputy sheriff, who was taking him to jail, and told him that he, appellant, would be responsible for the negro; that he was going to appeal his case to the Supreme Court. The sheriff thereupon released the negro from custody. He turned the negro loose on appellant's word that he would be responsible for him. The sheriff had no agreement in writing with appellant that he would pay the negro's fine or any part of it. Appellant did not say he would pay the fine, but did use the following language: "I will be responsible for him. He is my negro." The sheriff settled the judgment with the county court. The negro went away. The sheriff, being unable to find him, paid the fine and costs and demanded the same from the

appellant, who refused to pay, and thereupon the sheriff (appellee) brought this suit against the appellant. The appellant denied that he was indebted to the appellee, and said that he never agreed orally or in writing to pay the fine and set up the statute of frauds.

The above are the uncontroverted facts upon which a judgment was rendered in favor of the appellee, and this appeal has been duly prosecuted.

Pat McNally, for appellant.

Appellant made no promise to pay the fine and costs, but, if he did, it was oral and within the statute of frauds. 20 Cyc. 188-G; 9 Cal. 328; 5 Minn. 455; 20 Cyc. 187, 186; F. cc., 188 F.; 12 Ark. 174; 76 *Id.* 292.

J. H. Green and *W. E. Patterson,* for appellee.

The transaction is not within the statute of frauds. 8 Johns. (N. Y.) 29; 20 Cyc. 188-G; 21 N. Y. 412; 45 Ark. 75; 22 How. 28; 64 Ark. 465; 89 *Id.* 324; 20 Cyc. 191.

WOOD, J., (after stating the facts). The appellant asked for an instructed verdict in his favor upon the undisputed evidence, and he was entitled to it.

Viewing the evidence in the most favorable light for the appellee, the promise of appellant to be responsible for the negro whom the appellee had in custody meant no more than if the negro was released and failed to pay the judgment against him, that he (appellant) would pay the same.

The testimony showed that, after the negro was released and had gone away, the appellee continued a search for him for something like six months before he mentioned the matter to appellant about paying the fine. The reason he gave for this conduct was that he thought that appellant was also endeavoring to retake the negro, Frank Daniels.

The appellant testified that he did not promise to pay the negro's fine, but wanted the negro released, so that the latter could see his father-in-law and get the money

to pay his fine. Appellant said he had never seen the negro before he was employed to defend him.

The effect of the undisputed testimony was tantamount to a promise on the part of appellant to pay the negro's fine and costs in the event that the negro did not pay it himself. The negro was not discharged from the obligation to pay the fine and costs by the promise of appellant to pay the same. The judgment was not satisfied by virtue of that promise, and, if the negro had been recaptured, he would have been liable for the fine and costs. There was no new and independent consideration beneficial to appellant, and inducing him to make the promise upon which appellee relies. The promise of the appellant, at most, was but a collateral undertaking to satisfy the judgment against the negro, Daniels, in the event that Daniels, himself, was not made to pay the same. And the promise was therefore clearly within the statute of frauds.

The language of appellant to the effect that he would be responsible for the negro, that he was going to appeal the case, could have no other meaning than that, if the Supreme Court affirmed the judgment and Daniels did not pay it and was not present so that he could be taken into custody and forced to pay it, that in that event appellant would pay it. In other words, it was not an unconditional promise upon the part of appellant to pay the judgment against Daniels, but was only a promise to be surety for him, and to see that he paid it. In other words, this record shows that the main purpose of appellant was to answer for Daniels, but not to "subserve some pecuniary business purpose of his own, involving either benefit to himself or damage" to the appellee. His promise, therefore, was within the statute of frauds. Kirby's Digest, § 3654, subdiv. 2; *Kurtz* v. *Adams,* 12 Ark 174; *Chapline* v. *Atkinson,* 45 Ark. 67; *Scott* v. *Moore,* 89 Ark. 324; *Gale* v. *Harp,* 64 Ark. 465; *Long* v. *McDaniel,* 76 Ark. 292.

It follows that the court erred in not granting appellant's prayer for instruction, directing the jury to return a verdict in his favor.

The judgment is therefore reversed, and the cause is dismissed.

WESTERN UNION TELEGRAPH COMPANY v. BLAKE.

Opinion delivered June 29, 1914.

1. TELEGRAPH COMPANIES—DEATH MESSAGE—NOTICE TO COMPANY.—A telegraph company will be held to have notice that the parties contemplate the postponing of a funeral pending the receipt of a reply from the addressee of a death message, to a message sent him, apprising him of the death of his father-in-law. (Page 549.)
2. TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE—POSTPONEMENT OF FUNERAL—HEARSAY.—The testimony of the son and son-in-law of deceased, who assisted in making the arrangements for deceased's funeral, is competent and not hearsay, as showing that the funeral would have been postponed had they received a reply from the plaintiff, stating that he would attend the funeral, to whom they sent a message announcing deceased's death. (Page 550.)
3. TELEGRAPH COMPANIES—DELIVERY OF MESSAGE—DUE CARE—QUESTION FOR JURY.—It is a question for the jury to determine whether defendant telegraph company exercised due care in delivering a message to the addressee thereof, who worked for a lumber company with its office inside the free delivery limits, but when the addressee himself worked outside the free delivery limits. (Page 550.)
4. TELEGRAPH COMPANIES—MENTAL ANGUISH—DAMAGES.—Fifty dollars damages held sufficient compensation for mental anguish suffered by plaintiff, by reason of the defendant telegraph company's failure to deliver a message announcing the death of plaintiff's father-in-law, so that plaintiff could not attend the funeral, when it appears that plaintiff had not seen deceased in seven years, did not correspond with him; when the body was not embalmed, and when other relatives had made all the funeral arrangements. (Page 551)

Appeal from Bradley Circuit Court; *H. W. Wells*, Judge; modified and affirmed.

STATEMENT BY THE COURT.

Ben Blake instituted this action against the Western Union Telegraph Company to recover damages for mental anguish alleged to have been suffered by him on account of the negligent delay in delivering a telegram to him.

On the 16th day of September, 1913, Ruben Upshaw, the father of the wife of the plaintiff, died at his residence about thirteen miles in the country from Doniphan, Mo., and his family sent to the plaintiff the following message:

"Doniphan, Mo., September 16, 1913.

"Ben Blake, Warren, Ark.:

"Father Upshaw died this morning. Will bury tomorrow evening.

(Signed) "W. T. Elkins."

Elkins was also a son-in-law of Ruben Upshaw, and he sent the telegram at 3 P. M. on the day that Mr. Upshaw died. It was sent at the instance of the family to notify the plaintiff and his family of the death of Mr. Upshaw, so that they might attend his funeral. The plaintiff had been living in Warren for about seven years, and was acquainted with a great many people there. He had not visited his father-in-law since he came there to live, but had sent his family to visit him. For seventeen years prior to the time that plaintiff moved to Warren he lived on his father-in-law's farm, and his relation to his father-in-law was nearly like that of a son. The families corresponded after the plaintiff moved to Warren, although he did not himself write to his father-in-law.

The telegram in question was not delivered to the plaintiff until the morning of the 18th of September. The remains of Mr. Upshaw were buried at 4 o'clock on the evening of the 17th of September. His body was not embalmed, and the undertaker testified that the body of the deceased could not have been kept, without decomposition setting in, at that time of the year, longer than twenty-four hours. The son of the deceased testified

that he assisted his mother in making the funeral arrangements for the burial of his father, and that if they had received a message from the plaintiff asking them to delay the funeral until the arrival of himself and his family they would have done so; that the object of sending the message to the plaintiff was to notify him of the death of Mr. Upshaw so that he and his family might attend the funeral.

On the part of the defendant it was shown that the message was delivered at its office in Doniphan for transmission at about 3 o'clock on the 16th day of September, 1913; that on account of the instruments not being able to be worked the message could not be sent until 6 o'clock. It was received by the operator at Warren at 6:20 P. M. on the same day. The operator at Warren testified that he was unacquainted with the plaintiff and made every reasonable effort to find him but was unable to do so; that he inquired at the postoffice and the telephone office and was unable to locate him; that he was finally informed that he worked for the Bradley Lumber Company, and he inquired of that company but was unable to locate him; that the Arkansas Lumber Company had an office within the corporate limits and a commissary outside of the corporate limits; that he inquired at the office of that lumber company, where he thought the time of the men was kept, and that the party that answered the telephone told him that the plaintiff worked for the lumber company, but that he could not tell where he lived or what position he held; that the delivery limits of the defendant did not extend beyond the corporate limits.

In rebuttal it was shown by the plaintiff that the timekeeper of the Arkansas Lumber Company did know plaintiff, and that it was the custom of that company, when a message was sent to any of its employees at its office in the corporate limits of the city of Warren for the message to be delivered to the person to whom it was sent.

The timekeeper of the lumber company testified that the telegraph company did not inquire whether or not plaintiff worked for the lumber company.

The jury returned a verdict for the plaintiff in the sum of $250, and the defendant has appealed.

Other facts will be referred to in the opinion.

George H. Fearons, of New York, *N. B. Scott* and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. The burden was on plaintiff to show that the funeral would have been postponed, nor did defendant have notice that it was contemplated the funeral would be postponed. 92 Ark. 219; 87 Tex. 38; 27 S. W. 52; 87 Tex. 7; 26 S. W. 490; 27 S. W. 144; 97 Tex. 298; 78 S. W. 491; 93 *Id.* 686; 77 *Id.* 273; 60 *Id.* 982. Special circumstances claimed to give rise to damages must have been in contemplation of the parties or no recovery can be had. 78 Ark. 545; 84 *Id.* 457; 80 *Id.* 554; 99 *Id.* 117; 75 *Id.* 469.

2. Incompetent testimony was admitted which was material.

3. The free delivery limits were confined to the corporate limits of Warren. Blake lived beyond the limits. 89 Ark. 402; 96 *Id.* 213; 161 S. W. 1062.

4. The verdict is excessive. 90 Ark. 59; 101 *Id.* 487.

B. L. Herring, for appellee.

1. There is plenty of substantial evidence that the funeral would have been postponed.

2. Where the existence of a particular mental state is a relevant fact, declarations which indicate its existence are competent circumstantial evidence, and consequently primary evidence, competent, notwithstanding that the declarant is available as a witness. 16 Cyc. 1181, subdiv. (a), 1184 subdiv. (h).

3. Appellant knew the mssage was a death message, and that damages might result from negligence in delivery. 99 Ark. 117; 80 *Id.* 554; 87 *Id.* 303.

4. The message could have been delivered within the corporate limits. It was its duty to do so. 82 Ark. 117; 98 *Id.* 87.

5. The verdict is not excessive. 80 Ark. 554.

HART, J., (after stating the facts). It is first contended by counsel for defendant that the latter had no notice that it was contemplated that the funeral would be postponed. The testimony shows that if the message had been delivered on the afternoon on which it was sent the plaintiff and his family could not have left Warren until 2 o'clock A. M. the next morning, and could not have arrived at Doniphan until between 9 and 10 o'clock on the morning of the 18th inst.; that the funeral was had at 4 o'clock on the evening of the 17th inst. Therefore, they contend that the plaintiff and his family could not have attended the funeral, had plaintiff received the message on the afternoon on which it was sent, and that the language of the telegram did not convey any notice that the funeral would be postponed.

In the case of *Harrison* v. *Western Union Telegraph Co.,* 143 N. C. 147, 10 Am. & Eng. Ann. Cas. 476, in regard to a similar contention, the court said:

"We think the learned counsel for the defendant takes a view much too restricted when he contends that the only purpose of the telegram was to notify the mother of the hour of the interment, and that nothing else was reasonably within the contemplation of the parties. The evident purpose was to notify the stricken mother at once that her son was dead, to the end that she might come without delay and have the melancholy pleasure, and perform the sacred duty, of being with his remains as long as possible before they were committed forever to the grave.

"The fact that the hour fixed for the funeral is stated in the telegram is a mere incident to the general purpose for which the telegram was evidently sent."

So it may be said here the language of the telegram notified the defendant of the near relationship between the plaintiff, the sender of the telegram, and the person

named in it. The message itself suggested that its object was to notify the plaintiff of the death of a near relative, and also carried with it the suggestion that if there was not sufficient time for the plaintiff to arrive at the hour named in the message the funeral would be postponed until he could arrive.

It is next insisted by counsel for defendant that there was no competent testimony tending to show that the funeral would have been postponed had the message been received from the plaintiff to the effect that he desired to attend it. We do not agree with them in this contention. The son and son-in-law of the deceased testified that they assisted Mrs. Upshaw in making the funeral arrangements for her deceased husband, and that it was understood and agreed between themselves that the funeral would be postponed if word was received from the plaintiff and his family that they desired to attend; that the object in sending the message to the plaintiff was to notify him and his family of the death of Mr. Upshaw in order that they might attend the funeral. The son and son-in-law having testified that they assisted in making the funeral arrangements, their testimony in regard to the postponement of the funeral was not hearsay, and was therefore competent to show that the funeral would have been postponed had the plaintiff notified them to do so.

It is next insisted by counsel for defendant that it is not liable, because the plaintiff did not live within the free-delivery limits of the telegraph company at Warren, and that no fee was paid to send a special messenger to deliver it. The testimony shows that the plaintiff was a night watchman for the Arkansas Lumber Company and lived just outside of the delivery limits of the telegraph company at Warren; that the lumber company had an office within the free delivery limits at Warren, and that it was the custom of the timekeepers to deliver telegrams to employees which were sent to its office within the free delivery limits; that the plaintiff was well known to the officers of the lumber company there, and that the

lumber company would have delivered the message to him, had it been delivered to its office within the corporate limits of Warren. The question of whether the defendant company, by the exercise of ordinary diligence, could have delivered the message to the plaintiff within its delivery limits, under the facts and circumstances adduced above, was one of fact for the jury, and was properly submitted to it for its determination. *Arkansas & Louisiana Ry. Co.* v. *Stroude,* 82 Ark. 117. See also *Western Union Telegraph Company* v. *Webb,* 94 Ark. 350. It will be remembered that, although the telegraph operator at Warren testified that he inquired at the office of the Arkansas Lumber Company for the plaintiff and was told that he worked for the company but that his address and whereabouts were not at the time known, the timekeeper for the lumber company testified that he did know the plaintiff, and that no inquiry was made of him by the telegraph company. It was also shown that if the message had been delivered to the lumber company its employees would have delivered the message to the plaintiff.

It is next contended that the verdict was excessive; and in this contention we agree with counsel for defendant. It is true that in the case of the *Western Union Telegraph Company* v. *Rhine,* 90 Ark. 57, we allowed a recovery of $400 under somewhat similar circumstances. There it was shown that the body became badly decomposed and offensive odors came from it, and we said it could have afforded the mother but little consolation or satisfaction to have viewed her son's remains in such condition, if indeed it was practical for her to view them at all. There is a great difference, however, between the affection existing between a mother and her son and a son-in-law and his father-in-law. The body of the deceased in the present case was not embalmed, and the undertaker testified that the body could not have been kept longer than twenty-four hours without becoming decomposed. Mr. Upshaw died on the morning of the 16th inst. and was buried at 4 o'clock in the afternoon on the next day. The testimony shows that, had the

telegram been delivered to the plaintiff without delay, he could not arrive at Doniphan until between 9 and 10 o'clock on the morning of the 18th. He would then have had to travel thirteen miles to the residence where the deceased's body lay, and by the time he arrived there the body would have been necessarily discolored and badly decomposed. Therefore, instead of seeing the features of Mr. Upshaw as they appeared in life, he would only have seen his discolored and decomposed body and have been permitted to follow it to the grave. The plaintiff had not seen his father-in-law for seven years, and did not during that time visit him, although a correspondence was kept up between his family and that of his father-in-law. The plaintiff himself, however, had not written to his father-in-law during these seven years. The son and another son-in-law lived near Reuben Upshaw and made all arrangements for the funeral. There was no duty devolving upon plaintiff in that regard, and all he could have done would be to follow the body to the grave. We think under the circumstances related above that the verdict of $250 was too much. We think that $50 would have been a sufficient amount to compensate plaintiff for all mental pain suffered by him. The judgment, therefore, will be reversed, and judgment will be entered here for plaintiff in the sum of fifty dollars.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. RUSSELL.

Opinion delivered June 29, 1914.

1. STATUTES—ADOPTED CONSTRUCTION.—Where the Legislature adopts a statute of another State which has been construed by the courts of that State, it will be held that that interpretation was also adopted. (Page 555.)
2. DEFINITIONS—"PERMIT"—JOHNSON GRASS.—The word "permit" as used in section 2, Act 46, Acts 1909, making a railroad company liable for damages resulting from permitting Johnson grass to go to seed on its right-of-way, *held*, to mean "to allow or suffer," and that it implies that the owner did not attempt to prevent the Johnson grass from maturing and going to seed. (Page 555.)

3. JOHNSON GRASS—PERMITTING SAME TO GO TO SEED—LIABILITY OF RAILROAD COMPANY.—Evidence held sufficient to show that defendant railroad company permitted Johnson grass to go to seed on its right-of-way, causing damage to plaintiff's land adjoining, within Act 46, Acts 1909. (Page 555.)

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

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

This suit is based on section 2, Act 46, Acts 1909, page 103. This is an exact copy of the Texas statute construed in 87 S. W. Rep. 1144. When the Legislature adopts a statute of another State which has been construed by the courts of that State, the interpretation also is adopted. 78 Ark. 346; 98 *Id.* 125; 104 *Id.* 417; 82 *Id.* 334. Where a land owner permits Johnson grass to grow on his own land he can not recover.

G. C. Russell and *Webber & Webber,* for appellee.

There is no evidence that the Russells "*permitted*" any Johnson grass to go to seed on their lands. The Texas act was construed in 120 S. W. 930; see 87 S. W. 1144; 91 *Id.* 328; 101 *Id.* 1080; 109 *Id.* 984; 134 *Id.* 280; 109 *Id.* 984. Under these decisions the judgment is right and should be affirmed.

HART, J. Appellees instituted this action in the circuit court against appellant, and in their complaint alleged that appellant permitted Johnson grass to go to seed on its right-of-way so that ninety acres of their land adjoining the right-of-way of the railway company became sodded and implanted in Johnson grass, to their damage in the sum of $2,700. In addition they sued for $25 statutory damage. Appellant answered, denying the allegations of the complaint, and alleged that if appellees' land did become sodded and implanted with Johnson grass, appellees permitted Johnson grass to grow and mature on their own lands. At the conclusion of the testimony, the court instructed the jury to return a verdict for appellees in the sum of $25, which was done. From the judgment rendered, appellant has duly prosecuted an appeal to this court.

The suit is based on section 2 of Act No. 46 of the acts of the Legislature of the year 1909. It is as follows: "If it shall appear upon the suit of any person owning, leasing or controlling land contiguous to the right-of-way of any such railroad or railway company, or corporation, that said railway or railroad company, or corporation, has permitted any Johnson grass or Russian thistle to mature or go to seed upon their right-of-way, such person so suing shall recover from such railroad or railway company or corporation, the sum of twenty-five ($25) dollars, and any such additional sum as he may have been damaged by reason of such railroad or railway company or corporation permitting Johnson grass or Russian thistle to mature or go to seed upon their right-of-way.

"Provided, any owner of land or any person controlling land contiguous to the right-of-way of any such railroad or railway company or corporation company, who permits any Johnson grass or Russian thistle to mature or go to seed upon said land, shall have no right to recover from such railroad or railway company, or corporation, as provided for in this act." Acts of 1909, page 102.

The act in question is an exact copy of one passed by the Legislature of the State of Texas. See Session Laws of Texas of 1901, page 283. The Texas act was construed by the Supreme Court of Texas on June 19, 1905, in the case of the *San Antonio & A. P. Ry. Co.* v. *Burns,* 87 S. W. 1144. The court held:

"Laws 1901, page 283, chapter 117, provides that one owning, leasing, etc., land contiguous to the right-of-way of a railroad, which has permitted any Johnson grass or Russian thistle to mature or go to seed on its right-of-way, shall be entitled to recover damages occasioned by reason of such grass, provided that any owner, etc., who permits any such grass or thistle to mature or go to seed upon the land shall have no right to recover. *Held,* that where Johnson grass was communicated to land from a railroad right-of-way, but the owner permits

it to mature and go to seed thereon, he can not recover from the railroad." See also *Doeppenschmidt* v. *I. & G. N. Ry. Co.,* 101 S. W. (Supreme Court of Texas) 1080. This case was decided May 8, 1907.

It is well settled in this State that where the Legislature adopts a statute of another State which has been construed by the courts of that State it will be taken that this interpretation was also adopted. *State* v. *Arkansas Brick & Mfg. Co.,* 98 Ark. 125; *McNutt* v. *McNutt,* 78 Ark. 346; *Knights of Maccabees* v. *Anderson,* 104 Ark. 417; *Snellen* v. *K. C. So. Ry. Co.,* 82 Ark. 334. Therefore, it is contended by counsel for appellant that the evidence in this case shows that appellees permitted Johnson grass to mature and go to seed upon their land and that they have no right to recover in this action. We think, however, the undisputed testimony shows that appellees did not permit Johnson grass to mature and go to seed on their land within the meaning of the statute. The word "permit," as used in the statute, means to allow or suffer. It implies that the owner did not attempt to prevent the Johnson grass from maturing and going to seed. The evidence for appellees shows that they did not discover Johnson grass on their land until the year 1910; that during that year and the year 1911 they persistently cultivated the land and tried to keep the Johnson grass from maturing and going to seed; that some of it might have gone to seed, but that if it did so it was in spite of their efforts to prevent it. We may assume that the action of the court in directing a verdict for appellees was based upon this testimony. The evidence shows that appellant permitted the Johnson grass to mature and go to seed on its right-of-way during the years 1910 and 1911, and that during these years appellees made every effort to prevent it from maturing and going to seed on their land, to which it had spread from the right-of-way of the appellant railroad company. See *I. & G. N. Ry. Co.* v. *Voss,* 109 S. W.

(Texas Civil Appeals) 984; *M., K. & T. Ry.* v. *Tolbert,* 134 S. W. (Texas Civil Appeals) 280.

It follows that the judgment must be affirmed.

WILKES *v.* STACY.

Opinion delivered June 29, 1914.

1. CONTRACTS—COMMERCIAL TERMS—EXPLANATION.—While words in a contract relating to the ordinary transactions of life are to be construed according to their plain, ordinary and popular meaning, yet if, in reference to the subject-matter of the contract, particular words and expressions have by usage acquired a meaning different from their plain, ordinary and popular meaning, the parties using those words in such a contract must be taken to have used them in their peculiar sense; so words, technical or ambiguous on their face, or foreign or peculiar to the sciences or arts, or to particular trades, professions, occupations or localities, may be explained, where they are employed in written instruments, by parol evidence of usage. (Page 560.)
2. CONTRACTS—BREACH—CONSIDERATION — COMMERCIAL TERM — SUFFICIENCY OF COMPLAINT.—A complaint in a suit for damages for breach of a contract to let defendant have plaintiff's "entire furnishing trade" for a certain period, *held* to state a cause of action, as the commercial term might be explained by oral proof. (Page 561.)
3. CONTRACTS—BREACH—PROFITS—RECOVERY.—There may be a recovery of profits lost by reason of the breach of a contract to let defendant have plaintiff's "entire furnishing trade" for a certain period. (Page 562.)
4. CONTRACTS—MUTUALITY.—W. purchased the interest of S. in a business in which they were both interested, for a certain sum, W. agreeing to give S. a monthly sum for a year for service rendered, and S. agreeing to give to W. his entire furnishing trade for one year. *Held,* the contract was not void for lack of mutuality. (Page 563.)
5. EVIDENCE—PAROL EVIDENCE TO EXPLAIN COMMERCIAL TERM.—The rules of evidence permit the introduction of parol testimony to explain trade or commercial terms, or terms which have a fixed meaning, when used in a written contract. (Page 563.)

Appeal from Woodruff Circuit Court, Northern District; *J. M. Jackson,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant sued to recover damages under the following complaint:

"That the defendant, C. R. Stacy, and Charles N. Wilkes were engaged in the general merchandise business, under the firm name of Wilkes & Stacy, during the year 1911; that on the 29th of October the defendant sold to this plaintiff his entire interest in said store, this plaintiff thereby succeeding to said business of Wilkes & Stacy, for the sum of $3,640 (which was paid to the defendant), and the further consideration of an allowance of $75 per month to the defendant for the year 1911 for salary, and as a further consideration to this plaintiff for the payment of said sum of money, defendant agreed to furnish this plaintiff with his entire furnishing trade for the year 1912. It was agreed that said "furnishing trade" mentioned in the memoranda was to consist of goods and merchandise to be furnished the hands and tenants of the defendant for the year 1912, the payment of which he, defendant, obligated himself and promised to pay; said credit being extended solely to defendant.

"A memorandum of said contract and agreement was reduced to writing and in duplicate, and a copy of said memorandum is attached hereto, marked exhibit 'A,' and made a part hereof. That at the time said contract was made it was agreed between the plaintiff and the defendant that the 'furnishing trade' in the contract was to consist of the necessary articles, goods and merchandise to be furnished the tenants and employees of the defendant for the purpose of maintenance during the year 1912. That said furnishing was to be of the goods, merchandise and articles handled and sold by this plaintiff. Plaintiff states that in compliance with his agreement he bought and purchased the necessary goods and merchandise and articles to comply with said agreement, at a cost of $5,000, and stood ready at all times during the said year 1912 to furnish and deliver the same. Plaintiff further states that in violation of said contract and

agreement the said C. R. Stacy failed and refused to deliver his 'furnishing trade' as agreed upon with this plaintiff for the year 1912, and directed and delivered it to the E. H. Conner Mercantile Company, a firm doing a competitive and similar business to this plaintiff in the town of Augusta. That during said year of 1912, the said C. R. Stacy delivered to the said E. H. Conner Mercantile Company the accounts of his said hands, for which he became liable, which he agreed and contracted to place with this plaintiff, to the amount of $2,516. That under said contract and agreement, he agreed to buy goods from this plaintiff, the gross amount of which was $2,516; that the contemplated profits on said 'furnishing trade' was the consideration for which plaintiff made the contract herein mentioned.

"That said profits amounted to the sum of $960; that by reason of defendant's failure to furnish said 'trade' as agreed upon, this plaintiff is damaged and injured in the sum of $960, this being the net profit to this plaintiff on said goods and furnishings which were furnished to defendant's hands and tenants on account and credit of defendant, contemplated by the contract herein, for the year 1912.

"Premises considered, plaintiff prays that he have and recover of and from the defendant the sum of $960 and all costs in this suit expended."

The exhibit mentioned in the complaint, as being attached to it, was as follows:

"Agreement issued in duplicate form between C. R. Stacy and T. D. Wilkes.

"I, Conner Stacy, agree to take the amount of money I paid in the store of T. D. Wilkes & Bro., $3,640.33 (three thousand six hundred and forty and 33/100 dollars), and a salary of $75 per month for the year 1911 for services rendered and to be rendered, for my entire interest in said store now owned by Wilkes & Stacy. C. R. Stacy agrees to let T. D. Wilkes, or his agents, have his entire furnishing trade for the year 1912. T. D.

Wilkes agrees to allow the said C. R. Stacy 10 per cent discount on goods furnished the said C. R. Stacy's hands at the end of season 1912.

(Signed) "C. R. Stacy.
"T. D. Wilkes.

"Witness: C. N. Wilkes."

A demurrer was sustained to this complaint, and this appeal has been duly prosecuted from the order of the court dismissing the cause of action.

Harry M. Woods, for appellant.

1. The damages alleged in the complaint were not speculative, or indeterminable, but the allegations are specific and accurate, and the profits claimed are certain and probable. This case falls within the rule stated by this court in *S. W. Tel. & Tel. Co.* v. *Memphis Tel. Co.,* 111 Ark. 474; see also 13 Cyc. 51-54; 69 Ark. 219; 78 Ark. 336; 80 Ark. 228; 91 Ark. 427; 95 Ark. 363; 97 Ark. 135; 103 Ark. 584.

2. It may be conceded that the term "furnishing trade" used in the contract is indefinite, yet the complaint alleged specifically the meaning and use of the term, and parol evidence was admissible to show its particular meaning among business men in the section of the country in which it is used. Lawson on Contracts (1893), § 383; 106 Ark. 409, and cases cited; 9 Cyc. 578, 582, 587 and 772; 85 Ark. 576.

S. Brundidge, for appellee.

1. Appellant, in his complaint, attempted to change and vary the terms of the written contract. He can not change or vary the terms of the contract by parol. 94 Ark. 130; 105 Ark. 50; 54 Ark. 423; 100 U. S. 686-692.

2. The profits alleged in the complaint, for the loss of which appellant seeks to recover, are too speculative and remote. Cases cited by appellant; 106 Ark. 400-410.

SMITH, J., (after stating the facts). The allegations of the complaint appear to be more specific and definite than those contained in the exhibit. The complaint alleges the meaning of the term "furnishing trade" as used

in the exhibit. The meaning of trade terms may be shown. The rule in such cases is stated in Lawson on Contracts, (2 ed.), § 390, p. 450.

"The customs of particular classes of men soon give to particular words different meanings from those which they may have among other classes, or in the community generally. Mercantile contracts are commonly framed in a language peculiar to merchants, and hardly understood outside their world. Agreements which are entered into every day in the year between members of different trades and professions are expressed in technical and uncommon terms. The intentions of the parties, though perfectly well known to themselves, would be defeated were the language employed to be strictly construed according to its ordinary meaning in the world at large. Hence, while words in a contract relating to the ordinary transactions of life are to be construed according to their plain, ordinary and popular meaning, yet if, in reference to the subject-matter of the contract, particular words and expressions have by usage acquired a meaning different from their plain, ordinary and popular meaning, the parties using those words in such a contract must be taken to have used them in their peculiar sense. And so words, technical or ambiguous on their face, or foreign or peculiar to the sciences or the arts, or to particular trades, professions, occupations, or localities, may be explained, where they are employed in written instruments, by parol evidence of usage."

This question was recently thoroughly considered by this court in the case of *Paepcke-Leicht Lbr. Co.* v. *Talley,* 106 Ark. 400, in which case it was said: "Ordinarily, it is the duty of the court, in the trial of cases, to construe a written contract and declare its terms and meaning to the jury. But where the contract contains words of latent ambiguity, or where technical terms are used or terms which, by custom and usage, are used in a sense other than the ordinary meaning of the words, oral testimony is admissible to explain the meaning of the terms or words used, and the question may be submitted

to the jury to determine in what sense they are used." And the same opinion quotes from *Wood* v. *Kelsey,* 90 Ark. 272, the following language: "Courts may acquaint themselves with the persons and circumstances that are the subject of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described."

It is urged by appellee that appellant undertook in his complaint to enlarge and vary the terms of the contract for the sale of the stock of goods. But the exhibit is merely evidentiary of the terms of the sale, and the sufficiency of the complaint is to be determined by a consideration of its allegations. We need not consider any possible difficulty which appellant may experience in proving the allegations of his complaint, as no such difficulties are before us, when the sufficiency of the complaint is tested on demurrer. We think the allegations of the complaint are sufficiently definite and certain to state a cause of action. It is urged that the complaint does not state what articles appellee would desire furnished to his tenants during the year 1912 and that the complaint does not state the quantity of such articles. But it can not be assumed that appellee did not know what articles he would wish to purchase from appellee, nor can we assume that appellee did not have these articles for sale, as appellant had just purchased the stock of goods from appellee and this purchase constituted the consideration for the contract alleged to have been broken. In addition to the goods just purchased from appellee, appellant alleged that he bought additional goods and merchandise and articles to comply with said agreement at a cost of $5,000, and stood ready at all times during the year 1912 to furnish the merchandise embraced in the terms of the contract. Nor was there such uncertainty as to quantity as would render the contract void on that account. The contract as alleged in

the complaint, was that appellee should purchase all of the goods from appellant, which appellee desired furnished to his tenants during the year 1912, and the exact quantity of such goods is alleged to be $2,516; but they were purchased by appellee from another mercantile concern doing a similar business.

There is almost an infinite number of cases on the question of the recovery of profits by way of damages for breach of a contract; and this question has been the subject of a number of recent cases decided by this court. The rule in such cases, as stated by Mr. Justice RIDDICK, in the case of *Beekman Lumber Co.* v. *Kittrell,* 80 Ark. 228, was quoted from 13 Cyc. 53, as follows: "The recovery of profits, as in the case of damages for the breach of contracts, in general depends upon whether such profits were within the contemplation of the parties at the time the contract was made. If the profits are such as grow out of the contract itself, and are the direct and immediate result of its fulfillment, they form a proper item of damages." Such damages "must be certain both in their nature and in respect to the cause from which they proceed. It is against the policy of the law to allow profits as damages where such profits are remotely connected with the breach of contract alleged, or where they are speculative, resting only upon conjectural evidence or the individual opinion of parties or witnesses." The majority of the court think the facts alleged in the complaint meet the requirements of this test.

Appellee agreed to purchase from appellant all the supplies which it would be necessary to furnish appellee's tenants during the year 1912, whether this amount was much or little, but the allegations of the complaint show it to be an exact amount and the books of account which would have been kept would have shown the various articles bought, upon which, by calculation, the profits could have been ascertained. While these calculations might have proven intricate, that fact would not have prevented a recovery, if the proof of them was sufficient for such calculations to be made, and the allega-

tions of the complaint are that such was the case with reference to this transaction.

It is said that this contract is void for want of mutuality; but we do not think so. Appellee paid a fixed sum of money and agreed to give appellant employment for a definite time and to allow him a certain per cent of the profits. In consideration for this appellee agreed to purchase from appellant the supplies, which he would require for his tenants, and, whether that amount was much or little, it included all the supplies so to be purchased. This agreement necessarily implied that the goods should be sold at the usual and customary prices; just as such an agreement is implied in any case where goods are purchased without any definite understanding as to price.

The question of mutuality of contract was considered in the case of *Thomas-Huycke-Martin Co.* v. *Gray,* 94 Ark. 9, the syllabus in which case reads as follows: "A contract whereby defendant at a price fixed undertook to buy the output of a sawmill is not lacking in mutuality as not binding the plaintiffs to sell, since the contract implies a corresponding obligation on the part of the plaintiffs to sell at the stipulated price." And the same case quoted with approval from *Lewis* v. *Atlas Mut. Life Ins. Co.,* 61 Mo. 534, the following language: "It very frequently happens that contracts on their face, and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. As, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will necessarily be implied." See also *El Dorado Ice Co.* v. *Kinard,* 96 Ark. 184.

The judgment of the court below will therefore be reversed and the cause remanded, with directions to overrule the demurrer.

McCULLOCH, C. J., and HART, J., (dissenting). The parties themselves, in presenting the case here, have treated the allegations of the complaint as being no broader than the language of the contract itself, except that the complaint undertakes to define what is meant by the term "furnishing trade."

There can be no doubt that the rules of evidence permit the introduction of parol testimony to explain trade or commercial terms or terms which have a fixed meaning. That, however, is not the real question in this case, for, in our judgment, when the evidence is admitted explaining what the term "furnishing trade" means, the contract still falls far short of being sufficiently certain to be enforceable. The language of the contract does not sufficiently specify either the quantity or price of the goods to be sold, nor does it afford any basis for ascertaining the amount to be furnished under the contract. The language of the contract amounts only to an undertaking on the part of appellee to buy all of his goods during the year 1912 from appellant. He does not agree to purchase any particular quantity of goods nor a quantity sufficient to serve any use specified in the contract.

Now, it is elemental in the law of contracts that one is not enforceable which does not with certainty describe the subject-matter or fix some basis upon which the scope of the subject-matter can be ascertained.

The rule is stated in one of the encyclopedias as follows: "In order to constitute a valid verbal or written contract, the subject-matter of the agreement must be expressed by the parties in such terms that it can be ascertained to a reasonable degree of certainty." 7 Am. & Eng. Enc. Law, p. 116.

Mr. Elliott, in his Commentaries on the Law of Contracts (vol. 1, § 180), after stating the rule with reference to aiding, by parol testimony, the language of a contract, says:

"However, where the amount to be furnished is not governed by the needs of a particular business or undertaking and the determining factor is altogether uncertain, as where the purchaser is not bound to take any of the thing bargained for or is free to demand, in many instances, an unlimited amount should he desire it, the agreement is too indefinite to be upheld."

He cites authorities in support of this doctrine, among which may be consulted with profit the following: *Price* v. *Weisner,* 83 Kan. 343, 111 Pac. 439, 31 L. R. A. (N. S.) 927; *Price* v. *Atkinson,* 117 Mo. App. 52, 94 S. W. 816; *Wheaton* v. *Cadillac Automobile Co.,* 143 Mich. 21; *Price* v. *Stipek,* 39 Mont. 426, 104 Pac. 195; *City of Fort Scott* v. *Eads Brokerage Co.,* 117 Fed. 51; *Blakistone* v. *German Bank,* 87 Md. 302, 39 Atl. 855.

Judge Sanborn, in delivering the opinion in the Federal case cited above, said:

"A contract for the future delivery of personal property is void for want of consideration and mutuality if the quantity to be delivered is conditioned by the will, wish or want of one of the parties."

We find in this contract nothing more than an undertaking on the part of the appellee to purchase all of his goods during the specified year from appellant—not any specified quantity nor at any price mentioned, but merely such quantity as he might desire to purchase at a price thereafter to be agreed upon; and when the test laid down in the authorities quoted from is applied, the contract is too vague and indefinite to be enforceable.

The fact that appellee afterward purchased a certain quantity of goods from another dealer has no force in determining his liability upon the contract with appellant. The question is not how much he did purchase, but what he obligated himself to purchase from appellant.

The case was, in our judgment, correctly determined by the circuit judge on demurrer, and we think the case should be affirmed.

NORTON v. BACON.

Opinion delivered July 6, 1914.

1. IMPROVEMENT DISTRICTS—FORMATION—PUBLICATION OF NOTICE—JURISDICTION OF COUNTY COURT.—The publication of notice describing the land to be included in a proposed improvement district is jurisdictional, and the county court has no authority to form a district until notice has been published in accordance with the terms of the statute. Act 402, Acts 1909, p. 1153. (Page 568.)
2. IMPROVEMENT DISTRICTS—PUBLICATION OF NOTICE—DESCRIPTION OF LANDS.—Act 402, Acts 1909, providing for the formation of road improvement districts, provides for the publication of a notice which shall contain a correct description of the lands to be affected by the formation of such district. The description must be sufficient to put all land owners upon notice. (Page 568.)
3. IMPROVEMENT DISTRICTS—DESCRIPTION OF LANDS—VARIANCE BETWEEN PLAT AND NOTICE.—A variance between the description of lands to be included in a road improvement district to be formed under Act 402, Acts 1909, in the plat and in the notice, will be held fatal and will invalidate the formation of the district. (Page 569.)

Appeal from Lincoln Chancery Court; *John M. Elliott,* Chancellor; reversed.

Danaher & Danaher, for appellant.

The only question in this case is whether the mistake in the description of the land invalidated the formation of the district. The law plainly requires that the petition *shall* describe the territory to be included, and *shall* be accompanied by a plat, etc. Proper notice is jurisdictional. Act 402, 1909, p. 1153; 104 Ark. 298.

E. L. Carter, for appellees.

104 Ark. 298, was based upon different grounds. Kirby's Dig., § 5665; Acts 1909, p. 1153. The plat filed distinctly showed that part of section 6 was included in the district. The burden was on appellant to show that a majority of the property owners did not sign the petition or that there was fraud. 98 Ark. 543.

McCULLOCH, C. J. A road improvement district in Lincoln County was formed by an order of the county court, made upon petition of property owners in the dis-

trict to be affected, pursuant to Act No. 402 of the General Assembly of 1909.

Appellant owned property in the district, and, after the district was formed and proceedings were begun thereunder toward the assessment of property for the improvement, he instituted this action to restrain such proceedings, alleging that the order of the county court is void for the reason that neither the boundaries of the district nor the lands situated therein were described in the published notice.

The chancery court sustained a demurrer to the complaint, and an appeal has been prosecuted to this court.

According to the allegations of the complaint, the petition for the improvement undertook to describe the tracts of land to be affected, and a plat was filed with the petition giving a description of the lands to be included in the district and also showing the boundaries of the district; but the published notice which preceded the order of the court only set forth the description of the land as stated in the petition.

Section 6, township 9 south, range 5 west, is, as alleged in the complaint, an irregular section, according to the plat of the public survey, and the subdivisions thereof are numbered as lots. A portion of that section is included in the boundaries as shown in the plat and also by description of certain lots set forth in the petition and notice; but there is a variance between the description in the petition and notice and in that portion of the section included in the boundaries shown on the plat. That is to say, there is a variance if it be true, as alleged in the complaint, that the lots described inside of the boundaries do not answer to the description of those lots according to the plat of the public survey. Those lots contain 200 acres and lie along the west boundary line of the section and the east boundary of the districts. The lots included in the boundaries shown on the plat are described in the Government surveys as west half lot 5 and lots 6 and 17; whereas, in the petition and plat and in the

published notice that territory is described as lots 4, 5, 12, 13 and 20.

The plat of the public survey, as exhibited with the complaint, shows that lots 4, 12, 13 and 20 are situated in another portion of section 6 and are not contiguous to the other territory embraced in the district.

We have, therefore, according to the allegations of the complaint, a case where the notice does not conform to the plat filed with the petition, and the question raised is whether or not that avoids the proceedings.

The statute under which the district was formed reads as follows:

"Whenever a majority in value of the owners of real property in a county, or any part of a county, such majority in value to be determined by the assessment for purposes of general taxation in force at the time, shall present a petition to the county court of any county in this State, praying for the formation of a road improvement district, the said county court shall, after having given public notice for twenty days by printed copies posted in ten places in said county, or part thereof, one of which shall be posted on the principal door of the courthouse of said county, or by publication in some newspaper in said county, determine the fact that such petition is so signed by such majority in value of said land owners. The said petition shall be accompanied by a map or plat of the particular part of said county to be included within the boundaries of said district, if the said boundaries be less than the entire area of said county; and the said designated boundaries shall be plainly indicated so that no controversy may arise as to the limits of the same. Said petition shall also contain a general description of the proposed road, stating starting point, route, and terminous, as near as practicable." Section 1, Act No. 402, Acts of 1909, p. 1153.

There can be no doubt that the publication of notice describing the land is jurisdictional, and the county court has no authority to form a district until notice has been published in accordance with the terms of the statute.

The statute does not undertake to prescribe what the notice shall contain, but it is manifest that it is intended to contain a correct description of the lands to be affected, so that property owners may have an opportunity to know that their lands are about to be proceeded against, or to be included in the formation of the district. There must be such a description as would be sufficient to put all of the land owners on notice.

Now, according to the allegations of the complaint, the plat includes 200 acres of land which were not correctly described in the notice, and this makes a fatal variance between the notice and the plat. The fact that the plat and the notice both contain the same erroneous description does not obviate the variance, as the plat gives the exterior boundaries of the district and includes that area, even though the description by lot numbers is erroneous. To exclude the territory from the plat would be to form a district of less territory than that included in the boundaries set forth therein; and, on the other hand, if we should include that territory in the district, it would be done without notice having been given to the owner as required by the statute. So we think that there is a fatal variance between the description of the lands embraced in the notice and those included in the plat and that this invalidates the formation of the district.

The same principle was involved in the case of *Voss* v. *Reyburn,* 104 Ark. 298, where we held that (quoting from the syllabus), "where an attempted publication of an ordinance creating an improvement district omitted two half-blocks from the proposed improvement district, the variance is material and destroys the validity of the attempted organization."

That case related to an improvement district formed under general statute in a municipality, and publication of the ordinance was required, whereas under the statute which governs in this case notice was required to be published before the order is made forming the district. The two things are, however, of equal importance and

the same principle governs in each of the cases. In that case we said:

"The omission from the publication of the ordinance designating the district of the half of two blocks, containing twelve lots, is so material and important a variance from the petition and ordinance as passed as to destroy the validity of the attempted organization of the district. It was, in legal effect, no publication at all, and did not comply with the statutory requirement. The object of designating the boundaries of the district was to enable the property owners included therein and affected thereby to easily ascertain what property was included in the district. * * * It would be very unjust to property owners to include them in the district without giving them the opportunity, if they deemed it unwise, to protest against it and to endeavor to convince and persuade their neighbors of its inexpediency. This right is intended to be guaranteed to every owner of land in the district by the statute under consideration."

It follows that the chancellor was wrong in sustaining a demurrer to the complaint. Reversed and remanded, with directions to overrule the demurrer.

WESTERN TIE & TIMBER COMPANY v. CAMPBELL.

Opinion delivered July 6, 1914.

1. MORTGAGES—SECURITY FOR PURCHASE PRICE—PRIORITY OF CLAIM OF MORTGAGEE.—A mortgage given at the time of the purchase of real estate, to secure the payment of the purchase money, whether given to the vendor or to a third person who, as a part of the same transaction, advances the purchase money, has preference over all judgments and other liens against the mortgagor. (Page 572.)
2. CRIMINAL PROCEDURE—STATE—LIEN FOR FINE AND COSTS.—Under Kirby's Digest, § 2467, the lien in favor of the State for fines and costs, against the property of defendant in a criminal prosecution, begins at the time of the arrest or finding of the indictment, and gathers within its sweep all the property owned by the accused from that time until judgment, subsequently rendered for fine and costs, is paid. (Page 574.)

3. MORTGAGES—SECURITY FOR PURCHASE MONEY—PRIOR LIEN.—A purchase money mortgage must be given simultaneously with the execution of the deed of conveyance in order to take precedence over prior liens, for if there is any intervening space of time during which the title rests in the purchaser, the prior liens attach to it in preference to the mortgage. (Page 574.)

4. MORTGAGES—UNRECORDED MORTGAGE—LIEN.—An unrecorded mortgage is valid as between the parties and as against persons holding the property under a voluntary conveyance. Kirby's Digest, § 5396 (the registeration statute) does not apply between the parties to a mortgage or to a grantee under a voluntary conveyance. (Page 575.)

5. LIENS—STATE—PURCHASE MONEY MORTGAGE.—The lien of the State under Kirby's Digest, § 2467, for fines and costs, is superior to an unrecorded purchase money mortgage, given after the lien of the State, under the statute, became effective. (Page 575.)

Appeal from Jackson Chancery Court; *George T. Humphries,* Chancellor; affirmed.

A. J. Stack and *Frank H. Sullivan,* for appellant.

1. The appellant's lien under the mortgage is superior to the lien of the State for the fine and costs. Kirby's Dig., § 2467; 35 Ark. 445; 59 *Id.* 213. The State has no lien on after-acquired property. 50 Ark. 112.

2. Outside the State the authorities are uniform that the mortgage is the superior lien. 1 Jones on Mort. (6 ed.), § § 468-472; 92 Ga. 746; 131 *Id.* 668; 20 Ill. 57; 55 Ia. 245; 32 Ark. 258.

Stuckey & Stuckey and *Lon L. Campbell,* for appellee.

1. The lien of the State attached February 26, 1904; the lien of the deed of trust did not attach until November 4, 1904, hence the State's lien is superior. Kirby's Dig., § 2647; 93 Ark. 42; 65 *Id.* 532.

2. The State's lien was prior in time and bound all property from the time of indictment or arrest. There is no room for construction—the language is plain. Kirby's Dig., § § 2467-5396; 93 Ark. 42; 70 *Id.* 566; 102 *Id.* 415; 97 *Id.* 43; 13 *Id.* 82-85; 50 *Id.* 108; 21 *Id.* 202.

McCULLOCH, C. J. This controversy involves the title to a tract of land in Jackson County, Arkansas, both

parties to the suit claiming title from a common source, appellant claiming under a mortgage executed by one Thomas, and appellees claiming under a sale upon execution issued against the property of Thomas.

The question in the case relates to the priority of the respective liens.

On February 11, 1904, the grand jury of Jackson County returned an indictment against Thomas for misdemeanor, and he was arrested on a bench warrant in July of the same year.

After the return of the indictment against Thomas, some time during the month of February, 1904, the precise date not being shown, he negotiated the purchase of the tract of land in controversy from one Mustin, who was then the owner. The purchase price was to be $350, and Thomas borrowed $250 to complete the purchase, having only $100 of his own to pay on the land, and he executed the mortgage upon which appellant rests its claim of title to secure the amount so borrowed, which was used in paying the purchase price. The mortgage was dated February 26, 1904, and the deed from Mustin to Thomas bears date February 29, 1904, but the proof shows that the two transactions were simultaneous.

The mortgage was not recorded, however, until November 4, 1904.

On January 30, 1905, Thomas entered a plea of guilty, a fine of $50 was assessed against him, and judgment was rendered in favor of the State for the recovery of said fine and the costs of prosecution. In October, 1905, execution was issued on the judgment, the land was sold, and appellees became the purchasers.

Subsequently appellant purchased the notes secured by the mortgage executed by Thomas, and foreclosed the mortgage and became the purchaser at the sale.

It is quite well settled by the authorities that a mortgage, given at the time of the purchase of real estate to secure the payment of purchase money, whether given to the vendor or to a third person, who, as a part of the same transaction, advances the purchase money, has pref-

erence over all judgments and other liens against the mortgagor.

"A purchase-money mortgage may," says Mr. Jones, "be made to a third person who advances the purchase-money at the time the purchaser receives his conveyance, and such mortgage is entitled to the same preference over a prior judgment as it would have had if it had been executed to the vendor himself." 1 Jones on Mortgages (6 ed.), § 472.

Professor Pomeroy has this to say on the subject:

"Even in the absence of any statute, and upon the general principles of equity, a purchase-money mortgage given at the same time as the deed, or as a part of the same transaction, has precedence over any prior general lien, such as that part of a prior judgment against the mortgagor. The same equitable rule applies in like manner to a mortgage given by the grantee to a third person, as security for money loaned for the purpose of being used, and which is actually used, in paying the purchase price." 2 Pomeroy's Equity Jurisprudence (3 ed.), § 725.

The following cases, among many others, fully sustain the text: *Kaiser* v. *Lembeck,* 55 Ia. 244; *Clark* v. *Butler,* 32 N. J. Eq. 664; *Moring* v. *Dickerson,* 85 N. C. 466; *Rogers* v. *Tucker,* 94 Mo. 346; *Roane* v. *Baker,* 120 Ill. 308; *Courson* v. *Walker,* 94 Ga. 175.

"The reason given," says the North Carolina court in stating the principle in the above cited case, "is that the execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands, and without stopping, vests in the mortgagee, and during such instantaneous passage no lien of any character can attach to the title."

The facts presented in this record bring the case within that rule as to the mortgage under which appellant claims title, but the real turning point in the case is whether or not appellant's lien under the mortgage

was superior to the State's lien for the fine and costs assessed against Thomas.

The statute provides that "the property, both real and personal, of any person charged with a criminal offense, shall be bound from the time of his arrest, or the finding of an indictment against him, whichever shall first happen, for the payment of all fines and costs which he may be adjudged to pay." Kirby's Digest, § 2467.

This court, in an early case, speaking of that statute, said:

"This provision of law, we have no doubt, creates a lien in favor of the State, on all of the property of a person charged with a criminal offense, wheresoever it may be within the limits of the State, which attaches upon and binds it, not only in the hands of the accused, but also in the hands of any other person who shall, in any manner, possess or hold it, from the time of the arrest or indictment found, as mentioned in the statute, until the accused is discharged from the prosecution, or such fines and costs as shall be adjudged against him are paid." *Lawson* v. *Johnson,* 5 Ark. 168.

It is insisted by learned counsel for appellant that the lien which arises under the statute from the time of the finding of the indictment or the arrest, whichever first occurs, does not attach to after-acquired property.

But we think counsel are clearly mistaken in their interpretation of the statute. The binding force of the statute begins at the time of the arrest or finding of the indictment, but it gathers within its sweep all property owned by the accused from that time until the judgment subsequently rendered for fine and costs be paid.

Similar language is used in the statute creating liens in favor of judgment-creditors, the language being that a judgment shall be a lien "from the date of its rendition," and this court held in *Real Estate Bank* v. *Watson & Hubbard,* 13 Ark. 74-82, that the lien attached to any property acquired subsequent to the rendition of the judgment.

The main question is whether the State's lien attached as against the unrecorded mortgage.

It will be noted that under the authorities cited above a purchase money mortgage must be simultaneous with the execution of the deed of conveyance in order to take precedence over prior liens, for if there is any intervening space of time during which the title rests in the purchaser the prior liens attach to it in preference to the mortgage. *Cohn* v. *Hoffman,* 50 Ark. 108.

The registration statutes of this State provide that "every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before." Kirby's Digest, § 5396.

This court has held that, notwithstanding the provision of the statute with reference to registration of mortgages, an unrecorded mortgage is valid between the parties and as against persons holding the property under voluntary conveyance. *Main* v. *Alexander,* 9 Ark. 112; *Leonhard* v. *Flood,* 68 Ark. 162-168.

This is obviously so, because the registration statute is not intended to apply between the parties to a mortgage or to a grantee under a voluntary conveyance.

But is it valid as against the State's claim? We think not. If the statute, by express language, made the mortgage good except as against third parties, it might well be argued that the State was not deemed to be a party within its meaning. But the language is quite different. It declares, unconditionally, that the mortgage "shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before."

When the two statutes involved in this case are read together, the one which declares that the property of an accused person shall be bound for the fine and costs from the time of his indictment or arrest, and the one which declares when a mortgage lien shall take effect—the conclusion is unavoidable that the Legislature meant to give the State a lien against an unrecorded mortgage.

It does not follow that the State would have a lien as against equities of third parties not within the registration statutes; but where the statute has, as in this case, unconditionally provided that there shall be no lien until the mortgage is recorded, it would be straining the language of the lawmakers to say that an unrecorded mortgage should be valid as against the State's statutory lien.

We are of the opinion, therefore, that the State's lien was superior and that appellees acquired a superior title under their purchase at the execution sale. The decree of the chancery court is, therefore, affirmed.

MASSACHUSETTS BONDING & INSURANCE COMPANY v. HOME LIFE & ACCIDENT COMPANY.

Opinion delivered July 6, 1914.

1. INSURANCE—FIRE INSURANCE—BOND—LIABILITY.—The surety on a bond given by a fire insurance company, under Kirby's Digest, § 4339, which requires all fire insurance companies to give a bond annually, to secure the payment of all claims under any policies, and that such bonds shall be renewed annually, and conditioned that the bond shall be in full force and effect during the lifetime of any policy; *held*, the surety is liable for the return premiums, and for all losses which occur during the term of the bond, regardless of the fact that there have been previous bonds. (Page 580.)
2. INSURANCE—FIRE INSURANCE—BONDS—LIABILITY OF BONDSMEN.—The surety upon the bond of a fire insurance company, in force at the time a loss occurs only is liable, the provisions of the statute requiring a renewal, contemplate that there shall be only one bond in force all of the time, and the last surety can not enforce contribution from his predecessors, and policy holders can not hold the surety on the bond in force when the policy was issued. (Page 581.)
3. CONSTITUTIONAL LAW—LEGISLATIVE AUTHORITY.—The courts will not question the right of the Legislature to require fire insurance companies to furnish bonds, only for the payment of losses to the amount of $20,000. (Page 581.)

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

Bradshaw, Rhoton & Helm, for appellant.

The bond in force at the time the policies were cancelled is the only one liable to the insured.

Even though policies were written during the term of appellant's bond between March 1, 1912, and March 1, 1913, the claims for unearned premiums arose and accrued after March 1, 1913, and the appellee, Home Life & Accident Company, only is liable. 91 Ark. 43-51; 76 Ark. 410; 115 Fed. 69; 97 Ark. 553.

The liability of a surety is not to be extended by implication beyond the terms of its contract. 24 How. 315, 16 Law. Ed. 689; 17 Ohio 565; 32 Cyc. 73. A surety has the right to stand on the very terms of his contract. 4 L. R. A. 680; 3 L. R. A. 168; 9 L. R. A. 353; 13 L. R. A. 418.

See, also, on the question of liability as between successive sureties, 66 S. W. 394, 56 L. R. A. 936; 99 Am. St. Rep. 302; 9 L. R. A. 223; 90 S. W. 410; *Id.* 413; 33 So. 73, 81 Miss. 339; 59 N. Y. S. 345, 61 N. E. 902; 54 N. E. 771.

McRae & Tompkins, for appellee.

The primary liability is upon the company on the bond at the time the policy was written. Acts 1905, p. 492, § 4; 97 Ark. 459; Acts 1905, p. 772, § 4; Acts 1903, p. 409; Acts 1909, p. 939; 49 Am. Dec. 410; 15 *Id.* 100; 32 Cyc. 87; 36 S. W. (Tenn.) 731; 16 S. W. (Ky.) 526; 44 Am. Dec. 78; 76 Ark. 410; 40 Conn. 552, 16 Am. Rep. 74.

Cockrill & Armistead, for interveners.

The sureties in both bonds are liable. 76 Ark. 415; 97 Ark. 549.

McCULLOCH, C. J. The American Union Fire Insurance Company of Philadelphia became insolvent and was placed in the hands of a receiver by the courts of its domicile in March, 1913, and at that time it was liable to policy holders in this State for return premiums and fire losses. The company had been doing business in the

State for several years and had given, and annually renewed, its bond as required by statute.

The issue in this case relates to the liability on the successive bonds, the particular question being which bond is liable, whether it is the bond covering the period during which the policies were written, or the last bond, which is the one covering the period during which the liability to policy holders accrued, or both.

The first bond was executed by Southwestern Surety & Insurance Company as surety, and it covered the period from March 1, 1911, to March 1, 1912.

The second bond was given by appellant, Massachusetts Bonding & Insurance Company, to cover the period running from March 1, 1912, to March 1, 1913, and the controversy in this case arises over policies which were issued by the company during that period.

The last bond, which covers the period running from March 1, 1913, to March 1, 1914, was executed by appellee, Home Life & Accident Company, as such surety.

All of the bonds were in the same form, and were executed in conformity to the statute, which reads as follows:

"All fire, life and accident insurance companies, individuals or corporations, now or hereafter doing business in this State, in addition to the duties and requirements now prescribed by law, shall annually give a bond to the State of Arkansas with not less than three good and sufficient sureties, to be approved by the Auditor of the State, in the sum of twenty thousand dollars, conditioned for the prompt payment of all claims arising and accruing to any person during the term of said bond, by virtue of any policy issued by any such company, corporation or individual, upon the life or person of any citizen of the State, or upon any property situated in the State, and such bond shall be annually renewed; provided, that the bonds of all fire insurance companies doing business in this State shall be conditioned that said bond shall be in full force and effect during the lifetime of any policy issued by said company, but said bond shall be renewed

annually, as provided in this section." Kirby's Digest, § 4339.

The statute was amended in certain particulars by the act of May 31, 1909, but the above quoted language was not changed.

In *United States Fidelity & Guaranty Co.* v. *Fultz,* 76 Ark. 410, we held that the liability of the sureties is fixed when the loss by fire occurs and that claim accrued at that time within the meaning of the statute.

The decision in that case was followed by this court in *American Ins. Co.* v. *Haynie,* 91 Ark. 43, where it was said:

"By the provisions of the bond, the sureties were obligated to pay all claims accruing to any person during the term of the bond. The claim accrued when the insured had a present enforceable right of action against the insurance company. Manifestly, his claim against the company accrued during the term of the bond. The bond was executed on the 7th day of May, 1907, and was for a period of one year. The fire occurred on the 29th day of October, 1907. In accordance with the ruling in the case of *United States Fidelity & Guaranty Co.* v. *Fultz,* 76 Ark. 410, we hold that the bond was liable."

The same conclusion was reached in *Crawford* v. *Ozark Ins. Co.,* 97 Ark. 549, where the court had under consideration a statute providing for bonds to be given by mutual insurance companies. The language of the statute requiring bonds in such cases is substantially the same as that used in the statute hereinbefore quoted, except that it does not provide for annual renewal and does not contain the express provision that "said bond shall be in full force and effect during the lifetime of any policy issued by said company." It was held, following the decision in the Fultz case, *supra,* and in the Haynie case, *supra,* that the sureties on the bond covering the period during which the loss occurred were liable, notwithstanding the fact that the policy was issued during a former period covered by another bond. The court said:

"The clause of the bond under consideration should be construed and read as follows: Shall promptly pay all claims arising and accruing to any person or persons during the term of this bond, by virtue of any policy issued by said company, upon any property situated in the State of Arkansas, when same shall become due. This arrangement is according to the punctuation and grammatical construction; and, while punctuation should not control, neither should it be ignored, in considering what the makers of the instrument meant by the language employed. The comma after 'persons' and 'company' shows that the phrase, 'by virtue of any policy issued by said company,' is parenthetical. Their effect is to make the prepositional phrase, 'during the term of this bond,' relate to and qualify the participle 'accruing,' and not the verb 'issued.' When thus construed, the bond conforms to the law as interpreted in *American Insurance Company* v. *Haynie, supra,* by which this case is ruled."

Now, those cases settle the question beyond dispute that the last bond executed by appellee, Home Life & Accident Company, is liable for the return premiums and for all losses which occurred during the life of that bond, which took effect on March 1, 1913.

But it is insisted by learned counsel for appellee that the sureties on the bond covering the prior period were primarily liable, and that the sureties on the last bond are only secondarily liable, and that, as between the two sets of sureties, the liability should be adjudged against the sureties on the bond which covered the period during which the policies were issued.

Our conclusion is, however, that the cases quoted clearly hold that the sureties on the last bond are primarily liable, and the only undetermined question in this case is whether or not the sureties on the first bond are liable at all.

The chancellor held that the two sets of sureties were equally liable and divided the liability between them.

The claimants who intervened have appealed, and insist that there should be a decree against both sets of sureties.

We are unable to find any authority directly bearing upon the construction of our statute so far as relates to the question of liability of the sureties on a bond which had been renewed. But it seems to us that a fair interpretation of the legislative will is that the sureties on an annual bond are only liable for claims of policy holders which arise and accrue during the period covered by the bond and beyond that period, too, upon all policies issued during the lifetime of the bond until it is renewed. The statute says in plain words, it is true, that "said bond shall be in full force and effect during the lifetime of any policy issued by said company." But that expression is coupled with the provision that the bond shall be renewed, and we think that the renewal of the bond terminates all liability of the sureties on the bond except as to liabilities which have already accrued within the meaning of the statute.

This provision of the statute is a part of a comprehensive legislative scheme for the regulation of the insurance business and the protection of policy holders. It was determined that a bond for $20,000, executed by sureties to be approved by the Auditor, and with power vested in the Auditor to require a renewal at any time, was sufficient protection to policy holders. We have nothing to do with the policy of the Legislature in determining that that amount of bond is sufficient. The statute provides, in addition to the absolute requirement of an annual renewal, that it is the duty of the Auditor to require any insurance company to file a new bond "at any time when it shall appear that such bond is not sufficient, or that the amount thereof has been exhausted by judgment, or that the sureties on the same have died or become insolvent." Kirby's Digest, § 4343.

The purpose of the lawmakers was to require a subsisting indemnity in the sum of $20,000 to policy holders

against loss and that this was sufficient to fully protect them.

The only consistent interpretation of that scheme is that successive bonds extinguish the liability of sureties on the preceding bonds. The provision continuing the force of the bond during the lifetime of any policies issued during the period it covered was meant merely to continue that liability until it was extinguished by a renewal. We think this carries out a consistent scheme and that it was what the Legislature intended.

It is said that this construction will work a hardship, in that a bond in the sum of $20,000 is not sufficient to cover all the liabilities in this case.

That, however, is a matter which addresses itself to the Legislature, and not to the courts, for, as before stated, there is a legislative determination that a bond of $20,000 is sufficient. Doubtless it is generally sufficient, and this proves an exception to the rule.

The decree of the chancellor was not in accordance with the statute as we interpret it, and the decree is reversed and the cause remanded, with directions to adjudge liability in accordance with the statute as here interpreted.

POLK v. FRIERSON.

Opinion delivered July 6, 1914.

1. APPEAL AND ERROR—REVERSAL—MANDATE—FINALITY.—Where the decree of a chancery court is reversed and the cause remanded with directions to the chancery court to vacate its decree, and the rights of the parties are finally settled, the chancery court has no power, after the filing of the mandate of the Supreme Court, to re-open the cause and allow new parties to be made and the question relitigated as to them. (Page 584.)
2. APPEAL AND ERROR—REVERSAL—PRACTICE.—Where the litigation involves real estate, it is the rule of the Supreme Court, where the decree of the lower court is reversed and a decree final is determined upon here, to remand the cause with directions to the lower court to render and enter the judgment of this court, the

reason being that any orders or judgments affecting the title to real property should be entered on the proper court records in the county where the land is situated. (Page 585.)

Mandamus to Clay Chancery Court; *Charles D. Frierson,* Chancellor; petition denied.

STATEMENT BY THE COURT.

In the case of *Stephens* v. *Stephens,* 108 Ark. 53, the decree of the chancery court was reversed and the cause remanded with directions to that court "to vacate its decree cancelling and annulling the deed in question." Upon the filing of the mandate petitioner here asked to be made a party plaintiff to that suit. The chancellor denied his petition, and entered a decree in accordance with the mandate of the Supreme Court. The petitioner then filed his petition in this court for a writ of mandamus to require the judge of the chancery court to make an order allowing the petitioner to be made a party to the suit of *Stephens* v. *Stephens, supra,* setting up that at the time of the conveyance from William Stephens to his wife and children that the property was a homestead and that the wife of William Stephens, the grantor, had not joined in the conveyance, and that petitioner was an innocent purchaser for value of the property, and praying that the writ may issue requiring the chancery court to make him a party in order that his rights may be adjudicated.

The response set up that petitioner had never been made a party to the suit of *Stephens* v. *Stephens,* and that the petitioner set up rights which were alleged to have accrued after the rendition of the decree of the chancery court which was appealed from and reversed, and rights which had accrued before the rendition of the opinion and judgment of the Supreme Court on appeal, and which were not presented to the Supreme Court before it rendered its final decree. It set up that the reason that the court refused to allow the petitioner to be made a party at this time was because he, as chancellor, had no discretion to reopen or modify the judgment of

the Supreme Court as to any matter that was or might have been presented to said court.

The case is submitted upon the petition and the response thereto.

G. B. Oliver, for petitioner.

F. G. Taylor, for respondent.

The court could not do otherwise than enter a decree in conformity with the mandate of this court in the case of *Stephens* v. *Stephens,* and it properly refused to permit the petitioner to be made a party plaintiff. 21 Ark. 197; 152 S. W. (Ark.) 1008; 160 S. W. (Ark.) 399.

WOOD, J., (after stating the facts). The judgment of this court reversing the decree of the chancellor in the case of *Stephens* v. *Stephens* (108 Ark. 53) and remanding that cause with directions to vacate its decree cancelling and annulling the deed in question, was an end to the litigation involved in that lawsuit. That was a final decree settling the rights of the parties to that litigation, and the chancellor could only enter a decree as directed by this court. The chancery court had no power, after the mandate of this court was filed directing it to enter a decree cancelling and annulling the deed in question, to reopen the cause and allow new parties to be made and the question relitigated so far as the Stephenses were concerned. The mandate of this court did not leave the cause of *Stephens* v. *Stephens* open for further proceedings or direct any further proceedings to be had in that cause. Therefore, the only decree that the chancery court could have entered was the one it did enter in obedience to the mandate of this court.

The decree of the chancery court in *Stephens* v. *Stephens,* entered in obedience to the mandate of this court "settled the rights of the parties as completely and finally as if such a decree had been rendered here, instead of remanding it with such directions to the chancellor. It could not thereafter be modified, altered or disregarded." *Hopson* v. *Frierson,* 106 Ark. 292. See, also, *Walker* v. *Goodlett,* 160 S. W. 399.

Where the litigation involves real estate it is the rule of this court, where the decree of the lower court is reversed and a decree final is determined upon here, to remand the cause with directions to the lower court to render and enter the judgment of this court. The obvious reason for this rule is that any orders or judgments affecting the title to real property should be entered on the proper court records in the county where the land is situated.

The prayer, therefore, of the petitioner for the writ of mandamus will be denied.

MAMMOTH VEIN COAL COMPANY v. BISHOP.

Opinion delivered July 6, 1914.

1. BILLS AND NOTES—PAYMENT TO ORIGINAL PAYEE—RIGHTS OF ASSIGNEE.—A payment by the maker of a negotiable note to the original payee after the note has been assigned, although the assignment occurred after maturity, is not a good defense to an action by the assignee against the maker. (Page 588.)
2. BILLS AND NOTES—PAYMENT TO BANK—RIGHTS OF HOLDER.—Payment to a bank of the amount due on a note made payable there, when the bank does not have possession of the note, or authority to collect it, does not discharge the maker. (Page 589.)
3. BILLS AND NOTES—TRANSFER AFTER MATURITY—NEGOTIABILITY.—The assignee of a negotiable note, assigned after maturity, has the right to collect the note, subject only to defenses existing at the time of the transfer. (Page 589.)

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

STATEMENT BY THE COURT.

This suit was brought by appellant against R. A. Bishop to collect a negotiable promissory note for $600 made to the Bank of Midland on May 3, 1912. The maker of the note denied that the appellant company was the owner thereof, and also plead payment.

It appears from the testimony that the Mammoth Vein Coal Company, appellant, did business with and kept money on deposit in the Bank of Midland, and had

on July 29, 1912, three or four thousand dollars in that bank. On the 29th of July the auditor of the appellant company, having heard that the bank was not in good condition and had failed to pay some of its checks, went to the bank to withdraw or collect the coal company's deposit. He found the bank open and in charge of a young man, of whom he asked payment, and who told him the bank did not have the money to pay with. The auditor then requested that he turn over notes and securities owned by the bank in payment of the deposit of the Mammoth Vein Coal Company, and was shown some notes held by the bank, among others the note of R. A. Bishop, appellee, to the Bank of Midland, upon which this suit is brought. The young man was without authority to turn over any of the notes and securities in payment, and referred him to the cashier, Cunningham, who was ill at his home. The auditor then called to see the cashier of the bank and was told to go back to the bank and get what notes he desired in payment, and he returned, and, upon giving the message from the cashier to the man in charge, the note sued on, among others, was delivered to him. He did not give a receipt for the note and it was not endorsed at the time. The next morning he had an interview with the president of the bank on the subject, who then endorsed this note with the others in blank, "Bank of Midland, by I. H. Cunningham, President." This note was received by the coal company at its face value in payment of that much of its deposit due from the Bank of Midland. The auditor stated that the endorsement was made on July 30, in the town of Midland during banking hours, the note being at the time past due.

Appellee admitted that he executed the note sued on, and that R. E. McEachin came to him and asked if it would be satisfactory for him to take up the note at the bank and let Bishop make him a new note therefor. "I told him that it would be satisfactory to me, but that I would want my note. He said that the bank needed the money, and he had some money and that such an ar-

rangement was satisfactory to him, and he thought would be to the bank." Some time after that (August 6), the next time he came to town, he signed the note to R. A. McEachin, who told him that Mr. Cunningham did not have the old note, but that he would get it and deliver it to him, and gave him the bank's receipt of payment therefor. He did not know where the note sued on was at that time, and a short time after he signed the new note he was notified by the coal company that it held the note. He afterward paid McEachin on the new note $300 and refused to pay the balance because he had been notified that the coal company claimed to own the old note.

McEachin stated that he went to Bishop and asked how it would suit him to pay the note to the bank and let Bishop execute him a new note for $600. That this was agreeable to Bishop, and he went to the bank and gave Cunningham, the president, his wife's check for the amount due on the Bishop note, herein sued on. Cunningham told him that the note was not in the bank, but in Fort Smith, and he would get it and turn it over to him, and gave him the following receipt, stating at the time that the note had not been endorsed in any way.

"August 6, 1912.

"Received of R. A. McEachin, six hundred dollars ($600) in full payment of R. A. Bishop note.

(Signed) "Bank of Midland, Arkansas.

"By I. H. Cunningham."

McEachin turned the receipt over to Bishop and took his note for $600 on the 6th day of August.

Appellant asked the court to direct a verdict in its favor, which the court refused to do. The jury found a verdict in Bishop's favor, and from the judgment thereon this appeal comes.

James B. McDonough, for appellant.

1. The court should have directed a verdict for the appellant on the pleadings alone. The answer admits the execution of the note, and, in failing to deny the assignment thereof for a valuable consideration, admits

the assignment. Kirby's Dig., § 517. It was not sworn to. It does not allege that the note was paid to the Bank of Midland while the bank was in possession of and owner of the note. It therefore stated no defense. 21 Ark. 393.

In any event, appellant was entitled to an instructed verdict upon the undisputed testimony. If the note was past due, that fact did not detract from the right of the Bank of Midland to transfer the note by endorsement so as to pass good title to appellant. 4 Am. & Eng. Enc. of L. 246.

A check on a bank without funds is not a payment. The transaction between McEachin and Cunningham, the president of the bank, occurred after the note had been assigned to appellant, and was forbidden by statute. Kirby's Dig., § 521. Even if McEachin had paid cash, instead of a check, to the Bank of Midland, such payment would not have released appellee from payment of the note. The maker of a note can not question the authority or capacity of the payee to make transfer thereof. 89 Ark. 435.

The undisputed proof shows that the note was assigned in the afternoon of July 30, 1912; that on the next morning, at a time when the bank was transacting business, it endorsed the note by its president. These facts clearly establish the date of the assignment, and appellant's right to sue on the note. 31 Ark. 128; 31 Ark. 20; 41 Ark. 242; 36 Ark. 501; 75 Ark. 170; 96 Me. 429, 52 Atl. 905.

2. The court erred in its charge to the jury, especially in placing the burden upon the plaintiff. In all cases where payment is pleaded, as was done in this case, the burden is on the party pleading payment to prove it. 22 Am. & Eng. Enc. of L. 587, note 3, and Arkansas cases there cited; 67 Ark. 169.

A. A. McDonald, for appellee.

KIRBY, J., (after stating the facts). The court erred in not directing a verdict for appellant. The undisputed testimony shows that appellee executed the note sued on to the bank, that the bank transferred and delivered it to

appellant company for value, and it was due and unpaid at the time suit was brought. It is also true that R. A. McEachin, in trying to effect a settlement of his wife's account with the bank to prevent loss of her deposit, asked Bishop if it would be satisfactory for him (McEachin) to pay off this note to the bank and let Bishop execute him a new note therefor. That Bishop agreed to this, and McEachin did pay the bank $600 by a check from his wife on her account and took a receipt from the bank, already set out in the statement of facts. He was told at the time that the Bishop note was not in the bank, but was in Fort Smith, and would be gotten and turned over to him.

In *Block* v. *Kirtland,* 21 Ark. 393, the court said: "A payment by the maker of a negotiable note to the original payee after the note has been assigned, is not a good defense to an action by the assignee against the maker under the statute, nor by the Law Merchant. The maker must take care that the person to whom he pays a negotiable note is its holder or in possession of it." And in *State National Bank* v. *Hyatt,* 75 Ark. 174, "Payment to a bank of the amount due on a note made payable there, when the bank does not have possession of the note or authority to collect it, does not discharge the maker."

McEachin, who claims to have paid the note to the bank for the maker, knew at the time that the note was not in the possession of the bank, but that it was at Fort Smith, and the maker of the note was notified by the appellant, the assignee thereof, that it held the note and was the owner, before he paid any money to McEachin on the new note executed to him. Of course, the bank had no authority to collect the note after its delivery to appellant, and could not release any part of the consideration after its assignment. *State Nal't Bank* v. *Hyatt, supra;* Kirby's Digest, § 521. This was a negotiable note transferred and delivered to the appellant, it is true, after it became due, but this did not prevent it continuing negotiable, and gave the assignee the right to collect it,

subject only to defenses existing at the time of the transfer. Appellant can not be deprived of his right to collect the note because appellee saw fit to execute a new note to another person, without first requiring the delivery to him of this one, and thereafter paid one-half the amount of the new note, notwithstanding the notice to him that appellant was the owner of the note sued on. The judgment is reversed, and judgment will be entered here in appellant's favor for the amount of the note and interest. It is so ordered.

MULLINS v. CITY OF LITTLE ROCK.

Opinion delivered July 6, 1914.

1. LOCAL IMPROVEMENTS — ORGANIZATION — STATUTORY AUTHORITY.— Kirby's Digest, § § 5664-5742, authorizes the organization of local improvement districts within a city or incorporated town, and provides for the appointment of a board of improvement and outlines their duties. (Page 592.)
2. BRIDGE IMPROVEMENT DISTRICTS — ORGANIZATION — AUTHORITY OF COUNTY JUDGE.—The county judge may build a bridge only in accordance with the law, and must appoint a commission of two persons, who, with himself, would constitute a board of commissioners to construct the bridge. Kirby's Digest, § § 548, 549, *et seq.* (Page 593.)
3. LOCAL IMPROVEMENTS—COMMISSIONERS—BOARD OF IMPROVEMENT.— There can not be two boards of improvement or commissioners in control of the construction of one improvement. (Page 593.)
4. BRIDGE DISTRICT—COUNTY COURT—EXCLUSIVE JURISDICTION.—The county court is given power to construct bridges between two different cities or towns, and it may exercise the power to construct such a bridge to the exclusion of any other agency than that provided by law. (Page 593.)
5. BRIDGE DISTRICT—CONSTRUCTION—AID FROM MUNICIPAL CORPORATION.— There is no provision in the law for a local improvement district to aid a county in the construction of a bridge, connecting two cities. (Page 593.)
6. BRIDGE DISTRICT—AID FROM MUNICIPAL CORPORATION.—A city is without authority to organize an improvement district to aid the county in the construction of a bridge over a river, which shall connect two distinct municipal corporations. (Page 594.)

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

STATEMENT BY THE COURT.

The city council of Little Rock, upon a proper petition of the real estate owners in a certain locality, passed an ordinance laying off the territory described and creating Bridge District No. 1 for the purpose of aiding the county in building a free bridge across the Arkansas River, a navigable stream more than 400 feet in width, the middle of which is the boundary line between the cities of Little Rock and Argenta, one end of the bridge to be located on Broadway Street, in the city of Little Rock, and the other in the city of Argenta, Pulaski County.

Appellant, the owner of property within the proposed district, brought suit to restrain further proceedings in the creation of the district and construction of the proposed improvement. The validity of the ordinance is challenged, because the improvement contemplated is for the purpose of aiding the county in building a bridge across the Arkansas River, one end of which is to be in the city of Argenta, and not in the bridge improvement district, and because the proposed plan of aiding the county is but a subterfuge for the purpose of building a bridge across the Arkansas River, a part of which must necessarily be beyond the limits of the improvement district. The chancellor sustained a demurrer to the complaint, and the plaintiff refusing to plead further, the court dismissed it for want of equity.

R. E. Wiley and *Marvin Harris,* for appellant.

1. An improvement district can not be formed to aid some other person or body to make an improvement. Kirby's Dig., § § 5672, 5676, 5718, 549.

2. An improvement district can not be lawfully formed to aid in making an improvement, part of which is without the city limits. Page & Jones, Taxation by Assessment, § 365; Kirby's Dig., § 5664; 50 Ark. 116; 81 Ark. 286; 67 Ark. 37.

3. Only those improvements which are local are authorized to be constructed by municipal improvement districts under the terms of the Constitution. Const. 1874, art. 19, § 27; 67 Ark. 37-39; Hamilton on Special Assessments, § 237; 29 Wis. 599.

J. W. Mehaffy and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

We think the questions involved here have been settled by former decisions of this court. 96 Ark. 410; 104 Ark. 425; *Ferguson* v. *McLain,* ms. op.; 97 Ark. 334; 70 Ark. 451. See also 52 N. E. 212.

Appellant objects that the districts can not be formed to aid the county to do the work; but there is no good reason for the distinction sought to be established.

If the district can accomplish the end sought at less expense and more effectively through co-operation with the county, why should such co-operation be forbidden?

KIRBY, J., (after stating the facts). The statute authorizes the organization of any particular locality in a city or incorporated town into an improvement district, and assessment of the real property therein for the purpose of constructing any local improvement of a public nature in the manner set forth therein. It provides for the appointment by the council of three persons, owners of real property in the district, who shall compose a board of improvement for it, and this board is required to form plans for the improvement in accordance with the prayer of the petition, and procure estimates of the cost thereof, and to construct and complete the improvement in accordance with the ordinance providing therefor and the law relating thereto. Kirby's Digest, § § 5664-5742.

The statute also provides that the boards of improvement for such districts "shall have control of the construction of the improvements in their districts." Kirby's Digest, § 5718.

The court has already held that the building of a bridge across a stream within a city is a local improve-

ment of a public nature, for which an improvement district may be organized. *Ferguson* v. *McLean,* 113 Ark. 193.

It is the purpose of the improvement district attempted to be organized herein, however, to aid Pulaski County in the construction of a free bridge across the Arkansas River between the cities of Little Rock and Argenta, the improvement district to pay $200,000 for the construction of the improvement and the remainder of the cost thereof to be borne by the county of Pulaski. The county court has the authority to build the bridge but can do so only in accordance with the law, and would have to appoint a commission of two persons, who in conjunction with the judge would constitute a board of commissioners for the construction of the bridge, having all authority to agree upon the plans and specifications and award the contract therefor, and accept the improvement upon its completion. Kirby's Digest, § § 548, 549. The law does not contemplate, and there can not be two boards of improvement or commissioners in control of the construction of the one improvement, and the county court is given the power to construct bridges of this kind, and in exercising such power when it undertakes it would necessarily do so to the exclusion of any other agency than that provided for under the law. It may be desirable to have a free bridge constructed under the terms proposed in the ordinance, and that it could be secured for less cost to the district by this contribution by it of the designated sum to the improvement and in aid of the county, but the law makes no provision whatever for a local improvement district aiding the county in the construction of such an improvement. It is true this court held in *McDonnell* v. *Improvement District,* 97 Ark. 334, that an improvement district could receive contributions from the county and city to the proposed improvement to reduce the cost of the improvement to the limited 20 per cent of the value of the real property in the district, the law meaning only to limit the amount which can be assessed against the real property of the

district and not the total cost of the improvement when outside contributions reduce it to the prescribed percentage of the real property valuation. Although an improvement district may accept such contributions, there is no power given by law to such a district to levy assessments and make contributions to aid other agencies in the making of the improvement, notwithstanding it could thus secure a desired local improvement at a much less expense to the property owners than would be required if it was constructed by the district itself. Municipal corporations and improvement districts therein are both creatures of the statute and the Legislature has not seen fit to give this power or authority to the city to be delegated to the district nor to the district after its organization by the city council, the city being without power to authorize an improvement district to levy assessments for aiding another agency in the making of the improvement, and such district when organized, having no authority under the law to do so. The ordinance is void, and error was committed in sustaining the demurrer to the complaint. The judgment is reversed and the cause remanded, with directions to overrule the demurrer to the complaint.

APPENDIX

I.

IN MEMORIAM

JAMES H. STEVENSON

Mr. J. C. Marshall, upon presenting these resolutions, said:

May it Please the Court:

I have been requested to present to this court the resolutions adopted by the bar of Little Rock upon the death of James H. Stevenson. I shall add only a few words to what is well expressed in the resolutions.

I knew Mr. Stevenson well from the time he first entered the profession, at the age of twenty-one years, until his untimely death. Though he had not reached the meridian of life by a number of years, yet he had reached a high degree of legal attainment and had shown himself capable of exhaustive and accurate research into the most difficult legal questions. Indeed, he advanced in his profession much more rapidly than is usually done, and gave promise of attaining a very high place as a lawyer. He certainly had many qualities which go to make up a great lawyer; among them a reasonable degree of confidence in his own judgment and the ability and the perseverance to search out and carefully weigh the authorities upon any given question and to apply them to the particular matter in hand.

He engaged but little in the trial of causes, but devoted his time largely to the preparation of briefs in causes pending in this court. How well he did this work many volumes of its reports will show, as they contain abstracts of his briefs while employed by the Iron Mountain railroad covering a period of several years. He was at home as a legal writer, and if he had turned his attention to it he could no doubt have written text books of great accuracy and usefulness to the bench and bar. In addition to the preparation of his digest of the city ordinances of Little Rock and his annotation of "Martin's Chancery Decisions," mentioned in the resolutions, he also prepared an edition of the "Arkansas Justice," a textbook greatly prized and much used by justices of the peace and other officers over the State.

While devoted to his legal work he did not neglect the social side of life, but was fond of amusements and games and was closely identified with the social life of the city. He was a self-made man in every sense of the word, and deserved great credit for what he accomplished in so short a time. He was courteous and kindly in manner, and was perfectly upright in all his dealings. Had his health not failed him before his race was half run, we have every reason to believe he would have reached a very high place in his profession.

Resolutions of the Little Rock bar on the death of James H. Stevenson.

Mr. Stevenson was born near this city on the 7th of December, 1876. He was educated in our public schools, and graduated from the law department of our State University at the early age of nineteen. Being too young to enter upon the practice, he accepted the position of librarian of the Supreme Court, where he continued his studies, and he was admitted to the bar on his twenty-first birthday. In the same year, he formed a partnership with Mr. Roy D. Campbell in the practice in our city, a partnership which continued until he was appointed judge of the second division of the circuit court of Pulaski County, in January, 1909. He held this position for six months, with very hearty commendation of the bar, and resigned, to their universal regret, to become assistant general attorney for Arkansas of the St. Louis, Iron Mountain & Southern Railway Company. He continued to discharge his duties as such until February, 1912, when failing health compelled him to resign. While in partnership with Mr. Campbell, he prepared a digest of the city ordinances of Little Rock, and also a volume issued under the title of "Martin's Chancery Decisions."

On October 15, 1908, he married Miss Eleanor Gordon, of New York, who, with one child, survives him.

During his short career at the bar, he was engaged in a number of important cases, and his services were particularly conspicuous in the anti-trust cases, which were carried to the Supreme Court of the United States. The able brief in those cases was chiefly his production.

Mr. Stevenson was a learned, a diligent and an efficient lawyer. He excelled particularly in the preparation of briefs, where his remarkable knowledge of the books and his tireless industry made him indeed formidable. For jury practice he had less aptitude, and this he avoided. His mind was clear and logical. While in the service of the Iron Mountain railroad he devoted his whole time to the writing of briefs for the Supreme Court; and rarely has work of that description been so well done.

His service upon our circuit bench was too short for the wishes of the bar, who were unanimous in urging him to retain the position;

but it was long enough to enable him to display the qualities that go to make a judge—learning, impartiality, quickness of apprehension, accurate thinking and a strong sense of justice.

He was a man of perfect integrity, kind and courteous to all, faithful to every duty; and his untimely taking off, when he had reached a position where he was reaping the fruits of his long study and diligent labors, was a calamity to his family and a serious loss to us all. Therefore, be it

Resolved, That in the death of Mr. Stevenson, we have been deprived of one of our worthiest members, and that we sympathize deeply with his family in their bereavement.

Resolved, further, That these resolutions be presented to the Supreme Court, and that a copy of them be sent to his family as an expression of our esteem for our departed brother and our sympathy for them in their grief.

J. C. MARSHALL,
MORRIS M. COHN,
GEO. B. ROSE,
E. B. KINSWORTHY,
JOHN E. MARTINEAU,
Committee.

At the conclusion of the above remarks, the Chief Justice responded on behalf of the Court.

II.

OPINIONS NOT REPORTED.

Henson *v.* Hargraves; appeal from Baxter Circuit Court; John W. Meeks, judge; affirmed April 27, 1914; *per* Wood, J.

Lemuels *v.* State; appeal from Little River Circuit Court; Jefferson T. Cowling, judge; affirmed April 27, 1914; *per* Hart, J.

Woolman *v.* State; appeal from Garland Circuit Court; Calvin T. Cotham, judge; affirmed May 4, 1914; *per* McCulloch, C. J.

Jones *v.* Shibley; appeal from Crawford Circuit Court; Jeptha H. Evans, judge; affirmed May 4, 1914; *per* Wood, J.

Richardson *v.* Cohn; appeal from Cleburne Circuit Court; George W. Reed, judge; affirmed May 4, 1914; *per Smith*, J.

Bryan *v.* State, use Garland County; appeal from Garland Circuit Court; Calvin T. Cotham, judge; affirmed May 11, 1914; *per* McCulloch, C. J.

Hicks *v.* Hicks; appeal from Little River Chancery Court; James D. Shaver, chancellor; reversed May 11, 1914; *per* Smith, J.

McDaniels *v.* State; appeal from White Circuit Court; J. M. Jackson, judge; affirmed May 11, 1914; *per* Smith, J.

Garrard *v.* State; appeal from Columbia Circuit Court; C. W. Smith, judge; affirmed May 18, 1914; *per* Smith, J.

Burrow *v.* State; appeal from Randolph Circuit Court; John W. Meeks, judge; affirmed June 1, 1914; *per* McCulloch, C. J.

Graysonia-Nashville Lumber Co. *v.* Hopkins; appeal from Clark Circuit Court; C. W. Smith, special judge; reversed June 1, 1914; *per* McCulloch, C. J.

Randolph & Randalph *v.* Nelms; appeal from Crittenden Chancery Court; Charles D. Frierson, chancellor; affirmed June 1, 1914; *per* Wood, J.

Queen of Arkansas Insurance Co. *v.* Dumas; appeal from Yell Circuit Court, Dardanelle District; Hugh Basham, judge; reversed June 8, 1914; *per* Wood, J.

White River Levee District *v.* Travis; appeal from Prairie Circuit Court, Northern District; Eugene Lankford, judge; affirmed June 8, 1914; *per* Smith, J.

St. Louis, I. M. & S. Ry Co. *v.* Ward; appeal from Lawrence Circuit Court, Eastern District; R. E. Jeffery, judge; affirmed June 15, 1914; *per* McCulloch, C. J.

St. Louis, I. M. & S. Ry. Co. *v.* Cabiness; appeal from Saline Circuit Court; W. H. Evans, judge; affirmed June 15, 1914; *per* McCulloch, C. J.

Delolme *v.* State Savings Bank of Springfield, Mo.; appeal from Independence Chancery Court; George T. Humphries, chancellor; affirmed June 15, 1914; *per* Wood, J.

St. Louis S. W. Ry. Co. *v.* Green; appeal from Columbia Circuit Court; George W. Hays, judge; reversed June 15, 1914; *per* Hart, J.

Bank of Corning *v.* Crites; appeal from Lawrence Chancery Court; George T. Humphries, chancellor; affirmed June 15, 1914; *per* Smith, J.

Woodburn *v.* Bertig Store Co.; appeal from Mississippi Chancery Court, Chickasawba District; Charles D. Frierson, chancellor; affirmed June 22, 1914; *per* Hart, J.

Elliott *v.* Hogue; appeal from Union Chancery Court; James M. Barker, chancellor; reversed June 22, 1914; *per* Smith, J.

Valley Farming Co. *v.* Northern Construction Co.; appeal from Clay Circuit Court, Western District; W. J. Driver, judge; affirmed June 29, 1914; *per* Wood, J.

St. Louis, I. M. & S. Ry. Co. *v.* Musgrove; appeal from Phillips Circuit Court; J. M. Jackson, judge; reversed June 29, 1914; *per* Kirby, J.

Givens *v.* Hinton; appeal from Lafayette Chancery Court; James M. Barker, chancellor; affirmed July 6, 1914; *per* Wood, J.

Morphis *v.* State; appeal from Pope Circuit Court; Hugh Basham, judge; affirmed July 6, 1914; *per* Kirby, J.

Wheatley *v.* City of Rogers; appeal from Benton Circuit Court; J. S. Maples, judge; affirmed July 6, 1914; *per* Smith, J.

III.

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J. Y. Jarvis *v.* Spaulding Manufacturing Company; Randolph Circuit Court; W. A. Cunningham, special judge; appeal dismissed, April 27, 1914, by consent of parties; *per curiam.*

Chicago, Rock Island & Pacific Railway Company *v.* R. S. Taylor; Calhoun Circuit Court; Neil C. Marsh, special judge; settled and appeal dismissed on appellant's motion, May 11, 1914; *per curiam.*

John Mustel, indicted as John Matule, *v.* The State of Arkansas; Sebastian Circuit Court, Greenwood District; Daniel Hon, judge;

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Mrs. Maggie Abrams *v.* Little Rock Trust Company; Pulaski Chancery Court; John E. Martineau, chancellor; affirmed for noncompliance with rule 9, June 8, 1914; *per curiam.*

Henry Hosto, Louis Hosto, Fred Hosto, Emma Hosto, Henry Ledebur, Mrs. Henry Ledebur, Emma Ledebur, Henry Eilers, and Mrs. Cora Eilers *v.* The State of Arkansas; Prairie Circuit Court, Southern District; appeal dismissed for failure to comply with the condition of the statute fixing the time for filing transcripts in misdemeanor cases, June 8, 1914; *per curiam.*

A. W. Hall and Willie G. Hall *v.* John A. Croom, R. E. Cole and J. H. Gleason, directors of Levee District No. 1, of Yell County; Yell Chancery Court, Dardanelle District; Jordan Sellers, chancellor; appeal dismissed for noncompliance with rule 9, June 15, 1914; *per curiam.*

J. W. Ferguson, *et al. v.* E. E. Williams, *et al; certiorari* to Bradley Circuit Court; E. E. Williams, special judge; petition for *certiorari* overruled, July 13, 1914; *per curiam.*

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will leaving only legacies held to create a trust where the estate comprised real property. *Id.*
power of executors to mortgage property belonging to an estate. *Id.*
inconsistent provisions; construction. *Little* v. *McGuire*, 497.
terms of will held to create a trust in real estate, when. *Id.*

WORDS AND PHRASES:

word "court" held to mean "judge" in act providing for county depository. *Robertson* v. *Derrick*, 40.
"or otherwise," defined. *Townsley* v. *Hartsfield*, 253.
as used in written contracts, may be explained by oral testimony, when. *Davis* v. *Martin Stave Co.*, 325.