ARKANSAS REPORTS

VOL. 116

CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

DECEMBER, 1914, to FEBRUARY, 1915

JAMES V. JOHNSON
REPORTER

PUBLISHED
BY THE
STATE OF ARKANSAS
1916

COPYRIGHT 1916
BY EARLE W. HODGES
SECRETARY OF STATE OF ARKANSAS

FEB 26 1916.

LITTLE ROCK
DEMOCRAT PRINTING & LITHOGRAPHING COMPANY
1916

JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

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

TABLE

OF CASES REPORTED

A

Arkansas Cotton Oil Co. (State *ex rel.*, Attorney General *v.*) 74
Arkansas Logging Co. *v.* Martin 318

B

Bain *v.* Fort Smith Light & Traction Co..... 125
Bank of Forrest City (City of Forrest City *v.*) 377
Barnett Bros. *v.* Wright. 44
Barton *v.* Wilson..... 400
Beal (Horton & Co. *v.*).. 273
Bell v. Phillips..... 167
Biddle *et al.*, Receivers, *v.* Jacobs 82
Black *v.* Special School District No. 2..... 472
Bowden *v.* Webb..... 310
Bowen, Exr. (Williams *v.*) 266
Brignardello *v.* Cooper.. 103
Buena Vista Veneer Co. *v.* Hodges, Receiver 253
Butler *v.* Cabe..... 26

C

Cabe (Butler *v.*)..... 26
Campbell (St. Louis, I. M. & S. R. Co. *v.*)..... 119
Carbondale Machine Co. (Summers, Receiver, *v.*) 246
Chapman & Dewey Land Co. *v.* Woodruff..... 189
Chicago, R. I. & P. Ry. Co. (Tedford *v.*) 198
City of Forrest City *v.* Bank of Forrest City.. 377
Coleman (Southern Cotton Oil Co. *v.*)..... 268
Columbia County (Jackson *v*). 386
Collison (Hodges *v.*).... 420
Cook *v.* Worthington.... 328
Cooper (Brignardello *v.*) 103
Cooper *v.* McCoy..... 501
Coppedge (Little Rock Gas & Fuel Co. *v.*).... 334
Cotham (State *ex rel.* Wood *v.*) 36
Cotton Belt Levee Dist. No. 1 (West *v.*)..... 538
Crane *v.* Jackson..... 100
Crenshaw (Kendall *v.*)... 427

D

Dardanelle, Town of *v.* Gillespie 390
Davis (Loveless *v.*)..... 443
Dyer *v.* Dyer..... 487

E

Eagle *v.* Oldham..... 565
Elrod (St. Louis, I. M. & S. R. Co. *v.*)..... 514
English *v.* Shelby..... 212

F

Fechheimer - Kiefer Co., The, *v.* Kempner..... 482
Forrest City, City of, *v.* Bank of Forrest City.. 377
Fort Smith Light & Traction Co. (Bain *v.*)..... 125
Fort Smith & Western Rd. Co. *v.* Hare..... 10
Fowler *v.* Frazier..... 350
Frazier (Fowler *v.*)..... 350
Friend (Morris *v.*)..... 424

G

Gage (Hall *v.*)..... 50
Gaines *v.* Gaines..... 508
Garretson - Greeson Lbr. Co. *v.* Goza..... 277
German National Bank *v.* Moore 490
Gillespie (Town of Dardanelle *v.*) 390
Goza (Garretson-Greeson Lbr. Co. *v.*)..... 277
Grubbs (Kraft Co., C. L. *v.*) 520

H

Haley *v.* Thompson..... 354
Hall *v.* Gage..... 50
Hare (Fort Smith & Western Rd. Co. *v.*)..... 10
Hastings *v.* United States Fidelity & Guaranty Co. 220
Hearn (Holland Banking Co. *v.*) 238
Henson (Landreth *v.*)... 361
Hodges *v.* Collison..... 420
Hodges, Receiver (Buena Vista Veneer Co. *v.*)... 253
Holland (Meyer *v.*)..... 271
Holland Banking Co. *v.* Hearn 238
Holt *et al.*, Receivers, *v.* Leslie 433
Holub *v.* State..... 227
Horton & Co. *v.* Beall... 273
Huff (Kansas City & Memphis Ry. Co. *v.*).. 461
Hutton (J. K. Siphon Ventilator Co. *v.*)..... 545

I

Ide & Co. (Stiel & Co. *v.*) 244

J

J. K. Siphon Ventilator Co. *v.* Hutton..... 545
Jacks Bayou Drainage Dist. *v.* St. Louis, I. M. & S. Ry. Co..... 30
Jackson *v.* Columbia County 386
Jackson (Crane *v.*) 100
Jacobs (Biddle *et al.*, Receivers, *v.*) 82
Jones (Laser *v.*)..... 206
Jones *v.* Travers..... 95
Jones & Harrington *v.* Scott 108
Joyce (Smith *v.*)..... 61

K

Kansas City & Memphis Ry. Co. *v.* Huff..... 461
Kansas City S. Ry. Co. *v.* State 455

Kempner (The Fechheimer-Kiefer Co. *v.*) .. 482
Kendall *v.* Crenshaw 427
Klingensmith v. Logan County 65
Kraft Co., C. L., *v.* Grubbs 520

L

Landreth *v.* Henson 361
Langford *v.* National Life & Accident Ins. Co. 527
Laser *v.* Jones 206
Leslie (Holt *et al.*, Receivers, *v.*) 433
Lewis *v.* Young 291
Linn-McCabe Co., The, *v.* Williams 307
Little Rock Gas & Fuel Co. *v.* Coppedge 334
Logan County (Klingensmith *v.*) 65
Loveless *v.* Davis 443
Lucius *v.* State 260
Lyons (Morris *v.*) 416

Mc

McCoy (Cooper *v.*) 501
McKie *v.* McKie 68

M

Malvern Lumber Co. *v.* Sweeney 56
Martin (Arkansas Logging Co. *v.*) 318
Merchants & Planters Bk. of Camden *v.* New First Nat. Bk of Columbus, O. 1
Mewes *v.* Mewes 155
Meyer *v.* Holland 271
Middleton (St. Louis, I. M. & S. Ry. Co. *v.*) 284
Millsaps *v.* Urban 90
Moore (German National Bank *v.*) 490
Morris *v.* Friend 424
Morris *v.* Lyons 416

N

National Life & Accident Co. (Langford *v.*) 527
New First Nat. Bk. of Columbus, O. (Merchants & Plant. Bk. of Camden *v.*) 1
Newton *v.* Warren Vehicle Stock Co. 393

O

Ogburn (Rogers *v.*) 233
Oldham (Eagle *v.*) 565

P

Phillips (Bell *v.*) 167
Phillips (Wolf & Bailey *v.*) 115
Pine Bluff & Ark. River. Ry. Co. *v.* Washington. 179
Plumley *v.* State 17

Q

Queen *v.* Queen 370

R

Roberts *v.* State, Use Logan County 410
Rogers *v.* Ogburn 233

S

St. Louis, I. M. & S. Ry. Co. *v.* Campbell 119

St. Louis, I. M. & S. Ry. Co. *v.* Elrod..... 514
——— (Jacks Bayou Drain. Dist. *v.*)..... 30
——— *v.* Middleton 284
——— (Taylor *v.*) 47
——— *v.* Wilson 163
Scott (Jones & Harrington *v.*) 108
Shelby (English *v.*) 212
Smith *v.* Joyce..... 61
Sons *v.* State..... 357
Sorrels *v.* Warnock..... 496
Southern Cotton Oil Co. *v.* Coleman 268
Special School Dist. No. 2 (Black *v.*) 472
State (Holub *v.*) 227
——— (Kansas City S. Ry. Co. *v.*) 455
——— (Lucius *v.*) 260
——— (Plumley *v.*) 17
——— (Sons *v.*) 357
——— (Tanner *v.*) 452
State *ex rel.* Attorney General *v.* Ark. Cotton Oil Co. 74
State *ex rel.* Wood *v.* Cotham 36
State, Use Logan County (Roberts *v.*) 410
Stewart (Worthen *v.*) ... 294
Stiel & Co. *v.* Ide & Co... 244
Summers, Receiver, *v.* Carbondale Machine Co. 246
Sweeney (Malvern Lumber Co. *v.*) 56

T

Tanner *v.* State..... 452
Taylor *v.* St. Louis, I. M. & So. Ry. Co..... 47
Tedford *v.* Chicago, R. I. & P. Ry. Co..... 198
Thompson (Haley *v.*).... 354
Travers (Jones *v.*)..... 95

U

U. S. Fidelity & Guaranty Co. (Hastings *v.*)..... 220
Urban (Millsaps *v.*)..... 90

W

Warnock (Sorrels *v.*) ... 496
Warren Vehicle Stock Co. (Newton *v.*) 393
Washington (Pine Bluff & Ark. River Ry. Co. *v.*) 179
Webb (Bowden *v.*)..... 310
West *v.* Cotton Belt Levee Dist No. 1..... 538
Williams *v.* Bowen, Exr.. 266
Williams (The Linn-McCabe Co. *v.*) 307
Wilson (Barton *v.*)..... 400
Wilson (St. Louis, I. M. & S. Ry. Co. *v.*)..... 163
Wolf & Bailey *v.* Phillips. 115
Wood *v.* Wood..... 142
Woodruff (Chapman & Dewey Land Co. *v.*)... 189
Worthen *v.* Stewart..... 294
Worthington (Cook *v.*).. 328
Wright (Barnett Bros. *v.*) 44

Y

Young (Lewis *v.*) 291

TABLE OF CASES
CITED BY THE COURT

A

Ainsworth *v.* Lakin, 57 L. R. A. 132 132
Aitcheson *v.* Huebner, 90 Mich. 643 316
Alexander *v.* McCauley, 22 Ark. 553 500
Allen *v.* Keeves, 1 East. 435..... 8
Allison *v.* State, 74 Ark. 444..... 265
Altheimer *v.* Board Dir. Plum Bayou Levee Dist., 79 Ark. 229, 384
American Bonding Co. *v.* Laigle, S. & L. Co., 111 Ark. 155..... 259
American Bonding Co. *v.* Morris, 104 Ark. 276..... 197
American Sales Book Co. *v.* Whitaker, 100 Ark. 365..... 306
Anderson *v.* State, 82 Ark. 405... 460
Andrew *v.* Blackly, 11 Ohio St. 89, 8
Anthony *v.* Manlove, 53 Ark. 423, 119
Apel *v.* Kelsey, 52 Ark. 341....368-513
Arkadelphia *v.* Clark, 52 Ark. 23.. 393
Arkansas Central Ry. Co. *v.* State, 72 Ark. 250 438
Arkansas Life Ins. Co. *v.* American National Ins. Co., 110 Ark. 139 245-506
Arkansas Natl. Gas Co. *v.* Miller, 105 Ark. 477 325
Ashley *v.* Kanawha Valley Tr. Co., 60 W. Va. 306..... 135
——— *v.* ———, 9 Am. & Eng. Ann. Cas, 840-2 136

B

Bailey *v.* Chicago, M. & St. P. R. Co., 19 L. R. A. 653.....211
Baker *v.* Kinsey, 38 Cal. 631, 99 Am. Dec. 438..... 442
Baltimore City Pass. R. Co. *v.* McDonnell, 43 Md. 534..... 136
Bank of Hartford *v.* McDonald, 107 Ark. 232..... 258
Bankers Trust Co. *v.* McCloy, 109 Ark. 160..... 565
Barr C. & P. Co. *v.* Brooks-Ozan Mer. Co., 82 Ark. 219..... 306
Barton-Parker Mfg. Co. *v.* Taylor, 78 Ark. 586..... 306
Beavers *v.* State, 60 Ark. 124.... 419
Beene *v.* Beene, 64 Ark. 518..... 431
Bill *v.* Stewart, 31 N. E. 386..... 7
Billingsley *v.* St. L., I. M. & S. Ry. Co., 84 Ark. 617..... 348
Blair *v.* State, 69 Ark. 558..... 265
Blake *v.* Hamilton Dime Savings Bk. Co., 20 L. R. A. (N. S.) 290, 16 Am. & Eng. Ann. Cas. 210... 10
Blass *v.* Reinman, 102 Ark. 293.. 390
Bloom *v.* Strauss, 73 Ark. 56..... 332
Board of Imp. Dist. No. 60 *v.* Cotter, 71 Ark. 556..... 176
Bogy *v.* Roberts, 48 Ark. 17..... 152
Boles *v.* Kelley, 90 Ark. 34..... 176
Boley *v.* Sonora Development Co., 126 Mo. App. 116, 103 S. W. 975 564
Bonner *v.* Snipes, 103 Ark. 298.... 418
Booe *v.* Vinson, 104 Ark. 439..... 333
Bookout *v.* Bookout, 150 Ind. 63.. 408
Bothell *v.* Fletcher, 94 Ark. 100.. 9
Boykin *v.* State, 34 Ark. 443..... 359
Boylan *v.* Warren, 39 Kan. 301... 316
Bragg *v.* Hartney, 92 Ark. 55.... 377
Brannon *v.* May, 42 Ind. 92..... 408

Brooks Medicine Co., Wm., *v.* Jeffries, 94 Ark. 575..... 306
Brown, *In re*, 2 Story's Rep. 502.. 8
Brown *v.* Brown, 104 Ark. 313... 106
Bruder *v.* State, 110 Ark.. 415.... 24
Bruil *v.* Northwestern Mutual Relief Assn., 39 N. W. (Wis.) 529 204
Brummett *v.* Pearle, 36 Ark. 472.. 500
Bunch *v.* Chaffin, 106 Ark. 306.... 418
Burke *v.* Dulaney, 153 U. S. 228.. 306
Burks *v.* Harris, 91 Ark. 205..... 94
Burton *v.* Chicago Mill & Lbr. Co., 106 Ark. 304..... 35
Butler *v.* Ives, 139 Mass. 202.... 72
Byington *v.* St. L. Rd. Co., 147 Mo. 673, 49 S. W. 876..... 134
Byrd *v.* State, 69 Ark. 537..... 23

C

Campbell *v.* Campbell, 13 Ark. 513 332
Carey *v.* Watkins, 97 Ark. 153.... 94
Carpenter *v.* Gibson, 104 Ark. 32.. 152
Carr *v.* State, 43 Ark. 99..... 23
Carter *v.* Younger, 112 Ark. 483, 166 S. W. 547..... 432
Carwell *v.* Dennis, 101 Ark. 603.. 162
Caswell *v.* Boston Elevated Ry., 190 Mass. 527, 77 N. E. 380.... 136
Central Ry. Co. *v.* Lindley, 105 Ark. 294 140
Champion *v.* Gordon, 70 Pa. St. 474, 10 Am. Rep. 681..... 8
Chesapeake & Ohio Ry. Co. *v.* Heath, 103 Va. 64..... 60
Chicago, R. I. & P. Ry. Co. *v.* State, 86 Ark. 412, 219 U. S. 453..... 460
Childs *v.* State, 98 Ark. 435..... 23
Choate *v.* O'Neal, 57 Ark. 299.... 353
C., O. & G. Rd. Co. *v.* Hickey, 81 Ark. 579 225
Chowning *v.* Stanfield, 49 Ark. 87 500
Chrisman-Sawyer Banking Co. *v.* Independence Wool Mfg. Co., 168 Mo. 634, 62 S. W. 1026..... 564
Clark *v.* Clark, 49 Ill. 163..... 72
Clarke *v.* School Dist. No. 16, 84 Ark. 516 480
Cleveland School Dist. *v.* Great Northern Ry. Co. (N. D.), 126 N. W. 995, 28 L. R. A. (N. S.) 757 210
Cobb *v.* Hammock, 82 Ark. 584... 40
Cockrill *v.* Armstrong, 31 Ark. 580 332
Coleman *v.* Hill, 44 Ark. 452.... 500
Collins *v.* Mack, 31 Ark. 684..... 237
Collins *v.* Paepcke-Leicht Lbr. Co., 74 Ark.. 81..... 513
Conditt *v.* Holden, 92 Ark. 618.... 206
Condren *v.* Gibbs, 94 Ark. 478..... 317
Connor *v.* Electric Trac. Co., 173 Pa. St. 602, 34 Atl. 238..... 136
Corbitt *v.* Carroll,50 Ala. 315.... 227
Coughlan *v.* Cambridge, 166 Mass. 268, 44 N. E. 218..... 325
Coykendall *v.* Durkee 13 Hun. 260 211
Craig *v.* Russellville Waterworks Imp. Dist., 84 Ark. 390..... 178
Crane *v.* Siloam Springs, 67 Ark. 30 178
Crenshaw *v.* Moore, 134 Tenn. 528, 137 S. W. 924..... 408
Culley & Son *v.* Edwards, 44 Ark. 423 353
Cumming *v.* Brookland City Rd. Co., 104 N. Y. 669, 10 N. E. 855 136
Cupp *v.* Welch, 50 Ark. 294..... 177
Currier *v.* Continental Life Ins. Co., 52 Am. Rep. 134..... 534

D

Dallas Consolidated Elec. St. Ry. *v.* Ison, 83 S. W. 408..... 135
Daniels *v.* Kyle, 1 Kelley, 304... 8
Davies *v.* Durham, 141 N. C. 134, 52 S. E. 617..... 136
Dempsey *v.* Savis, 98 Ark. 570... 236
Denton *v.* Mammoth Spring Elec. L. & P. Co., 105 Ark. 161..... 89
Doner's Estate, *In re*, 27 Atl. 42.. 227
Doss *v.* Long Pairie Levee Dist., 96 Ark. 451..... 306
Drainage Dist. No. 1 *v.* Rolfe, 110 Ark. 374 268

Drinkwater *v.* Crist, 83 Ark. 293.. 407
Duckworth *v.* State, 83 Ark. 192.. 359
Durfey *v.* Thalheimer, 85 Ark. 552 389
Dwight *v.* Elmira C. & N. R. Co., 132 N. Y. 199, 15 L. R. A. 612, 28 Am. St. Rep. 563, 30 N. E. 398.. 210

E

Earl *v.* Harris, 99 Ark. 112..... 396
Earl *v.* Reid, 18 Am. & Eng. Ann. Cas. 1, 21 Ontario Law Rep. 545 54
Eddy *v.* Loyd, 90 Ark. 340..... 46
El Dorado & Bastrop Ry. Co. *v.* Knox, 90 Ark. 1..... 49
El Dorado Imp. Co. *v.* Citizens Bank, 85 Ark. 185..... 260
English *v.* North, 112 Ark. 489, 166 S. W. 577..... 448
Euper *v.* State, 85 Ark. 223..... 46
Evatt *v.* Miller, 114 Ark. 84, 169 S. W. 817 508
Exchange Nat. Bank *v.* Little, 110 Ark. 263 10

F

Fancher *v.* Kenner, 110 Ark. 117, 161 S. W. 166..... 353
Farmers Bldg. & Loan Assn. *v.* Jones, 68 Ark. 76..... 106
Ferguson *v.* Carr, 85 Ark. 251.... 225
Finley *v.* Shemwell, 94 Ark. 190.. 102
Fitzgerald *v.* Fitzgerald, 6 L. R. A. 2 P. C. 83..... 71
Fletcher *v.* Holmes, 32 Ind. 497.. 407
Flowers *v.* Flowers, 84 Ark. 557.. 405
Fogel *v.* Butler, 96 Ark. 87....209-420
Foote, *Ex parte*, 70 Ark. 12..... 390
Ford's Admr. *v.* Paducah City Ry. Co., 99 S. W. 355, 30 Ky. Law Rep. 644..... 135
Fourche River Lbr. Co. *v.* Walker, 96 Ark. 540..... 420
Frammell *v.* Little, 16 Ind. 251... 441
Frank *v.* Frank, 88 Ark. 1..... 577
Freeo Valley Rd. Co. *v.* Hodges, 105 Ark. 314, 151 S. W. 281.... 78
Fridge *v.* State, 20 Am. Dec. 463. 227
Fuller *v.* State, *ex rel.* Drainage Dist., 164 S. W. 770..... 357

G

Galloway *v.* Darby, 105 Ark. 558 333
Gauch *v.* St. L. M. L. Ins. Co., 88 Ill. 251 408
German-American Ins. Co. *v.* Harper, 70 Ark. 306..... 519
Gist *v.* Pettus, 115 Ark. 400..... 333
Gladish *v.* Lovewell, 95 Ark. 618.. 493
Glassey *v.* Worcester Consol. St. R. Co., 185 Mass. 315, 70 N. E. 199 136
Golder *v.* Golder, 95 Me. 259..... 408
Graham *v.* Remmel, 76 Ark. 140.. 306
Grand Trunk Ry. Co. *v.* Ives, 144 U. S. 408..... 136
Graves *v.* Rose, 246 Ill. 76, 92 N. E. 601, 30 L. R. A. (N. S.) 303.... 576
Greer *v.* Vaughan, 96 Ark. 524... 225
Griffin *v.* Collins, 49 S. E. (Ga.) 827 227
Grimmett *v.* Witherington, 16 Ark. 377 365
Grober *v.* Clements, 71 Ark. 565.. 430
Guynn *v.* McCauley, 32 Ark. 97... 513

H

Haley *v.* Thompson, 116 Ark. 354 479
Hall *v.* Cox, 104 Ark. 305..... 152
Hamburg Bank *v.* George, 92 Ark. 472 486
Hamilton *v.* State, 62 Ark. 543... 264
Hammond *v.* Hammond, 55 Md. 575 572
Hampton *v.* Hickey, 88 Ark. 324.. 414
Hanlon *v.* South Boston Hors R. Co., 129 Mass. 310..... 136
Hannaford *v.* Dowdle, 75 Ark. 127 153
Harbison *v.* Hammons, 113 Ark. 10, 167 S. W. 849..... 10
Harbour *v.* Harbour, 103 Ark. 73 152
Hardage *v.* Stroope, 58 Ark. 303.. 236
Hare *v.* Fort Smith & West Rd. Co, 104 Ark. 187..... 11
Harnwell *v.* White, 115 Ark. 88.. 178

Harper *v.* Smith, 89 Ark. 284.... 369
Harper *v.* Smith, 89 Ark. 284.... 513
Harris *v.* Carstens Pk. Co., 86 Pas. 1125, 6 L. R. A. (N. S.) 1164.. 440
Harrison *v.* Sutter, St. R. Co., 116 Cal. 165, 47 Pac. Rep. 1019.... 136
Hauenstein *v.* Gillespie, 73 Miss. 742, 55 Am. St. Rep. 569..... 226
Hayes *v.* Goldman, 71 Ark. 251.... 237
Hayes *v.* Mich. Cent. Rd. Co., 111 U. S. 228..... 134
Hazelton *v.* Douglas, 65 Am. St. Rep. (Wis.) 122..... 226
Head *v.* Phillips, 70 Ark. 432.... 577
Helena Spl. School Dist. *v.* Kitchens, 108 Ark. 137.....357-479
Helmert, *Ex parter*, 103 Ark. 571 314
Henderson *v.* Durham Traction Co., 132 N. C. 779, 44 S. E. 598. 136
Hershy *v.* McGreevy & Yantis, 46 Ark. 498 246
Hess' Admr. *v.* Segenfelter, 127. Ky. 348 534
Hester *v.* Bourland, 80 Ark. 145.. 493
Hibben *v.* Malone, 85 Ark. 584.205-500
Higgins *v.* Lockwood, 74 N. J. L. 158 317
Hitchcock *v.* Galveston, 96 U. S. 341 384
Hoard *v.* State, 80 Ark. 87..... 24
Hoffman *v.* McFadden, 56 Ark. 217 427
Hogue *v.* State, 93 Ark. 316..... 360
Hollenberg *v.* Bankston, 107 Ark. 337 252
Holmes *v.* Bluff City Lumber Co., 97 Ark. 180..... 265
Holwerson *v.* St. Louis & Sub. Ry. Co., 157 Mo. 216..... 134
Honey *v.* Greene County, 102 Ark. 106 356-479
Hooper *v.* Chism, 13 Ark. 496..... 375
Hot Springs St. Ry. Co. *v.* Hildreth, 72 Ark. 572..... 140
——— *v.* Johnson, 64 Ark. 421.. 140
Hubbard *v.* Central of Georgia Ry., 63 S. E. 19, 19 L. R. A. (N. S.) 738 470
Hughes *v.* U. S., 4 Wall. 232..... 505
Huntington *v.* Attrill, 146 U. S. 657 79
Hutchinson *v.* Hutchinson, 34 Ark. 164 237

I

Imp. Dist. *v.* St. L. S. W. Ry. Co., 99 Ark. 515..... 178
Ingham Lbr. Co. *v.* Ingersoll, 93 Ark. 447 397
Iredell *v.* Barbee, 31 N. C. 250.... 227

J

Jacks *v.* Dyer, 31 Ark. 334..... 405
Jackson *ex parte* 45 Ark. 158.... 314
Jackson *v.* State 92 Ark. 71..... 265
Jacoway *v.* McGarrah, 21 Ark. 347 405
Jentzsch *v.* Jentzsch, 84 Ark. 322 152
Jewett *v.* McConnell, 112 Ark. 291, 165 S. W. 954..... 40
Johnson *v* Johnson, 41 Vt. 467... 406
Johnson *v.* Mantooth, 108 Ark. 36 506
Johnson *v.* Phillips, 85 Ark. 86.. 409
Johnson v. Richardson, 44 Ark. 365 152
Johnson *v.* Stewart, 62 Ark. 164.. 140
Jones, *In re*, 31 L. R. A. (N. S.) 548, 109 Pac. 750..... 392
Jones *v.* Nichols, 46 Ark. 207.... 166

K

Kansas City, Ft. S. & M. Ry. Co. *v.* Becker, 63 Ark. 477..... 518
Kansas City So. Ry. Co. *v.* Boles, 88 Ark. 533..... 15
Kelly's Heirs *v.* McGuire, 15 Ark. 555 99
Kendall *v.* Kendall, 42 Ia. 464.... 408
Kies *v.* Young, 64 Ark. 381..... 72
Kissire *v.* Plunkett-Jarrell Grocer Co., 103 Ark. 473..... 423
Kraft *v.* Smothers, 103 Ark. 269.. 176
548, 109 Pac. 750..... 392

L

Lake *v.* Little Rock Trust Co., 77 Ark. 53 423
Lamar, Exr., *v.* Micon, Admr., 114 U. S. 218..... 366
Lamont *v.* Grand Lodge Iowa Legion of Honor, 31 Fed. 177.... 537

Lanzer *v.* Butt, 84 Ark. 335..... 177
Lawler *v.* Lawler. 107 Ark. 70... 74
Leonard *v.* State, 95 Ark. 381... 459
Lewis *v.* Rieff, 114 Ark. 366..... 178
Lewis Mer. Co. *v.* Harris, 101 Ark. 4 494
Lindsay *v.* Lindley, 20 Ark. 573... 102
Liston *v.* Chapman & Dewey Land Co., 77 Ark. 116..... 400
L. H. & St. L. Ry. Co. *v.* Jolly, 90 S. W. 977 60
Little Rock Ry & Elec. Co. *v.* Sledge, 108 Ark. 95..... 136
——— *v.* Dobbins, 78 Ark. 553. 185
Little Rock Trac. & Elec. Co. *v.* Nelson, 66 Ark. 494..... 23
Lovewell *v.* Bowen, 75 Ark. 452... 315
Lumpkins *v.* Johnson, 61 Ark. 80 513
Luttrell *v.* Reynolds, 63 Ark. 258.. 506

M

Mahan *v.* Union Depot, etc., Co., 34 Minn. 29, 24 N. W. 293..... 136
Main *v.* Oliver, 88 Ark. 383..... 306
Marsel *v.* Bowman, 62 Ia. 57..... 441
Mason *v.* Adone, 30 Tex. Civ. App. 276, 70 S. W. 347..... 81
Mason *v.* Dierks Lbr. & Coal. Co., 94 Ark. 107..... 106
Mathy *v.* Mathy, 88 Ark. 60..... 152
Matlock *v.* Bledsoe, 77 Ark. 60.. 534
May *v.* Fletcher, 40 Ind. 575..... 408
Meek *v.* Penn. Co., 38 Ohio St. Rep. 632 136
Melton *v.* St. L., I. M. & S. Ry. Co., 99 Ark. 436..... 507
Memphis & L. R. Ry. Co. *v.* Stringfellow, 44 Ark. 322..... 438
Memphis St. Ry. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374..... 135
Merchants Nat. Bank *v.* Citizens Gas Light Co., 159 Mass. 505... 384
Merchants Bank *v.* State Bank, 10 Wall. (U. S.) 604..... 5
Merrill *v.* Monticello, 138 U. S. 673 382
Meyer *v.* Holland, 116 Ark. 271... 276
Midland Valley Ry. Co. *v.* Ennis, 109 Ark. 206..... 60
——— *v.* Fay & Egan, 89 Ark. 342 204
——— *v.* Moran Bolt & Nut Mfg. Co., 80 Ark. 403..... 252
Mills *v.* Marshall, 8 Ind. 54..... 406
Millsaps *v.* Brodgon, 97 Ark. 469.. 28
Minnesota Rate Cases, 230 U. S. 352 461
Minor *v.* Mapes, 102 Ark. 354.... 29
Missouri & North Ark. Rd. Co. *v.* Duncan, 104 Ark. 409..... 138
Mobbs *v.* Millard, 106 Ark. 563.368-514
Mobley *v.* Andrews, 55 Ark. 222...353
Mohawk Bank *v.* Broderick, 10 Wend. 304 8
Morgan *v.* Kendrick, 91 Ark. 394 419
Montgomery *v.* Dane, 81 Ark. 154 107
Moore *v.* St. Louis Transit Co., 194 Mo. 1, 92 S. W. 390..... 135
Morrilton Waterworks Imp. Dist. *v.* Earl, 71 Ark. 4..... 134
Morrow *v.* James, 69 Ark. 539..237-513
Morton *v.* Morton, 82 Ark. 492.... 162
Moss *v.* Sandefur, 15 Ark. 381... 353
Murray *v.* Menefee, 20 Ark. 561.. 102
Mutual Life Ins. Co. *v.* Allen, 138 Mass. 24, 52 Am. Rep. 245..... 537

Mc

McCray *v.* Cox, 105 Ark. 47..... 293
McDaniel *v.* Orner, 91 Ark. 171.. 94
McDonald *v.* Horker, 57 Ark. 632.. 374
McDonald *v.* Smith, 95 Ark. 526.. 152
McGill Lbr. Co., J. H., *v.* Lane-White Lbr. Co., 90 Ark. 426.... 162
McKeown *v.* Lacey. 200 Mass. 437 72
McKneely *v.* Terry, 61 Ark. 527.. 205
McMahan *v.* State, 102 Ark. 12.... 43
McRae *v.* Warmack, 98 Ark. 52.. 532

N

Naler *v.* Ballew, 81 Ark. 328.... 153
Nathan *v.* Sloan, 34 Ark. 524.... 423
National Surety Co. *v.* Coates, 83 Ark. 545 419

Nashville, C. & St. L. Ry. *v.* Dale *et al.*, 68 Kan. 108, 74 Pac. 596 205
Nelson & Wife *v.* Green, 22 Ark. 547 353
Newman *v.* Jacobson, 108 Ark. 297 106
Newtan *v.* Russian, 74 Ark. 88... 107
Norfolk R., etc., Co. *v.* Corletto, 100 Va. 355, 41 S. E. 740..... 136
North American Trust Co. *v.* Chappell, 70 Ark. 507..... 577

O

O'Hair *v.* O'Hair, 76 Ark. 389.... 152
Oliver *v.* Nance, 34 Ark. 564..... 408
Owen *v.* Storm, 72 Atl. 441..... 260

P

Page *v.* Metropolitan Life Ins. Co., 98 Ark. 340..... 535
Park Hotel Co. *v.* Fourth Nat. Bank, 30 C. C. A. 409..... 260
Parker *v.* Wilson, 98 Ark. 561... 333
Patch *v.* White, 117 U. S. 210.... 572
Pate *v.* Johnson, 15 Ark. 75..... 162
Patton *v.* Texas & Pac. Ry. Co., 179 U. S. 658..... 60
Pedigo *v.* Commonwealth, 103 Ky. 41, 42 L. R. A. 432, 82 Am. St. 566, 44 S. W. 143..... 232
Penn. Co. *v.* Chicago, M. & St. P. Ry. Co., 144 Ill. 197, 33 N. E. 415 205
People *v.* Medart, 46 N. E. 1095.. 227
Perry County Bk. *v.* Rankin, 73 Ark. 589 64
Pettus *v.* Kerr, 87 Ark. 396..... 138
Pickler *v.* Ark. Pkg. Co., 112 Ark. 33 306
Pillow *v.* Sentelle, 49 Ark. 430... 74
Pipkin *v.* Williams, 57 Ark. 242.. 106
Pitts *v.* Stuckert, 111 Ark. 388... 314
Potter *v.* Worley, 57 Ia. 66..... 406
Powell *v.* Holman, 50 Ark. 85.... 317
Price *v.* Greer, 76 Ark. 426..... 500
Prudential Ins. Co. *v.* Williams, 113 Ark. 373, 168 S. W. 1114.... 535
Pulaski County *v.* Hill, 97 Ark. 450 419

R

Railway Co. *v.* Amos, 54 Ark. 159 338
——— *v.* Combs, 51 Ark. 324.. 211
——— *v.* Ferguson, 57 Ark. 16 166
——— *v.* Goolsby, 58 Ark. 401. 123
——— *v.* Henderson, 57 Ark. 414 88
——— *v.* Murphy, 60 Ark. 333.. 310
——— *v.* Sweet, 60 Ark. 550.... 310
Rawls *v.* American Mutual Life Ins. Co., 27 N. Y. 284, 84 Am. Dec. 280 533
Reynolds *ex parte*. 52 Ark. 330.. 14
Reynolds *v.* Railway Co., 59 Ark. 171 14
Richardson *v.* Bales, 66 Ark. 452.. 205
Robinson *v.* Bishop & Wife, 23 Ark. 378 333
Rock Island Plow Co. *v.* Masterson, 96 Ark. 446..... 204
Rockford City Ry. Co. *v.* Blake, 173 Ill. 354, 50 N. E. 1070, 64 Am. St. Rep. 122..... 135
Russell *v.* St. L. S. W. Ry. Co., 113 Ark. 353, 158 S. W. 135..... 518

S

Sadler *v.* Cravens, 93 Ark. 11.... 67
St. Louis, I. M. & S. Ry. Co. *v.* Andrews, 79 Ark. 437..... 60
——— *v.* Ayres, 67 Ark. 371.... 211
——— *v.* Barnett, 65 Ark. 255.. 138
——— *v.* Broomfield, 83 Ark. 288 339
——— *v.* Brown, 49 Ark. 253... 237
——— *v.* Carter, 93 Ark. 589... 138
——— *v.* Dowgiallo, 82 Ark. 289 185
——— *v.* Gibson, 107 Ark. 431.49-140
——— *v.* Harden, 83 Ark. 255.. 339
——— *v.* Hempfling, 107 Ark. 476 89
——— *v.* McCullough, 101 Ark. 254 338
——— *v.* Philpot, 72 Ark. 23.. 49
——— *v.* Raines, 90 Ark. 482.. 338
——— *v.* Rhoden, 93 Ark. 29.. 49
——— *v.* Robertson, 103 Ark. 361 185

St. Louis, I. M. & S. Ry. Co. *v.* Shaw, 94 Ark. 15 442
——— *v.* Yates, 111 Ark. 486 325
St. Louis & N. Ark. Rd. Co. *v.* Crandell, 75 Ark. 89 162
St. Louis Land & Bldg. Assn. *v.* Fueller, 81 S. W. 414 64
St. Louis & S. F. Rd. Co. *v.* Grider, 110 Ark. 437 439
St. Louis S. W. Ry. Co. *v.* Russell, 64 Ark. 230 50
——— *v.* Stanfield, 63 Ark. 643 49
Salter *v.* Burt, 20 Wend. 205 8
Sanders *v.* McMillan, 39 Am. St. Rep. 19 406
Scoggin *v.* State, 109 Ark. 515 ... 24
Seaboard Air Line Ry. *v.* Chamblin, 60 S. E. 727, 108 Va. 42 209
——— *v.* Horton, 233 U. S. 492. 468
Seattle & M. R. Co. *v.* Murphine, 30 Pac. 720, 4 Wash. 448 209
Settle *v.* St. Louis & S. F. Rd. Co., 127 Mo. 336 89
Shane *v.* Dickson, 111 Ark. 353.74-352
Sharp *v.* State, 51 Ark. 155 486
Shayne *v.* Evening Post Pub. Co., 168 N. Y. 70 80
Sidway *v.* Lawson, 58 Ark. 117.106-177
Simmons Nat. Bk. *v.* Dilley Foundry Co., 95 Ark. 368 259
Simpson *v.* Blewitt, 110 Ark. 87 .. 276
Smith *v.* Bank, 99 Mass. 605 88
Smith *v.* Bell, 31 U. S. 68 573
Smith *v.* Imp. Dist. No. 14, 108 Ark. 141 176
Smith *v.* McNeal, 109 U. S. 426 ... 505
Smith *v.* Weatherford, 92 Ark. 6 265
Smithee *v.* Mosely, 31 Ark. 426 ... 500
Sorrells *v.* McHenry, 38 Ark. 127 .. 46
South Covington & Cin. Ry. Co. *v.* City of Covington, 35 S. C. R. No. 5, p. 158 460
Spears *v.* State, 16 L. R. A. (N. S.) 285, 46 So. 166 232
Speed *v.* Fry, 95 Ark. 148 267
Sperry *v.* Sperry, 8 N. H. 477 237
Spooner *v.* Spooner, 155 Mass. 52 72
Spradling *v.* Spradling, 101 Ark. 451 152
Sprouse *v.* Commonwealth, 132 Ky. 269, 116 S. W. 344 232
State *v.* Lancashire Ins. Co., 66 Ark. 466 459
State *v.* Norman, 153 N. C. 591 ... 232
State *v.* Southwestern Land & Timber Co., 93 Ark. 621 414
State *ex rel.* Smith *v.* Askew, 48 Ark. 82 40
State *ex rel.* *v.* King, Auditor, 154 Ind. 621 216
——— *v.* Neel, 48 Ark. 283 314
——— *v.* Stevenson, 89 Ark. 31 40
——— *v.* Williams, 110 Tenn. 549 316
Stevens *v.* Boston El. R. Co., 184 Mass. 476, 69 N. E. 338 136
Stewart *v.* Pritchard, 101 Ark. 101 106
Stewart *v.* Stewart, 65 N. W. 976 .. 576

T

Thomas *v.* State, 85 Ark. 138 359
Tiner, Admr. *v.* Christian, Admx., 27 Ark. 306 353
Tuttle *v.* Farmers' Handy Wagon Co. *et al.*, 144 N. W. 938 327

U

Union Compress Co. *v.* Wolf, 63 Ark. 174 519

V

Vance, *In re*, 92 Cal. 195 366
Vaughan *v.* State, 58 Ark. 353 ... 309
Vaugine *v.* Taylor. 18 Ark. 65 162
Veasey *v.* Veasey, 110 Ark. 389 ... 374

W

Wales-Riggs Plantations *v.* Caston, 105 Ark. 641 527
Walls *v.* Brundidge, 109 Ark. 250 493
Ware *v.* Allen, 128 U. S. 590 306
Warmack *v.* Askew, 97 Ark. 19 ... 225
Watkins *v.* Curry, 103 Ark. 414 .. 94
Watkins *v.* Griffith, 59 Ark. 360 .. 178

Watson *v.* Wolff-Goldman Realty Co., 95 Ark. 18 236
Weatherford *v.* State, 78 Ark. 36 265
Weaver *v.* Rush, 62 Ark. 51 405
Webb *v.* Webb, 111 Ark. 54 333
Westlake, *In re*, 82 Pac. 279, 40 Wash, 144 209
Westminster Bank *v.* Wheaton, 4 R. I. 30 8
West St. Louis Savings Bk. *v.* Shawnee County Bk., 95 U. S. 557 260
Wheelock *v.* Simons, 75 Ark. 19 .. 236
Whipple *v.* Tucksworth, 81 Ark. 403 176
Williamsport, City of, *v.* Commonwealth *ex rel.*, 84 Pa. St. 487 384
Wilmans *v.* Robinson, 67 Ark. 517 236
Wilson *v.* Torchon Lace & Mer. Co. (Mo.) 149, S. W. 1156 564
Winchester, City of, *v.* Redmond, 93 Va. 711 134
Wood *v.* Wood, 59 Ark. 441 430
Wood *v.* Stewart, 81 Ark. 41 94
Wood *v.* Wood, 100 Ark. 372 152
Woodberry *v.* Matherson, 19 Fal. 778 406

Y

Yelvington *v.* Short, 111 Ark. 253 398
Young *v.* Crawford, 82 Ark. 33 ... 490
Young *v.* Hiner, 72 Ark. 299 366

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

THE MERCHANTS & PLANTERS BANK OF CAMDEN *v.* THE NEW FIRST NATIONAL BANK OF COLUMBUS, OHIO.

Opinion delivered December 14, 1914.

1. BILLS AND NOTES—CERTIFIED CHECK—RIGHT TO STOP PAYMENT.—After a bank has certified a check, the drawer can not stop payment on it, and the mere fact that the drawer has notified the bank not to pay the check, does not release the bank from its liability thereon.
2. BILLS AND NOTES—CERTIFIED CHECK—TIME OF PAYMENT.—A check was drawn payable to order and dated ahead. Before the date of payment, the drawer had the check certified by the drawee bank. *Held*, the word "certified," as used by the bank on the check, clearly and unequivocally imported an absolute promise by the bank to pay the check, when presented to it on the day named.
3. BILLS AND NOTES—CERTIFIED CHECK—CHECK PAYABLE AT FUTURE DATE—RIGHTS OF HOLDER IN GOOD FAITH.—A check is a negotiable instrument, and a holder of it in good faith and without any notice of any infirmity of title is entitled to maintain an action upon it against the maker, although the latter has a good defense as against the payee; and the fact that a check is payable at a future date, does not change the rule.
4. BILLS AND NOTES—CERTIFIED CHECK—RIGHTS OF HOLDER.—A bank which has received a certified check for deposit, and has credited the depositor with the amount of it, is a *bona fide* holder, and may enforce payment of it as against the drawee bank.

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

STATEMENT BY THE COURT.

Walter P. and John E. Ritchie instituted this action in the chancery court against John J. Lentz, A. C. Stuart,

State National Bank of Texarkana, Arkansas, and Merchants & Planters Bank of Camden, Arkansas, to enjoin them from paying a check drawn by W. P. Ritchie against the Merchants & Planters Bank for $2,000, payable to the order of John J. Lentz, and certified by the bank.

The action was commenced on the 23d day of February, 1912, and subsequently the New First National Bank, of Columbus, Ohio, learning of the pendency of the suit, appeared and was made a party defendant. It filed its answer and cross complaint against W. P. Ritchie and the Merchants & Planters Bank of Camden, alleging that it was a *bona fide* purchaser for value in the usual course of business, and asked judgment for the amount of the check.

The facts, briefly stated, are as follows: On July 1, 1911, W. P. and John E. Ritchie entered into a written contract whereby Lentz agreed to sell them certain bonds and stocks of the Texarkana Telephone Company for the sum of $30,000; and the contract further provided that the Ritchies should deposit with A. C. Stuart a certified check on the Merchants & Planters Bank, of Camden, Arkansas, for $2,000, payable to John J. Lentz, for the faithful performance of the contract. It was also provided that should the Ritchies fail to carry out their part of the contract on or before the 1st day of November, 1911, the said Stuart was authorized and directed to deliver the check to Lentz as a forfeiture and in full settlement of all damages sustained by him for a breach of the contract. The check is as follows:

"Camden, Ark., November 1, 1911.

"Pay to John J. Lentz, or order, two thousand ($2,000) dollars.

(Signed) "W. P. Ritchie.

"Certified for $2,000. 6-29-1911. A. C. Powell, Cashier.

"Protested for nonpayment March 22. Louis Baiurlein, Notary Public."

On February 23, 1912, Lentz demanded the check from Stuart and the holder notified the Ritchies that he

was going to deliver it to Lentz, and did deliver it to him on that date. That night Lentz left for his home in Columbus, Ohio, and on the morning of February 26, 1912, he presented the check to the New First National Bank of Columbus, which, because it was a certified check, received it as cash and placed the amount to the credit of Lentz. In due course the check was presented on March 22, 1912, to the Merchants & Planters Bank of Camden for payment. Payment was refused by the bank on the ground that it had been enjoined by the chancery court in the present action.

The evidence on the part of the New First National Bank of Columbus shows that it had no notice of any infirmity, if any, in the check until it received notice of protest some time after March 5, 1912. In the meantime Lentz had checked out of the bank all of his deposit and his account at the close of business on March 4, 1912, showed an overdraft of $872.67. The chancellor made the following finding of fact:

"Plaintiffs on June 29, 1911, issued and caused to be certified by the defendants, the Merchants & Planters Bank of Camden, Arkansas, their check, dated the 1st of November, 1911, payable to the order of John J. Lentz, one of the defendants, for the sum of $2,000 as earnest money on a contract of purchase to be performed November 1, 1911, and to be forfeited to the said John J. Lentz in the event that plaintiff failed to comply with said contract: that said check was delivered to A. G. Stuart, one of the defendants, as trustee, subject to the conditions of the contract; that said contract was not executed, and on February 23, 1912, the said A. G. Stuart delivered said check to the defendant, John J. Lentz and at that time, the said John J. Lentz had not complied with his part of the contract and was not entitled to receive the check; that on the same day a restraining order enjoining the payment of said check was issued and served on the defendants, the State National Bank, and the Merchants & Planters Bank of Camden, Arkansas, but no service thereof was had on the other defendants."

It is conceded that the finding of fact in this respect is not against the preponderance of the evidence.

The chancellor also found that the New First National Bank of Columbus, Ohio, was an innocent purchaser for value in the ordinary course of business and was entitled to recover from the Merchants & Planters Bank of Camden, Arkansas, the amount of the check. A decree was accordingly entered by the chancellor in favor of the New First National Bank of Columbus, Ohio, against the Merchants & Planters Bank of Camden, Arkansas, and the latter bank has duly prosecuted an appeal to this court.

W. H. Arnold and *Will Steel,* for appellant.

1. If the so-called certified check involved here had not been post-dated, the question would be whether its negotiation several months after the date would put the purchaser on inquiry as to defense or the ownership thereof. 7 Enc. of L. 852; 101 Ark. 543; 71 N. Y. 435, 27 Am. Rep. 70; 7 Johns. 70. But the check here is an irregular act, and is not in fact a check, but a bill of exchange. Certification of a post-dated check before its date is an irregular act and puts the purchaser upon inquiry. 13 N. Y. Sup. Ct. 76; 6 Am. Dig., Cent. Ed., § 404; 52 Barb. (N. Y.) 592.

Where a depositor dates a check on a certain day, but inserts a future date of payment, the instrument is not a check, because not payable on demand, but is a bill of exchange payable at some future date. 5 Ohio St. 13; 64 Am. Dec. 632; 8 N. Y. 190; 57 N. Y. 126.

Since the check was overdue when deposited in the bank in Ohio, the bank was not a holder in due course, and the check was open to any defense which would have been good against Lentz. 7 Enc. of L. 952; 7 Am. Dig., Cent. Ed., Bills and Notes, § 21; 64 Am. Dec. 634, and cases cited.

2. If a purchaser at all, was the appellee bank an innocent purchaser? 7 Am. Dig., Cent. Ed., § 887; 2 Fed. Rep. 609; 3 Hun, 147; Am. Dig. 1908A, "Banks and Banking," par. 145B; Am. Dig., Cent. Ed., par. 899, § J.

Webber & Webber, for appellee.

1. By certifying a check to be good, the bank assumes an unconditional obligation to the holder, to pay it on demand. Norton, Bills and Notes, 395-398. The certification implies that the check is drawn on sufficient funds in the drawee's possession, that they have been set apart for payment, and will be thus applied when presented for payment. 5 Cyc. 540, 541; 19 U. S. (L. Ed.) 1008, 1019. As between the holder and the drawer, when a certified check has been delivered, the maker's power over it is gone; and the drawer or endorser of a certified check can not stop payment or revoke it, after delivery, by notice to the drawee not to pay.

A bank that has received a certified check for deposit is a *bona fide* holder, and may enforce payment, notwithstanding it may have received notice, before payment to the depositor, that the check was fraudulently obtained by him. 20 L. R. A. (N. S.) 290, and note; 43 Barb. 392.

2. There is no merit in the contention that the check was in fact not a check, but a bill of exchange, and, therefore, past due when negotiated. A check may be payable at a future date without ceasing to be a check. 10 Am. St. Rep. 681; 7 Cyc. 531; *Id.* 868; *Id.* 853; 32 Am. Dec. 530; 114 Pac. 668; 71 S. E. 946; 39 Ua. 92; 80 Am. Dec. 507; 69 Am. Dec. 678; 67 Barb. 24; 86 N. Y. Supp. 857.

HART, J., (after stating the facts). (1) In a case note to 16 Am. & Eng. Ann. Cases, at page 213, it is stated that the rule seems to be well settled that after a bank has certified a check, the drawer can not stop payment on it, and that the mere fact that the drawer has notified the bank not to pay the check does not release the bank from its liability thereon. A number of cases from various States are cited to support the rule.

In the case of Merchants' Bank v. State Bank, 10 Wallace, U. S. 604, Mr. Justice Swayne, speaking for the court, at page 647, said:

"By the law merchant of this country the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient

funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption and is extinguished by payment.

"It can not be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion.

"A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks, the practice is at once to charge the check to the account of the drawer, to credit it in a certified check account, and when the check is paid to debit that account with the amount. Nothing can be simpler or safer than this process.

"The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money.

"It is computed by a competent authority that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than one hundred millions of dollars.

"We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity."

This is conceded to be the correct rule, by counsel for the defendant, but it is contended by them, in the first place, that the notation on the margin of the check is not equivalent to a certification by the bank, and that if it were, because the check was payable at a future time, it became to all intents and purposes an inland bill of exchange, and some authorities are cited by them in support of the latter contention.

(2) In regard to the first contention made by counsel for the defendant it may be said that the check was made payable on November 1, 1911, and on the 29th day of June the drawer of the check caused this notation to be made on it by the cashier of the bank: "Certified for $2,000. 6/29/1911. B. C. Powell." On the 1st day of July, 1911, the check was delivered to A. C. Stuart to be by him and in turn delivered to John J. Lentz in compliance with the terms of the contract on that day executed between Lentz and the Ritchies. When Ritchie presented the check to the bank for certification it was manifest that he intended to negotiate it and when certified by the bank the certification became an acknowledgment by the bank that Ritchie would have funds on deposit which the bank would pay over to the holder of the check upon its being presented after November 1, 1911. The word "certify" clearly meant an absolute promise on the part of the bank to pay the check when presented to it on the day named. The language clearly and unequivocally imported an absolute promise to pay by the bank.

(3) In regard to the second contention of counsel for the defendant, it may be said that in the case of *Bill v. Stewart,* 31 N. E. 386, the Supreme Court of Massachusetts said that a check is a negotiable instrument and a holder of it in good faith and without notice of any infirmity of title is entitled to maintain an action upon it against the maker, although the latter has a good defense as against the payee. The court further held that the

fact that it is postponed does not take the case out of the rule.

In the case of *Champion* v. *Gordon,* 70 Pa. St. 474, 10 Am. Rep. 681, the same contention was made as is made by counsel for defendant in the present case. Mr. Justice Sharswood, who was not only a very able and learned judge, but also a law writer of great renown delivered the opinion of the court, and said:

"The law merchant recognizes clearly a distinction, in many respects between checks on banks and ordinary bills of exchange. One difference is that, when the former are payable on demand or at sight, no days of grace are allowed. The same rule holds when they are postdated. Byles on Bills, 14, note; 3 Kent's Com. 104, note; In re *Brown,* 2 Story's Rep. 502; *Daniels* v. *Kyle,* 1 Kelly, 304; *Mohawk Bank* v. *Broderick,* 10 Wend. 304; *Salter* v. *Burt,* 20 *Id.* 205; *Andrew* v. *Blachly,* 11 Ohio, St. 89; *Westminster Bank* v. *Wheaton,* 4 R. I. 30. Whether it applies also to checks payable at a future day named, is a question upon which there is a contrariety of opinion and decision. Mr. Justice Story says: 'The argument pressed is that checks are always and properly payable on demand, and that, when payable at a future time, they become to all intents and purposes inland bills of exchange. But I am not, by any means, prepared to admit the validity or force of this distinction; and no case has been cited which, in my judgment, satisfactorily establishes it. A check is not less a check, because it is postdated, and thereby becomes, in effect, payable at a future and different time from that on which it is drawn or issued. This is sufficiently apparent from the case of *Allen* v. *Keeves,* 1 East. 435.' "

The learned justice further said: "If such an order drawn upon a bank, payable at a future day named in it, must be considered as an inland bill of exchange, and not a check, then the payee or holder has the right to present it at once for acceptance, protest it at once for nonacceptance, and sue the drawer immediately. Should it be accepted, however, the funds of the drawer in the bank

would necessarily be thereby tied up, until the day of payment. All the objects of directing payment at a future day would thus be frustrated. What the drawer undertakes is, that on a day named he will have the amount of the check to his credit in the bank. In the meantime he wants the full and free use of his entire deposit. It is not denied that a post-dated check can not be presented for acceptance. That is, by implication, payable on a future day. Why, then, is a check expressly so made payable, to stand on a different ground?"

Lentz, the holder of the check in this instance, resided in Columbus, Ohio. On the 26th day of February, 1912, he presented the check to the New First National Bank of that place, with which bank he transacted his banking business. The bank received the check as cash because it was certified and placed the amount to the credit of Lentz. It was then forwarded for collection in due course of business and payment was refused by the Merchants & Planters Bank of Camden because it had been enjoined from making payment by the chancery court and the check was, therefore, protested for non-payment.

Before the New First National Bank of Columbus had learned of this fact, Lentz had checked out of the bank all of his deposit and his account on March 4, 1912, showed an overdraft of $872.67. The testimony of the bank in this respect is not contradicted, and it is, therefore, shown to be an innocent purchaser for value in the usual course of business.

The fact that Lentz deposited the check with a bank at Columbus, Ohio, instead of collecting it from the bank on which it was drawn, is a matter of no moment as tending to put the bank on notice that the check was subject to any infirmity. This is so because Lentz resided in Columbus, Ohio, and deposited the check with a bank there with which he usually transacted his business. The bank there being a *bona fide* holder for value in the usual course of business, was not affected by any fraud in the transaction between the Ritchies and Lentz. *Bothell* v.

Fletcher, 94 Ark. 100; *Exchange National Bank* v. *Little,* 110 Ark. 263; *Harbison* v. *Hammons,* 113 Ark. 120, 167 S. W. (Ark.) 849; *Blake* v. *Hamilton Dime Savings Bank Co.,* 20 L. R. A. (N. S.) 290, 16 Am. & Eng. Ann. Cases, 210.

(4) In the last mentioned case the Supreme Court of Ohio held: The object of certifying a check is to enable the holder to use it as money. The drawer or indorser of a certified check can not, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay, and a bank that has received a certified check for deposit and has credited the depositor with the amount of it, is a *bona fide* holder and may enforce payment of it, notwithstanding the fact that it may, before payment to the depositor, have received notice that the check was fraudulently obtained by the depositor."

It follows that the decree must be affirmed.

FORT SMITH & WESTERN RAILROAD COMPANY *v.* HARE.

Opinion delivered December 14, 1914.

1. CONDEMNATION—RAILROAD DEPOSIT OF MONEY.—Under Kirby's Digest, § § 2955 and 2956, providing for the making a deposit in court, subject to the court's order, in condemnation proceedings, the deposit is to remain as security to the land owner for the compensation that may be finally awarded to him, and is subject to the court's order as the sum may be inadequate or too much, according to the court's final order.

2. CONDEMNATION—DEPOSIT.—In condemnation proceedings money deposited in a bank under Kirby's Digest, § 2955, is deposited subject to the order of the circuit court, and none of the parties to the proceeding has a right to withdraw that deposit without an order of the court, as it is contemplated that further proceedings be had before the money deposited should be paid to any one.

3. CONDEMNATION—DEPOSIT BY RAILROAD—LIABILITY—PAYMENT.—Where, in condemnation proceedings, money is deposited by a railroad company in a bank to the order of the court, under Kirby's Digest, § 2955, the railroad has no further control of the money, and is not liable, when the bank paid out the money improperly.

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

STATEMENT BY THE COURT.

This is the second appeal in this case. The opinion on the former appeal is reported in 104 Ark., at page 187, under the style of *Hare* v. *Fort Smith & Western Railroad Company,* and reference is made to that opinion for a complete and detailed statement of the facts and issues involved in the present appeal. We deem it proper, however, to make a brief statement here of the issues involved.

Shortly prior to the 28th day of June, 1901, the Fort Smith & Western Railroad Company instituted condemnation proceedings against Matt Grey, administrator of the estate of Mary A. Hare, deceased, Ella Hare, and others, for the purpose of obtaining a right-of-way over certain lands alleged to belong to them. On the 28th day of June, 1901, the circuit court made an order that the sum of $2,000 be deposited in the First National Bank of Fort Smith, Arkansas, subject to the order of the court for the purpose of making compensation to the defendants when the amount due them for the property sought to be appropriated should have been assessed according to law. The jury fixed a final award at the sum of $3,000 and judgment was rendered by the court upon the verdict, and that judgment recites as follows:

"Now, therefore, it is ordered, adjudged and considered that plaintiff take, have and hold possession of the said property above described, for its own use, and that of its assigns and successors, for the purposes aforesaid forever.

"And it is also adjudged that defendant have and recover of plaintiff, the sum of $3,000 and costs. And it is ordered that the sum of $..... deposited in court, be paid over to defendants, or to such one or more of them as shall establish his or their right to receive the same."

After this judgment was rendered Matt Grey, administrator of the estate of Mary A. Hare, drew a check

on the bank in which the $2,000 was deposited subject to the order of the court, the check being made payable to himself, and the bank paid him the money. No order of the court was made directing the bank to pay this money to him. The railroad company also paid him the sum of $1,000, the balance of the judgment.

At the time the condemnation proceedings were instituted and at the time the final award was made and judgment rendered on it, Mary A. Hare was an insane person and had before that time been duly adjudged insane by the probate court, and a guardian of her person and property had been appointed. Her condition was not disclosed in the condemnation proceedings, personal service being had upon her as if she were a sane person. It was not then known to whom the property belonged, but it was afterward adjudged to be the property of Ella Hare. She, by her guardian, instituted proceedings under section 4431 of Kirby's Digest, to vacate the judgment under the condemnation proceedings because she was a person of unsound mind and her condition did not appear in the record in the condemnation proceedings. The Fort Smith & Western Railroad Company alone was made a party defendant. The court sustained the demurrer to her complaint and dismissed her cause of action because the other defendants in the condemnation proceedings were not made parties to the action to set aside the judgment. This court, in our former opinion, held that Ella Hare could not maintain the action without making the other defendants to the condemnation proceedings parties to the proceeding. This court further held that the court should not have dismissed the complaint absolutely, and modified the judgment so as to dismiss the complaint without prejudice to a future action or suit by the plaintiff.

The plaintiff Ella Hare then instituted another action under section 4431 of Kirby's Digest to vacate the judgment in the condemnation proceedings, and all of the defendants in that suit were made parties. The court below granted the relief prayed for and after vacating

the judgment rendered in the condemnation proceedings, rendered judgment in favor of plaintiff against the Fort Smith & Western Railroad Company for the sum of $3,000, together with interest thereon from the 22d day of October, 1901, this being the amount allowed for compensation for the land taken and damaged by the railway company for railroad purposes. To reverse that judgment the railroad company has prosecuted this appeal.

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

The court erred in rendering judgment against appellant for the amount of the condemnation money, with interest thereon.

As to the $2,000, appellant paid that amount into court in accordance with its order and in strict compliance with the statute. Kirby's Digest, § 2955. This payment was an absolute discharge, *pro tanto,* of appellant's liability, and the money was thereafter in the custody of the court and subject to be paid out only on its order. Having deposited the money, as directed, and taken possession of the land condemned, appellant had no further interest in the money. 28 N. J. L. 162; 136 N. Y. 83; 32 N. E. 702; 22 Ohio St. 536; 2 N. J. Eq. 292; 73 N. Y. 560; 23 Vt. 226; 118 Pa. St. 515; 12 Heisk. (Tenn.) 621; 47 S. W. (Tenn.) 155.

Winchester & Martin, for appellee.

The court did not err in rendering judgment in favor of appellee for the value of the land at the time it was condemned, with interest. The court said on former appeal that if the judgment should be set aside appellee would be entitled to recover damages for the condemnation of the land. 104 Ark. 187-195. If appellee had been under no disability she would have been bound by the judgment rendered in the condemnation suit. *Id.* But being at the time an imbecile, and sued and treated throughout that suit as a person of sound mind, she is in no wise bound by any step taken in that suit. 1 Black on Judgments, § 205.

HART, J., (after stating the facts). Section 9, article 12, of the Constitution of 1874, provides that, "No property nor right-of-way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money," etc.

Section 2955 of Kirby's Digest provides that where the determination of questions in controversy in condemnation proceedings is likely to retard the progress of the work the court, or judge in vacation, shall designate the amount of money to be deposited by such company, subject to the order of the court, and for the purpose of making such compensation, when the amount thereof shall have been assessed, and that the judge shall designate the place of such deposit.

Section 2956 of Kirby's Digest provides that when such deposits shall have been made in compliance with the order of the court or judge, it shall be lawful for the railroad company to enter upon the land and proceed with its work.

In construing this section of the Constitution and the section of the statutes above referred to, in the case of *Reynolds* v. *Railway Company,* 59 Ark. 171, the court said:

"The Constitution and statute are unambigous. The purpose for which the deposit is required is apparent. By making the deposit the railroad company merely acquires the right to enter upon the land and proceed with its work pending an assessment of the damages. Its right to the property is not complete until the damages have been paid. The deposit is not made *for* the owner of the land, but, to the order of the court, to *secure* to him the payment of such damages as may be awarded by the jury."

In the case of *Reynolds,* Ex parte, 52 Ark. 330, the court, in regard to the section of the Constitution and sections of the statutes above referred to, said:

"The requirement that a deposit of money shall be made to secure the payment of compensation to the land

owner presupposes that the time is not ripe for payment, else no provision for security would be needed.

"It has been suggested that the clause means only a deposit of the assessment made by a jury in a condemnation proceeding as a provision for cases where the owner may refuse to accept the amount awarded as payment, or may be unknown, or not *sui juris*. It certainly covers these contingencies, and might easily have been restricted to them if it had been so intended. But the language employed does not restrict the meaning to such cases; it is general—compensation must be paid or secured in every case; and, pending proceedings to condemn, it is for the Legislature to determine when the deposit by way of security may be made."

See, also, *Kansas City Southern Railway Company* v. *Boles,* 88 Ark. 533.

(1) Thus it will be seen that the preliminary deposit is made subject to the order of the court and remains on deposit as security to the land owner for the compensation that may be finally awarded him. On the final hearing of the case the award may be increased and so the preliminary deposit may be insufficient to meet the award, and it would be necessary for the railroad company to pay an additional amount. On the other hand, the final award may be for a smaller sum than the amount deposited, and in that event the court would order a return of the excess to the railroad company. So, also, as was the fact in the case of *Reynolds* v. *Railway Company, supra,* the railway company might abandon its proposed route before entering upon the land and before any damage was done to the land owner, in which event it could file a motion for leave to dismiss its condemnation proceeding, and the court would order the amount of the preliminary deposit returned to it.

(2) In the case before us the preliminary deposit of $2,000 was placed in a bank subject to the order of the circuit court, and none of the parties to the proceeding had a right to withdraw that deposit without an order of the court. The final judgment in the case provided that

the amount deposited in the court should be paid over to the defendants or to such one or more of them as should establish his or their right to receive the same. This judgment contemplated further action on the part of the court before the money should be turned over to any of the defendants. It is not contended now by counsel for the plaintiff that the amount recovered on the final hearing of the cause was too small. On the other hand, it is conceded that the proof shows that that amount was the full value which should have been recovered as compensation for the land taken and damage done by the railway company. The only contention made by counsel for the plaintiff is that the railroad company should have paid the money to the legal guardian of Ella Hare. It will be noted, however, that the railroad company did not pay the money to any of the defendants, and as far as the record discloses, it had nothing whatever to do with the money being paid by the bank to Matt Grey as administrator of the estate of Mary Hare, who was the mother of Ella Hare.

(3) As we have already seen, the final judgment of the court contemplated that further proceedings should be had before the money deposited should be paid to any one. Matt Grey, as administrator of the estate of Mary Hare, deceased, drew a check on the bank in favor of himself for the amount of the preliminary deposit and that was paid to him. So far as the record shows, this was without the consent of the railroad company, and without any action on its part in that behalf. The amount so deposited was placed in the bank subject to the orders of the circuit court as security to the land owner for whatever sum might finally be awarded him as compensation for the land appropriated by the railroad company for its right-of-way. The railroad company had no further control over the money, and, having taken no part whatever in transferring the funds from the bank to Matt Grey, it is not liable to the plaintiff, Ella Hare, therefor.

A different question arises as to the $1,000. That amount of money was paid by the railroad to Matt Grey.

It follows from our decision on the former appeal that he was not entitled to receive it, and that it should have been paid to the guardian of Ella Hare.

It also follows that the judgment of the circuit court will be modified, and the cause of action of the plaintiff for the $2,000, the amount of the preliminary deposit, will be dismissed here; and the judgment of the circuit court for $1,000 and interest will be affirmed.

PLUMLEY *v.* STATE.

Opinion delivered December 14, 1914.

1. CRIMINAL LAW—EVIDENCE—RES GESTAE—HOMICIDE.—In a prosecution for homicide, exclamations of deceased made within ten or twenty seconds after he was shot are admissible in evidence as part of the *res gestae.* All that occurred at the time and place of the shooting, which has reference thereto, or connection therewith, is part of the *res gestae.*
2. HOMICIDE—SELF-DEFENSE.—In order to justify a homicide on the grounds of self-defense, it must appear that the circumstances were sufficient to excite the fears of a reasonably prudent person, and that the party killing really acted under this influence, and a bare fear that deceased will commit the act, to prevent which the homicide is committed, is not sufficient.
3. HOMICIDE—SELF-DEFENSE.—In a prosecution for homicide for the plea of self-defense to be availing, defendant must have acted so as to save his own life, and the deceased must have been the assailant, and it must appear that defendant endeavored to decline further combat before the mortal injury was given.
4. HOMICIDE—SELF-DEFENSE—RETREAT.—Defendant, in a prosecution for homicide, in order to establish a plea of self-defense, must show that he employed all the means in his power, consistent with his own safety, to retreat, and the plea is unavailing if he failed to do so.
5. HOMICIDE—SELF-DEFENSE.—In order to justify a plea of self-defense, it must have appeared to the defendant that his danger was imminent, and that, in order to save himself, the killing of deceased was necessary.

Appeal from Columbia Circuit Court; *C. W. Smith,* Judge; affirmed.

STATEMENT BY THE COURT.

A. J. Plumley was indicted for the crime of murder in the first degree in Columbia County for the killing of

his son-in-law, Bynum Martin, and upon trial was convicted of murder in the second degree, and from the judgment he appealed.

The facts are substantially: Bynum Martin was killed by being shot with a shotgun on the 3d day of October, 1913, in front of the house of Witt Perkinson in Columbia County, Arkansas. The killing occurred just about dark or shortly thereafter. Perkinson, who was at the supper table, heard a gun fire and a woman scream at his back porch. He ran immediately to her and then to the front porch, when he heard the dying man exclaim, "Oh! oh! Witt he shot me for nothing." He went to the place and found Bynum Martin lying on the ground wounded, who expired in five minutes thereafter. The feeling between the appellant and his son-in-law was not friendly and on the day of the killing and immediately before it, appellant called him up over the telephone and asked him why he had taken the flooring out of his cotton house, to which Martin replied, "I don't know that I have." Appellant said, "Yes, you have. I didn't give you the cotton house." Martin replied, "You have this wrong; come down here and we will talk it over." Appellant said, "No; I am not coming down there to your house, but I will meet you on half-way ground," to which Martin replied, "All right." This conversation was over a rural telephone line and J. H. Miller took down his receiver and heard it. He said the voices seemed dispassionate, and he was greatly shocked to hear of the death of Martin about a half-hour afterward. Appellant stated that Martin had moved the floor out of his cotton house, and he called him over the telephone and asked why he had done so, and "Martin replied that he did not know that he had moved the floor out of my cotton house," and I told him, "I did not give him the cotton house," and he said, "If you will come down here we will settle all that right now." I told him I did not care about coming down there, but would meet him on half-way ground, and he said he would do that, and I hung up the receiver. "I then picked up my gun and walked over to the bureau

drawer where I had two shotgun shells and put the shells in my gun. My wife asked me not to go down there, and I stood there and talked to her two or three minutes and told her I wouldn't meet Bynum myself, but would go to Witt Perkinson's and get him to go over to the half-way place and meet Bynum, and I started out, and just as I got to the place where the trail forked to go up to Perkinson's house, Bynum hailed me and said, "Is that you, Andrew Plumley?" and I said, "Yes," and he started toward me. I told him I was going up to Witt Perkinson's to get him to settle the matter and Bynum said, "No, sir," this is the time and here is the place where we will settle the matter," and I kept going and he started to head me off, saying all the time that he would not wait, that we would settle everything right there and then; he was within a few feet of me, about twelve, and said, "Here is the place where we will settle it," and at the time put his hand in his pocket and I thought I heard the click of a pistol. He was within ten or twelve feet of me. I raised my gun and fired, and he fell over there between me and the road. He was between ten and fifteen feet from me, between me and the road. I was standing in the trail that goes up from my house to Perkinson's, down toward my house from Martin's. My house was northwest of his, he was southeast of me. He was on the north side of the mound. We had not been on good terms prior to that night. He had mistreated my wife and also my daughter, who was his wife, to whom he had been married three years. I sold him the place he lived on and the house and little strip of land about thirty yards wide and two hundred fifty yards long, was not on the land I sold him, but I let him have the use of it, and he moved the floor from the house on this piece of land I had built for a shop. When I called him over the telephone he did not appear to be in a good humor. He was walking very fast when he came down toward me. Appellant told no one of having killed Martin until the Sunday following when he was asked about it.

Perkinson testified that he lived about two hundred yards from Plumley, the appellant. That the nearest way between the two houses was through his back yard; that the path from the front way was about fifty or seventy-five yards further than from the back. That Martin lived about a quarter of a mile from him; that going out from his front gate Plumley lived west and Martin to south. I heard the report of the gun that killed Bynum Martin. I was eating supper at the time and it was after dark, probably thirty minutes. There was only one report. About that time a woman screamed at the back of my house. I heard the scream about the time I heard the report, and went to see about it, and Mrs. Plumley was at the back door; I then ran to the front and the man who was shot exclaimed, "Oh! oh!"—that, I don't suppose, was over ten seconds after the shot was fired; I couldn't understand him; I heard him say, "Oh! oh!," and "Witt, he shot me for nothing." I was about fifty yards from the wounded man, and he died about five minutes after he was shot. He was unconscious after I got to him; it might have been twenty seconds from the time I heard the gun fire until Martin made the statement; I had gotten to the front porch after the gun fired, and I started when I heard the scream out the back way; I suppose it is twenty-five or thirty feet from the back to the front of the house. I heard Martin's statement before I got off of the front porch. Martin was lying to the right of my front gate toward Plumley's house. The body was lying toward the cotton house. Mrs. Plumley went out to where the body was lying. Plumley was not there that night, although there was a crowd of thirty or forty present. A knife partly opened was found near Martin's body shortly after he was killed. The wound was in the left side. Nine buckshot entered the body with the exception of those striking the hand of the deceased. The cotton house was sixty or seventy feet from where the body was lying, and near where the roads come together.

The State's theory of the case was that appellant had gotten behind the cotton house and waited until Mar-

tin came more than two-thirds of the way and shot him as he passed. Gun wads were found in a direct line between the place where the weeds and grass had been tramped down by the cotton pen by some one standing there, and the place where the body laid, showing they had been fired from the same gauge gun used by the appellant and loaded with buck shot. The first wad was found about ten or twelve feet from the cotton house and the layer of thin paper, the one over the shot, was found within five or six feet of the body which was about thirty-five feet from the cotton house. The most of the shot ranged upward and the mound near which Martin fell was about a foot and a half higher than the ground at the cotton house.

The court, among others, gave the following instructions, over the objections of the appellant.

Instruction No. 5, given at the instance of the State, is as follows: "You are instructed that a bare fear of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under this influence, and not in the spirit of revenge."

Instruction No. 7, given at the instance of the State, is as follows:

"You are instructed that in ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, as it appears to the defendant, acting without negligence on his part, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal injury was given."

Instruction No. 9, given at the instance of the State, is as follows:

"You are instructed that in order to justify the taking of life in self-defense, the defendant must have employed all the means within his power and consistent with his safety to have avoided the danger and averted the necessity of the killing, and if you find that the defendant, consistent with his own safety, could have avoided the danger to himself as it actually appeared to him, and have averted the necessity of shooting the deceased by retreating, then you are told it was his duty to retreat, and if he failed to do so, he can not plead self-defense in justification of his act."

Instruction No. 10, given at the instance of the State, is as follows: "You are instructed that before the plea of self-defense made herein by the defendant shall be available, it must have appeared to the defendant, not only that the danger to him at the hands of the deceased was imminent, but it must also appear that it was so pressing and urgent that, to save himself from death, or great bodily harm, the killing of the deceased was necessary."

J. W. Warren, C. W. McKay and *Wade Kitchens,* for appellant.

1. The testimony of Perkinson was inadmissible as a dying declaration. 21 Cyc. 988; 85 Ark. 300; 39 *Id.* 221; 52 *Id.* 345; 63 Ark. 382; 12 Bush. 271; 46 S. W. 217; 80 S. W. 88; 107 *Id.* 768; 20 Cyc. 976. The declarant was not *in extremis.* 2 Ark. 229.

2. Nor was the declaration admissible as *res gestae.* 85 Ark. 300; 85 Ala. 330; 66 Ark. 494.

3. The court erred in giving instruction 5. 67 Ark. 594.

4. Instruction 7 for the State, also 9, on self-defense, are not the law. Nor is No. 10. See 67 Ark. 594.

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

1. The "dying declaration" was properly admitted as *res gestae.*

2. Instruction 5 was proper. 109 Ark. 510-515; 80 Ark. 87; 67 Ark. 594.

3. Courts are not required to cover *all* the law in one instruction. Instructions 7 and 10 are not open to objection. 110 Ark. 402; 29 Ark. 248; 67 *Id.* 594-607; 110 Ark. 402-414; Jacobson's Dig., p. 611; 76 Ark. 515.

4. No. 9 for the State is sustained by 76 Ark. 515. There is no error.

KIRBY, J., (after stating the facts). (1) It is contended that the court erred in admitting the testimony of the exclamation made by the deceased after he was shot and in giving each of said instructions. Appellant insists that the testimony of Witt Perkinson, admitted over his objections, that deceased exclaimed immediately after he was shot, "Oh! oh! Witt, he shot me for nothing," was incompetent and highly prejudicial. We do not agree with this contention. The exclamation was part of the *res gestae,* and it was necessary to make this proof to fully and correctly set out the facts of the killing. The exclamation was made by the wounded man within ten or twenty seconds, at most, after the shot was fired, and was so close in point of time as to be a part of the transaction, and it would have been difficult to give a connected and correct account of the occurrence without stating all that was said and done concerning it. As said in *Childs* v. *State,* 98 Ark. 435, "Under the law, all that occurred at the time and place of the shooting which has reference thereto or connection therewith was part of the *res gestae.*" *Byrd* v. *State,* 69 Ark. 537. "*Res gestae* are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting." *Carr* v. *State,* 43 Ark. 99. See, also, *Little Rock Traction & Electric Co.* v. *Nelson,* 66 Ark. 494.

It is next contended that said instructions given by the court deprived the accused of acting upon the appearance to him of danger and authorized the jury to find him guilty, unless they believed from the evidence that the killing was necessary to save his own life or to prevent his receiving great bodily harm.

(2) There was no error committed in giving instruction numbered 5 complained of. It did not relate to the question of murder or manslaughter, but exclu-

sively to the question of justification of the homicide, or self-defense, and there is nothing in the testimony indicating that appellant is not a person of ordinary reason and sense. *Bruder* v. *State,* 110 Ark. 415; *Scoggin* v. *State,* 109 Ark. 515; *Hoard* v. *State,* 80 Ark. 87.

(3-4-5) Neither are instructions numbered 7 and 9 open to the objection that they precluded the defendant from acting upon the appearance to him of danger. Nor did the court intend by instruction numbered 10 to tell the jury that the defendant was not permitted to avail of the plea of self-defense, unless it appeared to them that the danger was so pressing and urgent that to save himself from death or great bodily harm the killing of the deceased was necessary. It was the purpose only to tell the jury in this instruction that it must have appeared to the defendant not only that the danger to him at the hands of deceased was imminent, etc., but also that it was so pressing and urgent that to save himself, etc., the killing of the deceased was necessary. Although the instruction says "it must have appeared to the defendant not only that the danger to him was imminent," but it must also appear, etc., intending only to say, but also or but it must also have appeared "that it was so pressing and urgent," etc., leaving it to the jury to properly consider defendant's right to act upon appearances of danger when doing so without fault or carelessness. It was not the intention, however, and the instruction did not require the jury to find that the danger was so pressing and urgent that the defendant was required to act in order to save himself nor deny him the right to act upon the appearance of danger.

The instructions given for the defendant unmistakably show that such was the court's direction, and this instruction properly construed is not in conflict with them. The court repeatedly told the jury that the defendant had the right to act under the circumstances as they appeared to him and in instruction numbered 6, after stating that the defendant relied upon the plea of self-defense, "The court instructs you that in determining

whether or not he acted within his rights under the law of self-defense, you may render the question very simple by adopting the rule which the court now instructs you is the law, as follows:

First. "In so far as is possible, you are to place yourself in the position and under the circumstances surrounding the defendant at the time of the shooting, acting without carelessness on his part, as those circumstances and his position have been disclosed by the evidence, viewing it from the standpoint of the defendant at the time, as you believe from the evidence it appeared to him, you will ask:

(1) "Did it appear to the defendant at the time he fired the fatal shot, acting without carelessness on his part, that he was in danger of losing his life or of receiving great bodily harm at the hands of the defendant?

(2) "If it did so appear, did the defendant reach the conclusion that he was in danger of losing his life or of receiving great bodily harm at the hands of the deceased after the exercise of such caution and prudence in judging the appearance and circumstances by which he was surrounded as appeared to him to be reasonably consistent with his safety?"

The court told the jury in instruction numbered 8, "You will note that you must place your findings upon what you believe from the evidence the defendant, acting without carelessness on his part, actually thought of the circumstances and appearances by which he was surrounded at the time. It is not how you think those circumstances and appearances might have affected or impressed you, nor what the defendant might have done, or ought to have done. The question for you to decide on this issue of self-defense is, what, in good faith, acting under the test the court has given you, the defendant thought he ought to do. It really comes at last to this: Was the defendant really trying to save his own life or to prevent great bodily harm to himself, or did he shoot deceased simply out of malice or revenge? If he shot to save his own life or to prevent great bodily harm to

himself, acting without carelessness on his part, as it appeared necessary to him under the test above laid down, he is not guilty, and you will acquit him."

The appellant claimed to have killed the deceased in necessary self-defense, and the jury did not give credence to his statement. While it is true that seven of the eight of the charge of buckshot that entered the body and side of the deceased went through his hand, lending some weight to defendant's statement that he shot deceased when he thought he was about to draw a weapon; it is further true that most of the shot ranged upward, and if defendant had been in ten or fifteen feet of the deceased when he shot him, and shooting from his hip even as he claimed, the range of the bullets would doubtless not have been upward and most probably the entire charge would have entered the body of deceased without separating. The testimony would have warranted the conviction of the defendant of the higher degree of the offense and the instructions fairly submitted the issues to the jury.

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

BUTLER v. CABE.

Opinion delivered December 14, 1914.

1. PUBLIC HIGHWAYS—RIGHT TO USE OF.—All persons alike have equal right to use the public streets and highways for purposes of travel by proper means, and with due regard to the corresponding rights of others, and an automobile and a mule driven to a buggy are alike proper means of conveyance upon a public highway.
2. AUTOMOBILES—USE OF PUBLIC ROADS—DUTY OF CARE.—All travelers upon public highways are bound to the exercise of ordinary care in the use thereof, both for their own protection and the safety of others, and ordinary care may require a greater exercise of care by automobilists on country roads, where horses and mules are likely to be frightened, than that required of other users of the highway.
3. AUTOMOBILES—PUBLIC HIGHWAY—FRIGHTENING ANIMALS.—In an action for damages where plaintiff was injured when a mule he was

driving was frightened by defendant's automobile, while both were traveling upon a public highway, it is prejudicial error to charge the jury that plaintiff could not recover if he knew that the animal was likely to be frightened by an automobile driven on the highway, and that plaintiff's conduct in driving such an animal was not that of a reasonably prudent man under similar circumstances.

Appeal from Lafayette Circuit Court; *J. M. Carter,* Judge; reversed.

STATEMENT BY THE COURT.

Thomas W. Butler brought this suit against the defendant Cabe for damages for personal injury to his buggy and harness alleged to have been caused by the negligence of the defendant in frightening his mule and causing it to run away, by the operation of his automobile at a rapid and dangerous rate of speed upon the public road along which plaintiff was driving, and in failing to stop after plaintiff's signal and his discovery that the mule driven by plaintiff was becoming unmanageable from fright.

It appears from the testimony that appellant was driving toward his home on the public country road, and that when he came near a sharp curve around which he could not see, that defendant approached in his automobile from beyond the curve at a high rate of speed, and made no effort to stop his car or slacken the speed of it after plaintiff's signal, and he discovered that the mule driven by plaintiff was greatly frightened and becoming unmanageable. The mule bolted, ran into the woods, struck the buggy against a tree and threw the occupants out, breaking plaintiff's wrist and otherwise severely injuring him and breaking up the harness and buggy to some extent. There was testimony tending to show the speed of the automobile, and that the mule driven by plaintiff was not gentle and was not safe to drive where automobiles were passing, and was always greatly frightened by them although the plaintiff said that the mule was gentle and had never been regarded as unsafe to drive nor greatly frightened at automobiles until after this occurrence. The court instructed the jury, giving,

among others, over appellant's objection, instruction No. 4, as follows:

"If you find from the evidence that the mule driven by the plaintiff was afraid of an automobile and would become frightened and probably unmanageable on meeting one upon the public highway, and this fact was known to plaintiff, and, notwithstanding this knowledge, plaintiff drove said mule on the public highway where he would probably meet automobiles, and that his conduct in so doing was not that of a reasonable and prudent man under similar circumstances, then you should find for the defendant." The jury returned a verdict for the defendant and from the judgment thereon plaintiff prosecutes this appeal.

D. L. King, for appellant.

Searcy & Parks, for appellee.

KIRBY, J., (after stating the facts). (1) Appellant contends that the court erred in giving said instruction No. 4, and we agree with this contention. All persons have equal right to use the public streets and highways for purposes of travel by proper means with due regard to the corresponding rights of others, and it is unquestioned that an automobile is a proper means of conveyance on the public highway, neither can it be disputed that driving a mule to a buggy is a like proper means of conveyance. Certainly a citizen is not to be deprived of his right to use any means of conveyance within his control because, forsooth, the animal he must drive is unaccustomed to the sight of automobiles and becomes frightened upon meeting or coming near them. Public highways are established for the benefit of all who find it necessary or desirable to travel thereon, adopting any means of conveyance not prohibited by law.

In *Millsaps* v. *Brogdon,* 97 Ark. 469, the court said:

"The beggar on his crutches has the same right to the use of the streets of the city as has the rich man in his automobile. Each is bound to the exercise of ordinary care for his own safety and the prevention of injury to others in the use thereof."

In *Minor* v. *Mapes,* 102 Ark. 354, the court said:

"Automobilists and the drivers of other vehicles have the right to share the street with pedestrians, but they must anticipate the presence of the latter and exercise reasonable care to avoid injuring them. Care must be exercised commensurate with the danger reasonably to be anticipated."

(2-3) All travelers upon the public highways are bound to the exercise of ordinary care in the use thereof, both for their own protection and the safety of others, and ordinary care as indicated in the quotation from *Minor* v. *Mapes* may require greater care exercised on the part of the automobilist and others driving vehicles of high power and great speed that make fearsome noises calculated to frighten unsophisticated country horses and mules not city broke and accustomed to seeing them, than that required of other users of the highway. In some jurisdictions automobilists are prohibited the use of certain streets and highways and our own statutes restrict their operation as to the rate of speed that may be maintained. Said instruction allowed the jury to find against the plaintiff who was unquestionably seriously injured by the frightening of his mule and the overturning of his buggy, if the jury found that he knew the animal driven by him was afraid of an automobile and might become frightened and unmanageable upon meeting one upon a public highway, if his conduct in driving the animal upon a public highway where he would probably meet automobiles was not that of a reasonable and prudent man under the circumstances, taking away from the jury altogether the right to find for the plaintiff notwithstanding any negligence on his part, if it can be held that the driving of an animal upon a public highway where an automobile might be met, not accustomed to the sight thereof was negligence, if the defendant, after discovering his perilous position, failed to exercise ordinary care to prevent the injury. Our courts have invariably held railway companies responsible for damages caused by the frightening of animals ridden or driven along public

highways near their tracks and at crossings for failing to use the proper care to prevent injury by them after it becomes apparent that injury may result from the fright. This instruction in effect told the jury that the plaintiff was not entitled to recover for an injury caused by his mule becoming frightened at the approach of an automobile and running away and injuring him if he knew that the animal was liable to become frightened upon meeting an automobile, and a prudent person would not have driven an animal of that kind upon the public highway where automobiles might be met. This is not the law. Plaintiff had the right to drive his mule on the public highway, being bound, of course, to the exercise of ordinary care while doing so, and there was no reason to think that he could or would not have time upon the approach of an automobile to take such measures as would protect himself from danger on account of the fright of the animal by either leaving the road, if opportunity offered, or by getting out of the buggy and holding the animal until the danger was past. The court erred in giving this instruction and the judgment must be reversed and the cause remanded for a new trial.

It is so ordered.

JACKS BAYOU DRAINAGE DISTRICT *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered December 14, 1914.

1. IMPROVEMENT DISTRICTS—JURISDICTION OF CIRCUIT COURT—FORMATION.—On an appeal to the circuit court from an order of the county court, establishing a drainage district, the issue is on trial anew in the circuit court, which court has the same power to establish the district as the county court had.

2. IMPROVEMENT DISTRICTS—FORMATION—PETITION—DUTY OF COURT.—Where the petition for the establishment of an improvement district does not have a majority of the signatures of land owners, either in number, acreage or value, there should be no uncertainty about it being to the advantage of the land owners; and under such circumstances an uncertainty should be resolved in favor of the

owners of the property to be assessed, and upon whose shoulders the burden of the improvement will rest.

3. IMPROVEMENT DISTRICTS—FORMATION—BENEFIT—FINDING OF COURT.—Evidence *held* to show that a contemplated drainage district would not be for the benefit of the land owners within the said district.

4. TRIAL—EVIDENCE—REFUSAL OF COURT TO HEAR MORE.—It is within the discretion of a trial judge to refuse to hear more testimony on the issue of the formation of a drainage district, where the case is sufficiently developed before him.

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

STATEMENT BY THE COURT.

The county court of Lonoke County formed certain lands therein into a drainage district upon the petition of the property owners. There were several remonstrances filed to the granting of the petition. The St. Louis, Iron Mountain & Southern Railway Company, among others, remonstrated against the establishment of the district. Upon the hearing the court found in favor of its establishment, and from this finding the said railway company prayed and was granted an appeal by the county court as shown by the amended record herein.

A great deal of testimony was introduced at the trial in the circuit court and a great majority of the witnesses testifying stated that the benefits to be derived from the establishment of the district would not be in anything like fair proportion to the expense or the cost thereof. Some of them testified that the lands would derive no benefit whatever from the drainage, that most of them were of the pipe clay character that would not produce anything if they could be cultivated. Two of the commissioners testified that the improvement would greatly benefit all the lands in the district and some others were also of that opinion. It was conceded that the petition did not contain a majority of the land owners, either in number, acreage or value.

The court was asked to and did make the following findings of fact:

"*First.* Is it the opinion of the court that it would be to the best interest of owners of real property within the

proposed district that the same become a drainage district?

"The court can not find the facts as set out in the first clause, but finds that it would be a great benefit to some of them.

"*Second.* Is it the opinion of the court that the establishment of the proposed Jacks Bayou Drainage District would be to the advantage of the owners of real property therein?

"The court makes the same finding to this as the first.

"*Third.* Is it the opinion of the court that the cost of the proposed drainage is reasonable?

"The court can not find the facts as set out in third clause.

"*Fifth.* Is it the opinion of the court that the lands embraced in the proposed drainage district are in need of drainage?

"The court finds that some of the lands in the proposed district need draining, but a great majority of the land owners of the district are opposed to the proposed drainage, both in number and amounts of land owned by them, and it would therefore be unjust to force it upon them."

The court reversed the judgment of the county court establishing the district and dismissed the petition, and from this judgment this appeal is prosecuted.

Trimble & Trimble and *J. A. Watkins,* for appellant.

1. The circuit court should have sustained the motion to dismiss the appeal from the county court because the railway company had filed no affidavit for appeal from the final order in the cause in the county court. Moreover, the record fails to show that its prayer for appeal was granted. 104 Ark. 119; 92 Ark. 148; 65 Ark. 419; 27 Ark. 156; 21 Ark. 73.

2. The court in its discussion with attorneys as to the date of final hearing of the case, erred in holding "that plaintiff would have to show that a majority of the residents in the district and owners representing a

majority of the acreage was in favor of the district," etc. Acts 1909, p. 829, as amended by Acts 1911, p. 193, § 2.

E. B. Kinsworthy, Thos. B. Pryor, R. E. Wiley, T. E. Hendricks and *T. D. Crawford,* for appellee.

1. The corrected record shows that three different affidavits for appeal from the county court's order were filed. The first appeal was prayed and allowed in the county court, and the second and third were prayed of and allowed by the circuit clerk. Either method of procuring an appeal is sanctioned by the statute. Kirby's Dig., § 1487.

No objection was raised in the lower court to the sufficiency of the affidavit. It is too late to object here. 52 Ark. 318, and cases cited; 59 Ark. 177.

2. In the light of the testimony the circuit court was justified in finding that it was not to the best interest of the owners of real property within the district that the district should be formed. Section 2 of the act of 1909, as amended by act of 1911; 106 Ark. 303. And the court's finding of fact upon conflicting evidence is conclusive. 84 Ark. 359; 88 Ark. 587.

KIRBY, J., (after stating the facts). The proceedings for the establishment of this drainage district were had under the provisions of the Acts of the Legislature of 1909, as amended by Acts of 1911 (Acts 1909, p. 829, 1911, p. 193).

Appellant's first contention is that the circuit court erred in not dismissing the appeal from the county court for want of jurisdiction, claiming no affidavit had been made therefor and no order granting the appeal. The amended record shows, however, that an affidavit was made by appellant for appeal, stating it was aggrieved by the order of the court overruling its remonstrance and exceptions to the report of the remonstrants assessing the benefits against it, etc., and the record also shows after the judgment establishing the district was made, and on the same day that an appeal was prayed and granted. The contention is therefore without merit and the circuit court had jurisdiction of the cause.

It is next contended that the court erred in stating in the discussion with the attorneys after overruling the motion of the drainage district to dismiss the appeal that plaintiff would have to show that a majority of residents and owners representing a majority of the acreage was in favor of the district, otherwise judgment would be in favor of the remonstrants and the finding of the county court reversed. It is insisted now that the trial court did not correctly understand the law relating to the establishment of drainage districts as shown by said announcement, and therefore erred in its findings of fact and judgment thereon. It calls attention to section 2 of the Acts of 1909 as amended by the Acts of 1911 in support of this contention, which provides:

"If upon the hearing provided for in the foregoing section, the petition is presented to the county court, signed by a majority, either in numbers or in acreage, or in value, of the holders of real property within the proposed district, praying that the improvement be made, it shall be the duty of the county court to investigate, as provided in the preceding section, and to establish said district if it is of the opinion that the establishment thereof will be to the advantage of real property therein."

(1-2) It is true under the provisions of this law that the county court had authority to investigate the conditions and to establish the district prayed for and create the improvement, if it was of opinion that the establishment thereof would have been to the advantage of the owners of real property therein. And while it is also true that the circuit court found that the improvement would be of great benefit to the owners of some of the real property within the district, and that some of the lands were in need of drainage, it found further that the cost of the proposed drainage district was not reasonable, that a great majority of the land owners of the district, both in number and amount of land owned, were opposed to it, and that the establishment of the district would be unjust to them and reversed the judgment of the

county court. The matter was for trial anew in the circuit court, which, of course, had the same power to establish the district as the county court had. This court said relative to the exercise of the power given to establish a drainage district when not petitioned for by the majority in numbers, ownership or acreage of the lands proposed to be included, in *Burton* v. *Chicago Mill & Lbr. Co.,* 106 Ark. 304: "This is certainly a very great power vested in the court, and when exercised in the face of the failure of petitioners to secure the signatures of a majority either in number or acreage, or value, there should be no uncertainty about it being to the advantage of the land owners; and under such circumstances an uncertainty should be resolved in favor of the owners of the property to be assessed, upon whose shoulders the burden of the improvement will rest." And this statement is now reaffirmed.

(3) Without doubt great uncertainty existed about the establishment of the district being to the advantage of the land owners which the court properly resolved in favor of the owners of the property to be assessed and against the establishment of the district proposed.

There was much testimony showing that a great portion of the lands included in the district were composed of or underlayed with a whitish pipe clay and so unfertile as to be of little use for agricultural purposes. The evidence is amply sufficient to sustain the finding and judgment of the circuit court.

(4) Neither is there any merit in appellant's contention that the court erred in announcing that the case was sufficiently developed, and in declining to hear more testimony. Much testimony had already been introduced disclosing fully the condition, and after the matter had been so thoroughly developed, it was within the discretion of the trial judge to decline to hear further testimony. It was a public matter being investigated, and after the great amount of testimony was heard that the record shows to have been introduced, other testimony would have necessarily been along the same lines, and

the court was not required in the exercise of a sound discretion to continue the investigation until every land owner in the district could be heard.

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

STATE *ex rel.* WOOD *v.* COTHAM.

Opinion delivered December 21, 1914.

1. CIRCUIT COURTS—NEW JUDICIAL CIRCUITS—CREATION—VACANCY.—The creation of a new judicial circuit causes a vacancy to exist in the office of judge of that circuit.
2. CIRCUIT JUDGES—TENURE OF OFFICE—FILLING VACANCIES.—The tenure of office of a circuit judge, and the method of filling a vacancy is unalterably fixed by the Constitution.
3. CIRCUIT COURTS—JUDGES—TERM OF OFFICE.—Under art. 7, § 17, Const. of 1874, terms of elective offices created by the Constitution began on the date the result of the election to fill those offices was officially declared, which was October 31, 1874, and the terms end in regular cycles of the periods named by the Constitution as the duration of the respective terms.
4. CIRCUIT COURTS—JUDGES—ELECTION—TENURE OF OFFICE.—Where a vacancy occurred in the office of a circuit judge more than nine months before the next succeeding general election, an appointment by the Governor would run temporarily until a special election should be held.
5. CIRCUIT COURTS—ELECTION OF JUDGE—TERM OF OFFICE.—When a new judicial circuit is created there is evolved into operation the office of circuit judge with an unexpired term ending with the period prescribed in the Constitution for the ending of the terms of the other circuit judges in the State.
6. CIRCUIT JUDGES—TERM OF OFFICE—ELECTION.—The provision in art. 7, § 17, Const. 1874, that "judges of the circuit court shall be elected by the qualified electors of the several circuits and hold their office for the term of four years," refers, not to any election held by the people, but to the election held at the expiration of the term prescribed by the Constitution. The term of circuit judge began on October 31, 1874, and ends in regular cycles of four years.
7. CIRCUIT JUDGES—TERM OF OFFICE.—The Eighteenth Judicial Circuit was created by an act of the General Assembly, Act 114, Acts 1911; *held*, that thereupon a vacancy resulted in the office of circuit judge for the unexpired term ending on October 30, 1914.

Quo warranto; judgment of ouster against the respondent.

Mehaffy, Reid & Mehaffy, for relator.

1. The question involved here depends upon the construction which should be placed upon the provisions of sections 17 and 50 of article 7, Constitution of 1874. Did the framers of the Constitution mean to fix a term of four years to begin at the time the first judges should be declared elected, with successive terms of four years each, or did they intend that upon the happening of a vacancy for any cause, a new full term was to commence. This court is committed to the former construction. 15 Ark. 664; 48 Ark. 82.

Since in every instance where article 7 of the Constitution provides for "terms" of office, it fixes each term at a certain number of years, definitely fixes the time for each term to begin, and nothing is said about the length of time that an officer elected or appointed to fill a vacancy, shall hold, it was manifestly the intention to create a certain fixed term of office irrespective of the person of the incumbent. 165 S. W. 954; 13 Cyc. 1398; 23 Am. & Eng. Enc. of L. 418; 6 Now. (Miss.) 582; 100 Ky. 66; 37 S. W. 266; 38 S. W. 132; 104 N. W. 197; 138 Ky. 313; 127 S. W. 1010; 99 Mo. 361; 12 S. W. 895; 222 Mo. 268; 17 Ann. Cas. 1006; 121 S. W. 64; 84 Pac. 488; 6 L. R. A. (N. S.) 750.

2. Upon the creation of the Eighteenth Judicial Circuit, there was a vacancy in the office of circuit judge of that circuit. 111 Pac. 188; 126 Pac. 806; 16 Idaho 266; 100 Pac. 1060; 41 Mont. 377; 11 Am. Rep. 415; 10 Ore. 230; 123 Ky. 601; 96 S. W. 865; 85 S. W. 901.

This court is committed to the construction that the word "vacancy," as used in section 50, article 7, refers to the term, so that one elected to fill a vacancy holds only the unexpired portion of the term of his predecessor. 85 S. W. 901; 6 How. 582; 6 Nev. 276; 11 Col. App. 404; 53 Pac. 236; 36 La. Ann. 836; 70 Ga. 390.

3. The words, "next general election," in section 50 should be construed to mean the next general election to

fill offices of the class to which the vacancy belongs; otherwise, an appointment by the Governor to fill a vacancy, would fill the office, in some cases, for several years, because the appointee would hold for the remainder of the term. 78 Ark. 494-501; 54 N. W. 606; 57 N. W. 495; 30 Fla. 579; 11 So. 922; 35 Mont. 523; 10 Am. & Eng. Ann. Cas. 1138, note 1140; 64 Kan. 247; 68 Pac. 633.

John T. Castle and *Moore, Smith & Moore,* for respondent.

1. This court is not committed to any doctrine adverse to the position of the respondent. The question involved here was not involved in either the *Sorrels* case, 15 Ark. 664, nor the *Askew* case, 48 Ark. 82, relied on by relator.

The question in this case is not whether respondent is entitled to fill an unexpired term, but when did the first regular term of judge of the Eighteenth Circuit begin?

The term "vacancy" does not always imply an unexpired term. There may be a vacancy entirely disconnected from any unexpired term. 88 N. E. 743; 103 S. W. (Mo.) 144. Under the Constitution, the first regular term of judge of the Eighteenth Circuit was properly filled at the biennial election of 1912, and began to run for the full four-year period from October 31, 1912.

2. Circuit judges must be elected at general elections, which are to be held biennially in September, and ending in regular cycles of four years. 112 Ark. 291; 165 S. W. 954.

The general election act passed by the Legislature of 1875 shows that it did not construe the Constitution of 1874 to require all circuit judges to be elected in the same year.

3. Under the Constitution of 1874, upon the creation of a new circuit, the temporary *interim* or vacancy in the office ends at the next general biennial election taking place after the creation of the circuit, and the full term begins to run upon the qualification of the party elected at such biennial election.

The next general election for the full constitutional term of his successor, is the next election in point of time, without regard to the time of the election at which the office would have been filled had there been no vacancy. 112 Pac. 588; 141 N. W. 377; 33 Atl. 373; 113 N. W. 192; 47 N. W. 704; 31 N. W. 788; 132 N. W. 677; 36 S. W. 987; 65 Pac. 705; 13 Kan. 367; 56 Pac. 1017.

McCULLOCH, C. J. The Eighteenth Judicial Circuit was created by an act of the General Assembly of 1911, Act 114, p. 78, which contained the following provisions concerning the appointment of a judge and a prosecuting attorney:

"Sec. 3. That the Governor shall appoint a circuit judge to preside over and a prosecuting attorney for the Eighteenth Judicial Circuit, who shall hold their respective offices until their successors shall be elected and qualified, in conformity with the provisions of the general laws of the State of Arkansas applicable thereto; such circuit judge and prosecuting attorney shall be residents of said circuit, shall possess all the qualifications required by law of circuit judges and prosecuting attorneys and shall perform all the duties required by law of circuit judges and prosecuting attorneys."

The respondent, Calvin T. Cotham, was commissioned by the Governor to fill the office of circuit judge, his commission, according to the express language thereof, being made to run until the next succeeding general election. At the general election in September, 1912, he submitted his name to the voters of the district as a candidate for that office, and was elected. His claim is that his election at that time was for a full term of four years from the date of his election, or rather from October 31, 1912, the date on which he was commissioned pursuant to the election. At the general election in September, 1914, an election was held for the office of judge of the circuit, and the relator, Scott Wood, received the highest number of votes cast, and has been duly commissioned by the Governor. He claims that the tenure of Judge Cotham ended on October 30, 1914, the day on

which the terms of the other circuit judges of the State ended, and he has filed his petition in this court against Judge Cotham for a writ of *quo warranto* to determine by what authority the latter assumes to exercise the functions of the office of judge of that circuit.

(1) It is conceded by learned counsel on both sides that the creation of the new judicial circuit caused a vacancy to exist, within the meaning of the Constitution, in the office of judge of that circuit. This court has so decided. *State* ex rel. *Smith* v. *Askew,* 48 Ark. 82.

(2) It will be noted that the Legislature authorized only a temporary filling of that vacancy by executive appointment, and left the succession to be supplied in conformity to existing laws without attempting to define or to reiterate them. The lawmakers could not have done otherwise, for the tenure of office and the method of filling a vacancy in unalterably fixed by the Constitution. *Cobb* v. *Hammock,* 82 Ark. 584; *State* ex rel. *Attorney General* v. *Stevenson,* 89 Ark. 31.

(3) The Constitution of 1874 (section 17, article 7) provides that "the judges of the circuit courts shall be elected by the qualified electors of the several circuits and shall hold their offices for the term of four years." Terms of elective offices created by the Constitution began on the date the result of the election to fill those offices was officially declared, which was October 31, 1874, and the terms end in regular cycles of the periods named by the Constitution as duration of respective terms. *Smith* v. *Askew; supra; Jewett* v. *McConnell,* 112 Ark. 291, 165 S. W. 954.

Section 50, article 7, of the Constitution of 1874, reads as follows: "All vacancies occurring in any office, provided for in this article shall be filled by special election save that in case of vacancies occurring in county and township offices six months, and in other offices nine month, before the next general election; such vacancies shall be filled by appointment by the Governor."

(4) In the instance now under consideration, the vacancy occurred more than nine months before the next

succeeding general election and the appointment by the Governor ran temporarily until a special election should be held. If the vacancy had occurred within nine months before the next general election, the question would have been presented whether the appointment ran to the end of the term of the office or merely to the next succeeding general election; but no such question is presented in this case. No election was held prior to the general biennial election of 1912, when Judge Cotham was elected. It was proper, therefore, for an election of circuit judge to be held at that time—none having been previously held—but the question of the tenure to follow from that election is presented now for our determination. What we have to decide is whether the vacancy in the office of judge brought about by the creation of the new circuit was for an unexpired term which ended coincident with the expiration of the term of the other circuit judges of the State, as contended by the relator, or whether, as contended by the respondent, a full term began with the first general election (1912) after the creation of the new circuit.

(5) The argument of learned counsel for the respondent, as we interpret it, is that a vacancy in the office does not necessarily imply the interruption of a fixed term, leaving an unexpired portion thereof, but that a full term for the constitutional period springs into being with the creation of a new office unless limited by the Constitution itself. The result sought to be adduced from this predicate is that a full term began at the time for commissioning officers elected at the first regular biennial election after the creation of the office, and that an *interim* occurred from the creation of the district until that time, which could be and was in this instance filled by an appointment by the Governor. The position is untenable and one which we think is inconsistent with the argument made, for if, as contended, a full term sprang into being by the creation of the office, it began at once and ran for the full term of four years. This, however, is directly in conflict with the decision of the court in *Smith* v. *Askew*,

supra, where it was held that the office was created by the Constitution, and not by the Legislature, and that a full term did not begin to run from the first election. In that case the court thoroughly committed itself to the doctrine of convenience in uniformity in the election of officers, and while the facts of that case were slightly different from the facts in the present case, it necessarily results from that decision that upon the creation of a new circuit there is evolved into operation the office of circuit judge with an unexpired term ending with the period prescribed in the Constitution for the ending of the terms of other circuit judges in the State. Indeed, the facts in the case of *Smith* v. *Askew* were not materially different from those in this case. The new circuit was, in that case, created by an act of the General Assembly of 1883, and the act contained a provision for the election of a judge of the circuit at a special election on a day named, and contained the further provision that "the terms of office of said officers shall expire at the same time that the terms of office of other circuit judges and prosecuting attorneys expire." Judge Askew was elected at the special election pursuant to the terms of the statute, and held office until the regular election of 1886, when Judge Smith was elected, and, thereafter, on October 31, 1886, was commissioned for a full term of four years. The contention on behalf of Judge Askew was that his election was for a full term of four years from the time he was elected in June, 1883, and that he held over from the expiration of that term until his successor could be elected at the biennial election of 1888. He did not submit himself for re-election, as did Judge Cotham, at the first biennial election succeeding the creation of the district. But that is immaterial, for the election of Judge Askew put him in office for the unexpired term, if there was one. There is no intimation in the opinion in that case that the regular full term began with the election of 1884, expiring at the election of 1888, and that the election of Judge Smith in 1886 was to fill an unexpired portion of the term. The clear inference, on the contrary, is that Judge Smith was

regularly elected for the full term, and it is a part of the judicial history of the State that that interpretation has ever since then been placed upon it, and the incumbent of the office of judge in that circuit has been regularly elected for a full term in cycles of four years running from the election of Judge Smith in 1886.

We are not, however, forced to mere inferences as to what the court meant to decide in *Smith* v. *Askew,* but the views here announced are in accord with the express language of the opinion itself. After quoting the statute, which specified that "the terms of office of said officers shall expire at the same time that the terms of office of other circuit judges and prosecuting attorneys expire," the court said: "However, we lay no stress upon this legislative declaration, further than as it shows what the General Assembly understood what the Constitution meant. For, the term of office of circuit judge being, as we have seen, fixed by the organic law, and beyond the control of the Legislature, no enactment that they might indulge in would cause the term to end a day sooner or a day later. All that portion of the third section of the act above quoted, which prescribes the duration of the term, and the time when the office is to be filled by a second election, may therefore be stricken out as superfluous, these matters being regulated by the Constitution and general laws of the State."

In *McMahan* v. *State,* 102 Ark. 12, we also declared that the policy of uniformity in terms of office is favored by our statutes.

(6) The provision in section 17, article 7, of the Constitution that "Judges of the circuit court shall be elected by the qualified electors of the several circuits, and hold their office for the term of four years" refers, not to *any* election held by the people, but to the election held at the expiration of the term prescribed by the Constitution. And, as we have already seen, the term for circuit judges began on October 31, 1874, and ends in regular cycles of four years.

(7) It follows, therefore, from what we have said, that upon the creation of the Eighteenth Judicial Circuit there resulted a vacancy in the office of circuit judge for an unexpired term ending on October 31, 1914, and that relator has been duly elected and commissioned for a full term beginning on the expiration of that unexpired term. He is entitled to the office, and a judgment of ouster will be rendered against the respondent. It is so ordered.

WOOD, J., not participating.

SMITH, J., dissents.

BARNETT BROTHERS *v.* WRIGHT.

Opinion delivered December 21, 1914.

1. MECHANIC'S LIENS—AFFIDAVIT.—In an action to enforce a mechanic's lien, the affidavit filed in the circuit court is not the basis of the cause of action, and is not a part of the pleadings which could be reached by demurrer, nor does it constitute the evidence of indebtedness on which the action is founded.
2. MECHANIC'S LIENS—AFFIDAVIT—SUFFICIENCY OF DESCRIPTION—EVIDENCE.—The affidavit given to procure a mechanic's lien, will be held sufficient, when the complaint in the action to enforce the lien is tested on demurrer, which describes the property as a certain lot, one acre in area, owned by defendant, on which his dwelling house is situated, and evidence *aliunde* is admissible to identify the property.
3. MECHANIC'S LIENS—DESCRIPTION OF PROPERTY.—The description of property sought to be charged with a mechanic's lien is sufficient, if there appears enough in the description to enable a party familiar with the locality to identify the premises intended to be described, with reasonable certainty, and to the exclusion of all other property.
4. MECHANIC'S LIENS—ASSIGNMENT OF CLAIM—PARTIES.—The rights of the lienor in a claim for a mechanic's lien may be assigned under Kirby's Digest, § 4994, and the original claimant is not a necessary party to the action.

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

Appellants, pro se.

1. The court erred in sustaining the demurrer. The carpenter had a lien for his work. Kirby's Dig., § 4970.

The description was sufficient, but, if not a defective description, is no ground of demurrer. Kirby's Dig., § 6136.

2. Mechanic's liens may be enforced in the circuit court, although the amount is less than $100. 31 Ark. 486; Kirby's Dig., § 4983. A substantial compliance with the law is all that is required, as mechanic's lien laws are liberally construed. 30 Ark. 568.

E. H. Vance, Jr., for appellee; *Albert W. Jernigan,* of counsel.

1. The sworn statement for a lien "containing a *correct description* of the property," was not filed within ninety days. Kirby's Dig., § 4981, p. 1072.

2. The description was fatally defective. 83 Ark. 334; 59 *Id.* 460; 69 *Id.* 357; *Ib.* 357; 77 *Id.* 542; 93 *Id.* 176; 94 *Id.* 306. Alexander had no lien and none passed to appellants by the assignment.

Mehaffy, Reid & Mehaffy, in reply for appellants.

The lien was filed in time (Kirby's Dig., § 4981), and the description as amended is sufficient. 90 Ark. 340; 52 *Id.* 302; 30 *Id.* 568; 49 *Id.* 475; 51 *Id.* 302.

McCULLOCH, C. J. Appellants instituted this action in the circuit court of Hot Spring County to enforce a lien for the price of labor performed by one Alexander, a mechanic, for appellee in the construction of a house on a lot owned by the latter. Alexander assigned his claim to appellants, after having filed the claim in the office of the circuit clerk of the county, verified by affidavit, as provided by statute. In the affidavit of verification, the property was described as "the dwelling house of John W. Wright, which is situated on part of the northeast quarter of the southwest quarter of the southwest quarter, of section 13, township 4 south, range 17 west, containing one acre of land." The lot is accurately described by metes and bounds in the amended complaint. The court sustained a demurrer to the complaint on the ground that the description in the affidavit of verification, which is exhibited with the complaint, is insufficient to accurately identify the property

sought to be charged with the lien. Appellants declined to plead further, and judgment was rendered dismissing the complaint.

(1) The complaint describes the property accurately and states a cause of action. Therefore, it is good on demurrer. The affidavit was not the basis of the cause of action, and did not become a part of the pleadings so as to be reached by demurrer. Such is the rule in actions at law. *Sorrells* v. *McHenry,* 38 Ark. 127; *Euper* v. *State,* 85 Ark. 223.

The statute (Kirby's Digest, § 6128), provides that "if the action, counterclaim or set-off is founded on a note, bond, bill or other writing as evidence of indebtedness, the original, or a copy thereof, must be filed as part of the pleading," but the affidavit does not constitute the "evidence of indebtedness" on which the action is founded.

Even if the affidavit could be considered in testing the sufficiency of the complaint, we are of the opinion that the description therein is sufficient. That is to say, it is sufficient when challenged by demurrer. The words furnish the key to a description of the property sought to be charged, and are sufficient to let in extrinsic proof in aid thereof. *Eddy* v. *Loyd,* 90 Ark. 340.

(2) The language of the affidavit is equivalent to a statement that the property sought to be charged with the lien is a certain lot, one acre in area, owned by appellee, on which his dwelling house is situated, and evidence *aliunde* is admissible to identify the property.

(3) Mr. Phillips, in his work on Mechanic's Liens (3 ed., § 379), discussing the rules of law established by decisions of court with reference to the essentials of a description of property sought to be charged with a mechanic's lien, says: "Among those laid down, and probably the best rule to be adopted, is, that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to

set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise. It is enough that the description points out and indicates the premises, so that, by applying it to the land, it can be found and identified. A description that identifies is sufficient, though inaccurate. If the description identifies the property by reference to facts, that is, if it points clearly to a piece of property, and there is only one that will answer the description, it is sufficient."

In the same section, the author gives numerous illustrations of rather loose descriptions which have been upheld by various courts.

The same rule is in substance stated with approval by other text writers on the subject. Boisot on Mechanic's Liens, § 431; Rockel on Mechanic's Liens, § 103.

(4) The statute (Kirby's Digest, § 4994) expressly authorizes an assignment of a claim of this kind, and Alexander, the original claimant, is not a necessary party to the action.

The circuit court erred in sustaining the demurrer, and the judgment is reversed and the cause remanded with directions to overrule the demurrer.

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

Opinion delivered December 21, 1914.

1. ANIMALS—DOGS—RAILROADS—LIABILITY FOR KILLING DOG.—Dogs are personal property for the negligent killing of which railroads are liable.
2. RAILROADS—KILLING ANIMAL—NEGLIGENCE—PRESUMPTION.—Proof that a dog was killed by the running of a train makes a *prima facie* case of negligence on the part of the railroad company.
3. RAILROADS—KILLING ANIMAL—PRESUMPTION—LOOKOUT.—Where a dog is killed by the operation of a train by actually coming in contact with it, the *prima facie* case of negligence thus made out is not changed by the lookout statute of 1911, Act 284, p. 275.

4. RAILROADS—DUTY TO MAINTAIN LOOKOUT—NATURE OF LOOKOUT TO BE KEPT.—The lookout statute, Acts 1911, p. 275, Act 284, requiring railroads to maintain a constant lookout for persons and animals on the track, does not require every employee on the train to keep a lookout, and it is sufficient if the lookout is kept by one person, unless by reason of a curving track or other obstruction, an efficient lookout can not be kept by one person alone.

5. RAILROADS—INJURY TO ANIMAL—NEGLIGENCE—QUESTION FOR JURY.—Plaintiff's dog was killed at a public crossing by being struck by a moving train. *Held*, under the evidence it was a question for the jury whether the accident was the result of defendant's negligence.

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

S. H. Mann and *J. W. Morrow,* for appellants.

1. No signals were given as required by § 6595, Kirby's Digest. Failure to perform a statutory duty is negligence *per se.* Whittaker's Smith on Negligence, 44. Negligence was the proximate cause of the injury. 4 A. & E. Enc. Law 925(b)-927(c).

2. No proper lookout was kept as the law provides. Kirby's Dig., § 6595; 68 Ark. 32; 78 *Id.* 251; 64 *Id.* 236.

3. It was manifest error to direct a verdict. 66 Ark. 363.

E. B. Kinsworthy, P. R. Andrews and *T. D. Crawford,* for appellee.

There was *no* testimony to make a case of *prima facie* liability (107 Ark. 431; 106 *Id.* 399), and hence a verdict was properly directed for defendant.

HART, J. Geo. P. Taylor sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages for the alleged negligent killing of his dog by one of defendant's passenger trains. The facts were as follows:

On July 31, 1913, one of defendant's north-bound passenger trains struck the dog of the plaintiff and killed it while the dog was on the railroad crossing in the town of Forrest City. The train did not slow down before or after striking the dog. The crossing was ninety steps north of the depot. The track curved there and the dog

came on the track at the crossing about fifteen or twenty feet ahead of the engine.

According to the testimony of the witnesses for the plaintiff, there was no obstruction along the right-of-way at that point, and, in their judgment, the employees of the railroad company who were in the cab of the engine could have seen the dog approaching the track.

Neither the engineer nor the fireman of the train which struck the dog testified. Another engineer, who had run on that particular piece of road for many years, testified that the engineer sat on the right-hand side of the cab, and that at that particular crossing where the dog was killed he could not have seen the dog go on the track fifteen feet ahead of the engine. He also testified that it was the custom for the fireman to commence coaling the engine after the train left the station.

The value of the dog was proved.

The court directed the jury to return a verdict for the defendant, and the plaintiff has appealed.

(1-2) Dogs are personal property, for the negligent killing of which railroads are liable. Proof that a dog was killed by the running of a train makes a *prima facie* case of negligence on the part of the railroad company. *St. Louis, I. M. & S. Ry. Co.* v. *Rhoden,* 93 Ark. 29; *El Dorado & Bastrop Ry. Co.* v. *Knox,* 90 Ark. 1; *St. Louis Southwestern Ry. Co.* v. *Stanfield,* 63 Ark. 643; *St. Louis, I. M. & S. Ry. Co.* v. *Philpot,* 72 Ark. 23.

(3) Here the dog was killed by the operation of the train by actually coming into contact with it, and the *prima facie* case of negligence thus made is not changed by the lookout statute of 1911, Act 284, p. 275. *St. Louis, I. M. & S. Ry. Co.* v. *Gibson,* 107 Ark. 431.

(4) The engineer and the fireman of the train which struck the dog did not testify at the trial. It is true another engineer testified that the engineer could not have seen the dog come upon the track fifteen feet ahead of the engine, and that it was the custom of the fireman to begin to coal the engine immediately after the train

left the depot, but this testimony was not sufficient to overcome the *prima facie* case of negligence made against the defendant by killing the dog. The statute requires that an efficient lookout be kept. It is not required that every employee upon the train should be constantly upon the lookout. It is sufficient that the lookout be kept by one person, unless by reason of curving track or other obstructions an efficient lookout can not be kept by one person alone. *St. Louis S. W. Ry. Co.* v. *Russell,* 64 Ark. 236.

The injury occurred at a public crossing in a populous town, and the jury might have found from all the evidence that the engineer alone could not have kept an efficient lookout.

(5) The dog was killed at a public crossing in the town of Forrest City about ninety steps north of the depot. It is true that there was a curve in the track there, that the dog approached from the left-hand side, and that the engineer usually sat on the right-hand side of the cab. But the witnesses for the plaintiff testified that there was no obstruction on the right-of-way there, and that, in their judgment, the engineer could have seen the dog approaching the track. From the testimony the jury might have found that the engineer was not keeping a lookout, or that if he was keeping one if he had blown the whistle, the dog might have been frightened away from the track. Thus, from the testimony of the plaintiff's witnesses who saw the train hit the dog, the jury might have found that the defendant was guilty of negligence.

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

HALL v. GAGE.

Opinion delivered December 21, 1914.

1. WALLS—ADJOINING LAND OWNERS—FALLING WALL—NEGLIGENCE.—Where defendant's wall, left standing after a fire, fell on the property of plaintiff, the fact that the wall fell is *prima facie* evidence

of negligence on defendant's part in conformity with the doctrine of *res ipsa loquitur*.

2. WALLS—INJURY FROM FALLING—NEGLIGENCE.—Where defendant left a wall twenty-four feet in height, standing after a fire, without making any effort to remove it or to prop it up, it being obvious that the upper portions of the wall could never be used again; *held*, it was defendant's duty not to suffer such a wall to remain on his land when its fall would injure his neighbor, without using such care in the maintenance of it as would absolutely prevent injuries, except from causes over which he had no control.

3. WALLS—INJURY FROM FALLING—NEGLIGENCE—LIABILITY—ACTS OF NEIGHBOR.—Defendant left a wall standing on his property after a fire, which fell and injured the property of plaintiff, the adjoining owner. *Held*, it was no defense to plaintiff's action against defendant that at the time defendant's wall fell plaintiff was erecting on his property a building in violation of a city ordinance, when plaintiff's acts in erecting his building did nothing to cause defendant's wall to fall.

4. APPEAL AND ERROR—REVERSAL OF JUDGMENT—FAILURE TO ABSTRACT.—When a cause is reversed, judgment will not be entered for the appellant, although the case was fully developed, where the appellant failed to abstreact the testimony showing the measure of his damage.

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

Davies & Ledgerwood and *R. G. Davies*, for appellant.

Appellee's plea of contributory negligence is in itself an acknowledgment that he was guilty of negligence. 79 Ala. 223.

The fire itself was enough to notify appellee that his wall left standing thirty feet high was dangerous. It was his duty to take such precautions as were necessary to protect the public. 2 L. R. A. (Ark.) 189, and authorities cited below. In cases of this kind, it is not necessary to allege negligence on the part of the defendant. 131 Ill. 322; 2 N. Y. 159; 80 N. Y. 579; 81 N. Y. 52; 122 N. Y. 18; 39 Pa. St. 257.

For further authorities touching the liability of owners of walls, etc., left standing, and which fall and injure others, see 27 L. R. A. 256; 107 Mass. 492; 9 Am. Rep. 61;

26 L. R. A. 256; 57 *Id.* 135; 172 Mass. 257; 209 Ill. 302; 180 Mass. 397; 3 Hill 193; 48 La. Ann. 1433; 34 L. R. A. 609; 20 So. 887; 153 Mass. 366.

C. Floyd Huff, for appellee.

HART, J. J. H. Hall sued Vince Gage to recover damages on account of the alleged negligence of the latter in allowing his wall to fall on the former's building. The facts, so far as are necessary to determine the issues raised by the appeal, briefly stated, are as follows:

Hall and Gage owned adjacent lots in the city of Hot Springs upon which they had buildings. On September 5, 1913, the buildings on both of these lots were destroyed by fire. On the lot of Gage a wall was left standing about twenty-four feet high and one and one-half inches of this wall was on Hall's land. Almost immediately after the fire Hall cleared away the debris from his lot and proceeded with the erection of a concrete building. The wall of his new building was sixteen feet high and in making the concrete wall he used the brick wall of Gage as a part of the form. After the erection of Hall's new building the wall of Gage's building fell over on it and materially injured it. The break in Gage's building was one and one-half feet above the wall of Hall and the undisputed testimony shows that the wall left standing on Gage's land after the fire was not in any way undermined by the erection of the building of Hall, but, as a matter of fact, was strengthened by it. The fall of the wall of Hall's building occurred on the 18th day of October, 1913. Gage resided in Hot Springs and knew that the wall was standing there and had taken no steps to remove it or to make it safe.

There is some testimony from which it might be inferred that a rain accompanied by wind occurred in the city of Hot Springs on the day the wall fell, but the extent or violence of the wind is not shown by the record.

After the fire Hall, in erecting his building, used "reinforced concrete with iron," and at that time there was a city ordinance which required that a building be constructed of stone, brick or iron.

The plaintiff requested the court to give instruction No. 1 as follows: "The court instructs the jury that the collapse of a building or falling of a wall is *prima facie* evidence of negligence, and imposes a burden upon the owner to show that the accident happened without his negligence." The court, over the objection of the plaintiff, modified the instruction by adding thereto the words: "Unless such presumption has been sufficiently explained or rebutted by other proof shifting such burden."

The plaintiff also asked the court to give instruction No. 2, which is as follows: "It is the duty of an owner of a building to take reasonable care that it shall not fall and injure others; and therefore, the mere fact of the fall of a building, whereby a person lawfully on adjoining premises, is injured, raises a presumption that the owner of the building has been negligent." The court, over the objection of the plaintiff, modified in the same manner as in instruction No. 1.

The plaintiff requested instruction No. 4 as follows: "The jury are instructed that the fact, if shown by the evidence, that Hall was erecting a building on his property in violation of a city ordinance, is no defense to this action, and, if true, will not permit the owner from recovering for his injuries if otherwise entitled thereto." The court modified this instruction by adding thereto the words: "Unless such violation of the city ordinance was the proximate and contributing cause of his injury."

The court, over the objection of the plaintiff, also gave at the request of the defendant instruction No. 1, as follows: "The court instructs the jury that before you can find for the plaintiff you must find from the evidence that the injury to the property of plaintiff was caused by the negligence of the defendant, unless you find that the falling of said wall was negligence within itself, and unless the plaintiff has established the negligence of the defendant, and the injury was the result of such negligence, by a fair preponderance of the evidence, then you will find for the defendant."

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

In the case of *Ainsworth* v. *Lakin,* 57 L. R. A. 132, the Supreme Court of Massachusetts held: "The owner of walls left standing by a fire, which can not be used for rebuilding, owes adjoining owners the duty, after a reasonable time for investigation, to exercise such care in the maintenance of walls likely to fall on their property as will absolutely prevent injuries except from causes over which he would have no control, such as *vis major,* acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably be expected to anticipate and prevent."

In the case of *Earl* v. *Reid,* 18 Am. & Eng. Ann. Cases, page 1; 21 Ontario Law Reports, 545, Teetzel, J., said: "I think it is the plain duty of every owner of land to keep the buildings or structures thereon in such a condition that they shall not, by falling or otherwise, cause injury to persons lawfully on adjoining lands. In other words, every owner of a building is under a legal obligation to take reasonable care that his building shall not fall in the street or upon his neighbor's land and injure persons lawfully there.

"While the owner can not be charged for injuries caused by inevitable accident, the result of *vis major* or of the wilful act or negligence of some one for whom he is not responsible, he is liable for injuries caused by the failure on his part to exercise reasonable care."

(1) The fact that the wall fell is *prima facie* evidence of negligence in conformity with the maxim, *res ipsa loquitur.* Thompson's Commentaries on the Law of Negligence, volume 1, paragraph 1213. See, also, paragraph 1060 of the same volume. To the same effect see *Earl* v. *Reid. supra.*

(2) It follows from these principles of law that the court erred in modifying instructions Nos. 1 and 2, asked by plaintiff, and in giving instruction No. 1, asked by defendant. Moreover, in the present case, the undisputed evidence shows that there was left standing on the de-

fendant's land after the fire, which occurred on September 5, 1913, a wall twenty-four feet high, and that the upper part of this wall could not be used should the defendant decide to rebuild on his lots. The defendant saw the wall standing there after the fire, and it was patent and obvious to him that the upper portion of it could not be used by him again in rebuilding upon his property. He permitted it to stand there without any effort to remove it or to prop it up so it would not injure the property of persons on the adjoining land. It was his duty not to suffer such a wall to remain on his land where its fall would injure his neighbor, without using such care in the maintenance of it as would absolutely prevent injuries, except from causes over which he had no control. According to the undisputed evidence, he permitted it to remain there in this dangerous condition from September 5 until October 18 without any effort whatever to remove it or to prop up the upper portion of it. There was, therefore, no testimony in the case upon which to predicate the modifications to instructions Nos. 1 and 2, asked by the plaintiff.

(3) We are also of the opinion that the court erred in modifying instruction No. 4, asked by plaintiff, by adding the words: "Unless such violation of the city ordinance was the proximate and contributing cause of his injury." There was no testimony upon which to base this qualification of the instruction. According to the undisputed testimony, plaintiff, in erecting his building, did nothing whatever to undermine or cause to fall the wall of the defendant. If he had erected his building of stone, brick or iron, the falling of the wall would have injured it just the same. There is no testimony in the record tending to show that plaintiff's erecting a concrete building in any way caused the injury to his property.

(4) The plaintiff insists that the judgment should be reversed and a judgment entered here in his favor because, he says, the cause had been fully developed and the undisputed evidence shows the amount of damages suffered by him. He states in his abstract that his damages

amounted to $1,700. But he does not abstract his testimony on this point, and we are not required to explore the record to see whether the testimony on this point is undisputed. Counsel for the defendant deny that it is undisputed and aver that the damage sustained by the plaintiff, as shown by the record, amounts to only about half the amount claimed by plaintiff.

For the errors indicated, the judgment will be reversed and the cause remanded for a new trial.

MALVERN LUMBER COMPANY *v.* SWEENEY.

Opinion delivered December 21, 1914.

1. NEGLIGENCE—PROOF OF INJURY.—Proof of an alleged act or omission as causing an injury is not sufficient to establish it as a cause, so long as other causes exist and were present, which equally might have caused it.
2. NEGLIGENCE—PERSONAL INJURY—PROOF—CONCURRENT CAUSE.—Plaintiff's intestate was employed in defendant's mill, and plaintiff claimed that deceased was injured by defendant's negligence, and died as a result of the injury. It appeared that deceased was suffering from cancer of the stomach at the time of the alleged injury. *Held*, under this evidence the issue of negligence should not have been submitted to the jury, as there was no evidence connecting the alleged accident with deceased's death and under all the evidence, the cause of the death was merely a matter of surmise.
3. EVIDENCE—NEGLIGENCE—PROOF.—The existence of a fact is not proved by evidence of a subsequent condition which is merely consistent with its existence, and does not warrant a submission of the question to the jury.
4. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.—Where plaintiff alleged that the deceased was injured by the negligence of defendant, by being struck by a truck, in the moving of which he was assisting, due to the truck striking a rise in the floor; *held*, under the evidence, that deceased assumed the risk of his employment, as the condition of the floor was well known to him, and no negligence was shown in furnishing deceased a safe place in which to work.

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

Wynne & Harrison and *Henry Berger,* for appellant.

The court ought to have directed a verdict for the appellant as requested. There was a total failure of

proof to establish the fact of an injury. Under the proof in the case the jury could not have arrived at a verdict in favor of the plaintiff except through indulgence in speculation, conjecture or surmise. 3 Bailey on Personal Injury (2 ed.), 2136; *Id.* 2135; 119 Mich. 640; 143 Mich. 379; 106 N. W. 117; 145 Mo. 316; 76 Ia. 744; 181 Fed. 91; 126 Pac. 960; 56 Ill. App. 578; 103 Va. 64; 93 S. W. 868; 90 S. W. 977; 79 Ark. 437; 179 U. S. 658; 109 Ark. 206-214; 116 Wis. 31.

John C. Ross, for appellee.

There was positive proof of the fact that the deceased was injured, and the proof further shows that appellant was guilty of gross negligence which was the direct cause of the injury. 105 Ark. 402.

While there is evidence upon which the jury might have based a finding that the deceased came to his death from cancer or ulcer, yet there is also evidence which justified the jury in finding that the exciting, proximate cause of his death was the sudden, violent jerk and wrench of his body which ruptured a blood vessel from which hemorrhage almost immediately set up. Notwithstanding a person may be suffering from a latent disease such as cancer of the stomach, from which he might have died at some future time, yet, if he receives an injury which sets in motion a chain of causes that result in death sooner than he would otherwise have died, there is liability for his death. 106 Ark. 91; 91 Ark. 343. This court has permitted the verdicts of juries to stand in cases much closer on the facts than is the case here. See, 103 Ark. 61; 107 Ark. 476; 77 Ark. 434-436; 100 Ark. 207; 105 Ark. 374.

KIRBY, J. This appeal is brought from a judgment for damages for an alleged personal injury, resulting in the death of appellee's intestate. He was working for the appellant company at the time of the alleged injury in trucking lumber to the planer. The lumber was loaded on a frame, which was on two wheels, constituting a truck, and one man stood at the end of the lumber behind and

kept it in balance and helped to push, while the other, the deceased in this instance, rolled one of the wheels by pushing it along to the planer, the floor of which was an inch and a half higher than the runway adjoining it, and to enable the helpers to more easily push the truck over this raise, a plank about an inch thick and ten feet long was usually kept against the edge of the rise in the planer floor. When the truck deceased was helping to push reached this rise, the plank had been moved away from against it and one wheel of the truck struck the rise first, causing it to stop.

Appellant contends that it caused a severe jerk of the deceased, who was rolling the wheel that did not strike the obstruction. The man at the end of the lumber who was keeping it balanced, said it was the business of the employees trucking the lumber to put a plank up against the edge of the planer floor to better enable them to roll the lumber up, and that he did not notice that the plank was not up against the rise until after the wheel struck the obstruction and the truck stopped. He said that deceased was in a better position to see whether the plank was in place than he was, and that it was his duty also to notice the condition and remedy it. He testified further that there was no severe jolt or jerk of the truck when it struck the rise in the floor, that he did not notice any at all, and also that deceased made no complaint of any jolt or jerk, or of being injured at the time. It is true he answered "Yes, sir," when asked if he didn't remember in giving a statement in the case saying, "When we run the buggy against the offset, it caused a considerable jerk." Shortly after deceased went to work at the resaw, and in probably twenty minutes thereafter complained of feeling bad, and went home, and died within a month and a half. The testimony of the physicians tended strongly to show that he was afflicted with cancer of the stomach, and had been for some time, and that his death was due to that.

Two witnesses who were familiar with the trucking of lumber and the trucks used by appellant company,

stated that if one of the trucks heavily loaded was pushed rapidly against the rise in the floor, one wheel striking before the other, that the tendency would be to jerk the other wheel and the man who was pushing it with sufficient violence maybe to produce a severe injury. No one saw the deceased when the wheel struck the rise in the floor, the man at the end of the lumber being behind and on the other side of it from him, and it does not appear that he had hold of the wheel at the time.

Appellant only contends here that the court erred in refusing to direct a verdict for it, and we agree with this contention. There is no testimony showing negligence on the part of the lumber company that resulted proximately in injury to and death of the deceased. It may be that he was jerked or shaken by the sudden coming in contact of the opposite wheel of the truck with the rise in the planer floor and injured thereby, but the man who was at the end of the load of lumber and holding the truck in balance and who must necessarily have been slung around or affected by the jerk, testified that there was no jerk or jolt resulting from the contact, that he noticed none, and that he must have noticed it if there had been. He testified further, and it was not disputed, that deceased made no complaint whatever of being jarred or injured at the time. If his stomach was weakened by the inroads of the disease from which he suffered, he might the more easily have been injured, it is true, by a jolt or jerk, but the jury would have been compelled to speculate upon the cause of his injury in arriving at a verdict in favor of the appellee, which they doubtless did do as indicated by the small amount awarded as damages.

The testimony does not even show that deceased had hold of the wheel of the truck at the time the other wheel struck the obstruction. The death of deceased could have resulted from the disease from which he suffered, as well as from the injury claimed to have been inflicted, and the jury are not permitted to speculate as to its cause.

(1) 3 Bailey on Personal Injury, page 2136, states the rule as follows: "It may be correctly stated as a rule that proof of an alleged act or omission as causing injury is not sufficient to establish it as the cause, so long as other causes exist and were present, which might as well have caused it. Surmise and conjecture can not supersede proof. There must exist some degree of certainty. There need not be absolute certainty or freedom from reasonable doubt but sufficient must be shown to overcome or more than balance any presumption that other causes may have produced it."

(2-3) The most the evidence establishes is a condition which could have been caused by an injury at the time, or resulted from the disease of the deceased, and whether an injury did occur was under the evidence but a surmise or conjecture. The existence of a fact is not proved by evidence of a subsequent condition which is merely consistent with its existence, and does not warrant a submission of the question to the jury.

In *St. Louis, I. M. & S. Ry. Co.* v. *Andrews,* 79 Ark. 437, the court said: "The jury are not allowed to indulge in presumptions. Upon a charge of negligence of this sort, there must be proof, otherwise the injury complained of must be held to have resulted from an accident for which no one is legally liable to respond in damages. Such shows no more than that plaintiff's injury resulted in an accident."

In *Midland Valley Ry. Co.* v. *Ennis,* 109 Ark. 206, the court said:

"The evidence tends to show as before stated, that he fell under the cars right at the frog and was run over. It is purely a matter of conjecture how he came to fall under the cars. Juries are not permitted to rest a verdict purely upon speculation, but there must be testimony which warrants a finding of the essential facts or which would warrant a reasonable inference of the existence of those facts." See, also, *Patton* v. *Texas & Pacific Ry. Co.,* 179 U. S. 658; *L. H. & St. L. Ry. Co.* v. *Jolly,* 90 S. W. 977; *Chesapeake & Ohio Ry. Co.* v. *Heath,* 103 Va. 64.

(4) Moreover, the raised floor of the planer was an obvious defect, if a defect at all, and it was the duty of the deceased or those engaged in trucking the lumber to place the plank up next to the rise if they desired to use it. There was nothing to conceal the condition, and there was no negligence shown upon the part of appellee in failing to exercise ordinary care in furnishing deceased a safe place in which to work. He assumed the risk of the employment, and can not recover on that account.

The judgment must be reversed, and as the cause seems fully developed, will be dismissed. It is so ordered.

SMITH v. JOYCE.

Opinion delivered December 21, 1914.

MORTGAGES—EFFECT ON TITLE—CONTRACT TO SELL—PENALTY.—A mortgage is not such a conveyance by one who has executed a previous agreement to convey the same property, as will subject the mortgagor to the penalty denounced by Kirby's Digest, § § 1694 and 1695.

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

STATEMENT BY THE COURT.

The complaint in this cause alleged that, on March 1, 1913, appellant executed to appellee a bond for a title, a copy of which was attached to the complaint and made an exhibit thereto, in which he agreed to convey to appellee certain lots in the city of Paragould, Arkansas, on condition that appellee should pay him $25 cash and twenty-five notes, of $15 each, the first to be due on April 1, 1913, and the balance to be due on the first of each subsequent month, and one note for $6.25 due May 1, 1915. The total sum to be paid amounted to $406.25. Appellee paid $25 in cash, according to the terms of this contract, and, according to the allegations of the complaint, made other payments, amounting, in all, at the time the suit was brought, to $43.18.

There was no allegation that appellee had complied with his contract at the time the suit was filed further than to make the payments above stated.

The complaint further alleged that on the 26th of May, 1913, appellant and his wife made, executed and delivered to one C. A. Mack a mortgage conveying said lots as security for a loan of $1,000, made appellant by said Mack, who, at the time, had no knowledge of plaintiff's equity, and that this mortgage had been duly recorded in Greene County, and had been executed without the knowledge or consent of appellee.

It was not alleged that appellee had lost anything by reason of the mortgage that appellant had executed to Mack, nor was there any allegation of appellant's insolvency.

Appellee prayed judgment for $86.36, which was twice the amount of the payments made by him under his bond for title. Appellant filed a demurrer to this complaint, which was overruled by the court, and, appellant having refused to plead further, final judgment was rendered against him, and he duly saved his exceptions and prayed an appeal, which was granted.

M. P. Huddleston, Robt. E. Fuhr and *J. M. Futrell,* for appellant.

1. Sections 1694-5 of Kirby's Digest are highly penal, and should be strictly construed. 87 Ark. 411.

2. The complaint stated no cause of action. There is no allegation that Joyce had complied with his contract, and a failure to do so worked a forfeiture *ipso facto.* Appellant did not "sell and convey"—he merely *mortgaged* his equity in the land, as he had the right to do.

R. P. Taylor, for appellee.

1. The violation of the statute constitutes a fraud.

2. In Arkansas a mortgage transfers the legal title —hence it is a sale and conveyance. 43 Ark. 504; 65 *Id.* 132; 66 *Id.* 572; 73 *Id.* 589.

3. This is not a highly penal statute. 68 Ark. 443; 24 Atl. 831; 176 Ill. 489; 42 L. R. A. 804; 93 Ark. 45. The statute is remedial. 68 Ark. 438, and cases *supra.*

SMITH, J., (after stating the facts). This action was instituted under sections 1694 and 1695 of Kirby's Digest, which, so far as they are relevant here, read as follows:

"Section 1694. If any person shall *bona fide* sell any tract or parcel of land, and shall make any written deed, conveyance, bond or other instrument in writing, assuring the title of such land to the purchaser thereof, and shall afterward sell and convey such tract of land to any subsequent purchaser, whether the subsequent purchaser have knowledge of the previous sale or not, such person shall be deemed guilty of a misdemeanor," and fined not less than twice the value of the land so sold.

"Section 1695. Any person who shall violate * * * the preceding section shall, in addition to the above fine * * * pay to every person so by him injured or defrauded by any of the means therein mentioned, double the damages sustained by him, to be recovered by proper action."

The briefs contain an interesting discussion of the question whether the above statute is penal or merely remedial.

Appellee concedes that he could not recover if this statute was construed to be penal, and not remedial, but he insists that it is remedial in its nature and should receive a liberal construction to accomplish the purposes intended by the Legislature in its enactment.

But we think there can be no recovery in either event. There is no allegation here that appellant is insolvent, nor is there any allegation of any offer of performance on appellee's part to which appellant can not respond, and, consequently, there is no allegation that appellee has been injured or defrauded, unless the mere execution of the mortgage under the circumstances above stated constitutes an injury, or a fraud, within the meaning of the statute.

Appellee insists that a mortgage is such a conveyance of land as is comprehended within the phrase, "and shall afterward sell and convey such tract of land to any subsequent purchaser." But we do not agree with this

contention. A mortgagee is not a purchaser in the strict legal sense of that term. It is true that this court said in the case of *Perry County Bank* v. *Rankin,* 73 Ark. 589, 592, that, "It is the rule in this State that a mortgage deed conveys to and vests in the mortgagee the legal title to the property described, subject to be defeated by payment of the debt." But in whatever form it may have been executed, if it is in fact a mortgage, it is always subject to be defeated by the payment of the debt which it secures. In fact, this is a distinguishing and essential characteristic of a mortgage.

The words, "sell and convey," are defined in Words & Phrases, and it was there said: "The 'power to sell and convey' does not confer the power to mortgage." And, further, "A trust with power to sell out and out will not authorize a mortgage, and a trust for sale, with nothing to negative the seller's intention to convert the estate absolutely will not authorize the trustee to execute a mortgage." A number of cases are there cited in support of that text.

In the case of *St. Louis Land & Building Assn.* v. *Fueller,* 81 S. W. 414, the Supreme Court of Missouri had occasion to define the phrase, "sell and convey," and it was there said:

"They (counsel) urge that the terms of the grant of power, 'to sell and convey,' should have been followed by the terms, 'in fee.' This suggestion is answered by the fact that the terms, 'sell and convey,' when applied to real estate, mean, in the absence of appropriate expressions in the instrument itself limiting and restricting such general acceptance of the meaning of such terms, a conveyance in fee; hence it follows that the addition of the words 'in fee' would give no additional force to the words used in the deed before us. The intention to authorize the conveyance of the entire estate, by the use of the terms in the grant of power, 'to sell and convey,' is made clear when considered in connection with the statute, which expressly declares the nature and character of title vested by a conveyance of real estate. The learned counsel for

respondents very aptly applied the statute." It is stated thus: "The Goff deed is dated February 4, 1874. The statute then provided that '* * * every conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear, or be necessarily implied in the terms of the grant.' That statute is in full force and effect today. 1 Rev. St. 1899, p. 1096, section 4590."

The above section of the Missouri statutes which is quoted in part is so similar to section 733 of Kirby's Digest, which section relates to the construction of conveyances, as to suggest that, if our statute was not copied from the Missouri statute, it was, at least, drawn to conform with it.

We conclude, therefore, that a mortgage is not such a conveyance, by one who has executed a previous agreement to convey, as subjects the mortgagor to the penalty of the statute.

As has been said, there is no allegation of any tender of performance on appellee's part, nor of any refusal or failure to respond on appellant's part; nor that appellee has been injured or defrauded, except by the fact of the execution of the mortgage.

The judgment of the court below is, therefore, reversed and the cause will be remanded with directions to sustain the demurrer.

KLINGENSMITH *v.* LOGAN COUNTY.

Opinion delivered December 21, 1914.

COUNTY COURT—JAIL—CONTRACT WITH ARCHITECT—ENFORCEABILITY OF CONTRACT.—A county judge made a contract with an architect to draw plans for a county jail, but no order of the county court appointing an architect was made, nor was any appropriation ever made to pay for the work. *Held*, although bids were taken and a contract let, the architect was not entitled to any compensation under his contract with the county judge.

Appeal from Logan Circuit Court, Northern District; *Jeptha H. Evans*, Judge; affirmed.

STATEMENT BY THE COURT.

This cause was tried upon the following agreed statement of facts:

"The county judge of Logan County determined to build a jail at Booneville and employed A Klingensmith, an architect of Fort Smith, to draw the plans and specifications and to superintend it. He was to receive 3 per cent for drawing plans and specifications and 2 per cent for superintending it. Mr. Klingensmith did the work of drawing plans and specifications and letting the contract. Based on a low bid, his agreed compensation for this was to be 3 per cent of the low bid, which amounted to $210. The county judge made an order for the building of the jail September 17, 1912, but at no time did either the county court or the quorum court of Logan County make any appropriation for the building of the jail, and the question to be raised by this appeal is the right of the architect to recover for his work when no appropriation whatever was made by the county court or quorum court, notwithstanding he did the work under the directions of the county judge, and there is no county court order appointing him as architect, but there is one approving his plans."

Appellant requested the court to make a declaration of law predicated upon the above statement which was to the effect that appellant was entitled to a judgment for the amount sued for. The court refused to make this declaration of law, but upon the contrary, made a finding in favor of the county, and this appeal has been duly prosecuted.

Vincent M. Miles, for appellant.

The county court may authorize the building of a jail and approve a contract therefor without any previous appropriation by the levying court. Kirby's Dig., § 1011; 93 Ark. 11; 63 *Id.* 397; 73 *Id.* 523; Const. 1874, art. 16, § 12.

J. D. Benson, for appellee.

It should appear of record (1) that the county court authorized the building of the jail; (2) that there

were sufficient funds available for the purpose; (3) that the circumstances would permit the court to levy a tax to build the jail, and (4) that a proper order be made upon the above three matters *of record.* Kirby's Digest, § 1011; 93 Ark. 11; 63 *Id.* 397; 73 *Id.* 523.

SMITH, J., (after stating the facts). It was decided in the case of *Sadler* v. *Cravens,* 93 Ark. 11 (to quote from the syllabus in that case) that "Kirby's Digest, § 1011, authorizing the county court to build a courthouse or jail whenever it shall think it expedient to do so, was not repealed by the subsequent statute (Kirby's Digest, § 1502), providing that 'no county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended.' "

Upon the authority of this case, the county court can order the construction of a jail even in the absence of any order to that effect by the quorum court, or of any appropriation by that court. And it may be true that the power of the county court to contract for the construction of a courthouse or a jail through proper orders of that court implies the power to make a preliminary contract with an architect for the preparation of plans for such buildings. But we are not required here to decide whether the county court has the right to make this preliminary contract with the architect where it has made no order determining the necessity for the construction of such building and its purpose to build it. We must assume that the terms employed in the agreed statement of facts are not used colloquially, but in their technical sense. This statement recites that the county judge did certain things, and the county court did certain other things, and this distinction shows those terms were employed advisedly. The county judge, and not the county court, made an order for the building of the jail, and there was never any appropriation by either the county court or the quorum court for that purpose. It does not appear that the county court undertook to make any contract with appellant for the preparation of these plans, al-

though such a contract was made by the county judge. The agreed statement of facts recites that appellant did the work under the directions of the county judge, but there was no county court order appointing him architect for that purpose. There is the recital, however, that the county court made an order approving his plans, and this is the only order of the court upon which appellant could predicate any cause of action against the county. But the majority of the court think this order approving the plans did not make a contract, because it did not order the construction of the jail, nor did it undertake to bind the county to make any use of these plans. We can not interpolate anything into this agreed statement of facts which will add any validity to the recital that there was an order of the court approving the plans. That order does not undertake to bind the county to pay for these plans, and the judgment of the court below will, therefore, be affirmed.

McKIE v. McKIE.

Opinion delivered December 21, 1914.

1. CONTRACTS — INTERMARRIAGE — EXTINGUISHMENT OF OBLIGATION — COMMON-LAW RULE.—At common law the intermarriage of the two parties to a contract extinguished the obligation.
2. HUSBAND AND WIFE—PRE-NUPTIAL CONTRACT—ENFORCEMENT AFTER MARRIAGE—EQUITY.—A. executed her note and mortgage to B. to secure a loan to her; the parties thereafter intermarried. *Held*, under article 9, § 7, Constitution of 1874, and Kirby's Digest, § 5214, the common-law rule has been modified, and the unity of the parties to the marriage so destroyed that the obligations incurred before the marriage relation was entered into, are not extinguished by it.

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

Rector & Sawyer, for appellant.

The debt and deed in trust are now enforceable. If not now enforceable, they are not extinguished, but merely dormant until the holder is under no disability

to enforce the same. Vol. 16, Laws of England, by the Earl of Hallsbury, p. 433, § 883; 21 Cyc. 1276, "Husband and Wife," and notes; 49 Ill. App. 163; 29 Ind. 564; 23 N. Y. 527; 1 N. Y. City Ct. 405; 76 Vt. 176. As to the reason for the rules as to marriage rights, see 50 Am. Dec. 534; 64 Ark. 389. As to the reason for the rule that marriage extinguishes obligations previously existing between the contracting parties, see *Cage* v. *Acton,* 1 Lord Raymond Reports, 517-520.

Have the reasons set forth by Lord Chief Justice Holt in the last named cause, been abrogated by our statutes?

In equity contracts between husband and wife will be enforced if reasonable. 41 Ark. 183; 42 Ark. 511; 49 Ark. 438; *Id.* 126; 95 Ark. 526.

The Constitution expressly frees the wife's separate estate from the debts of her husband, and the implication therefrom is that all other charges against it shall remain, and that in her "debts" are included debts, whether to third parties, or to her husband, that are equitable charges made by the situation. Art. 9, § 7, Const. 1874; 39 Ark. 242; Kirby's Dig., § 5228.

There may be contracts on the part of the wife that can not be enforced in a court of law, yet a court of equity will enforce them, if there is a lien upon her separate property by virtue of the acts of the parties, or the court will engraft a lien on her separate property if the equity of the situation demands it. It does not follow that, because the husband might be unable to recover on the debt in a court of law, he could not enforce the contract in a court of equity. 200 Mass. 437, 438; 117 N. Y. 411; 176 Mo. 107; Cord, Legal and Equitable Rights of Married Women, § 265; 36 Ark. 586; 48 N. J. Eq. 240; 67 Mo. 600; 7 Paige 112.

There is no case in point as to the question involved in this case, decided by this court, but see 49 Ind. 235-240; 16 S. W. (Ky.) 129; 102 Tenn. 439; 101 Tenn. 723; 120 Tenn. 589; 2 Story's Eq. Jur., § 1370; 73 Am. St. Rep. 899.

Davies & Ledgerwood, for appellee.

Was the debt extinguished by the marriage? The property upon which the mortgage was given was not the separate estate of a married woman, because appellee was at that time a single woman, and when she entered into the marriage contract with appellant, the note was paid, not extinguished, but *paid,* by the act of the parties in entering into the marriage contract, and not by operation of law. The court ought to have gone further in its decree, and ordered the satisfaction of the mortgage on the record. 31 Ark. 294; 102 Tenn. 439; Stewart on Husband and Wife, § 44.

Throughout a long line of decisions this court has declared the policy of this State to be that legislative enactments will not change the common law rule unless there are express words in the statue to that effect, and that all common law disabilities remain except when changed by express words or clear implication. 66 Ark. 118; 100 Ark. 69; 89 Ark. 118; 30 Ark. 66; 27 Ark. 288; 49 Ark. 428; 39 Ark. 361; 107 Ark. 70. See also 21 Cyc. 1276; 232 Pa. St. 89; 81 Atl. 1455; 102 Mass. 246; 105 Mass. 115; Smith's Cases on Law of Persons, 397; Newman on Pleading and Practice, 67; 16 L. R. A. 526; *Id.* 530; 101 Ark. 531; 67 Ark. 15; 80 Ark. 42; 87 Ark. 175; 88 Ark. 308; 92 Ark. 486, 490.

McCULLOCH, C. J. Appellant and appellee were at the time of the commencement of this suit, and are now, husband and wife, but at the time of the execution of the note and mortgage involved in this case they were not married. They resided in the city of Hot Springs, in this State, and appellee, being the owner of certain real estate situated there, borrowed a sum of money from appellant and executed to him her promissory note and a mortgage on the real estate to secure the payment of the same. Subsequently she and appellant intermarried, and the question raised in this case is whether or not the marriage extinguished the debt. Appellee instituted the action against appellant to cancel the mortgage on the ground that it had been extinguished

by the intermarriage of the parties, and appellant filed a cross-complaint to foreclose the mortgage.

(1) The rule at common law was that the intermarriage of the two parties to a contract extinguished the obligation. The question, however, for decision in this case is whether modern statutes governing the marriage relation and property rights thereunder, particularly the provision of the Constitution of this State (Sec. 7, Art. 9) to the effect that the property of a married woman "shall, so long as she may choose, be and remain her separate estate and property," and the statute which provided that a married woman may transfer her separate property, carry on any trade or business, and sue or be sued in the courts of the State (Kirby's Digest, 5214) operate as a modification of the common law rule so as not to extinguish the obligation of a contract between the parties executed prior to the marriage. Statutes of this character exist well nigh universally in the American states, but the courts are not altogether in accord as to the effect thereof. In England there has been a great modification in the strict rules of the common law with respect to the property rights of married women, and the trend of the decisions there is to give a broad interpretation to these statutes in relaxation of those common law rules.

In Lord Halsbury's Work on the Laws of England (Vol. 16, p. 433), in commenting on the case of *Fitzgerald* v. *Fitzgerald,* L. R. 2 P. C. 83, where the English court decided that a husband's ante-nuptial contract to pay an annuity was not extinguished by the intermarriage of the parties but was only suspended, the following statement is found: "The rules of the common law were founded on the doctrine of the unity of the person, and the inability of husband and wife to sue one another, and although the Married Women's Property Acts contain no express provision on the subject, it is doubtful whether these rules have any application now that this disability has been removed. There seems on principle to be no reason why a husband or wife should not sue

the other on a contract made before marriage, unless, regard being had to the nature or terms of the contract, and the other circumstances of the particular case, a contrary intention appears."

In some of the American states, where there are statutes similar to ours, they have been construed to modify the common law rule so as to allow the parties to sue on a contract made before marriage. In Massachusetts the court first decided against such modification, but the later cases have overruled the former ones, and now hold it to be the settled law of the State that the subsequent intermarriage of the maker and payee of a note does not extinguish the binding force of the obligation. *Butler* v. *Ives,* 139 Mass. 202; *Spooner* v. *Spooner,* 155 Mass. 52; *McKeown* v. *Lacey,* 200 Mass. 437.

In Illinois it has been decided that statutes similar to ours modify the common law rules so that a wife's ante-nuptial contract is not extinguished by her intermarriage with the obligee. *Clark* v. *Clark,* 49. Ill. App. 163.

There can scarcely be found a more learned or interesting discussion on the subject of modification, by modern statutes, of the rules of the common law, with respect to the rights and liabilities of married women, than the opinion of Judge Riddick in the case of *Kies* v. *Young,* 64 Ark. 381, where it was held that (quoting from the syllabus) "The common law liability of a husband for his wife's ante-nuptial debts has not been abrogated by the married woman's act which excludes the marital rights of the husband in the wife's property during coverture, and confers upon married women power to acquire and hold property."

The rule laid down in that case was subsequently abrogated by statute relieving the husband from liability for the wife's ante-nuptial debts, but the luminous discussion of the law by Judge Riddick still remains for our guidance upon analogous questions. It can not be contended that the statutes of this State have in express terms abrogated the common law rule governing

the question involved in the present case any more than they did the question involved in the case just referred to, but the question for determination in this case is, as it was in that, whether the reasons for the common law rule have been abolished by statutes so as to cause the rule itself to cease.

(2) In *Kies* v. *Young, supra,* the court decided that all of the reasons for the common law rule, so far as it related to the liability of a husband for the ante-nuptial debts of his wife, had not ceased with the changes in the law wrought by modern statutes, and that, therefore, the rule itself had not ceased as a part of the law of this State. But it does not follow that the same can be said of the question now before us concerning the extinguishment of the liability of the wife for her ante-nuptial debts. On the contrary, it seems to us that the provisions of the Constitution and statutes of this State, which sweep away almost entirely the husband's common law right to take or control the property of his wife, do completely abrogate the common law rule that an ante-nuptial debt is extinguished by the intermarriage of the parties. The husband can not sue at law to enforce the obligation because the statutes do not confer that remedy, but the obligation remains unextinguished and may be enforced in equity. The principal reason why this court upheld the liability of the husband for the ante-nuptial debts of the wife, according to the common law rule, is that, while the Constitution and statutes of the State give the wife the right to hold her property so long as she may choose, and to sue and be sued on her obligations with respect to her separate estate incurred during coverture, those rights to hold her own property are limited to her exercise of the choice to claim it, and that this does not entirely take away the husband's rights, so that it can be said that the reason for holding the husband liable for the debts has ceased. It is pointed out in the decision that the wholesomeness of the common law rule in that respect is not affected by modern enactments, because the wife may choose not to take

her property but to allow her husband to take it, and that as there is no provision in the statute for her to be sued on an ante-nuptial obligation, there would be no remedy for the creditor unless the common law remedy against the husband is preserved. The reasons there stated have no application to the present case where the ante-nuptial obligation of the wife to the husband is under consideration, and where she has the choice of holding her property and of disposing of it at will without the consent of the husband there is no reason why the common law rule extinguishing her obligation to the husband should still prevail. It has long been the law of this State that an obligation of husband and wife, even during coverture, while unenforceable at law, is binding and enforceable in equity. *Pillow* v. *Sentelle,* 49 Ark. 430. We have held, too, that where there exists a valid obligation of one of the spouses to the other, the remedy is not suspended during coverture, but that the obligation may be enforced in a court of equity. *Lawler* v. *Lawler,* 107 Ark. 70; *Shane* v *Dickson,* 111 Ark. 353. The question can not be said to be entirely free from doubt, but we believe the true, the just and the logical rule to be that the common law doctrine on this subject has been modified and that the unity of the parties to the marriage has been destroyed to the extent that obligations incurred before the marriage relation was entered into are not extinguished by it.

We are, therefore, of the opinion that the learned chancellor reached the wrong conclusion on the question involved, and his decision must be reversed with directions to enter a decree in accordance with this opinion.

WOOD and HART, JJ., dissent.

STATE, *ex rel.* THE ATTORNEY GENERAL *v.* ARKANSAS COTTON OIL COMPANY.

Opinion delivered December 21, 1914.

1. CORPORATIONS—SURRENDER OF CHARTER—ABATEMENT OF ACTIONS.—An action against a corporation to recover penalties for alleged viola-

tions of the anti-trust statutes, will be abated, when the corporation, during the pendency of the action, surrenders its charter, under Kirby's Digest, § § 957 and 958.

2. ACTIONS—PENAL AND REMEDIAL.—Where an action is founded entirely upon a statute, and the only object is to recover a penalty or forfeiture, it is a penal action; but where the damages are given wholly to the injured party, as compensation for the wrong and injury, the statute having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is remedial.

3. CORPORATIONS—DISSOLUTION—PENAL ACTION—ABATEMENT.—A strictly penal action does not survive against a corporation, which, during the pendency of the action, surrenders its charter, since the statutes make no provision for the payment of penalties assessed against a dissolved corporation.

4. CORPORATIONS—RIGHT TO DISSOLVE VOLUNTARILY—ANTI-TRUST ACT.—The right of a corporation to dissolve voluntarily under the statutes of the State, is not abridged or limited by Act 1, page 1, Acts 1905.

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

Wm. L. Moose, Attorney General; *Jno. P. Streepey,* Assistant, and *Edw. B. Downie,* for appellant.

1. There was at best but a mere technical surrender of the charter and demise of the Arkansas Cotton Oil Company. The Union Seed and Fertilizer Company has made no change in the operation of the mills, conducts the business at the same stand, with the same force and in the same manner as was heretofore done by the Arkansas Cotton Oil Company, and is, in fact, but a mere continuation of the last named company. The rule applied by the Supreme Court of the State of Washington should be applied here. 111 Pac. (Wash.) 1073; 127 Pac. (Wash.) 307, 309; 107 Ark. 118.

2. Sections 953, 957 and 958 of Kirby's Digest, constitute saving clauses to prevent the abatement of this action. 55 L. R. A. 779, 780 (N. Y.)

3. An action of this nature can not be abated as against the sovereign. To permit such a course would be iniquitous, permitting the corporation to take advan-

tage of its own wrong and leaving the sovereign without remedy.

4. This rule of the common law was never adopted by the State of Arkansas. 9 Ark. 258-270; Kirby's Dig., § 623.

Moore, Smith & Moore and *Cockrill & Armistead,* for appellee.

The dissolution of the Arkansas Cotton Oil Company, a domestic corporation, in the manner provided by statute, abated the action:

1. Because the dissolution of a corporation abates all pending suits against it, in the absence of a saving statute providing otherwise. 3 Story, 657; 21 Wall. 609; 8 Pet. 281 (8 L. Ed. 945); 144 U. S. 640, 36 L. Ed. 574; Cook on Corporations, 1908 ed, § 642; 10 Cyc. 1316, 1317; 68 Ill. 348; 128 Pac. 1040; 69 S. E. (Ga.) 822; 65 S. E. 1084; 120 Fed. 165; 74 Fed. 425; 87 Hun. 384; 141 N. Y. S. 505; 18 Ark. 554; 11 So. 428; 12 S. E. 275; 126 N. W. 1043.

2. Because this is an action for a penalty which did not survive the death of the corporation. 18 Enc. Pl. & Pr. 1128; 122 S. W. 1077; 33 L. R. A. (N. S) 576, note; Kirby's Dig., § 6285; 110 U. S. 76; 105 Am. St. 74; 40 Am. Rep. 146; 42 *Id.* 14; 66 Am. Dec. 184; 7 L. R. A. 553; Dec. Digest, "Penalties," § 31; 70 S. W. 347; 161 S. W. 136.

3. There is no merit in the effort of the State to avoid the abatement of the action on the theory that the Union Seed & Fertilizer Company, the purchaser of its properties, is a mere continuation of the Arkansas Cotton Oil Company. The State must fail in this contention, not only because the Union Seed & Fertilizer Company is not a party to this suit, but also because the facts do not bring this case within the rules laid down in the cases cited in support of the contention, even if this was a suit for debt or tort; and certainly there is no rule of law which imposes upon a purchasing corporation liabilities for *penalties* incurred by the selling corporation, no matter under what circumstances the sale was made.

4. Section 3 of the Anti-Trust Act of 1905, providing for the forfeiture of the corporation's charter, does not take away or affect the corporation's right to surrender its charter during the pendency of an anti-trust suit.

Kirby's Digest, § § 957, 958, gives to all corporations the absolute right of voluntary dissolution. It was within the province of the Legislature to provide that, pending suits for penalties should not abate upon the dissolution of the corporation, but it did not.

The mere fact that our anti-trust act *authorizes* the court to forfeit the charter of an offending corporation, does not justify the presumption that it will be done, even if the defendant is found guilty. Section 3 of the act is no more mandatory than section 2, providing for a fine; and that the act contemplates only one mode of punishment is shown by section 11, providing for compensation of the Attorney General, *when a charter is forfeited only.* 73 S. W. 645; *Id.* 1132.

McCULLOCH, C. J. This is an action at law instituted by the Attorney General against the Arkansas Cotton Oil Company, a domestic corporation, to recover penalties for alleged violation of the anti-trust statutes. During the pendency of the action in the circuit court of Pulaski County, the defendant conveyed all of its assets to another corporation for a nominal consideration, and by a resolution adopted by a majority of the stockholders, filed in the office of the Secretary of State, surrendered its charter. Thereupon a motion was filed in this case, by one who had been a stockholder of the dissolved corporation and the vice president and secretary thereof, to abate the action on the ground that since the corporation had dissolved, an action against it could no longer be maintained. The court sustained the motion and the Attorney General appealed to this court.

There is a statute concerning the voluntary dissolution of corporations, which reads as follows:

"Sec. 957. Any corporation may surrender its charter by resolution adopted by the majority in value

of the holders of the stock thereof and a certified copy of such resolution filed in the office of the county clerk of the county in which such corporation is organized, shall have effect to extinguish such corporation.

"Sec. 958. When any corporation has surrendered its charter, the chancery court shall have jurisdiction to pay its debts and to distribute its assets among the stockholders according to their several interests." Kirby's Digest, § § 957-958.

(1) Other sections of the statute provide for dissolution by decree of a chancery court, at the instance of stockholders or creditors. The doctrine seems to be settled by many courts of the American states that the effect of a dissolution of a corporation is to abate actions pending against it at the time of its dissolution "in the absence of a statute providing for the continuation of such actions." 10 Cyc. of Law, pp. 1316-1317. The authorities on that subject are collated in the encyclopedia. It is said in most of the cases that the courts, in thus holding to the doctrine, are following the common law on the subject; but it is pointed out that there was no such doctrine at common law for the reason that business corporations were unknown at that time, and there only existed those which were either municipal, ecclesiastical, or eleemosynary. How far we would feel constrained to go in following those decisions in a case involving a suit against a corporation to recover a debt, we need not now stop to consider, for in the light of our statutes on the subject a discussion of the effect of a dissolution during the pendency of such an action would seem to be academic. The statute, it will be observed, gives the unqualified right to dissolve and makes provisions for the payment of debts and the distribution of assets. It means, that by such dissolution, the existence of the corporation is terminated, except for purposes specified therein, either expressly or by necessary implication. 5 Thompson on Corp., § 6478. In the case of *Freeo Valley Rd. Co.* v. *Hodges,* 105 Ark. 314, 151 S. W. 281, we said, in discussing this statute, that even "in the absence of a statute

on the subject, the decided weight of authority is that strictly private corporations may surrender their charters and dissolve themselves except so far as creditors have a right to object." We have here no action for the payment of debts, for this is one by the State to recover a penalty, the purpose being not to recover a debt, but to punish for alleged infractions of the law. The statute makes no provision for the continuance or survival of any such action against a dissolved corporation.

It is insisted that the suit can not be abated as against the State, and for ground of that contention it is said that the State would be without a remedy. But we inquire why can not the action be abated, if there is nothing in the statute which authorizes its continuance? The legislative will is supreme and the unqualified right of dissolution is declared in the statute. The statute does, as before stated, contain a provision for the payment of debts and the distribution of assets, but this does not, for obvious reasons, apply to the recovery of a penalty. The distinction between a penalty and a debt is pointed out by the Supreme Court of the United States in the case of *Huntington* v. *Attrill,* 146 U. S. 657. Speaking of penal statutes, the court said "Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws."

(2) In 1 R. C. L., § 46, pp. 47-48, it is said: "As to what is a penal action the rule is that where an action is founded entirely upon a statute, and the only object of it is to recover a penalty or forfeiture, it is clearly a penal action. But where the damages are given wholly to the party injured, as compensation for the wrong and injury, the statute having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is not penal, properly so called, but remedial. In other words, where a liability is imposed by statute upon a person purely for a violation of its provisions, the statute is penal; but where it

is a statute which is merely declaratory of a common-law right, coupled with a means or way enacted for its enforcement, giving a remedy for an injury against the person by whom it is committed to the person injured, and either limiting the recovery to the amount of loss sustained or to cumulative damages as compensation for the injury, it is a remedial statute."

(3) Since there is no provision in the statute for the payment of this kind of a claim against a dissolved corporation, it is plain that there can be neither a continuation of the action nor a revival thereof. Whether there would be an abatement of an action which does in effect survive under the statute, we need not stop to inquire, for the reason that that question is not raised here. We have before us the question of enforcement of a strictly penal statute, which does not survive under this or any other statute, no provision is made for the enforcement of such claim against a dissolved corporation, and it necessarily follows that the action does not survive even where the dissolution takes place after the commencement of the action.

The State, to sustain its contention, relies upon the case of *Shayne* v. *Evening Post Publishing Co.,* 168 N. Y. 70, an opinion of the New York Court of Appeals rendered by Judge Parker. That was an action for libel against a domestic corporation, and, the charter of the corporation having expired by limitation during the pendency of the action, there was a motion to revive or continue the action in the name of the trustees, the motion being founded on a statute of that State which provided that upon the dissolution of any corporation the directors should be the trustees of the creditors, stockholders or members, with full power to settle the affairs of the corporation, collect and pay outstanding debts and distribute surplus proceeds. The court held that the action for libel came within the terms of the statute and that the cause should be revived against the former directors of the defunct corporation as trustees. There is much in the opinion in that case which seems to be at variance with the

current of American authority; but whether it should be followed in a case involving the right to revive an action against a corporation for liability other than a penalty, we need not consider. It has much persuasive force but it is not an authority on the question now before us. Whether that court was right or wrong in deciding that an action for libel fell within the terms of the statute, that question is not pertinent to the issue now before us. We must look for a solution of this question to the statutes of our own State, which provide for the payment of debts and distribution of assets of a dissolved corporation, but not for the payment of penalties.

A decision of one of the Texas courts of civil appeals is precisely in point. *Mason* v. *Adoue,* 30 Texas Civil Appeals Reports 276, 70 S. W. 347. That was an action, the same as this, to collect penalties for alleged violations of the anti-trust laws of that State; and during the pendency of the action the defendant corporation was dissolved by the judgment of another court, and it was held that this operated as an abatement of the action. The Supreme Court of that State denied a petition for a writ of error.

We are of the opinion that that is the correct solution here, and that the circuit court was correct in entering an order abating the action.

(4) Our attention is called to the third section of the anti-trust statute of 1905, which provides, in addition to the penalty prescribed in section 2, that any corporation organized under the laws of this State found guilty of a violation of the terms of the statute shall forfeit its charter, such forfeiture to be declared by any court of competent jurisdiction. It is argued that this provision of the statute is inconsistent with the right of voluntary dissolution of a corporation during the pendency of the State's suit to enforce penalties. The act of 1905 does not attempt, in express terms, to repeal any other statute except the act of 1899, which relates to the same subject. It is not a general statute covering the laws on the subject of the organization, control and

dissolution of corporations, and, therefore, does not repeal any other statutes by implication except such as are in irreconcilable repugnance to it. It does not deal at all with the question of voluntary dissolution of corporations, and it would be extending the force of the statute beyond its legitimate scope to hold that it took away or limited the right of voluntary dissolution expressly and unqualifiedly conferred by another statute. There are no limitations as to time or circumstances in the statute conferring the right of voluntary dissolution, and that provision in the act of 1905 can not be reasonably construed as a limitation on that right.

It is urged that the effect of this holding is to thwart the efforts of the State to enforce the anti-trust laws, giving corporations the privilege of defeating the State's right of action by voluntary dissolution. But the answer to this is that the remedy lies with the Legislature. It is entirely within the power of the lawmakers to declare that a dissolution shall not abate an action to enforce the anti-trust laws; and that notwithstanding such dissolution, the accrued penalties shall be enforced against the assets of the corporation. Until that remedy is provided by the lawmakers themselves, none can be molded by the courts, in the face of the statutes now in existence, which expressly and unqualifiedly give the right of dissolution without any provision, after such dissolution, for the enforcement of penalties.

Judgment affirmed.

KIRBY, J., dissents.

BIDDLE *et al.*, RECEIVERS, *v.* JACOBS.

Opinion delivered December 21, 1914.

1. NEGLIGENCE—CONCURRENT CAUSES—LIABILITY.—In an action for damages caused by negligence, where the evidence as to the cause of the injury leaves the question to conjecture between causes for one of which the defendant would not be liable and a cause or causes for which it would be liable, the plaintiff will fail.
2. VERDICT—NEGLIGENCE—CONCURRENT CAUSES—LIABILITY.—When the evidence tends equally to sustain either of two inconsistent propo-

sitions, a verdict in favor of the party bound to maintain one of them against the other is necessarily wrong.

3. VERDICT—EVIDENCE—CONJECTURE.—Verdicts can not be predicated upon conjecture.

4. NEGLIGENCE—WRONGFUL DEATH—CONCURRENT CAUSES—SUFFICIENCY OF THE EVIDENCE.—In an action for damages for personal injuries resulting in death, growing out of negligence, it is necessary that a preponderance of the evidence should show that the death resulted from the injury received, by reason of defendant's negligence.

5. NEGLIGENCE—PERSONAL INJURIES—EVIDENCE—CAUSAL CONNECTION.—In an action for damages caused by negligence, plaintiff must prove not only the negligence, but that it was the cause of the damage; there does not, however, have to be direct proof of the fact itself, it being sufficient if the facts proved are of such a nature, and are so connected and related to each other that the conclusion therefrom may be fairly inferred.

6. NEGLIGENCE—WRONGFUL DEATH—SUFFICIENCY OF THE EVIDENCE.—Deceased was injured in a railroad wreck, and died shortly thereafter. At the time of his death he had a tumor at the base of the brain. *Held*, under the evidence, the jury was warranted in finding that the tumor was caused by the injury, and that defendant's negligence was the cause of deceased's death.

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

STATEMENT BY THE COURT.

Appellee is the administratrix of the estate, and the widow, of A. C. Jacobs, deceased. She alleged in the complaint which she filed in this cause that her intestate, on August 19, 1913, became a passenger on one of appellee's trains operated between Fort Smith and Mansfield, and that this train collided with a train of the Midland Valley Railroad, as the result of which her intestate sustained certain injuries from which he died, after great suffering, on the 30th of December, 1913.

Appellant makes no denial of its negligence, nor of its liability for any damages which may have resulted from this collision. There was a judgment for a large sum of money, but it is not urged that the verdict is excessive. Indeed, appellant complains of no error committed at the trial, except that it says there is no preponderance of the evidence that intestate's death was at-

tributable to any injury received in this collision, and that the verdict of the jury to the contrary is supported only by conjecture. Appellant offered no evidence in its own behalf, but says that appellee's evidence was legally insufficient to sustain the verdict of the jury.

Upon this issue we must view the evidence in the light most favorable to appellee and, when thus viewed, it would have supported the following findings of facts: That the train upon which deceased was a passenger consisted of an engine and two coaches, and deceased was seated next to the window and about the middle of the chair car, with one arm resting upon the window sill and his foot upon the water pipe. That the chairs of the car were constructed of cast iron, the seats being supported by a pedestal formed of that material, firmly attached to the floor. That deceased was an attorney, and was at the time en route to Booneville to assist in the defense of a man charged with murder. The trains which collided were running fifteen or twenty miles an hour, and the impact was of such force and violence that many seats were torn from the floor, their backs broken and passengers thrown violently from their seats. The back of the chair in which deceased was seated was broken, and he was violently precipitated backward to the floor. Immediately after the collision, the deceased, upon being asked if he was hurt, replied that he "was hurt some," and, after rendering assistance to several of the ladies, and upon reaching the ground, he complained of his arm, back and shoulder blade, and was holding his arm in an unnatural position, and while lending assistance to others he manifested symptoms of discomfort by shrugging his shoulders and attempting to straighten himself. His complaints caused a Mr. Brock, who was also an attorney and was deceased's traveling companion, to examine his back at the scene of the collision, where there was discovered a bruised condition between the shoulder blades, about three-quarters of an inch in length, and the following night deceased complained of increased pain in his back. He remained at Mansfield the night of the ac-

cident, and went to Booneville the next morning, where he remained for nearly a week. During this time he was engaged in the trial of a cause there, and he manifested symptoms of pain and suffering, and seemed to be nervous and uneasy, and while at Booneville he was frequently seen moving his body in a manner that indicated soreness and a feeling of uneasiness and pain. He returned to Clarksville, his home, within a week after the accident, and his condition at that time was plainly noticeable by his law partner, who stated that, when deceased came into the office, there were traces of pain in his eyes and a seriousness about him which he had never observed before, and that deceased was never a well man afterward, and that deceased's pains continued to become more serious and severe. That shortly after the collision, deceased's eyesight became affected, and his locomotion impaired, and he experienced difficulty in climbing the stairs, and dreaded to do so. That he complained of having headaches and the pain in his back grew worse, and he later suffered pain in the base of his head, and frequently described it as "feeling as if some one was cutting the brain with a knife." Deceased went about to some extent as late as October, but all of his acquaintances had previously observed his changed condition, in fact, the testimony was that this changed condition was observable upon his return home after his injury. The proof is that, prior to his injury, he was a strong, healthy, vigorous man, of erect carriage, and athletic build, and a doctor, who became the principal witness in the case, testified that he had known deceased from his childhood and had been his physician for years, and that he was a man of unusual strength and of excellent health, but that within a week after the injury deceased's manner had changed, and he complained of pains in his back and head, and within two weeks after the injury deceased suffered a partial stroke of paralysis in his arm and leg, and was compelled to use a cane. This doctor testified that, upon his second examination of deceased, he found that his temperature was below normal

and his pulse too rapid, and that deceased took on a downcast, dejected appearance, and lost his accustomed snap and vigor, and ceased to be able to hold himself erect as he had done before his injury, and began to walk in a sidewise manner, half stooped or leaning over, and began to drag his foot and to walk with difficulty. This doctor was examined and cross-examined at great length, and, while he stated that he did not know the cause of deceased's death, further than that it resulted from a pressure on the brain, he stated, in a most unequivocal manner, that, in his opinion, death was caused by the injury received in this collision. This witness testified, however, that death might have been caused by a tumor upon the brain, and he defined the symptoms attendant upon a brain tumor and stated that these symptoms were present in this case, although he stated his opinion to be that deceased did not die from that cause.

The evidence of all the witnesses was to the effect that deceased gradually grew worse and that his death was unquestionably caused by a pressure of some character upon the brain, and this pressure grew gradually stronger and, after causing the most indescribable suffering, finally resulted in deceased's death.

The doctor testified that the exact cause of death could have been ascertained only by the performance of an autopsy. No autopsy was ever performed.

Appellant insists that the very manner in which deceased died shows that there was no laceration leading to the formation of a blood clot, and the brief in its behalf contains a most interesting presentation of this view of the evidence. It is urged that such an injury will produce a certain effect, and that whatever blood clot might form from such an injury would form at once, and its result would be immediately apparent, and that in such a case the blood clot would become absorbed and the patient recover, or, if this did not happen, the injured party would in no case grow gradually worse, but the effect of the blood clot would be immediately apparent.

In the course of the cross examination, the physician made the following statement in response to a question about traumatic injuries increasing in size:

"A. Well, I might not be able to tell you. This is what happens, as we think: We have blood poured out and we have a little clot there; that forms a little clot maybe; and if these little clots in a month or two months or six months or a year, may be absorbed. They don't take on life. It acts as dead matter and this is absorbed, taken up, disappears; whereas, on the other hand, we may have a rent sufficiently extensive to have the pouring out of some blood, a clot forms, and after a little while the little minute blood vessels that surround it seem to begin to nose about some way or other or in some particular way it begins to be free, and it takes on, some way that we don't exactly understand, a disposition to live and to grow and to develop and enlarge. That is what we call a blood clot trying to become organized and that becomes a tumor, just a growth, or something that don't belong there. And it would have the same kind of symptoms and give you the same kind of trouble that we had in this case in Mr. Jacobs' case."

This statement is assaulted with great vigor, and it is insisted that we should disregard it as being contrary to all common knowledge and common experience and, therefore, without probative force.

W. F. Evans and *W. J. Orr,* for appellants; *Ponder & Ponder,* of counsel.

1. The death of Jacobs was not caused by the injuries received in the collision. There is absolutely no proof of that fact. Verdicts must rest upon facts in evidence and *not* on speculation and conjecture. Where the evidence leaves the cause of death to conjecture as to the liability of a railroad, the plaintiff must fail. 179 U. S. 658; 21 Sup. Ct. 275; 150 S. W. 572. Courts are not required to give credence to statements of witnesses that falsify the well known laws of nature. 171 Mo. 116; 79 Ark. 608; 106 S. W. 947; 19 *Id.* 751; Rogers on Expert Testimony, Nos. 8-12-13.

2. The testimony of experts must be predicated upon facts in evidence, not mere opinions. 119 N. W. 200; 120 *Id.* 521; 76 Pac. 174; 134 *Id.* 338; 13 Cyc. 216.

Geo. F. Patterson, W. E. Atkinson, F. M. Seawell, and *Frank Pace,* for appellee.

The evidence shows that death resulted from the injuries received in the collision. All the medical experts and other witnesses show this beyond doubt, and the history of the case proves it beyond doubt. 48 Minn. 26; 36 Ill. App. 68; 177 Mass. 179; 36 Fed. 167; 69 N. Y. App. Div. 442; 28 Col. 129; 1 Thompson on Negl., par. 153-4; 13 Nev. 340; 104 S. W. 1011; 124 Mo. App. 230; 7 Thompson on Negl. 153; 89 Hun. (N. Y.) 374; 102 Mo. 582; 6 N. Y. Supp. 504; 59 N. Y. App. Div. 363; 69 N. Y. Supp. 550; 61 Mich. 619; *Id.* 622. Whether the direct causal connections exist, is a question, in all cases, for the jury upon the proved facts. 98 Ark. 352; 104 Mo. 382, and cases cited, *supra.* The injury is deemed the cause of death if death was hastened by the injury. 1 Thompson on Negl., par. 149; 91 Tenn. 56. See also 95 S. W. 1118; 213 Ill. 274; 13 Cyc. 216; 96 Ark. 358.

SMITH, J., (after stating the facts). (1) Appellant invokes the rule that, where the evidence as to the cause of death, or any other effect, leaves the question to conjecture between causes for which appellant would not be liable and a cause or causes for which it would be liable, the appellee must fail.

(2) That this is the law is well settled by the decisions of this court. In the case of *Railway* v. *Henderson,* 57 Ark. 414, Justice MANSFIELD quoted with approval from the case of *Smith* v. *Bank,* 99 Mass, 605, the following language: "When the evidence tends equally to sustain either of two inconsistent propositions, a verdict in favor of the party bound to maintain one of them against the other is necessarily wrong."

(3-4-5) Verdicts can not be predicated upon conjecture, and to apply that principle to the facts of this case, it may be said that it is not sufficient that a reasonable

view of the evidence is that the collision might have caused deceased's injury. It is essential under the issues in this case that a preponderance of the evidence should show that his death resulted from the injury received in the collision. Such proof is not required, however, to exclude all doubt on the subject, nor is it required that the proof show the death could not, or that the death did not, in fact, result from a tumor, or some other cause not attributable to the collision. But it is sufficient if the evidence reasonably warrants the jury in finding from a preponderance of the evidence that deceased's death did, in fact, result from an injury received in this collision. If that finding rests upon mere speculation or conjecture, it can not be said to be warranted by the evidence. A number of authorities on this subject were reviewed in the opinion in the recent case of *Denton* v. *Mammoth Spring Electric Light & Power Co.*, 105 Ark. 161. And other authorities are cited in the more recent case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hempfling*, 107 Ark. 476. In this last named case there was quoted with approval, from the case of *Settle* v. *St. Louis & S. F. Rd. Co.*, 127 Mo. 336, the following language: "In actions for damages on account of negligence plaintiff is bound to prove not only the negligence, but that it was the cause of the damage. This causal connection must be proved by evidence, as a fact, and not be left to mere speculation and conjecture. The rule does not require, however, that there must be direct proof of the fact itself. This would often be impossible. It will be sufficient if the facts proved are of such a nature, and are so connected and related to each other that the conclusion therefrom may be fairly inferred."

(6) Does the evidence in this case meet the requirements above stated? We think the jury's finding is based upon evidence legally sufficient to sustain the verdict. Here there were no premonitory symptoms of an approaching tumor, which is shown to be a disease which very gradually makes its appearance and very gradually accomplishes its deadly work. Deceased left his home a

well man and returned within a week noticeably changed in his appearance. The only physician who testified in the case stated that appellant could have received the injury from which he died in this collision and testified that a collision was a very good place to get an injury such as, in his opinion, caused deceased's death. Indeed, there is no cause assigned for deceased's condition except that he did sustain an injury in this collision, and it is only surmise and conjecture that there might have been some other cause.

Under this state of the proof we do not feel disposed to overturn the verdict of the jury. The failure to have an autopsy performed was a circumstance to be considered by the jury, but we can not say as a matter of law that that failure must defeat a recovery. The judgment is affirmed.

MILLSAPS v. URBAN.

Opinion delivered December 21, 1914.

1. SALES—COUPON CONTEST—QUESTION FOR JURY.—Defendant offered an automobile as a premium in a voting contest. *Held*, defendant was required to abide by the rules laid down by himself in the contest, and to accord all contestants the same treatment, and that under the testimony the jury would be warranted in finding that this had not been done.
2. SALES—COUPON CONTEST—BREACH OF CONTRACT—LIABILITY.—Where plaintiff entered into an oral agreement with defendant to work to secure votes in a contest for an automobile, with the understanding that if she secured the highest number of legal votes that she was to receive said automobile, and where plaintiff complied with all the conditions of the contest and secured the highest number of legal votes, plaintiff will be entitled to recover from defendant the value of the said automobile as shown by the testimony.

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

STATEMENT BY THE COURT.

Appellant advertised that he would give away an automobile under the conditions and in accordance with certain rules set forth in literature distributed by him.

His plan was that he would furnish coupons to certain business houses in the city of Hot Springs which had become members of the Business Men's Co-operative Club, a name given to the business houses which had arranged to procure these coupons from him, and which are hereinafter designated as club members, and these coupons were to be given by the members of this club to their customers at the rate of one coupon per each five cents' worth of merchandise purchased from the club member, and the holders of these coupons were entitled to cast them as ballots in a popularity contest for some lady contestant for this automobile. It was advertised that the contest would close on the 30th day of April, 1911, at 8 p. m., at which time there was to be a final count of the ballots and an award of the prize, but prior to this final count there was to be a count each Saturday night of the votes cast that week and an announcement of the standing of the candidates made at the end of each week.

Appellee entered the contest, and led all the other contestants until the final result was announced. She testified that appellant told her he had modified the rules of the contest to permit ballots to be cast, not only upon coupons issued for purchases made from members of the club, but that coupons might be issued upon collections made for such members by contestants upon the same terms as in cases of purchase of merchandise direct from such members. Appellee thereupon undertook the collection of various accounts given her for that purpose by club members and cast for herself the coupons thus earned.

Appellant testified that a Mrs. Coates was also a contestant, and that on the last Wednesday of the contest Mrs. Coates sold her chances to a man named Bert Walls, who ran a cigar stand in one of the hotels in Hot Springs.

The judges who had been appointed to conduct the contest, testified that, after this, coupons representing 1,000 votes each were cast for Mrs. Coates in large numbers, and that all of them were issued by Mr. Walls. These judges reported this fact to appellant and protested to

him that these coupons were not being voted in accordance with the rules of the contest, as they understood them, but they were told by appellant that any member of the club could buy any number of votes and do with them whatever he pleased, and that the coupons did not have to represent actual sales of merchandise at all and that, as judges, they were only expected to count and certify the coupons which had been voted as they found them. The coupons were so counted and Mrs. Coates was found to have the majority, but to make this majority it was necessary to include the coupons issued by Mr. Walls.

The 30th of April proved to be Sunday and a notice was published in a daily paper that the contest would be extended until Tuesday of the following week, and while it is not certain that coupons were cast after Saturday for either of the contestants herein named, it is altogether probable that they were cast for both of them after that date. But appellee says she was 104,000 votes ahead when the voting closed on Saturday.

Appellee says that appellant's representations to her, as to how he would award the automobile, induced her to enter the contest and that his statement of its terms constituted a contract on appellant's part to award the automobile to her, if she complied with the conditions imposed, and received the largest number of votes. The case was tried in her behalf on the theory that appellant and Walls conspired together to defraud her out of the automobile, and she testified that she complained to appellant about his conduct of the contest, and that he told her he would not give her twenty-five cents for her chance and that any one could enter the contest on the last day, and that he would sell any one all the chances he wanted. Appellant offered no proof whatever in his own behalf, but insists that appellee's proof is insufficient to establish the commission of any fraud, or the breach of any contract.

At her request the court gave the following instruction:

"If the jury find from the evidence that the plaintiff entered into an oral contract or agreement with the defendant to work to secure votes in the contest for an automobile, with the understanding that if she secured the highest number of legal votes that she was to receive said automobile, and further find that the plaintiff fully complied with all the conditions on her part to be performed and secured the highest number of legal votes, but that defendant breached the contract between the plaintiff and defendant, and on account of said breach the plaintiff was not declared the winner of said contest, and failed to secure said automobile, you will find for the plaintiff for the value of said automobile as shown by the testimony."

Appellant requested the court to charge the jury as follows:

"The court instructs you that before you can find for the plaintiff in this case you must first find from the evidence, by a preponderance of the proof, that on the 30th day of April plaintiff was the leading contestant in the contest; second, that there was a conspiracy to defraud between the defendant and Bert Walls; third, that in furtherance of such conspiracy to defraud, Bert Walls purchased the chances of a young lady whose name was being run in the contest; and that the defendant and Bert Walls cast more than a hundred thousand illegal votes in such race; fourth, that such votes so cast were illegal, and were known by the defendant to be illegal, and were cast by him in furtherance of such conspiracy to defraud the plaintiff; fifth, that she demanded of the plaintiff and was refused the automobile referred to in the evidence."

This instruction was modified by the addition of the following clause: "Unless you should find from the evidence that the defendant breached the contract between himself and plaintiff, after the plaintiff had performed all of the conditions on her part to be performed." And, over appellant's objection to this modification, the instruction was given as modified.

At the request of appellant the court gave five instructions on the subject of fraud, and upon the quantum of proof required to establish it.

There was a verdict in appellee's favor for the value of the automobile, and this appeal has been duly prosecuted.

C. C. Sparks and *Wm. G. Bouic.*

1. No fraud was shown. It is never presumed. 37 Ark. 149; 92 *Id.* 518; 20 Cyc. 120; 44 Atl. 247; 80 Mo. App. 22.

2. There is no evidence of collusion or conspiracy. All the votes cast for Mrs. Coates were in accordance with the rules and legal and there is no evidence that any votes were cast after Saturday. Hence, there is an absolute failure of proof to sustain the judgment.

Appellee, per se.

The proof of fraud is clear and convincing and there is no error in the instructions.

SMITH, J., (after stating the facts). No point is made as to the illegality of the transaction out of which this litigation arose. No contention is made that this was a lottery, or that the element of chance entered into the award of the prize. Had such been the case, the entire transaction would have been illegal and the courts would have refused any aid in enforcing any rights depending upon it. *McDaniel* v. *Orner,* 91 Ark. 171; *Watkins* v. *Curry,* 103 Ark. 414; *Carey* v. *Watkins,* 97 Ark. 153; *Burks* v. *Harris,* 91 Ark. 205; *Wood* v. *Stewart,* 81 Ark. 41.

(1) The jury was warranted, under the evidence, in finding that appellee became a contestant upon the condition that coupons would be issued by the members of the club, only to purchasers of goods from them, or to persons making collections for them. Appellant, of course, could have prescribed any terms he saw fit for the use of the coupons which he furnished the members of the club, but fairness required that the same terms be pre-

scribed for all contestants and that the contest be carried out upon the terms which induced persons to become contestants, and that no changes should thereafter be made, to which the contestants themselves did not assent. The jury might have found from the evidence that appellant induced appellee to become a contestant by the representation made to her that votes would be permitted only where goods had been sold by club members, or collections had been made for them, and that appellee would have earned the prize had that engagement been kept, but that appellant permitted votes to be cast in sufficient numbers to defeat appellee, which were not based upon either sales or collections.

(2) The instruction given at appellee's request correctly submitted these issues to the jury, and the modification which the court made of appellant's instruction, set out above, was a proper one.

Finding no prejudicial error, the judgment of the court below is affirmed.

JONES *v.* TRAVERS.

Opinion delivered January 4, 1915.

1. VOLUNTARY CONVEYANCES—UNDUE INFLUENCE—MENTAL WEAKNESS.—If a person, although not positively *non compos*, or insane, is yet of such great weakness of mind, as to be unable to guard himself against imposition, or is unable to resist importunity or undue influence, a contract made by him under such circumstances, will be set aside; and it is not material from what cause such weakness arises.
2. VOLUNTARY CONVEYANCES—UNDUE INFLUENCE—MENTAL WEAKNESS—CANCELLATION.—When deceased, an elderly woman, executed a deed to valuable property to defendant, without a valuable consideration; *held*, the evidence warranted a finding by the chancellor, that the conveyance was not her deliberate act, nor free from fraud on defendant's part, and a decree cancelling the deed will be affirmed.

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

W. N. Carpenter, Bratton & Fraser, and *Harry H. Myers,* for appellant.

1. The burden was on the appellees to prove their allegations. 6 Cyc. 334-5, 367. Executed contracts are not cancelled except where the proof is clear and convincing, and never for fraud unless fraud is clearly shown. *Ib.* Old age, failing health and loss of memory, etc., are not alone sufficient to prove incapacity to make a will. 1 Redfield on Wills 249. Whoever alleges mental incapacity must prove it. 25 N. Y. (11 Smith) 9. Undue influence *must be proved;* it is never inferred from the relationship of the parties. 7 Jones Law, N. C. 412.

2. To set aside a deed the proof must show imposition, fraud or undue influence, with weakness of mind, etc. 27 Ark. 166. See also 97 Ark. 450; 73 *Id.* 170.

3. Appellant has a clear preponderance of testimony in his favor. The findings of a chancellor are only persuasive. 31 Ark. 85; 41 *Id.* 292; 42 *Id.* 521; 15 *Id.* 209; 23 *Id.* 341. When clearly erroneous this court does not hesitate to reverse. 50 Ark. 185; 55 *Id.* 112; 43 *Id.* 307.

O. M. Young and *John L. Ingram,* for appellees.

The evidence shows the deeds were procured by fraud and the exercise of undue influence and without consideration. Appellant abused the confidential relationship of physician and patient. Mrs. Stewart was old, feeble and in poor health, and went to appellant and never escaped from his clutches. The finding of the chancellor is amply sustained by the evidence.

McCULLOCH, C. J. Elizabeth Stewart, a childless widow, died in Arkansas County, in this State, where she resided, on January 4, 1913, and this is an action instituted by her collateral heirs in the chancery court of that county to set aside a deed executed by her to the defendant, Jones, a short time before her death.

Mrs. Stewart was 72 years of age at the time of her death and had resided in Illinois all of her life until about three years before her death, when she purchased the lands in controversy, which are situated in Arkansas County, and removed to that locality to reside. She owned

considerable property at Shipman, Illinois, but disposed of a portion of it about the time she purchased the lands in Arkansas. She was a thrifty, business woman of more than ordinary intelligence, energy and business sagacity until her health became poor shortly before she removed to Arkansas. It is claimed that her mental capacity then became such that she was not capable of executing a conveyance.

The defendant was a physician in Alton, Illinois, when Mrs. Stewart went to that place for treatment. She boarded at the home of an acquaintance and was treated by the defendant and other physicians. The testimony tends to show that defendant was favored by her above other physicians, and the testimony adduced by the plaintiffs tends to show that soon after the two became acquainted he acquired a profound influence over her. She went back to Shipman with her brother, but shortly thereafter she and the defendant came to Arkansas together and from then until the time of her death they occupied a home together on the land in controversy. Defendant had been married, but was divorced from his wife, and he also brought with him to Arkansas a young woman who had been his housekeeper in Alton, and who resided with him and Mrs. Stewart until the latter died.

The lands in controversy consist of 190 acres, which the testimony tends to show are of the aggregate value of ten or twelve thousand dollars. There was a mortgage on the lands for four thousand dollars. The conveyance executed by Mrs. Stewart to the defendant bears date of August 6, 1912, and recites a consideration of the sum of "$1.00 paid and other good and valuable considerations." The deed was not placed of record by the defendant until four days after the death of Mrs. Stewart. According to the testimony of the defendant himself, Mrs. Stewart's health became poor during the summer or early part of the fall of 1912, and she was treated for chronic malaria. Three or four days before her death she was coming down the stairs, and as she reached the bottom of the stairs a misstep caused her to fall against

a door and injure her head. She was confined to her bed and a few days thereafter sustained a stroke of paralysis and became unconscious and died in that condition. A post-mortem disclosed the fact that her skull was fractured. The evidence adduced by the plaintiffs tends to show that while Mrs. Stewart was formerly a woman of strong and active mind, when her health became poor, about the time she went to Alton for treatment, she became mentally weak and easily influenced and seemed to be under the influence of the defendant. It appears, however, that this was her first acquaintance with the defendant.

Many witnesses were introduced who had known Mrs. Stewart for a lifetime and their testimony is sufficient to establish the fact that she was not of sufficient mental capacity to intelligently manage her business—at least, that she was easily influenced, and when subjected to the influence of others that she was not of sufficient mental capacity to resist such influences. The testimony adduced by the defendant, on the other hand, tends to show that Mrs. Stewart's mental capacity and her activity of mind continued unabated up to the time of her death. If the testimony is measured by numerical strength, it perhaps preponderates in favor of the defendant as to the mental capacity of Mrs. Stewart, but, the witnesses adduced by the defendant were persons who, in the main, had merely a casual acquaintance with Mrs. Stewart, while those who testified on behalf of the plaintiffs were in better position to judge of her mental capacity. The chancellor found in favor of the plaintiffs and cancelled the conveyance, and we are unable to discover from the record that the testimony on the issues involved preponderates against his finding.

The defendant does not attempt to give any reason why Mrs. Stewart conveyed to him this valuable tract of land. He states in general terms that he became interested with her in the lands purchased in Arkansas, but he does not say what interest that was and in what way he became interested. The lands were purchased in

her own name and he doesn't say that he furnished any of the consideration. He states that the consideration of $1.00 and other valuable considerations expressed in the deed correctly represented the consideration, but he does not undertake to show that there was in fact any other consideration except the $1.00 recited. We must assume, therefore, from this condition of the record that the deed was executed without any valuable consideration whatever, and if it be sustained at all it must be upon the theory that it was a gift. When the testimony in the record is carefully weighed, in the light of common experience, the conclusion is irresistible that the defendant exercised some peculiar influence over Mrs. Stewart which induced her to execute this conveyance conveying to him the valuable property in controversy without any consideration whatever. He employed an attorney to prepare this deed and there was nothing in the record to show that Mrs. Stewart initiated the plan of conveying the property to him, and nothing to show that it was her desire to do so. The officer who took the acknowledgment was not called to testify, nor was any one else called who was present when the deed was executed.

(1) In *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, the court said: "If a person, although not positively *non compos,* or insane, is yet of such great weakness of mind, as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract made by him under such circumstances, will be set aside. And it is not material from what cause such weakness arises. It may be from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear, constitutional despondency, or overwhelming calamities. And although there is no direct proof that a man is *non compos,* or delirious, yet, if he is of weak understanding, and is harassed and uneasy at the time; or if the deed is executed by him *in extremis,* or, when he is a paralytic, it can not be supposed that he had a mind adequate to the business which

he was about; and he might be very easily imposed upon."

(2) When the facts of this case are measured by the standard thus announced, we are of the opinion that the conveyance of Mrs. Stewart to the defendant was not executed for a valuable consideration, and was not her deliberate act, free from fraud or undue influence. In fact, there is nothing in the record to sustain the conveyance except the bare fact of its execution. It is not fortified by any other fact which would tend to form a reasonable basis for it.

The conclusion of the chancellor will not be disturbed, and the decree is therefore affirmed.

CRANE v. JACKSON.

Opinion delivered January 4, 1915.

1. FERRIES—RIGHT TO OPERATE—EXCLUSIVENESS.—Ownership of lands on both sides of a navigable stream entitles the owner to the privilege of operating a ferry under license from the county court, and when the county court has once granted the privilege of keeping a public ferry, the privilege is exclusive within the distance so long as it is exercised under the annual grant of license provided for.
2. FERRIES—INFRINGEMENT OF RIGHT—REMEDY.—One whose ferry privilege has been infringed is not bound by the order of the county court, granting license to a rival, but may invoke the aid of a court of chancery for redress.
3. APPEAL AND ERROR—FAILURE TO ABSTRACT—PRESUMPTION.—Where the appellant failed to abstract the testimony in support of his contention on an issue of fact, it will be assumed on appeal that appellee's contention upon the facts is sustained by the evidence.
4. FERRIES—ABANDONMENT.—Where a ferryman fails to provide adequate service for the needs of the community, he will be held to have temporarily abandoned the ferry, to the extent that he is not entitled to equitable relief to restrain others from operating a ferry to meet the needs of the community.

Appeal from Conway Chancery Court; *John E. Martineau,* Chancellor on Exchange; affirmed.

U. L. Meade and *Mehaffy, Reid & Mehaffy,* for appellant.

1. When the county court has once granted the privilege of keeping a public ferry, the privilege is exclusive within the distance prescribed by the statute, so long as it is exercised under the annual grant of license. 20 Ark. 561-3; 23 *Id.* 514; 36 *Id.* 467. There is no evidence of abandonment. 94 Ark. 192; 20 *Id.* 573; 95 *Id.* 466; *Ib.* 353.

2. Injunction is the proper remedy and damages should be recovered. 88 Ark. 330; 44 *Id.* 189; 52 *Id.* 90.

3. A forfeiture can only be enforced by the State. Failure to pay the license or violation of the statutory regulations is no defense to an action against one operating a rival ferry for infringement. 12 A. & E. Enc. Law 1104; 2 Kan. 198; 19 Ind. 315; 59 S. W. 526; 36 Ark. 466; 52 *Id.* 90.

Sellers & Sellers, for appellees.

1. Petit Jean is not a navigable stream. Kirby's Dig. § 3555; 39 Ark. 409.

2. Appellant had no legal authority to operate a public ferry. Kirby's Dig. § 355-8-9, 3565-6; 25 Ark. 26; 94 *Id.* 193; 51 *Id.* 235; 52 *Id.* 63. But if he had he lost the right by nonuser and abandonment.

3. Appellees merely had a private crossing and charged no tolls. 44 Ark. 184; 67 S. E. 814.

4. Failure to furnish the public necessary and safe ferry privileges deprives a ferry licensee of the right to injunction. 19 Cyc. 505; 94 Ark. 193; 52 *Id.* 61; 5 Cal. 47; 2 Pom., Eq. Rem., § 583; 12 A. & E. Enc. (2 ed.) 1106; 33 Ark. 304; 23 *Id.* 493; 53 *Id.* 150; 67 *Id.* 238; 74 *Id.* 252.

5. He who comes into equity must come with clean hands. 215 Fed. 168; 169 S. W. 257; 111 Fed. 287; 113 Am. St. 507; 66 S. W. 161; 2 L. R. A. 368, and notes.

McCULLOCH, C. J. Appellant, L. J. Crane, has for many years owned lands on both sides of the Petit Jean River at a crossing where the river constitutes the boundary line between the counties of Yell and Conway, and since the year 1899 he has operated a ferry under license annually granted to him by the county court of each of

said counties. That is to say, he has procured a license from each county until the year 1910, and thereafter from the county court of Yell County, but no license was issued to him for the years 1910 or 1911 by the county court of Conway County, though he made application therefor. On August 6, 1911, the county court of Conway County granted a license to George McGowan & Co., alleged to be a partnership composed of seventy-five or eighty residents of that locality, including appellees, to operate a ferry within one mile of the crossing where appellant's ferry was operated. This is an action instituted by appellant against appellees to enjoin them from operating the ferry, alleging that the operation thereof was an infringement upon appellant's rights. The case was heard by the chancellor upon the pleadings and depositions of numerous witnesses and there was a decree dismissing the complaint for want of equity.

(1-2) It is well established by the decisions of this court that ownership of lands on both sides of a navigable stream entitles the owner to the privilege of keeping a ferry under license from the county court, and that "when the county court has once granted the privilege of keeping a public ferry the privilege is exclusive within the distance so long as it is exercised under the annual grant of license provided for." *Murray* v. *Menefee,* 20 Ark. 561; *Lindsay* v. *Lindley,* 20 Ark. 573; *Finley* v. *Shemwell,* 94 Ark. 190. Those cases also settled the proposition that one whose ferry privilege has been infringed is not bound by the order of the county court granting license to a rival, but may invoke the aid of a court of chancery for redress. In this state of the law, it is clear from the record in this case that appellant's right to exercise ferry privileges are superior to those of the appellees, and there is nothing to show an abandonment of the privilege.

(3-4) It is contended, however, by appellees that they took out ferry license and are operating a ferry merely for their own convenience, and that they are doing this from necessity because of the fact that appellant fails

to give adequate accommodations and that his ferry boat is so out of repair that it is dangerous to attempt to cross on it. The abstract furnished by appellant is so meager—in fact, there is no abstract at all of the evidence—that we must assume that the appellees' contention upon the facts, with reference to the lack of service given by appellant and the unsafe condition of the boat, is sustained by the evidence, and, that being true, appellant is in no position to ask for equitable relief. While, as before stated, the evidence does not show an abandonment on appellant's part of his ferry rights, still the same principle controls in a case where he, by his own derelictions, makes it necessary for travelers to make some other provision for crossing, and in that case he is not in a position to ask for equitable relief. His failure to discharge his duty as ferryman, which makes it necessary for others to seek another means of crossing, is in effect a temporary abandonment to the extent that it calls for a denial of any equitable relief. For, as long as he refuses to ferry travelers across the river, or, what is the same thing, fails to provide adequate means for doing so, he can not ask a court of equity to restrain another from doing that which he fails or refuses himself to do. Therefore, from the meager record in this case, we assume that the decree of the chancellor was based upon a preponderance of the evidence on this issue and that the same is correct.

Decree affirmed.

BRIGNARDELLO v. COOPER.

Opinion delivered January 4, 1915.

1. MORTGAGES—FORECLOSURE—WIFE AS PARTY DEFENDANT.—The wife is not a necessary party to a suit to foreclose a mortgage executed by her husband, save for the purpose of barring her inchoate right of dower.
2. HOMESTEAD—NATURE OF—ABANDONMENT.—The homestead right depends upon the impressment as such, and the continued occupancy thereof; and the right may be destroyed by abandonment.

3. MORTGAGES—FORECLOSURE—RIGHT OF WIFE TO CLAIM HOMESTEAD.—Where in an action to foreclose a mortgage on property belonging to a married man, he sets up a claim to the homestead, and his claim is ineffectual, an adjudication against him will bar any right his wife may have had to assert a similar claim.

Appeal from Garland Chancery Court; *Jethro P. Henderson,* Chancellor; affirmed.

M. S. Cobb, for appellants.

1. The mortgage was void. It was a homestead and the wife did *not* join in the execution of the mortgage nor acknowledge it. 94 Ark. 107; 26 L. R. A. (N. S.) 574; 57 Ark. 242; 60 *Id.* 270; 64 *Id.* 493; 71 *Id.* 286; 144 Ill. 203; 118 Iowa 458; 41 N. W. 317; 33 Kan. 53; 22 So. 134; 18 *Id.* 318; 108 Ark. 297; 69 *Id.* 596; 80 N. W. 1087. The residence of the husband is the residence of the wife. 29 Ark. 280; 27 Miss. 704; 34 L. R. A. 287, and cases *supra.*

2. The question is not *res adjudicata,* nor is the wife estopped. 94 Ark. 107.

3. The wife had the right to intervene by bill in the nature of a bill of review. 81 Ark. 154; Kirby's Dig., § § 3902-3; 108 Ark. 297; 58 Ga. 403; 7 Dillon 351; 14 R. I. 55; 36 L. R. A. 385, and note.

Charles C. Sparks and *Martin, Wootton & Martin,* for appellees.

1. The wife can not maintain the action. 3 Enc. Pl. & Pr., p. 590; 104 Ark. 567; 94 Ark. 107; Story, Eq. Pl., § 421; 98 Ark. 15.

2. The homestead claim is *res judicata.* Kirby's Dig., § 3902; 94 Ark. 110; 108 Ark. 297; 59 *Id.* 211; 104 *Id.* 316; 101 *Id.* 104; 68 *Id.* 79.

3. Appellants never impressed this property with the character of the homestead. 69 Ark. 597; 1 Martin Chy. 40; 57 Ark. 179; 76 *Id.* 575; 78 *Id.* 479; 84 *Id.* 362; 94 *Id.* 107.

McCULLOCH, C. J. Appellant, Dominic Brignardello, an Italian by birth, came to this country many years ago and left his wife and child in his native land. He settled in Memphis, Tennessee, and lived there several years and then moved to the city of Hot Springs, in this State, where he still resides. He became the owner of certain lots of real estate in Hot Springs, on which a house is situated, and he mortgaged the property to appellee, Cooper, to secure payment of a debt for borrowed money. His wife did not join in the conveyance. She had not come to this country at that time, and, according to the testimony of appellee and his witnesses, said appellant held himself out as an unmarried man and obtained the loan from appellee on the faith of such representation. Appellee instituted an action against said appellant in the chancery court of Garland County to foreclose the mortgage, and was met with the plea that said appellant was a married man, that the property embraced in the mortgage was his homestead and that the mortgage is void on account of the fact that the wife of the mortgagor had not joined in the execution of the instrument. Issue was joined on that plea, evidence was adduced, and the court rendered a decree in favor of appellee, foreclosing the mortgage. There was no appeal from that decree. Subsequently, appellants, Dominic Brignardello, and his wife, Mariah Brignardello, instituted this proceeding in the nature of a bill of review, praying that the decree of foreclosure be set aside and the mortgage declared to be void on the same ground which had been pleaded in the former suit, namely, that the mortgaged property constituted the homestead of the mortgagor and that the wife had not joined in the execution of the instrument. The court sustained a demurrer to the bill and rendered a decree dismissing it.

If the wife is entitled to relief, under the facts stated, she can have that relief in an independent suit and this proceeding can be so treated. It is therefore unnecessary to decide whether or not she can attack the decree by proceedings in the nature of a bill of review.

(1-2) The wife is not a necessary party to a suit to foreclose a mortgage executed by the husband, save for the purpose of barring her inchoate right of dower. To hold otherwise would be to say that the wife's interest in the homestead is direct and not one derived from the fact that it is the homestead of the husband as the head of the family. The homestead right depends upon the impressment as such and the continued occupancy thereof. He may abandon it and thus destroy the homestead right. *Pipkin* v. *Williams,* 57 Ark. 242; *Sidway* v. *Lawson,* 58 Ark. 117; *Farmers Building & Loan Association* v. *Jones,* 68 Ark. 76; *Mason* v. *Dierks Lbr. & Coal Co.,* 94 Ark. 107; *Stewart* v. *Pritchard,* 101 Ark. 101; *Brown* v. *Brown,* 104 Ark. 313; *Newman* v. *Jacobson,* 108 Ark. 297.

(3) We have a statute here which provides that "a debtor's right of homestead shall not be lost or forfeited by his omission to select and claim it as exempt before the sale thereof on execution * * * but he may * * * set up his right of homestead when suit is brought against him for possession, and if the husband neglects or refuses to make such claim his wife may intervene and set it up; provided, if the debtor does not reside on his homestead, and is the owner of more land than he is entitled to hold as a homestead, he or his wife, as the case may be, shall select the same before sale." Kirby's Digest, § 3902. Now, this statute, so far as its terms are expressed, applies to sales of the homestead under execution, and it is only by analogy that it can be applied to a suit in equity to foreclose a mortgage. It will be seen that the statute gives the wife the right to select and claim the homestead only in case the husband "neglects or refuses to make such claim," and it can have no analogous application except in those cases. So, if the wife has the right to intervene in a foreclosure suit for the purpose of claiming the homestead, it is only where the husband fails to claim it, and such is not the case here. The husband did set up the claim to the homestead and his claim proved ineffectual. He failed to suc-

cessfully maintain his claim, and there has been an adjudication against him which bars the right of the wife to assert a similar claim. *Farmers Building & Loan Association* v. *Jones, supra.*

In the case just cited, which was a suit against the husband and wife to foreclose a mortgage, in the execution of which the wife had not joined, the court said: "While the act of March 18, 1887, is a limitation upon the right of the husband to convey his homestead, except by the consent of his wife, it does not in any manner affect or restrict his right of abandonment. This right he has by virtue of his marital and parental authority, and when he has chosen to exercise it, as he did here, he renders the property which had formerly been his homestead the proper subject of alienation without his wife's concurrence. * * * He could not be heard after the execution of the mortgage, under the circumstances, to say that he had not abandoned his homestead; and if there was an abandonment by him, his wife is bound by it." It follows, therefore, that a decree against the husband, which adjudicated all of the questions relating to the right to claim the homestead necessarily bound the wife to the extent of her right to claim the homestead.

Appellants rely on the decision in *Montgomery* v. *Dane*, 81 Ark. 154, as sustaining their contention, but that case involved the right of a purchaser at execution sale. The husband failed to claim the homestead and the wife, being still in possession, was accorded the privilege of asserting the claim to the homestead and protecting it from the effect of the sale. The decision followed the case of *Newton* v. *Russian,* 74 Ark. 88, and other cases holding that where the wife continued to occupy the homestead there was a presumption that the husband, who had deserted his family, would return to his duty, and that under those circumstances there was, in law, no abandonment of the homestead. Counsel also rely on the case of *Mason* v. *Dierks Lbr. & Coal Co., supra,* but in that case there had been no assertion of the homestead claim by the husband and the wife was

permitted to make the claim after his death. It was not decided in that case that the husband had in fact abandoned the homestead; and the debt being void as to the wife, she was permitted to assert her homestead claim after the husband's death.

Our conclusion in this case, therefore, is that the wife is bound by the adjudication against her husband and can not reassert the homestead claim. The decree does not, of course, bar her dower right. Affirmed.

HART and KIRBY, JJ., dissent.

C. JONES & HARRINGTON v. SCOTT.

Opinion delivered January 4, 1915.

1. DAMAGES—AMOUNT—PERSONAL INJURIES.—Where plaintiff, an employee of a building contractor, was injured by the falling of a heavy iron "I" beam, fracturing his arm and leg and inflicting other serious injuries, and when plaintiff expended about six hundred dollars in paying the expenses of his injury, a judgment for $1,500 damages will not be held to be excessive.
2. NEGLIGENCE—PERSONAL INJURY—RES IPSA LOQUITUR.—Plaintiff was injured by the falling of an "I" beam by reason of the loosening of the supporting ropes by which the beam was being raised. *Held*, the doctrine of *res ipsa loquitur* had no application under the facts, but that the jury might find defendant negligent in not fastening the braces with sufficient strength.
3. CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—PERSONAL INJURY.—In an action for damages for personal injuries when plaintiff, an employee of defendant, was injured by the falling of an "I" beam, and the evidence was conflicting as to what instructions were given to plaintiff with regard to passing under the beam, the question of defendant's negligence is for the jury.
4. EVIDENCE—ACTION FOR DAMAGES—PERSONAL INJURIES—CONTRACT—INDEMNITY—INSURANCE.—Defendants were contractors erecting a building for one M. Plaintiff, an employee of defendants, was injured by the falling of an iron beam. In an action by plaintiff against defendants and M. for damages, the contract between M. and defendants is admissible in evidence for the purpose of showing the nature of their relationship, and it is not error to permit to be read to the jury a portion of the contract which provides "contractor to carry accident insurance on persons working on building or premises."

5. APPEAL AND ERROR—INSTRUCTIONS—HARMLESS ERROR.—It is not prejudicial error of which appellant can complain, in a personal injury action, to submit erroneously the issue of assumed risk to the jury, when the same issue was submitted to the jury in an instruction given at appellant's request.

6. MASTER AND SERVANT—ASSUMPTION OF RISK.—If an employer acting through a constituted agent, calls a servant to a certain work and fails to warn him of the danger, the servant will not be deemed to have assumed the risk, if the danger was unknown to him and was not so obvious that a reasonably prudent man would not have undertaken to perform the service.

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

Scott Wood, for appellant.

1. The doctrine of *res ipsa loquitur* does not apply between master and servant. 79 Ark. 81; 51 *Id.* 479; 87 *Id.* 374; 46 *Id.* 555.

2. Appellee was guilty of contributory negligence. 70 Ark. 603; 36 *Id.* 149; 95 U. S. 439; 3 Labatt, Master and Servant, § 1251, note 8; 84 Ark. 377; 85 *Id.* 237; 96 *Id.* 461; 100 *Id.* 441; 77 *Id.* 405; Labatt, M. and S., vol. 3, § 1280. The danger was open and obvious. 4 Labatt, M. and S., § 1362-3.

3. There is error in the court's charge. The defenses of assumed risk and contributory negligence are separate and distinct. 77 Ark. 367; 89 *Id.* 424-8; 92 *Id.* 109; 3 Labatt, M. and S., § 1222-5; 36 Ark. 49.

4. It was error to admit as evidence the contract with Maurice. Abbott's Civ. Jur. Trials, 308; Abbott's Proof of Facts 51-404; 104 Ark. 1; 31 So. 790; 4 Labatt, M. and S., § 1593, note.

B. H. Randolph and *T. P. Farmer,* for appellee.

1. The evidence is overwhelming that defendants were guilty of negligence in the use of the hoisting apparatus. Negligence can be inferred where reasonably safe appliances are not provided. 95 U. S. 439. No warning was given. 106 Ark. 25; 95 Ark. 291, 295.

2. There is no error in the instructions. 77 Ark. 405; 2 Thompson on Negl., vol. 5, § § 5380 and 5345.

3. A servant does not assume the risk unless he is aware of the danger. 77 Ark. 367; 89 *Id.* 424; 92 *Id.* 109.

4. There was no error in admitting the contract as to insurance. The contract was only material to show whether appellants were independent contractors or not. No prejudice resulted. 104 Ark. 1; 99 Minn. 97; 9 Am. Cases 318; etc.

A. J. Murphy, for appellants in reply.

McCULLOCH, C. J. Appellants are contractors engaged in building houses, and, while putting up a building in the city of Hot Springs for one Maurice, they employed appellee as a laborer. He received personal injuries while engaged in his work and instituted this action against appellants and Maurice to recover compensation for his injuries. After all of the testimony was introduced, the court gave a peremptory instruction in favor of Maurice, but submitted to the jury the issues raised by the pleadings as to the liability of appellants, and the jury found against them, assessing damages in the sum of $1,500.

(1) Appellee was a common laborer, engaged in doing any kind of work about the building which he was called to do by Glenn, the foreman. He assisted the brick masons by carrying up brick and mortar, and also assisted the carpenters when directed to do so. At the time he was injured, the workmen had just raised a heavy iron beam called an "I" beam, and after it was raised it fell to the pavement, and appellee being, as the evidence tends to show, ascending a ladder from the cellar below, to the pavement, it fell on him and fractured his arm and also his leg and inflicted other serious injuries. He was confined to a hospital for ten days and suffered great pain. He expended about $600 in hospital and physician fees and in paying other expenses of his illness. There is no question about the assessment of damages being excessive if he is entitled to recover anything at all.

It was a two story building and the walls of the upper story had been built, the front of the building still

being open. The beam was to be raised to the floor of the second story and placed, or "seated" as it is termed, with the ends projecting into the walls on each side. It was very heavy and was raised by means of a block and tackle, suspended on a snub-beam, extending out a few feet over the sidewalk. The snub-beam was constructed of two 2x14 pieces of timber, twenty-six feet long, extending over two other upright pieces 2x14, which carried the weight. The two pieces forming the snub-beam were placed together, resting on edges, and at the back ends were fastened by cleats. Two braces were used over the front end of the snub-beam, being pieces 2x6 in dimensions, and extending from either wall over the beam, being spiked together and also spiked to the beam. Appellee and four or five other men were placed in the cellar to raise the beam by pulling on the rope, and when it was raised up above the place where it was to be seated, the rope was tied to a beam or pillar in the cellar to hold it in place until ready to be lowered into its seat. The beam was raised in that way and the rope tied in the cellar and appellee went up a ladder to the pavement for the purpose of going up to the second story to wait on the brick masons, and just as he got up to the pavement on the ladder the "I" beam fell from above and struck him. The testimony shows that one of the 2x6 braces broke loose, which released the two pieces constituting the snub-beam, and they rolled over, which caused the "I" beam to fall. The negligence of appellants, if any, consisted in failing to securely fasten the braces so that they could not come loose. It is not contended that any of the timbers broke; therefore, there was no negligence in any other respect.

(2) It is insisted that the evidence is not sufficient to sustain the charge of negligence. Appellants introduced a number of witnesses who testified that the appliance for raising the "I" beam was constructed in the most approved method and was the customary way of doing it, and their testimony tended to show that there was no negligence in the way in which this appliance was con-

structed. We think, however, the jury were warranted in finding that the braces were not spiked or nailed with sufficient strength—either that the nails were too small or not driven in far enough, and that there was negligence in this respect. While the doctrine of *res ipsa loquitur* is not applicable, the jury were warranted in finding from a description of the appliance, and the manner in which the braces came loose, that they were not nailed with sufficient security, and that there was negligence in that respect. This was an appliance which was furnished by appellants and they owed the duty to the servant to exercise ordinary care to see that it was reasonably safe. The happening of the injury itself did not necessarily make out a case of negligence, but under the circumstances the jury could draw the inference that these braces were not put together with sufficient strength.

(3) It is also contended that the undisputed evidence shows that the plaintiff was directed not to come out under the beam, and for this reason he was guilty of contributory negligence and the verdict in unsupported. There is a conflict in the testimony as to what took place and our conclusion is that there was enough to go to the jury on the question of contributory negligence. Mr. Jones, one of the appellants, and also the foreman, testified that they gave appellee specific directions along with the other workmen not to go underneath the beam. They testified also that when the beam was raised, and the rope was tied so as to keep it suspended until they were ready to seat the beam, the other men in the cellar were called out, but that the appellee and another one of the workmen were told to remain there for the purpose of holding the ropes. The testimony of appellee, while not as definite in detail as that of the appellants, tends to show that he was not given any such direction, but that the foreman called out to the men in the cellar to come out for the purpose of waiting on the bricklayers. The jury might have found from the testimony that they were told to come out of the cellar for the purpose of waiting on the bricklayers in the upper story and that the plaintiff came

out to perform the duty he was called to do. The question of appellee's contributory negligence was, under the circumstances, one for the jury to determine. He had the right to rely to some extent on the assumption that appellants had performed their duty in providing a reasonably safe appliance to hold the beam and that it would not drop on him. Therefore, in passing beneath it to get to his work, he was not guilty of negligence, unless, as claimed by appellants, he was specially warned not to place himself there. He was not, as a matter of law, guilty of contributory negligence, unless he was warned not to place himself in that position. In other words, it was, under the proof, a question for the jury to determine whether or not he was guilty of negligence in passing under the beam, and as that question was properly submitted to the jury the verdict on that issue should not be disturbed.

(4) Error is assigned in permitting to be read to the jury the contract between appellants and Maurice, containing the following clause: "Art. 11-A. Contractor to carry accident insurance on persons working on buildings on premises." No objection was made to the introduction of the contract except the particular clause quoted above. The contract was introduced for the purpose of showing the relation between appellants and Maurice, for the jury to determine whether appellants were employees or agents, or whether they were independent contractors. The contract related exclusively to the question of the liability of Maurice and could not affect the question of appellant's liability, for it is conceded that appellee was working for them and that they were responsible for the appliance furnished for raising the beam. The ground of the objection to the introduction of this clause of the contract was that it conveyed to the jury the information that the contractors were to furnish insurance and might have induced the jury to find a verdict against them because they were protected by insurance. There was no attempt to prove that they carried accident insurance, but, on the contrary, the court

instructed the jury that they could only consider the contract in evidence for the purpose of determining whether or not appellants were independent contractors. We think it was proper, with that explanation, to let the whole contract go to the jury so that they might, in passing on the question of Maurice's liability, determine whether or not the contractors were his servants or whether they were independent contractors in the sense that he was not responsible for their conduct. This particular clause had some bearing upon the question as to whether they were independent contractors or mere employees. We find no error in that ruling of the court.

(5) It is insisted that the court erred in giving instruction No. 1 on the subject of assumption of risk. The principal ground of the objection to this instruction is that appellants did not plead assumed risk as a defense and the court should not have submitted it to the jury. It may be said at the outset that if their position be well taken, the error was not prejudicial. Be that as it may, however, if there was an error of the court it was acquiesced in by appellants, who requested several other instructions which, in fact, submitted the issue of assumption of risk. This is particularly true of instruction No. 10, given at appellant's request, which told the jury that if the plaintiff and other employees were warned by the foreman in charge of the work to stay out from under the beam, there could be no recovery. While this instruction did not specifically use the words "assumed risk," it necessarily referred to that principle.

(6) Another objection made to the same instruction is that it in effect told the jury that appellee would not be deemed to have assumed the risk if he was called upon to perform service at that place without warning of the danger. It is said that this is erroneous because it fails to specify that the call to service must have been made by one authorized to make the call, otherwise the appellee would not be relieved from the assumption of risk by obeying the call. This argument is not sound,

for the language of the instruction implies the call to service by one in authority. The instruction necessarily means that if the employers, acting through constituted agents, called the servant to do a certain work and failed to warn him of the danger, he would not not be deemed to have assumed the risk if the danger was unknown to him and was not so obvious that a reasonably prudent man would not have undertaken to perform the service.

There are other assignments with respect to the instructions given by the court, but we are of the opinion that the case was properly submitted to the jury. The other assignments are not of sufficient importance to call for a discussion.

Judgment affirmed.

WOLF & BAILEY v. PHILLIPS.

Opinion delivered January 4, 1915.

1. TAX SALES—RECOVERY OF LANDS FORFEITED—AFFIDAVIT.—Under Kirby's Digest, § § 2759 and 2760, an action to recover lands held by another under a tax sale must be dismissed by the court if the affidavit required by Kirby's Digest, § 2759, has not been filed, setting forth a tender by plaintiff of the amount of taxes, costs and interest, etc.
2. TAX SALES—FORFEITED LANDS—SUIT TO RECOVER—SUFFICIENCY OF AFFIDAVIT.—In an action to recover lands forfeited for taxes, the affidavit filed by plaintiff as required by Kirby's Digest, § 2759; *held*, sufficient under the statute.

Appeal from Lawrence Circuit Court; Western District; *H. L. Ponder*, Special Judge; reversed.

STATEMENT BY THE COURT.

The appellants instituted this suit in ejectment to recover certain lands. Appellants claimed title by virtue of a tax deed and adverse possession. Appellee claimed title under tax deeds. The appellants alleged that the tax deeds under which appellee claimed were invalid by reason of certain irregularities in the publication of the notice for the sale of the lands.

Appellants, before the issuance of the summons, filed the following affidavit: "I, George G. Dent, attorney and agent for Wolf & Bailey, owners of the land in controversy (describing same), do solemnly swear that as such attorney and agent I have tendered to Carrie D. Phillips all taxes, interest and fees, together with all costs of improvement made by the said Carrie D. Phillips on said land, as required to be tendered before suit filed, and that the said Carrie D. Phillips refused to accept the same, but stated that she would not receive the same and that it was unnecessary for further tender to be made." (Signed) "Geo. G. Dent."

At a former term of the court the appellee moved to dismiss because of the insufficiency of the affidavit of tender. After first dismissing as to part of the lands involved, on a succeeding day of the same term, the court held that the affidavit was sufficient and overruled the motion to dismiss. At a succeeding term of the court the proceedings were had from which this appeal comes. The record shows that the appellee renewed her motion to dismiss the action "for want of a sufficient affidavit of tender of taxes prior to filing suit herein. The cause was submitted to the jury and the evidence was adduced by both parties. At the conclusion of the evidence the appellee moved the court to instruct the jury to return a verdict in favor of the appellee "on the ground that the tender required by law as a prerequisite to the bringing of an action of this character had not been properly made," and that the affidavit did not comply with the statutory requirements. The court then heard evidence on the motion to dismiss and read to the jury section 2759 of Kirby's Digest, and further instructed the jury as follows:

"Now that is the requirement of the law before the bringing of this kind of an action, and the court holds that in this case there was no such affidavit filed in this case as the law provides, and that the affidavit filed in this case and offered in evidence is not a compliance with

the above statute, and your verdict will be for the defendant for that reason."

The jury returned the following verdict: "We, the jury, find for the defendant." The court thereupon entered a judgment "that the plaintiffs take nothing from the defendant herein, and that the defendant have and recover of and from the plaintiffs all her costs in this cause paid out and expended, for which execution may issue."

The appellants duly prosecute this appeal.

W. E. Beloate and *George G. Dent,* for appellants.

1. The court erred in directing the jury to find for the defendant. If the affidavit was defective, it was the duty of the court to dismiss the cause for want of jurisdiction. As it stands, the judgment of the court precludes the appellants from instituting another suit. Kirby's Digest, § 2760.

2. The affidavit was sufficient. It shows not only that the tender was made and refused, but also that appellee stated that "it was unnecessary for further tender to be made." This estopped her from now complaining that an insufficient tender was made. 53 Ark. 423.

Appellee, pro se.

The affidavit of tender was insufficient. A tender of the taxes paid, and improvements made, was no tender either of "the amount first paid for said lands," or "the interest thereon," or "the amount of taxes paid thereon by the purchaser subsequent to such sale," or "the value of improvements made on such lands by the purchaser." Kirby's Dig., § 2759.

WOOD, J., (after stating the facts). The statute provides that no person shall maintain an action for the recovery of any lands, or for possession thereof, against any person who may hold such land by virtue of a purchase thereof at tax sale without filing an affidavit setting forth that the claimant had tendered to the person holding the lands "the amount of taxes and costs first paid for said lands, with interest thereon from the date

of payment thereof and the amount of taxes paid thereon by the purchaser subsequent to such sale, with interest thereon, and the value of all improvements made on such lands by the purchaser, his heirs, assigns or tenants, after the expiration of the period allowed for the redemption of lands sold for taxes, and that the same hath been refused." Kirby's Digest, § 2759.

The court erred in instructing a verdict for the appellee, for these reasons:

(1) *First.* It is the duty of the circuit court, where the above statute is not complied with, "to dismiss said action at the cost of the plaintiff." Kirby's Digest, § 2760. This statute contemplates that the court shall dismiss the action where the affidavit is insufficient, without submitting the issue raised by the pleadings in the case to the jury. It is a matter that must be disposed of *in limine.* It is erroneous procedure to have the cause submitted on the merits to the jury and then direct the jury to return a verdict in favor of the defendant in the action because the plaintiff has failed to file a sufficient affidavit. The judgment of the court based on the jury's verdict was not one dismissing the action, but was tantamount to a judgment in favor of the defendant on the merits.

(2) *Second.* While the affidavit does not, in form, comply strictly with the requirements of the statute, it does state that Dent, as agent for appellants, had tendered to the appellee all the taxes, interest, fees and costs of improvement made by the appellee, "as required to be tendered before suit filed, and that the said Carrie D. Phillips refused to accept the same, but stated that she would not receive the same, and that it was unnecessary for further tender to be made." We think the affidavit, taken as a whole, showed that all the taxes, interest and costs of improvements "as required to be tendered before suit filed," were tendered. This was a substantial compliance with the statute and was sufficient to authorize the appellants to maintain their suit.

In *Anthony* v. *Manlove,* 53 Ark. 423, the court, speaking through Judge HEMINGWAY, of this statute, said: "There is no wise or beneficent purpose to be accomplished by the act which would justify the extension of its operation beyond its letter; besides, being penal in its nature, it should be strictly construed."

The purpose of the lawmakers was to make sure that a person claiming lands held by another under tax title should be willing to reimburse the latter for all the sums he had expended on the lands in the event that his title proved defective by reason of irregularities and omissions of the officers making the tax sale. The affidavit under review is sufficient to show that the appellants were willing to do this.

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

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

Opinion delivered January 4, 1915.

1. CATTLE QUARANTINE—LIABILITY OF RAILROADS—TRANSPORTING CATTLE.—It is unlawful for any railroad company carrying cattle from other States or Territories below the quarantine line established by the United States Department of Agriculture, or from below the district cattle quarantine line of this State, to unload such cattle at any point in the State above the district cattle quarantine line, except such points as are designated by the officials in charge of the enforcement of the law establishing quarantine. Act 409, Acts 1907.

2. CATTLE QUARANTINE—TRANSPORTATION OF CATTLE—LIABILITY OF RAILROAD COMPANY.—In the transportation and unloading of cattle, a railroad company is required to comply with the act of Congress of March 3, 1905, chapter 1496, 33 St. L. 1264, and Act 409, Acts of Arkansas of 1907, and in an action for damages growing out of a violation thereof, it is not necessary to charge the railroad company with knowledge that cattle brought from below the quarantine line and unloaded above it were infected or infested with the fever tick, since, if the cattle were transported and unloaded in compliance with the quarantine laws, the duty rested upon the railroad company to show such compliance in justification of its conduct in carrying the cattle over the quarantine line.

3. CATTLE QUARANTINE—UNLOADING CATTLE—LIABILITY OF RAILROAD COMPANY.—In an action against a railroad company for damages growing out of unloading cattle above the quarantine line; *held*, the evidence failed to show that the cattle so unloaded were from a tick-infested country, or that they communicated disease to the plaintiffs' cattle.

Appeal from Lawrence Circuit Court, Eastern District; *W. A. Cunningham*, Special Judge; reversed.

STATEMENT BY THE COURT.

C. C. Campbell, appellee, and nine others brought separate suits against the St. Louis, Iron Mountain & Southern Railway Company, appellant, for damages for loss of their cattle alleged to have been caused by the negligence of the railroad company in transporting infected cattle from below the quarantine line across it and unloading them at Alicia, a point above the line from which their cattle became infected with the fever and died.

It appears from the testimony that a wreck occurred just below the quarantine line and the door of the car containing the cattle was torn off and one of them escaped from the car; that the others were taken on across the quarantine line and unloaded at Alicia and the one that escaped was driven along the public road to the stock pen from which they were all shipped within a day or two.

There was some testimony tending to show that the cattle had ticks upon them, but no witness was able to say they were fever ticks. About the usual time for the development of the fever from ticks after the wrecked car load of cattle was unloaded at Alicia, the cattle in the community began to get sick with fever and die and the testimony shows that some of them were infested with fever ticks. The testimony further tends to show that Alicia, while above the quarantine line, was under quarantine, in fact during all the year, except the season before for a few days when the quarantine was lifted. There was testimony tending to show, however, that there had been no infection nor fever among the cattle in and around Alicia for some years and since the establishment

of the quarantine line. There was no testimony tending to show the point from which the car of cattle was shipped further than one man said he had heard the roadmaster say they were Southern cattle, and this witness also testified that he thought they must be Southern cattle or Texas cattle because of the peculiar brands upon them.

The cases were consolidated upon the trial and verdicts for certain amounts were rendered against the railroad company in each, in favor of the plaintiffs, and judgment thereon. From the judgment the railroad company prosecutes this appeal.

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

1. Instruction 2 for plaintiff was erroneous. There is no allegation nor proof that the company knew, or should have known, that the cattle were infected. The *onus* was on appellee to show this. 58 Ark. 401; 47 Am. St. 653; 23 L. R. A. 73; Act of Congress, March 3, 1905, 33 Stat. L., chap. 1496, pp. 1264, 1265.

2. The testimony fails to show liability. Besides *hearsay* testimony was admitted.

W. P. Smith, for appellee.

1. *Railway Co.* v. *Goolsby,* 58 Ark. 401, is not an authority in this case. *Scienter* was alleged and denied in that case, while here there was no averment of knowledge by the company of infection. 47 Am. St. 653, simply holds that courts take judicial knowledge that Texas or Southern cattle are infected and is in favor of appellee.

2. It is against the law to unload infected cattle above the quarantine line. 33 St. L. 1264-5; Acts 1907, 266; Kirby's Dig., § § 7907-7916; 90 Ark. 343. Hence, there was no error in instruction No. 2.

3. The evidence supports the verdict and the jury were properly charged.

KIRBY, J., (after stating the facts). It is contended by appellant that it had no knowledge that the cattle necessarily unloaded and collected at Alicia because of the injury to the car in which they were being shipped, were infected with the fever or carried the fever-producing

tick, and that there is no evidence tending to show they were brought from infected territory, nor sufficient to sustain the verdict, and also that the court erred in giving instruction numbered 2 for plaintiff.

In said instruction the court told the jury that if the railroad company had in charge a car of cattle from infected territory, which it caused or permitted to be unloaded at Alicia, and that the cattle of plaintiff were infected with the fever tick and died as a result thereof, and that the infection was communicated to plaintiff's cattle or to the range, and from the range to plaintiff's cattle, by the unloading of the car of cattle in charge of the defendant railroad company, or in the driving of said cattle along the road, it should find for the plaintiff.

(1) The district cattle quarantine line of the State runs along the boundary line between Jackson and Lawrence counties, being the south boundary line of Lawrence and the north line of Jackson County. The wreck occurred in Jackson County below the quarantine line, and one of the cattle escaped from the car and was driven to the pen, and the others were carried across the line and unloaded above the line at Alicia in Lawrence County. It is unlawful for any railroad company carrying cattle from other States or Territories below the quarantine line established by the United States Department of Agriculture or from below the district cattle quarantine line of this State to unload such cattle at any point in the State above the district cattle quarantine line, except such points as are designated by the officials in charge of the enforcement of the law establishing the cattle quarantine. Section 12, Act 409, Acts of 1907. This law also declares that all cattle above the district quarantine line bearing *boophilus anulatus* ticks should be considered as affected with a contagious disease.

Congress by Act of March 3, 1905, chapter 1496, 33 Stat. L. 1264, provided for the establishment of cattle quarantine districts by the Secretary of Agriculture and that cattle or live stock may be moved from a quarantine State or Territory or the quarantined portion of any

State or Territory into any other State or Territory under and in compliance with the rules and regulations made by the Secretary of Agriculture in pursuance of the act authorizing the establishment of the quarantine district and making it unlawful to move or allow to be moved any cattle from any quarantine district in any manner or under any conditions other than those prescribed by the Secretary of Agriculture.

It is contended that the instruction is erroneous because it did not require the jury to find that the company knew or should have known that the cattle which it turned loose and unloaded at Alicia were infected and that the burden was upon appellees to show that appellant had such knowledge or notice of such facts as would make it chargeable with knowledge that the cattle unloaded were infected and liable to communicate the disease within the principle announced in *Railway Co.* v. *Goolsby,* 58 Ark. 401.

There is no allegation herein as in that case that the company knew or had knowledge of such facts as would make it chargeable with knowledge that the cattle were infected, the allegation being only that the railway company brought infected cattle into Alicia and unloaded them there and that the infection and disease was thereby communicated to plaintiff's cattle.

(2) The national law prohibits the moving and carrying of cattle from a quarantine State, Territory or district into any other State or Territory, except in compliance with the regulations prescribed by the Secretary of Agriculture, and the State makes it unlawful for a railroad company carrying cattle from any other States or Territories below the quarantine line established by the United States Department of Agriculture or from below the district cattle quarantine line of the State to unload such cattle at any point in Arkansas above the said district quarantine line, except in accordance with the prescribed regulations. The railroad company is bound to comply with the requirements of both these laws

in the carrying and unloading of cattle which dispenses with any necessity for charging it with knowledge that the cattle brought from below the quarantine line and unloaded above it were infected or infested with the fever tick, and liable to communicate the disease if they were in fact so infected. And if the cattle were carried and unloaded in accordance with the regulations prescribed by the officials charged with the enforcement of these laws, it devolved upon the railroad company to show that fact in justification of its conduct in carrying cattle from below and unloading them above the quarantine line, which would otherwise be unlawful.

(3) The majority of the court, however, is of opinion that there is not sufficient testimony to show that the cattle came from infected territory and communicated the fever, there being nothing tending to show such facts further than that a witness heard the roadmaster say they were Southern cattle and another that they must be, from the peculiar brands upon them. The witness who saw the ticks upon the cattle that were unloaded did not know whether they were fever-producing ticks or not, and his description of their color did not indicate that they were. If the railroad company brought cattle from infected territory or cattle bearing ticks that produced the disease among the plaintiff's cattle from which they died, it would of course be liable for the damages, but the mere fact that the fever developed among the cattle about Alicia after the car of cattle was unloaded, with further testimony that for some time prior thereto there had been no infection nor fever among the cattle in and around the place, was not sufficient to show that said cattle were infected or from infected territory and communicated the disease to the cattle of plaintiffs. The station at Alicia is within a short distance of the district cattle quarantine line and it is equally as probable that the disease from which plaintiff's cattle died could have been communicated by cattle or ticks coming from below the quarantine line, which was hard by said station.

For the error designated the judgment is reversed and the cause remanded for a new trial.

BAIN v. FORT SMITH LIGHT & TRACTION COMPANY.

Opinion delivered January 4, 1915.

1. MUNICIPAL CORPORATIONS—CREATION OF RIGHTS BETWEEN THIRD PARTIES.—It is not within any of the general or special powers conferred upon municipal corporations in this State to create a right of action between third persons nor to enlarge the common law or statutory liability of citizens among themselves.
2. MUNICIPAL CORPORATIONS—POWERS—ORDINANCES.—A municipal corporation has no powers except those expressly conferred and those fairly implied for the attainment of declared purposes.
3. MUNICIPAL CORPORATIONS—PUBLIC SERVICE CORPORATIONS—GRANT OF FRANCHISE—CONDITIONS AND REQUIREMENTS.—In the grant of a franchise to a street railway company, a municipal corporation has the power to reserve the right to pass ordinances for the protection of the person and property of individuals, and creating a liability against the company in their favor for a violation of such ordinance, but when no such reservation was made in the grant of the franchise, the violation of an ordinance subsequently passed, could not become the basis of a liability for personal injuries.
4. MUNCIPAL CORPORATIONS—PUBLIC SERVICE CORPORATIONS—ORDINANCES—RIGHTS OF THIRD PARTIES.—There being no statute in this State creating a liability against street railway companies in favor of parties injured by an act constituting a breach of a city ordinance passed for the protection of persons or property, and there being no statute conferring upon municipal corporations the power to pass such an ordinance, no power exists in a city to create a liability in favor of an individual against a street car company for the violation of an ordinance creating such a liability.
5. MUNCIPAL CORPORATIONS—POLICE POWER—STREET RAILWAYS—REGULATION.—A city, under its general police power over the streets, may pass any reasonable and proper regulation prescribing the manner in which the franchise of street railways shall be enjoyed, not inconsistent or in conflict with their charter rights.
6. MUNICIPAL CORPORATIONS—USE OF STREETS—REGULATION—PUBLIC SERVICE CORPORATIONS.—A city ordinance giving United States mail wagons, when in use collecting mail, the right-of-way over the city streets, *held*, to be merely a police regulation designed primarily for the benefit of the general public to insure free course to the United States mails, and the ordinance does not undertake to create a liability in favor of a United States mail collector against a

street railway company for a violation of the terms of the ordinance.

7. STREET RAILWAYS—NEGLIGENCE—VIOLATION OF CITY ORDINANCE—EVIDENCE.—In a common-law action against a street railway company for an injury alleged to have been caused by the company's negligence, if, at the time of the injury, the street car producing it was being operated in a manner that violated an ordinance of the city, such fact may be shown as tending to establish the allegations of negligence.

8. STREET RAILWAYS—INJURY TO PERSON ON TRACK—CITY ORDINANCE—RIGHT-OF-WAY.—A city ordinance undertook to give United States mail collectors while in the exercise of their duties, the right-of-way over the city streets. Plaintiff, a mail collector, was injured by being struck by a street car. In an action for damages against the street railway company, *held*, the city ordinance did not create any liability against the street railway company, and should only be considered by the jury in passing upon the question of whether there was negligence upon the part of either the plaintiff or defendant.

9. STREET RAILWAYS—PERSONAL INJURIES—DUTY OF CARE.—An instruction in an action against a street railway company for damages for personal injuries, which requires the jury to find that the motorman used ordinary care in the management of his car at and near the place of the injury, held correct, since ordinary care in the management of a street railway car requires a constant lookout to be kept for persons upon the track.

10. INSTRUCTIONS—CONFLICT.—Instructions should not be considered as in conflict where they can be harmonized.

11. STREET RAILWAYS—INJURY TO PERSONS ON TRACK—DUTY TO LOOK AND LISTEN.—Where plaintiff was injured by being struck by a street car, while he was attempting to cross the track; *held*, an instruction that it was plaintiff's duty before going on or attempting to cross the track of defendant company, to look and listen for approaching cars, was proper, when, under the proof in the case, no circumstance developed to prevent him from looking for the car or to excuse him for not doing so.

12. STREET RAILWAYS—PERSONAL INJURIES—DUTY OF CARE—CONTRIBUTORY NEGLIGENCE.—In an action against a street railway company for damages for personal injuries received in a collision, if the plaintiff was guilty of contributory negligence, then the motorman was only required to use ordinary care and prudence, after discovering plaintiff's peril, to avoid injuring him.

13. STREET RAILWAYS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.—In an action against a street railway company for damages caused by plaintiff being struck by a moving car, when the evidence proves or tends to prove that the plaintiff was guilty of con-

tributory negligence, the street railway company is liable only when its servants in charge of the car fail to exercise ordinary care to prevent the injury after the plaintiff's perilous position has been discovered.

14. LOOKOUT STATUTE—APPLICATION TO STREET RAILWAYS.—The lookout statute of May 26, 1911, Act 284, p. 275, Acts 1911, amending Kirby's Digest, § 6607, has no application to street railways.

15. EVIDENCE—BURDEN OF PROOF.—The plaintiff must establish the material allegations of his complaint by a preponderance of the evidence.

16. STREET RAILWAYS—PERSONAL INJURIES—NEGLIGENCE—BURDEN OF PROOF.—In an action against a street railway company for damages for personal injuries caused by negligence, where plaintiff alleged that the motorman of defendant's car was negligent in stopping his car, and defendant denied the allegation, it is competent for the plaintiff to prove and the burden was upon him to show that the mortorman did not make a good stop.

17. EVIDENCE—BURDEN OF PROOF—DUTY TO INTRODUCE TESTIMONY.—Where the burden of proving any matter is thrown upon a party by the pleadings he must generally introduce in the first instance, all the evidence upon which he relies; and he can not, after going into part of his case, reserve the residue of his evidence for a subsequent opportunity.

18. EVIDENCE — REBUTTAL TESTIMONY — INTRODUCED WHEN. — Rebuttal testimony should rebut the testimony advanced by the other side, and should consist of nothing which might properly have been advanced as proof in chief, and where testimony is not properly rebuttal testimony but should have been introduced as testimony in chief, in the absence of a proper showing, the trial court may in its discretion refuse to admit the same as rebuttal testimony.

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

STATEMENT BY THE COURT.

The appellant was a United States mail collector; and under an ordinance of the city of Fort Smith, in case of conflict, had the preferential right-of-way over the appellee in the use of the streets. While in the discharge of his duties, he drove his cart to the mail box at Manhattan Cafe on Garrison Avenue, stopped the cart about four feet from the box, which was at the curb, gathered the mail from the box, and as he locked the box his horse started across the street, as he was in the habit of doing,

to the mail box on the opposite side. Appellant jumped into the cart when same was ten or twelve feet from the curb, and about the middle of the street between the curb and the first car track. At this time the street car was at or crossing Fifth Street, about seventy-five feet away. Appellant did not know the speed the car was going. It increased its speed after crossing Fifth Street, but appellant thought the motorman would check the speed and control the car so as not to run over him. This the motorman could have done had he applied the brakes in time, but the motorman did not check up the speed of the car until he was within ten or twelve feet of appellant's cart, when he made a hurried effort to do so. Appellant's wagon nearly cleared the track, but the hind wheel was struck by the car, causing appellant's horse and cart to be dragged against the first trolley post east of the point of contact, which was more than fifty feet from where appellee's car struck the cart of appellant. Appellant was thrown against an iron rod around the top of the cart, and in this way he alleges that he received the injuries of which he complained. The distance from the west side of Fifth Street, where the car first stopped or slowed up, was ninety-three feet from a point opposite the Manhattan box, the cart being struck a few feet west of that point.

The appellant's official and usual route in collecting the mail was to go from the Manhattan box to the box on the corner of Fifth and Garrison Avenue on the opposite side. That this was appellant's usual and official route was known to the motorman. From the curb to the first rail of the track was a little over thirty-five feet. The track was about five feet wide, and the horse and cart were about fifteen feet long. There was nothing to obstruct the view of the motorman, and he could have seen the appellant collecting mail at the Manhattan box and could have seen appellant's cart in starting from the Manhattan box to the box on the opposite side of the street.

The appellant sued the appellee for damages, alleging that its motorman was running the car at a danger-

ous and high rate of speed; that the motorman did not sound any bell or alarm; that he could have seen appellant by exercising ordinary care; that he ran upon appellant without warning, and by reason of these acts of negligence appellant was run down and seriously injured.

The appellee denied the allegations of negligence, and set up that the appellant was driving his cart in violation of the city ordinances, and that the collision was caused solely through the negligence of the appellant.

The testimony on behalf of appellant tended to establish the facts as above stated. The testimony on behalf of the appellee tended to show that appellant caught up with and jumped into his mail cart when same was on appellee's car track directly in front of the street car; that the motorman, when the horse's neck was about across the first rail of the car track, applied the brakes and reversed the current to stop the car, at which time the same was thirty or thirty-five feet away, going at a speed of four or five miles an hour, the current having been shut off, and the car was being carried by its own momentum; that the car stopped within two feet of where it hit appellant's cart; that the motorman attempted to stop the car as soon as he discovered appellant's dangerous position, but was unable to stop it in time to prevent the collision. The car was a light single truck car, with one passenger. The motorman applied the brakes as soon as the neck of the horse crossed the first rail, sounded the bell and made a good stop. Appellant was not thrown out of the cart, which was pushed up to within two feet of the trolley post, but stepped out of the same and gathered up his mail, complained only of having his hand slightly hurt, went away, and afterward during the day was seen gathering up the mail on his route.

The testimony on behalf of the appellant tended to show that the injuries of which he complained at the time of the trial were produced by the collision, while the testimony on behalf of the appellee tended to show that the injuries and suffering of which he complained at the time of the trial were from other causes, and that appellant,

by reason of the collision, only received a slight injury to his hand.

The above were the issues and substantially the facts adduced in evidence on behalf of the respective parties, and upon which the case was sent to the jury, whose verdict was in favor of the appellee, and from the judgment rendered in appellee's favor this appeal has been duly prosecuted.

Appellant complains of the rulings of the court in granting and refusing prayers for instructions and upon the admission and rejection of testimony. We will discuss the grounds urged for reversal in the opinion.

Ira D. Oglesby, for appellant.

1. The court, by refusing to give instruction 4 and modifying instruction 5, requested by appellant, gave no correct guide as to the rights of appellant under the ordinance, and tended to discredit the theory that appellant had any right-of-way superior to that of appellee. 84 N. Y. S. 514.

2. Instruction 5, given at appellee's request, was clearly erroneous, and was equivalent to a peremptory instruction. It limited the duty of the motorman to an effort to stop the car "as soon as he saw plaintiff in a position of danger." This is not the law. It was his duty to keep a reasonable lookout along the streets to observe persons attempting to cross where they had the right to do so, and if by his negligence in failing to do this a collision occurs, defendant is liable. 42 Ark. 321; Nellis on Street Railways, § 381; Sherman & Redfield on Negligence, § 485-c; Booth on Street Railways, § 306; 81 Mo. 466; 24 S. E. 953; 50 So. 632.

This instruction is in direct conflict with instruction 13, so that the jury were left without a correct guide as to the duty of the motorman.

Instruction 6 was erroneous in two particulars; first, in declaring that if appellant did not look and listen for the approaching car before attempting to cross, the jury should find for the defendant. It should have been left to the jury to say whether such failure, if shown, was,

under the circumstances, negligence. 108 Ark. 95. Second, in directing a finding for the defendant, if the jury "believed that plaintiff saw or could have seen the approaching car and drove or permitted his horse to go upon the track in front of said car." 70 N. W. 408; 66 App. Div. (N. Y.) 554; 40 *Id.* 307; 1 St. Ry. Rep. 434; 43 S. E. 618; 46 Atl. 779; 108 N. Y. 354; 7 App. Div. (N. Y.) 253; 36 Pac. 673; Sherman & Redfield, Neg., § 485-c; Nellis on Street Railways, 343.

Instruction 11, upon the burden of proof, errs in telling the jury that if the testimony is equally balanced as to whether plaintiff's condition was due to the accident, he can not recover, without defining what is meant by "equally balanced."

3. The court erred in refusing to permit appellant to prove the distance in which a car going at the speed fixed by appellee's witnesses could be stopped. The testimony of the witnesses offered by appellant for this purpose was certainly admissible to disprove that the car was going only four or five miles an hour; the statement of appellee's witnesses that if going at such speed it could not be stopped in less than thirty feet, and also the statement that a quick or good stop was made. Jones on Evidence, § 809; Wigmore on Evidence, 2477; 99 Ind. 569; 4 So. 524; 17 So. 505; 67 S. W. 237; 20 N. E. 819; 55 Ark. 164.

Jos. M. Hill and *Henry L. Fitzhugh,* for appellee.

1. Appellant, in requesting the giving of instructions 4 and 5, assumed that the city ordinance could create a cause of action. This is not the law. While the ordinance was not admissible in evidence, as we think, yet the court permitted its introduction, and then in instructions given explained to the jury the legal effect thereof. A city ordinance can not alter the common law rights of parties. This ordinance created no liability upon the part of the company, nor did it give the plaintiff a cause of action. 1 Nellis on Street Railways, 493; 23 Am. Rep.

507; 28 So. 87; 43 S. W. 432; 57 S. W. 707; 36 Cyc. 1561; 6 Thompson, Com. on Negligence, 1374.

2. There is no merit in appellant's objection to instruction 5 given at appellee's request. The use of ordinary care in the management of the car necessarily included the keeping of a proper lookout. The instruction was complete and unobjectionable as it stood, but when read in connection with instruction numbered 13, given at appellant's request, the jury could not have been misled. Moreover, if instruction 5 was defective in verbiage, it was appellant's duty to make specific objection at the time and point out to the court its defects. 93 Ark. 589; 104 Ark. 409; 87 Ark. 396.

3. Instruction 6 is correct. When an approaching car is in plain view, it is negligence *per se* to drive immediately in front of such car without looking or listening, and under such circumstances it becomes a question of law. 108 Ark. 95, and authorities cited. The effect of the latter part of the instruction was to charge the jury that if the plaintiff was guilty of contributory negligence, then the motorman was only required to exercise ordinary care after discovering his peril—and that is the law. 77 Ark. 401; 62 Ark. 164; 81 Ark. 368.

4. There was no error in excluding the testimony offered by appellant in rebuttal. The burden of proving that the motorman did not make a good stop or a stop which would have prevented the accident, was upon the plaintiff. The latter part of section 809, Jones on Evidence, cited by appellant, fits this case exactly, viz: * * * "and when the burden of proving any matter is thrown upon a party by the pleadings, he must generally *introduce, in the first instance, all the evidence upon which he relies;* and he can not, after going into part of his case, reserve the residue of his evidence for a subsequent opportunity." See also Wigmore on Evidence, 2437; 2 Elliott on Evidence, § § 947, 948; Underhill on Evidence, § 551.

5. Regardless of the question of preferential rights, the plaintiff's own testimony shows that he was guilty of

contributory negligence, and the court ought to have directed a verdict for defendant. 80 Ark. 159; 108 Ark. 95.

WOOD, J., (after stating the facts). I. The appellant asked the court to tell the jury in his prayer No. 4, that the city ordinance gave United States mail wagons when in use collecting mail the right-of-way, and that the appellant, as the driver of such wagon, had the right to assume that appellee's motorman, if he discovered, or by the exercise of ordinary care would have discovered, the approach of the mail wagon, to accord it and the driver the right-of-way. The court refused this prayer, but instructed the jury as follows:

"The motorman and the driver of the mail wagon are presumed to have been familiar with the ordinance giving the United States mail wagons the right-of-way and their conduct must be judged in the light of this provision."

And, further, at appellant's request, prayer No. 10: "The jury, in determining whether defendant was guilty of negligence and whether plaintiff was guilty of contributory negligence may take into consideration the ordinance introduced in evidence so far as same affects the rights of plaintiff and defendant."

The court further instructed the jury on its own motion No. A as follows: "The ordinance of the city of Fort Smith introduced in evidence does not create any liability against the defendant, and is only to be considered by the jury in passing upon the question as to whether there was negligence upon the part of either the plaintiff or defendant."

(1-2) Did the court err? It is not within any of the general or special powers conferred upon municipal corporations in this State to create a right of action between third persons, nor to enlarge the common law or statutory liability of citizens among themselves. This could only be done by contract between the municipality and the company sought to be charged with the violation of an ordinance alleged to be for the benefit of a citizen.

Kirby's Digest, chap. 115; *Holwerson* v. *St. Louis & Sub. Ry. Co.,* 157 Mo. 216. Such power is not implied from any of the powers expressly conferred. A municipal corporation has no powers except those expressly conferred and those fairly implied for the attainment of declared purposes. *Morrilton Waterworks Imp. Dist.* v. *Earl,* 71 Ark. 4. See also *City of Winchester* v. *Redmond,* 93 Va. 711.

(3) The city had the express power to authorize the construction of street railways (Kirby's Digest, § 5443), and in the ordinance granting the charter to the appellee the city could undoubtedly have reserved to itself the right as a condition or consideration for the granting of the franchise the power to pass ordinances for the protection of persons and property of individuals and creating a liability in their favor against the company for a violation of such ordinances, and the company, if it accepted the franchise with these provisions, would be bound thereby and liable in damages to individuals for a violation of such ordinances. It is not shown that the city of Fort Smith reserved to itself such power as a consideration for the grant of its franchise to the appellee, or that the company accepted the franchise with such power reserved as a consideration therefor. The violation of the ordinance, therefore, could not become the basis of a liability for personal injuries. See *Byington* v. *St. Louis Rd. Co.,* 147 Mo. 673, 49 S. W. Rep. 876.

(4) We have no statute creating a liability against street railway companies in favor of parties injured for breaches of ordinances passed for the protection of persons or property, and there is no statute conferring upon municipal corporations the power to pass such ordinances, as was the case in *Hayes* v. *Mich. Cent. Rd. Co.,* 111 U. S. 228. Therefore, no power existed in the city to create a liability in favor of appellant against appellee for a violation of the ordinance under review, and if the ordinance had created such liability it would have been void for lack of power to enact it.

(5) A city, under its general police power over the streets, could pass any reasonable and proper regulations prescribing the manner in which the franchise of street railways should be enjoyed, not inconsistent or in conflict with their charter rights. 36 Cyc. 1447, and note.

(6) As we construe the ordinance, it does not undertake to create a liability in favor of United States mail collectors against the appellee for a violation of its terms. It is only a police regulation to be enforced solely by fine, and was designed primarily for the benefit of the general public to insure the United States mail free course. True, it operates incidentally to protect the mail carts and the person of mail collectors while engaged in their duties, but it was not enacted for their special personal benefit in the sense of creating a right of action in their favor against the street railway company for a violation of the ordinance.

What effect, then, should be given the ordinance in this case?

In common law actions for negligent injuries, where at the time of the injury a city ordinance is being violated, in some jurisdictions it is held that violations of the city ordinance is not evidence of negligence, and that the ordinance is not admissible in evidence. See *Rockford City Railway Co.* v. *Blake,* 173 Ill. 354, 50 N. E. Rep. 1070, 64 Am. St. Rep. 122. See, also, *Ford's Admr.* v. *Paducah City Ry. Co.,* 99 S. W. Rep. 355.

In other jurisdictions it is held that the operation of cars in violation of a city ordinance is negligence *per se. Ashley* v. *Kanawha Valley Traction Co.,* 60 W. Va. 306; *Moore* v. *St. Louis Transit Co.,* 194 Mo. 1, 92 S. W. 390; *Memphis St. Ry. Co.* v. *Haynes,* 112 Tenn. 712, 81 S. W. 374; *Dallas Consolidated Elec. St. Ry.* v. *Ison,* 83 S. W. 408.

(7) But in other jurisdictions it is held that in a common law action against street railway companies for injury alleged to have been caused by the company's negligence if at the time of the injury the street car producing it is being operated in a manner that violated an ordi-

nance of the city, such fact may be shown as tending to establish the allegations of negligence.

The rule as last stated is supported by the weight of authority and the better reason. Without stating the rule or citing any authority to support it, we recognized and approved it in the recent case of *Little Rock Railway & Electric Co.* v. *Sledge,* 108 Ark. 95-110. Other authorities are as follows: *Davies* v. *Durham Trac. Co.,* 141 N. C. 134, 53 S. E. 617; *Henderson* v. *Durham Traction Co.,* 132 N. C. 779, 44 S. E. Rep. 598; *Meek* v. *Pennsylvania Co.,* 38 Ohio St. Rep. 632. See, also, *Cumming* v. *Brookland City Rd. Co.,* 104 N. Y. 669, 674, 10 N. E. Rep. 855; *Connor* v. *Electric Trac. Co.,* 173 Pa. St. 602, 34 Atl. 238; *Baltimore City Pass. R. Co.* v. *McDonnell,* 43 Md. 534; *Harrison* v. *Sutter St. R. Co.,* 116 Cal. 165, 47 Pac. Rep. 1019; *Mahan* v. *Union Depot, etc., Co.,* 34 Minn. 29, 24 N. W. Rep. 293; *Hanlon* v. *South Boston Horse R. Co.,* 129 Mass. 310. See, also, *Caswell* v. *Boston Elevated Ry.,* 190 Mass. 527, 77 N. E. Rep. 380; *Glassey* v. *Worcester Consol. St. R. Co.,* 185 Mass. 315, 70 N. E. 199; *Stevens* v. *Boston El. R. Co.,* 184 Mass. 476, 69 N. E. Rep. 338; *Norfolk R., etc., Co.* v. *Corletto,* 100 Va. 355, 41 S. E. Rep. 740, and note to *Ashley* v. *Kanawha Valley Trac Co.,* 9 Am. & Eng. Ann. Cas. 840-2, where the above cases are collated.

In a case where, at the time of the injury, a railroad train was being run at a greater rate of speed than that prescribed by a city ordinance, Mr. Justice Lamar, speaking for the Supreme Court of the United States, in *Grand Trunk Ry. Co.* v. *Ives,* 144 U. S. 408-418, said: "But perhaps the better and more generally accepted rule is that such an act on the part of the railway company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence," citing cases.

Now, the court, in permitting the ordinance to be introduced and in its instructions based thereon, con-

formed its rulings to the law as above announced and approved.

The prayer for instruction No. 4 was argumentative and calculated to mislead the jury.

(8) In modifying, and giving as modified, appellant's prayer No. 5, and in giving appellant's prayer No. 10 as requested, and in giving instruction No. "A" on its own motion, the court declared the law strictly in accord with the rule as above approved, and its rulings gave to the appellant the utmost to which he was entitled.

II. Instruction No. 5, given at the instance of appellee, was as follows:

"The court instructs you that if you believe from the evidence that defendant's motorman in charge of its car used ordinary care in the management of said car at and near the place where plaintiff was injured, and that as soon as he saw plaintiff in a position of danger, said motorman used such care and caution in stopping said car as to avoid injury to plaintiff as a person of ordinary care and prudence would have exercised under such circumstances, then your verdict must be for the defendant."

(9) Appellant contends that this instruction was erroneous because it only required the motorman to use ordinary care after he saw plaintiff in a place of danger. The instruction, taken as a whole, is not open to this objection. The instruction required the jury to find that the motorman used ordinary care in the management of his car at and near the place of the injury. Ordinary care in the management of a street railway car requires a constant lookout to be kept for persons upon the track. This is a well recognized duty of motormen under the law pertaining to the management of street railways and the instruction as offered, and the language used in the instruction, when fairly construed, must have conveyed the idea to the jury that such was the duty of the motorman. But if there were any doubt about it, the jury could not have been misled, for in prayer No. 13, given at appellant's request, the court told the jury that it was the

duty of the motorman to keep a reasonable lookout and to exercise reasonable care to discover the approach of vehicles toward the car track at such places as said vehicles had the right to cross, and to take reasonable and timely precaution to prevent striking or colliding with same. These instructions, when considered together, as they should be, could not possibly have misled the jury.

(10) Instructions should not be considered as in conflict where they can be harmonized, and instruction No. 13, given at the instance of the appellant, should be taken as not in conflict, but as supplementary to and explanatory of what is meant in instruction No. 5, by the use of the words "ordinary care in the management of his car," etc. But if the words "ordinary care in the management of his car" did not include the duty upon the part of the motorman to keep a lookout for persons and property on the track, then it was a defect in the verbiage, which should have been reached by a specific objection. See *St. Louis, I. M. & S. Ry. Co.* v. *Barnett,* 65 Ark. 255; *Pettus* v. *Kerr,* 87 Ark. 396; *St. Louis, I. M. & S. Ry. Co.* v. *Carter,* 93 Ark. 589; *Missouri & N. A. Rd. Co.* v. *Duncan,* 104 Ark. 409.

Instruction No. 6, given at the instance of appellee, of which appellant complains, is as follows:

"The court instructs you that it was the duty of plaintiff before going on or attempting to cross the tracks of defendant company to look and listen for approaching cars, and if you believe from the evidence that plaintiff failed to do so, or if you believe that plaintiff saw or could have seen the approaching car, and drove or permitted his horse to go upon the track in front of said car, then you should find for the defendant, unless you further find from the evidence that defendant's motorman, after he saw plaintiff in a perilous position, failed to use such care and caution in stopping said car as a person of ordinary care and prudence would have exercised under like circumstances."

The appellant contends that the instruction was erroneous in telling the jury that it was the duty of plaintiff,

before going on or attempting to cross the track of defendant to look and listen for approaching cars, and further erroneous in telling the jury that if plaintiff saw or could have seen the approaching car and drove or permitted his horse to go upon the track in front of said car, etc.

(11-12) The undisputed facts show that the appellant's view of appellee's approaching car was unobstructed. There were no circumstances developed by the proof to prevent him from looking for the car or to excuse him for not doing so. The instruction, when viewed in the light of the uncontroverted facts, therefore, was in conformity with the law as announced by this court in *Little Rock Ry. & Elec. Co.* v. *Sledge, supra.* Moreover, the instruction could not have been prejudicial in the particulars urged by the appellant, because the appellant himself testified that he was looking at the car; that he could see the motorman, and that the motorman could see him; that he was looking at the motorman for some distance before the wagon was struck and continued to look at the car before it struck his wagon. That part of the instruction which told the jury that if plaintiff saw the approaching car and drove in front of it, then the motorman was only required to use such care to prevent the injury as a person of ordinary prudence would have exercised under like circumstances, in effect told the jury that if appellant was guilty of contributory negligence, then the motorman was only required to use ordinary care and prudence, after discovering his peril, to avoid injuring him. This is a correct statement of the law applicable to the facts.

Instruction No. 8 was as follows: "It was the duty of plaintiff to keep a lookout for cars before going upon defendant's track immediately in front of its moving car, and if you believe from the evidence that plaintiff failed to keep such lookout for defendant's car and went upon defendant's track in front of an approaching car, then the court instructs you that the defendant would not be liable in this action, although you might believe that its motorman carelessly failed to discover plaintiff's peril

in time to have avoided a collision. If plaintiff was guilty of negligence in going upon defendant's track, then defendant's servant was only required to exercise ordinary care for plaintiff's safety after actually discovering him in a place of danger."

(13) The above instruction, like instruction No. 6, preceding it, correctly declared the law relating to the liability of street railway companies, in cases where the evidence proves or tends to prove that the plaintiff is guilty of contributory negligence. In all such cases street railway companies are liable only where their servants in charge of the car fail to exercise ordinary care to prevent injury after the plaintiff's perilous position has been discovered. *Johnson* v. *Stewart,* 62 Ark. 164; *Hot Springs St. Ry. Co.* v. *Johnson,* 64 Ark. 421. See, also, *Hot Springs St. Rd. Co.* v. *Hildreth,* 72 Ark. 572. The court did not, in instruction 8, tell the jury that appellant was guilty of contributory negligence as matter of law; it submitted the issue to the jury.

(14) The lookout statute of May 26, 1911, Act 284, p. 275, amending section 6607 of Kirby's Digest, as construed by this court in *Central Ry. Co.* v. *Lindley,* 105 Ark. 294, and *St. Louis, I. M. & S. Ry. Co.* v. *Gibson,* 107 Ark. 431, and other cases, has no application to street railways.

The same may be said of instruction No. 14. The objection that this instruction assumes as a fact that "plaintiff got into his cart and made no effort to avoid a collision," is not well taken. The instruction is hypothetical, and states, "if you find from the evidence," etc., that "the plaintiff got into the cart."

(15) The criticism of instruction No. 11, in regard to the burden of proof, and which told the jury that if the testimony is equally balanced on a certain point, leaving their minds in doubt, their verdict should be for the defendant, etc., is not obnoxious to the criticism that appellant makes of it, but, taken as a whole, it, in effect, tells the jury that the plaintiff must establish the ma-

terial allegations of his complaint by a preponderance of the evidence.

Appellant complains that the court erred in refusing to grant certain prayers for instructions in regard to expert testimony, but the court had already given, at appellant's request, an instruction which contained all the law that appellant was entitled to on that subject. We are convinced that the instructions, as a whole, fairly and correctly submitted the issues to the jury.

(16-17) III. The appellant contends that the court erred in refusing to permit him to prove by certain witnesses the distance in which a car going at the speed fixed by appellee's witnesses could be stopped, and that such stop could be made in a distance of from four to six feet. Appellant offered this testimony in rebuttal. Under the issues raised by the pleadings, the testimony was competent and proper to be introduced by the appellant in chief. The appellant had alleged that the car was running at a dangerous and high rate of speed, was not supplied with proper brakes by which it could be properly and quickly stopped, and that if the motorman had properly applied the brakes as he should have done the appellant would not have been run down and injured. The answer denied these allegations. To sustain these allegations of negligence it was competent for the appellant to prove and the burden was upon him to show that the motorman did not make a good stop. The offered testimony would have tended to show that appellee's motorman did not make a good stop. Appellant went partly into the proof on this subject, and, in fairness to the appellee, he should have discovered all that he then had to produce. "When the burden of proving any matter is thrown upon a party by the pleadings, he must generally introduce, in the first instance, all the evidence upon which he relies; and he can not, after going into part of his case, reserve the residue of his evidence for a subsequent opportunity." Jones on Evidence, § 809.

(18) "Rebuttal testimony should rebut the testimony advanced by the other side, and should consist of

nothing which might properly have been advanced as proof in chief." 2 Elliott on Evidence, § § 941, 948.

While the court, in its discretion, might have permitted the evidence to be introduced at the time it was offered, yet, since it was not rebuttal evidence, and no showing is made as to why it was not brought forward in chief, nothing to indicate that appellant was not in possession of the evidence at the time he was developing his case in chief, nothing to show that it had been discovered only after appellee had brought forward its testimony, the court did not abuse its discretion in rejecting it. It was within the discretion of the court to do so, and there was no error in its ruling. 2 Elliott on Evidence, § 948, and case cited in note 20; Underhill on Evidence, p. 551.

The record, upon the whole, is free from prejudicial error, and the judgment is therefore affirmed.

WOOD v. WOOD.

Opinion delivered January 4, 1915.

1. TITLE—RECORD TITLE—PRESUMPTION OF OWNERSHIP—BURDEN OF PROOF.—In an action by appellant against appellee, her husband, for alimony, appellee set up that certain lands, title to which was in appellant belonged one-half to him by reason of his having paid the purchase price of the same. *Held*, the title to the lands in controversy being in appellant, the burden was upon the appellee to prove the allegations of his cross complaint by a preponderance of the testimony, in order to entitle him to the relief sought, of having title to one-half the land vested in him.
2. HUSBAND AND WIFE—TITLE IN WIFE'S NAME—PRESUMPTION—GIFT.—Where title to land is taken in the wife's name, although the husband furnished the money therefor, the presumption is that the husband intended a gift, and the proof to overcome this presumption must be clear and convincing.
3. HUSBAND AND WIFE—WIFE'S DEED TO HUSBAND—EQUITY.—Where a wife conveys her property by deed to her husband, because of the dominating influence of a husband over his wife, the transaction will in equity be scrutinized with care.
4. HUSBAND AND WIFE—GIFT—COERCION—BURDEN OF PROOF.—A conveyance from a wife to her husband will not be defeated when it

clearly appears that the transaction was free from any undue influence on the husband's part, and when it is clearly shown that the wife intended to make a gift of the property to her husband, but the burden is upon the husband to show that the transaction was fair.

5. DEEDS—GIFT—DELIVERY.—A wife executed and acknowledged a deed conveying certain lands to her husband, so that he might have the same in the event of her death. She did not deliver the deed to him. *Held*, no title ever passed to the husband.

6. DEEDS—GIFT—DELIVERY.—A wife executed and acknowledged a deed to certain lands deeded to her husband. The notary who took the acknowledgment handed the deed to the husband. The wife testified that she never did, nor did she intend to deliver the deed to her husband, and that she had secured and held possession of the same. *Held*, the deed was never delivered to the husband, the act of the notary not constituting a legal delivery.

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

STATEMENT BY THE COURT.

This suit was instituted by the appellant against the appellee for alimony. She alleged that she was married to the appellee June 18, 1900, and that they lived together as husband and wife until December 15, 1912, when the appellee, without cause, abandoned her, and that he had failed to support her; that he had considerable money and property, which she set forth in her complaint.

The appellee answered, admitting the marriage. He denied that he abandoned appellant without cause; denied that he had failed to support her, and, by way of cross complaint, alleged that appellant had abandoned him, "that she was of a jealous and nagging disposition, such as rendered his life intolerable, and accused him of trying to poison her, and had unjustly accused him of adultery; that he had purchased a certain tract of land, which he described, but on account of being on bad terms with his neighbors, had the deed made to the appellant; that before their marriage he had furnished appellant money to file a donation claim to a certain other tract, which he described, and that after their marriage appellee, with his own means, had improved the latter tract to the extent of $500; that the appellant, knowing that these

lands were not her own, and in consideration of the labor and money expended by appellee in improving the same, had executed and delivered to him a deed to an undivided one-half interest therein; that the deed had been lost or mislaid and was never recorded. He prayed for a divorce, and that title be vested in him to one-half of the lands, and other relief.

The appellant testified that she owned 215 acres of land in Little River County, of which she bought fifteen acres outright from the State, and donated 120 acres more, and bought eighty acres from one Ed. Dollarhide. She testified that the defendant did not furnish any of the money with which to purchase this land. Stated that she and her brother borrowed the money with which to buy fifteen acres and to donate 120 acres of the land. The Dollarhide tract of eighty acres was purchased with money which she obtained by selling the interest which she had inherited from the Gillihan estate.

She testified that before her marriage to the appellee, she hired him to improve the land. "He worked for me at $19 per month for ten or twelve months, improving the property. At the same time I hired several other parties, and all were paid out of the timber." Appellant then exhibited in evidence nine receipts signed by the appellee. She explained that she paid the parties, including the appellee, and took receipts from them showing payments for the work done by them during separate months in the years 1898 and 1899. One of the receipts recited that it was for $16, the balance due for two months' work, dated August 29, 1898. The other receipts, eight in number, were for $19 each, for separate months of 1898 and 1899, which are designated. She also exhibited, in this connection, seven receipts signed by one Riddle for work done during the years 1898 and 1899 for $15 each for the separate months designated, and also two receipts from one Seastrunk, and one from James Black, for work done during the year 1900, for the months designated in the receipts. She stated, in this connection: "I paid these men from the sale of timber. I got $603

from the Hempstead County Bank for timber before our marriage. I had a statement thereof in my satchel until yesterday, when I fainted, and it has disappeared." She further testified: "Wood put no improvements on the land before our marriage that he did not receive pay for."

Concerning the making of a deed by her to appellee for a one-half interest in the land, she testified as follows: "I did make a deed to Wood for one-half interest in my land. We were not getting along well together, he was threatening to leave me, that my health was poor; I was not able to work and make my living, and I could not rent the land for enough to keep me up, and I made a deed with the understanding that I was to hold the deed as long as I lived, and in case I should die without leaving him a child to inherit the land, he was to have a half interest in it, and was to live with me and support me as long as I lived. He was not to have the deed until my death. I never delivered the deed to him; afterward he quit me, and I destroyed the deed, and I never intended that Mr. Wood should have any deed or title to this land until my death; that was the understanding."

In this connection, the record shows the following:

Q. After the deed was acknowledged, what did you do with it?

A. I put it in my trunk, locked it up and kept it.

Q. Did he ever receive this deed from you?

A. No, sir; he tried to take it, but I would not let him have it after he deserted me.

Q. How did he try to get it?

A. He tried to file the lock off the trunk.

Q. How did you prevent him?

A. Striking at him with a knife; he slapped my jaws, and I struck at him with a knife.

Q. What did he say he wanted with the deed?

A. He said he did not want the deed, but I knew he did.

Q. Why did you destroy the deed?

A. Because he had not complied with his request. He had left me, and he was not entitled to it.

Q. Did he ever pay you anything to get this deed executed?

A. No, sir; not one cent; it was never the understanding that he was to pay me anything.

Appellant testified that appellee had tried to destroy the receipts and other papers in evidence, but that she had hid them and that appellee did not know until the day she was testifying that he had not succeeded in destroying the papers. She stated, in answer to a question, that she knew the deed had never been delivered to the appellee, because she had never delivered it.

Witness C. W. Wright corroborated the testimony of the appellant as to the purchase of her interest in the Gillihan land, for which he paid $100, and that part of this money was paid on the Dollarhide land. This witness also testified that he bought timber of Mrs. Wood, which amounted to $199.63, and stated that the timber taken from the land would have more than paid for the improvements put on it before he purchased the remaining timber. He further stated that before the parties were married, that the appellee had no property that witness knew of, and that the parties traded with witness.

Appellee testified in his own behalf, in part, as follows: "When we were married, wife had a one-fourth interest in her father's estate and a deed to 15.87 acres I bought in her name in 1897; we were engaged at the time; she urged me to get the land before her brother and Jones got it; I told her if she could borrow the money to file, to go ahead and borrow it and file, and I could pay it back; she borrowed the money of I. B. Wright, and I gave her the money to pay him; in 1903 we sold her inheritance for $100, and I applied $50 of that money on the purchase of the Dollarhide land and gave my note for $75, which I paid myself. It was always understood, if anything came up, we were to divide the land equally; had title to Dollarhide eighty put in her name on account of having had some trouble with my neighbors. I put all improvements that were made on this land. Before we were married, I built a house, cleared six acres, and since then have built a house on the donation and cleared eight or

ten acres and fenced same; in fact, put all improvements there except one shanty and about three acres of deadening; think improvements done by me worth $900; that most rent in any one year received by me is $76. Mrs. Wood did make me a deed to one-half interest in the 215 acres of land. It was always understood between us that I was to have one-half interest in our home. I was to have this one-half interest for doing the work and making the improvements and paying the $75 on Dollarhide tract. The deed was delivered to me in her presence at Wilton; I took it and put it in my trunk which I kept locked; she had a key to it and it stayed there until we moved to Mena, and I neglected to have it recorded. While at Mena, and shortly after she had a spell of sickness there, I looked for the deed, and could not find it, and asked her and she said that she had fixed it so it would never do me any good, that she had burned it up."

Further on he stated: "I did not work for Mrs. Wood for wages; she donated the 120 acres before we married; wife had no money and did not receive $600 in June before our marriage. At the time she made deed to me, I thought it best on account of her being jealous and cranky, and there being an understanding I was to have half thereof; I asked her, saying it was time, so that if anything happened to either one of us, our brothers could not step in and take it away from the other, and she thought it was."

He denied that he had threatened to quit her if she did not make the deed; said he did not ask her for a deed when they had separated before, thinking she would come back. Said a consideration of $5 was named in the deed, and it was paid. He made no promise to live with her at the time, and did not contemplate leaving her. Said Mrs. Wood never employed him and never gave him a cent. Denied that he had tried to destroy any receipts given her by burning them.

Further on, he says: "I insisted on my wife making deed because she would take cranky spells, and I was afraid she would get mad and go sell the place or timber

off of it, as she did once before." Appellee had between $50 and $100 in cash when he married appellant.

After appellant had testified that she had hired appellee to do work for her before they were married and had paid him for the work, exhibiting the receipts already referred to, the appellee then testified in rebuttal as follows: "The receipts from me introduced by Mrs. Wood were given by advice of Mr. Jones, who suggested that we 'frame up' something to show, when we were being prosecuted for living together as man and wife; he drew up a contract by which I was to get $30 per month; the receipts were all signed by me at one time. I never ran my wife from home. The receipts from Jim Riddle were not for improvements; he was employed by me in crop, and I paid him and he was twice paid if she also paid him."

Witness Draper testified that he took the acknowledgment to the deed from Mrs. Wood to Mr. Wood, in 1905. After the acknowledgment the deed was delivered to Mr. Wood. It was to an undivided one-half interest in a tract of 160 or 220 acres, near Alleene. He prepared the deed at the instance of Mr. Wood, and Mrs. Wood signed and acknowledged it, and witness then handed it to Mr. Wood. Says the witness: "I delivered the deed to Mr. Wood, because it was taken for him, and delivered it in her presence. Wood paid for the acknowledgment, and no money passed between the parties."

A witness by the name of Oglesby testified that he was cashier of the Hempstead County Bank; had examined the books and did not find any account for the year 1899 in the name of Martha C. Gillihan. From the examination made the bank did not issue any statement in 1899 to Martha C. Gillihan showing that she had a balance on deposit of $603.00 or any other amount. On cross-examination, he stated that if Schultz, on May 8, 1899, had transferred to Martha C. Gillihan $603.00 it would not necessarily appear on Mr. Schultz's account as of that date. So far as witness could find, the bank did not then keep an account of the payee of checks. Witness

found no record of the bank that he had examined showing that the bank had ever cashed a check of J. V. Schultz in the sum of $603.00 during the months of May, June, July or August, 1899. Witness found no such check recorded on the book that he examined, and the record did not show any balance of $603.00 in favor of Schultz.

Witness Lake testified on behalf of appellant as follows: "I saw the paper plaintiff testified was from Hempstead County Bank. The paper was on the stationery of the Hempstead County Bank and showed the sum of $603.00 due Martha C. Gillihan. The name of Schultz was on the paper, but I would not undertake to say whether it was his obligation or that of the bank. I only gave special attention to the date, June 28, 1899, and the amount, for I expected the paper would be present when it was wanted."

The court rendered a decree denying appellee's prayer for a divorce, but quieting title in him to an undivided one-half interest in all the lands named in his cross-complaint, and decreeing him a one-half interest in $199.63, the amount received by the appellant from the sale of timber, and granting to the appellant alimony in the sum of $30.00 per month, and decreeing to the appellee the possession of his house or residence in the city of De Queen, occupied by the appellant. The appellant duly prosecutes this appeal. Other facts stated in the opinion.

Steel, Lake & Head, for appellant.

1. As to the 120 acres donated from the State, under the undisputed proof, the appellee, not having paid anything for the land, can not engraft a trust on the conveyance from the State to appellant. The State was the donor. 52 Ark. 55; 97 Ark. 568.

2. It is true that the wife may make a gift of land or other property to the husband, but all such transactions are scrutinized with great care to see that it was fairly entered into and that it was the wife's intention to make the gift. 101 Ark. 451-6; 95 Ark. 526; 88 Ark. 60.

3. Where a husband pays the purchase money and takes deed to the wife, the presumption of law is that a gift to the wife is intended, and the burden is on him to overcome such presumption by proof that is clear and convincing. 101 Ark. 456; 103 Ark. 273-8; 104 Ark. 32-6; 48 Ark. 18; 104 Ark. 301-11; 84 Ark. 322; 76 Ark. 389; 100 Ark. 372.

4. Counsel review the evidence and contend that there was never any delivery of the deed. Both parties say that it was executed so that if anything "happened" her brothers would not inherit. Delivery is a matter of intention, and there is nothing in the circumstances attending the execution of this deed to show that there was any present intention to deliver it. 98 Ark. 466; 97 Ark. 283; 77 Ark. 89; 100 Ark. 427; 55 Ark. 633; 13 Cyc. 748; 50 N. E. 198; 36 N. E. 955; 35 N. E. 94.

Otis T. Wingo and *B. E. Isbell,* for appellee.

1. The question of trust, we think, is eliminated by the finding of the court that for a valuable consideration, and without undue influence, the wife made and delivered a deed to one-half interest in the land, and the case resolves itself into the question whether or not such deed was really made and delivered, and if so, was it fairly obtained?

While equity will scrutinize such a transaction jealously, if it is fairly entered into it is binding. 95 Ark. 523. Such scrutiny is to ascertain, and not to defeat, the intention of the parties. 101 Ark. 456; 81 Ark. 328; 75 Ark. 127.

2. That where the husband pays the purchase price and takes the deed in the wife's name, the presumption is that a gift to her is intended, we concede to be true; but it is *only a presumption,* and it may be overcome by evidence showing that the husband's intention was that she should take as trustee and not for her own benefit. 40 Ark. 62; 45 Ark. 484; 71 Ark. 373; 73 Ark. 281; 76 Ark. 389; 89 Ark. 580; 100 Ark. 372; 103 Ark. 273.

3. The deed was delivered. This appears from all the circumstances attending the transaction, not only as

stated by appellee, but also as stated by the disinterested notary. 77 Ark. 89; 74 Ark. 104. While manual delivery was actually had, yet it was not necessary, since appellant's words and acts at the time, and the circumstances under which it was acknowledged, show clearly she intended the deed to take effect, and at once. 97 Ark. 283. The question as to whether or not there was a delivery is one of fact, and the chancellor's finding thereon should be sustained. 100 Ark. 427; 110 Ark. 430.

WOOD, J., (after stating the facts). (1) The title to the land in controversy being in appellant, the burden was upon the appellee to prove the allegations of his cross-complaint by a preponderance of the evidence in order to entitle him to the relief sought. This he wholly failed to do. On the contrary, the clear preponderance of the evidence shows that the appellant purchased the fifteen acres which she had at the time of their marriage from the State and that she donated the 120 acres, and that she furnished the money to purchase the eighty acres designated in the evidence as the Dollarhide tract. She makes a satisfactory explanation as to how she obtained money to acquire this land, and her testimony is corroborated by C. W. Wright and I. B. Wright. She stated that she borrowed part of the money to pay the donation fees from I. B. Wright. I. B. Wright corroborates her in this by stating that he remembered loaning her $10 to donate some land. The appellee himself states that she borrowed the money of I. B. Wright, but that he gave her the money to pay Wright. The appellant denies this, but I. B. Wright corroborates her, for he states that he thought she paid the money back in person.

Appellant shows that she obtained the money to purchase the Dollarhide tract from the sale of her interest in her father's estate, and she is corroborated in this by C. W. Wright, who states that he bought her interest in the Gillihan land at $100, and he shows that $47 of this was paid on the Dollarhide land, and that the balance was used by the appellee on his personal account. The appellee himself states that he used $50 of the money ob-

tained from the sale of the appellant's inheritance on the purchase of the Dollarhide land, but states that he gave his individual note for $75 of the purchase money, which he paid himself; but he does not deny that he used the other $50 on his own account.

(2) So it is established by a clear preponderance of the evidence that the appellant furnished the money to purchase and to donate the land in controversy. The testimony therefore fails to show any resulting trust in favor of the appellee. But, even if appellant had furnished the money, the presumption, by taking the title in his wife's name, would be that he intended it as a gift, and in that case the proof to overcome this presumption of gift should be clear and convincing. *Carpenter* v. *Gibson,* 104 Ark. 32-36; *Hall* v. *Cox,* 104 Ark. 305-311; *Harbour* v. *Harbour,* 103 Ark. 273-8; *Spradling* v. *Spradling,* 101 Ark. 451-6; *Wood* v. *Wood,* 100 Ark. 372; *Jentzsch* v. *Jentzsch,* 84 Ark. 322; *O'Hair* v. *O'Hair,* 76 Ark. 389; *Bogy* v. *Roberts,* 48 Ark. 17; *Johnson* v. *Richardson,* 44 Ark. 365.

(3-4) The finding that the appellant executed and delivered to the appellee her deed to an undivided one-half interest in the lands in controversy is not established by a preponderance of the evidence. Because of the marital relation and the dominating influence which a husband has over his wife, it is a rule in equity to scrutinize with care a transaction where a wife conveys her real estate to her husband. While this is true, such conveyance will not be defeated when it clearly appears that the transaction was free from any undue influence on his part, and where it is clearly shown that the wife intended to make a gift of the property to her husband. Such gifts, when free from coercion or any undue influence, should be sustained; but, in such cases, the burden is on the husband to show that the transaction was fair; when the transaction is free from fraud and undue influence, if the real intention of the wife is to convey to her husband her real property as a gift, such intention must be carried out. *Spradling* v. *Spradling, supra; McDonald* v. *Smith,* 95 Ark. 526; *Mathy* v. *Mathy,* 88 Ark.

60; *Naler* v. *Ballew,* 81 Ark. 328; *Hannaford* v. *Dowdle,* 75 Ark. 127.

These well settled principles, when applied to the facts as to the alleged gift of an undivided one-half of the lands in controversy, do not sustain appellee's contention that there was such a gift. The appellant admits that she executed the deed, but she denies that she delivered the same to the appellee, and as to whether or not there was such a delivery with the intention of making an immediate gift of the undivided half interest in the lands is the only serious question in the case. This is purely an issue of fact, and a correct solution of it depends much upon the credit to be given the testimony of the parties themselves. It could serve no useful purpose to discuss in detail the evidence which has brought us to the conclusion that the greater weight should be given to the testimony of appellant and that the clear preponderance of the evidence shows that she did not deliver the deed to the appellee for the purpose of making an immediate gift to him of the lands in controversy. The appellant states that she made the deed with the understanding that she was to hold the same as long as she lived, and in case she died without leaving him a child he was to have a half interest in it and was to live with her and support her as long as she lived. She did not deliver the deed to him. The appellee himself corroborates the appellant in her statement as to her intention in making the deed, and that it was not to take effect until her death, when he says: "I asked her, saying it was time, so that if anything happened to either one of us, our brothers could not step in and take it away from the other, and she thought it was." In this testimony the appellee shows clearly that the deed was executed for the purpose of preventing the collateral heirs of the appellant from inheriting the property in the event of her death, for that was the only thing that could have happened to the appellant that would have enabled her brothers to deprive the appellee of possession of the property. Evidently appellee used the words "happen

to either of us" as referring to the death of either one of them.

Appellant's testimony as to her purpose in making the deed is further corroborated by the statement of witness Mrs. Schott, who testified on behalf of appellee, as follows: "She was speaking of her trouble and said she had burned the deed. I asked her, in the first place, why she wanted to burn the deed, and she said she had made it out so that if anything happened to her that her brother would not get it, but that Emery would get it all." She told witness that she had at that time intended that at her death Mr. Wood should have her property; that her brother should not come in; that it was not her intention to relinquish her interest in the land so that Mr. Wood or any one else would get it until her death.

True, Wood testified that it was always understood between them that he was to have a half interest in their home; that he was to have the half interest for doing the work and making the improvements and paying the $75 on the Dollarhide tract. In another place he states that he insisted on his wife making the deed because she would take cranky spells and he was afraid she would get mad and go sell the place or the timber off of it as she had once before. But this does not appeal to us as reasonable and consistent in view of the fact that appellee did not have the deed recorded.

(5-6) Now, appellee stresses the fact that the notary who took the acknowledgment testified that the deed was delivered to appellee, but the notary's testimony further shows that he had drawn the deed at the request and under the directions of appellee, when the appellant was not present; that he carried the deed to her to sign, and might have explained the nature of it to her; that she signed it and acknowledged it, and that he then delivered the deed to the appellee because it was taken for him, and he delivered it in the presence of the appellant. The testimony of this witness, when considered together, has no significance whatever in de-

termining the issue as to whether the deed was delivered by the appellant to the appellee for the purpose of conveying immediate title. His testimony showed that the deed was not delivered to the appellee at the instance and direction of the appellant at all, but that he was acting for the appellee in handing him the deed, and that the mere act of handing or delivering the deed to the appellee was not at appellant's request or suggestion or as her agent, and could not be considered as her act constituting a legal delivery for the purpose of transferring the immediate title to the property; and when appellant, in her testimony, denies that she delivered the deed to the appellee, she manifestly used the word "delivered" in the sense that she did not intend to give him the possession of the deed for the purpose of conveying to him the present title to the property and of giving present dominion and control over the same. The testimony of the appellant all the way through is consistent and reasonable. The testimony of the appellee was contradictory in itself and contradicted by other witnesses, and is inconsistent. The testimony of the appellant was entitled to more credit. Her testimony, in many particulars, was substantially corroborated. Therefore, her testimony as to the purpose for which the deed was executed and on the issue as to the delivery thereof should be taken as the true state of the case. The chancery court erred in not so accepting it.

The decree is therefore reversed and the cause remanded with directions to dismiss appellee's cross-complaint for want of equity.

MEWES v. MEWES.

Opinion delivered January 4, 1915.

1. DEEDS—CONSIDERATION—PAROL EVIDENCE TO VARY.—The only effect of the naming of the consideration in a deed is to estop the grantor from alleging that the deed was executed without consideration; for every other purpose it is open to explanation, and may be varied by oral proof.

2. DEEDS—CONSIDERATION NAMED—ADVANCEMENT.—Deceased sold certain lands belonging to himself and defendant, his son, and, in order to make title, defendant gave deceased a deed to his lands for a consideration stated in the deed greatly in excess of the contract price of sale which deceased had made with the purchaser. *Held*, under the evidence it was the intention of both parties that each receive from the sale the same amount per acre for their respective lands, and that the naming of the larger consideration in the deed from defendant to his father was not evidence of deceased's intent to make an advancement to his son.

3. ACTIONS—PARTIES—DESCENT AND DISTRIBUTION.—Deceased sold lands belonging to himself and his son and the money was deposited in bank. *Held*, in an action to determine whether the money was the property of the son or the widow and heirs of the deceased, the administrator was not a necessary party, but he is a necessary party in an action looking to the distribution of the assets of the estate.

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

W. N. Carpenter and *Sam Frauenthal*, for appellants.

1. The evidence clearly shows that the $6,600 in the Home Bank of DeWitt belongs to the estate of J. J. Mewes, and his widow, therefore, is entitled to one-third of it as her dower.

It is clear from the evidence that the true consideration which J. J. Mewes was to receive for his interest in the lands was $25 per acre, aggregating $7,000. The rule is that the true consideration may be shown by parol, no matter what consideration is recited in the deed. This can be shown by direct testimony, and also by the facts and circumstances in the case. 54 Mo. App. 636; 68 L. R. A. 929, note; 18 Ark. 65; 90 Ark. 426; 15 Ark. 275; 75 Ark. 89; 82 Ark. 492; 101 Ark. 603; 3 Enc. of Ev. 390; 20 L. R. A. 102.

2. The evidence shows that M. J. F. Mewes obtained from his father, J. J. Mewes, an undivided one-half interest in certain portions of the land involved in this suit, that he did not pay for the same and is still indebted to the estate therefor.

3. The court erred in rendering judgment against the plaintiff and the surety upon the injunction bond.

The injunction issued did not stay the proceedings upon any judgment or final order of any court. Sections 3998, 3999 and 4000, Kirby's Digest, apply only to cases where the enforcement of a judgment is enjoined. 52 Ark. 354; 48 Ark. 21; 105 Ark. 210.

John L. Ingram, for appellees.

1. The consideration placed in the deeds by J. J. Mewes himself was $13,600. There is no proof whatever that such consideration was fictitious, or that it represented a fictitious value. The $6,600 belongs to M. J. F. Mewes, but, if not, it does not follow that the widow of J. J. Mewes has a dower interest in it. The whole of the lands deeded to M. J. F. Mewes at the request of J. J. Mewes, was so deeded prior to the marriage of J. J. with Frederika Mewes. There was never at any time any seizin of the land by J. J. Mewes and the legal title never rested in him, but on the contrary it was a finished transaction at the date of the marriage. 67 Ark. 413; 7 Words & Phrases, 6397, 6398; 11 Hun. 251; 40 Fed. 224; 58 Pac. 95; 47 Mass. 433, 444; 27 Ark. 306.

2. The burden of proof was on the appellant to show that M. J. F. Mewes did not pay J. J. Mewes and that he is indebted to the estate. There was no competent proof to sustain this allegation.

3. There was no error in giving judgment on the injunction bond. Under the terms of the bond its signers undertook to pay appellant the damages he might sustain by reason of the injunction. The proof shows that he was damaged 10 per cent of the amount tied up by the order, and the court allowed him 6 per cent for the time the order was in force. 90 Fed. 15.

WOOD, J. This suit was instituted by the appellants, the widow and certain heirs of J. J. Mewes, deceased, against the Home Bank of DeWitt and M. J. F. Mewes, to restrain the bank from paying over to M. J. F. Mewes the sum of $6,600 on deposit in said bank, and to have M. J. F. Mewes account to them and to recover of him the dower interest of the widow and the interest of the heirs in the funds, alleging that the same was the prop-

erty of the estate of J. J. Mewes, deceased. They alleged, in short, that J. J. Mewes had contracted to sell 960 acres of land to one Tindall at the sum of $27.50 per acre, or for a total sum of $26,400; that included in the sale were 280 acres belonging to M. J. F. Mewes, and that he was entitled out of the proceeds of the purchase money, to the sum of $7,000, which was at the rate of $25 per acre. They prayed that M. J. F. Mewes be required to account for the sum of $24,000, and the difference between $26,400, for which J. J. Mewes contracted to sell the land and the sum of $24,000, which M. J. F. Mewes accepted therefor; that the $6,600 in the bank be ordered paid into court, and that the widow have her one-third interest thereof and also one-third of all the moneys due from M. J. F. Mewes to the estate of J. J. Mewes, and that the remainder be distributed among the heirs of J. J. Mewes according to their respective interests.

The answer admitted the sale of the lands, but alleged that the amount for which they sold was $24,000 in cash. Alleged that M. J. F. Mewes was to receive for his lands included in the sale the sum of $13,600 instead of $7,000, as alleged in the complaint; that according to a contract made with the widow and the other heirs of J. J. Mewes, certain mortgage indebtedness on the land was to be paid out of the proceeds of the purchase money and was chargeable to the estate of J. J. Mewes. The answer is a lengthy one, setting forth, in its admissions and denials, the grounds for the contention of appellee M. J. F. Mewes in the trial court that out of the proceeds of $24,000, which was actually received in cash from the sale of the lands, which were owned by himself and his father, he was to receive the sum of $13,600, and that when this sum was paid him there would be nothing left of the $6,600 on deposit for which the appellants were seeking to have him account. The issues raised by the pleadings are principally issues of fact.

The facts are substantially as follows: J. J. Mewes owned 680 acres of land; his son, M. J. F. Mewes, owned 280 acres. They were both anxious to sell the land, and

either one of them had the right to sell all of it, and both were trying to sell it. J. J. Mewes entered into a contract with one Tindall to purchase all the land. The understanding was that the purchaser should pay $24,000 in cash if it were possible to do so at the time the sale was completed, but, if not, then he was to pay, on a time basis, the sum of $27.50 per acre. The purchaser succeeded in raising the $24,000 in cash, and that was the consideration paid.

To enable J. J. Mewes to carry out his contract for the sale of the lands, including those belonging to his son, it was necessary for him to get deeds from his son for these lands. Accordingly deeds were prepared from M. J. F. Mewes to J. J. Mewes, one deed conveying 160 acres, in which the consideration named was $10,000, and the other conveying 120 acres, in which the consideration named was $3,600. These deeds were sent to M. J. F. Mewes, who lived at Golden, Illinois, and they bear date April 2, 1909, the same date that the deeds were executed from J. J. Mewes to Tindall, conveying the entire 960 acres of land, and in which the consideration named was $24,000. The deeds from J. J. Mewes to Tindall were deposited in the German-American Bank of Stuttgart and were delivered to the purchaser by the cashier of the bank, under prior instructions from J. J. Mewes, upon payment of $24,000 in cash. J. J. Mewes died May 2, 1909.

After the death of J. J. Mewes appellee M. J. F. Mewes took charge of his father's affairs. The German-American Bank paid over to him the $24,000. Out of this sum he paid to himself $7,000 and other amounts, debts of the estate of J. J. Mewes, which brought the total sum paid out to $17,400, leaving on deposit in the Home Bank of DeWitt the sum of $6,600.

Soon after the death of J. J. Mewes the widow and heirs entered into an agreement whereby the widow was given certain articles of personal property and was to have one-third of all the personal property of the estate, and it was agreed that the indebtedness of the estate was

to be paid out of the money obtained from the sale of the lands to Tindall.

The principal contention of appellants, and the only one necessary to be considered here, is that the $6,600 in the Home Bank of DeWitt belongs to the estate of J. J. Mewes. They claim that the lands of M. J. F. Mewes were sold for him by his father, J. J. Mewes for the same consideration as were the individual lands of J. J. Mewes, and that in the division of the purchase money for these lands M. J. F. Mewes was only to receive for the purchase price of his lands per acre the same that J. J. Mewes was to receive.

The appellee M. J. F. Mewes contends, on the other hand, that he was to receive the consideration named in the deed which he executed to his father, towit, $13,600; that this was the price that his father intended that he should receive as the consideration for the sale of his lands.

The testimony of Tindall, the purchaser, bearing upon this subject is as follows: "I asked Mr. Mewes about the time of making our deal if M. J. F. Mewes would make a deed for his land. He said that he would; that they were both anxious to sell the land and that either one had the right to sell all of it, and that both were then trying to sell the same. M. J. F. Mewes verified his father's statement in this regard."

Nowhere does M. J. F. Mewes deny the fact, which this testimony establishes, that he knew before the lands were sold that the consideration for the whole tract, including his lands, was $25 per acre in cash. He did not object to the sale of his lands at this price. He states that his father wrote him about the contract between himself and Tindall a few days before the deeds were received for him to execute. The above testimony shows, he was anxious to sell the lands and knew the consideration that his father was receiving for the same. His half of the purchase price at $25 per acre would be $7,000, and this is the sum that he allowed himself when he had full control of the entire sum received as a consideration for

the sale. Instead of taking out the sum of $13,600 as his part of the purchase price for which the lands sold, he took $7,000, and his own testimony shows that he was proceeding to divide up the remaining $6,600 as follows: He gave one sister a check for $1,650, another a check for $1,650, and had intended to send to the children of another deceased sister the sum of $1,650, and to keep the remaining $1,650 for himself as one of the heirs. This division of the $6,600 was not consummated because the injunction suit was commenced against him and the checks for that reason were not honored.

This testimony convinces us that before the institution of this suit appellee M. J. F. Mewes regarded the $6,600 now in controversy as the property of his father's estate, and that the thought of claiming the same as his individual property was born in his mind after the institution of the injunction suit.

Appellee's contention now is that the consideration he was to receive in the sale of the lands was $13,600. In other words, that his lands were to bring him in the sale the sum of nearly $50 an acre, whereas if he received this price, his father, according to the total purchase money actually received, would only get the sum of about $15 per acre for his portion of the lands. It is not pretended by appellee M. J. F. Mewes that his father bought his lands and was to pay him nearly $50 per acre therefor, while he was selling the same lands at $25 an acre. It is not claimed by him that there was any contract between himself and his father by which his father was to purchase his lands before the sale. Appellee only contends that he is entitled to $13,600 as his portion of the purchase money because that was the consideration named in the deeds to his father. He was asked: "By what right do you claim it?" and answered, "By the consideration of my father's deed. I considered what my deeds called for." He was asked this question: "If your deeds called for $10,000 and it sold for $5,000 you would go by what was in the deed and not what it sold for?" and answered, "Yes, sir."

(1) But the well settled rule of law is that "the only effect of a consideration in a deed is to estop the grantor from alleging that the deed was executed without consideration. For every other purpose it is open to explanation and may be varied by parol proof." *Vaugine* v. *Taylor,* 18 Ark. 65; *Pate* v. *Johnson,* 15 Ark. 275; *Carwell* v. *Dennis,* 101 Ark. 603; *J. H. McGill Lbr. Co.* v. *Lane-White Lbr. Co.,* 90 Ark. 426; *Morton* v. *Morton,* 82 Ark. 492; *St. Louis & N. A. Rd. Co.* v. *Crandell,* 75 Ark. 89.

(2) It was wholly immaterial, as to whether or not the appellee M. J. F. Mewes had bought and paid for, or whether his father had given him the lands which were included in the sale made by his father to Tindall. For the purposes of this case, it may be conceded that he had fully paid for these lands, but it is beyond controversy that he intended that his father should sell the same for him for a consideration of $25 an acre. The clear preponderance of the evidence shows that this was the sum that he was to receive. There is no testimony in the record to warrant a finding that his father intended to advance him the sum of $6,600 and in this way to prefer him over his other children. The mere fact that the father had the sum of $13,600 named as the consideration in the deeds for the purposes of the sale to Tindall did not tend to prove that he intended an advancement of all above the consideration of $25 per acre to his son M. J. F. Mewes.

Our conclusion, therefore, on the evidence, is that the $6,600 on deposit with appellee Home Bank of DeWitt is the property of the estate of J. J. Mewes, and that the court erred in dismissing the appellants' complaint for want of equity. This conclusion makes it unnecessary to consider the other questions presented.

(3) The administrator was not a necessary party to this suit for the purpose of determining as to whether the $6,600 on deposit with the Home Bank of DeWitt was the individual property of M. J. F. Mewes, or the property of the widow and heirs of J. J. Mewes. The ad-

ministrator however will be a necessary party when the assets of the estate are distributed.

The judgment is therefore reversed and the cause is remanded with directions to grant appellants' prayer for injunction against the appellee bank, to set aside the judgment rendered against appellant Frederika Mewes, and the sureties on her injunction bond, and, with permission to appellants, if so advised, to amend their pleadings, and to make the administrator of the estate of J. J. Mewes a party, and for such other and further proceedings as may be necessary, conformable to law and not inconsistent with this opinion.

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

Opinion delivered November 30, 1914.

1. RAILROADS—INJURY TO STOCK—FENCE.—A railway company is under no duty to construct and maintain a fence along its right-of-way to prevent cattle that are pastured upon the commons from going upon such right-of-way. The owner of cattle who permits the same to run at large, assumes all the risks incident thereto.
2. RAILROADS—INJURY TO STOCK—FOOD ON RIGHT-OF-WAY.—A railroad company which allows feed stuffs to be emptied or to accumulate upon its right-of-way in such a manner as to be attractive to cattle browsing upon the commons, is guilty of negligence, and will be liable in damages to the owner of animals that are injured by reason of such negligence.
3. RAILROADS—INJURY TO STOCK—DEFECTIVE FENCE.—Where a railroad company negligently permitted the fence enclosing its right-of-way to become so out of repair that cattle were injured thereby in attempting to reach feed stuffs placed upon the right-of-way in proximity to the defective fence, the railroad company will be liable in damages to the owner for such injuries.
4. RAILROADS—INJURY TO CATTLE—DEFECTIVE FENCE—SUFFICIENCY OF EVIDENCE.—In an action against a railroad company for damages for an injury to a cow, the animal being injured by a defective fence, while attempting to reach feed stuffs left by defendant on its right-of-way, the evidence *held* insufficient to show any negligence on the part of defendant.

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

STATEMENT BY THE COURT.

The appellee sued appellant for damages caused by an injury to his cow, alleging that "defendant negligently caused hay, grain and other feed stuff to be scattered upon and near the railroad track in quantities sufficient to induce and toll cattle upon said land, and that said cow was attracted and tolled to said land and railroad track. That said lands were surrounded by barbed wire attached to posts lying on the ground, some of the strands being two or three feet above the ground at places. That the barbed wire was so dangerously kept as to endanger stock that would be attracted or tolled on the land where said feed lay. That the cow became entangled in the barbed wire and was so permanently injured thereby as to unfit her for a milk cow." The appellant denied the allegations of negligence.

The testimony for the appellee tended to show that the cow was injured at a point north of Old Gibbs Mill. The first panel of the fence just north of the mill was entirely out. Directly across from there were three bottom wires in place. When the cow was discovered by the appellee, she was standing twenty or thirty feet off of the right-of-way. Appellee went to where she was standing and found flesh hanging on the barbed wires and milk scattered on the weeds and hay at about twenty or thirty feet from the fence. There were box cars on the siding there. Feed stuff and grain were emptied there and were laying on the right-of-way within ten or fifteen feet of the opening in the fence.

The section foreman testified that there was a spur track, called Giggs Spur, used to set out cars. When he found the fence out of repair, he tried to keep it in repair, but it was a hard matter because people cut the wires along the road. When he discovered the fence in that condition, he fixed it, or had it done. He did not know that the fence was out of repair at that place. After he was notified of the injury to the cow he made an investigation of the track the next day, and if there was any feed stuff scattered along there he didn't see it.

Another witness testified that he was yardman in August, 1912, at the time the cow was injured. It was his duty to repair the fence when it was down. The section foreman told him the fence was out of repair, and immediately after hearing about the cow being injured he repaired the fence. Some one had broken a post down and knocked the wires all loose. One wire had been cut, but not at this place. There was nothing wrong with the fence at the place where the cow was supposed to have been injured. It was out of repair about a hundred feet from there on the opposite side. Some people lived there and cut the wire to make a gate to come out.

There was testimony tending to show that the cow was unfitted by reason of the injury for a milk cow, and tending to show her value as a milk cow.

The appellant asked the court to direct the jury to return a verdict in its favor, duly objected and excepted to the ruling of the court in refusing such prayer, and made such refusal of the court one of its grounds for a new trial. The appellant also assigned as one of its grounds for a new trial, that the verdict was contrary to the evidence. From a verdict and judgment in favor of the appellee for $50, this appeal has been duly prosecuted.

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

There is no liability shown. If the evidence had disclosed that appellant had created a condition in its fence which permitted the cow to get on the right-of-way, or had permitted such condition to exist for such a length of time that appellant would be held to have notice of it, and if it further had shown that appellant had placed food on its right-of-way which would attract cattle, a case of liability might have been made out. The evidence does not show how long the defective condition existed, but it does show that the foreman and the yardman both were on the lookout for defects in the fence, and that the people in the neighborhood were continuously cutting the fence. The proof does not show who put the feed ap-

pellee saw on the right-of-way, or when. 46 Ark. 207; 57 Ark. 16; 6 Pa. St. 472; 36 Ark. 607; 37 Ark. 593.

No brief filed for appellee.

WOOD, J. (after stating the facts). (1-2-3). The appellant was under no duty to construct and maintain a fence along its right-of-way to prevent cattle that were pastured upon the commons from going upon such right-of-way. The appellee, in permitting his cow to run at large, assumed all the risks incident thereto. *Railway Company* v. *Ferguson,* 57 Ark. 16. But the appellant would have no right to allow feed stuff to be emptied or to accumulate upon its right-of-way in such manner as would be attractive to cattle that might be browsing upon the commons. This would be luring such animals, by reason of their natural instincts, into places of danger; and if appellant did this, it would be negligent. If appellant permitted feed stuff to be placed upon its right-of-way in such manner as was calculated to attract cattle thereto, it would be liable for damages to the owner of animals that were injured by reason of such negligence. If appellant negligently permitted the fence inclosing its right-of-way to become so out of repair that cattle were injured thereby in attempting to reach feed stuff placed upon its right-of-way in proximity to the defective fence, the appellant would be liable in damages to the owner for such injuries. See *Jones* v. *Nichols,* 46 Ark. 207.

(4) Applying the above principles to the facts of this record, appellee, having the burden of proof, has failed to sustain the allegations of his complaint. There is no proof as to how long the defective condition in the fence had existed. There is nothing to show that the defective condition had existed for so long a time as to warrant the inference that appellant had notice of such defective condition and that it was therefore negligent in not having the same repaired before the alleged injury.

It was shown on behalf of appellant that the section foreman and the yardman, whose duties were to keep the fence in repair, did not know that the fence was out of

repair at that place until after the injury. They testified that people were continuously cutting the fence. For aught that appears to the contrary, the defective condition in the fence may have existed for so short a time that appellant, in the exercise of ordinary care, could not have repaired the same before the injury to the cow occurred. There is no proof on which to predicate a charge of negligence. Negligence under the circumstances would not be presumed but would have to be affirmatively shown.

For the error in not granting appellant's motion for a new trial, the judgment is reversed and the cause is dismissed.

BELL v. PHILLIPS.

Opinion delivered January 4, 1915.

1. IMPROVEMENT DISTRICTS—FORMATION—PETITION — DESCRIPTION. — The original petition for the formation of an improvement district will be held insufficient where it does not contain any description of the boundaries of the proposed district, and where it can not be ascertained from the petition what territory was included in the proposed district.
2. IMPROVEMENT DISTRICTS—ORDINANCE—VALIDITY— FORMATION.—Where the petition for the formation of an improvement district is insufficient because of an insufficient description of the property to be included in the district, the ordinance passed in pursuance of said petition can not be held to be in due form and legally passed.
3. IMPROVEMENT DISTRICTS—LOCAL IMPROVEMENT—SUFFICIENCY OF DESCRIPTION.—A petition for a local improvement asked that the "Public Square and that part of Center Street, Mountain Street, Block and East streets known as the Public Square and adjacent thereto be included in the improvement district. *Held*, the description was too uncertain and indefinite to be the foundation for an improvement district.
4. IMPROVEMENT DISTRICTS—INITIAL PETITION—VALIDITY.—The validity of the initial petition for the formation of an improvement district is jurisdictional, and when such petition is not in conformity with the law, the district can not be created.
5. IMPROVEMENT DISTRICTS—VALIDATING ACTS.—The legal effect of a legislative enactment seeking to cure defects in the formation of an improvement district is to cure all omissions prior to the pas-

sage of the act which might have been dispensed with by legislative act.

6. IMPROVEMENT DISTRICTS—INITIAL PETITION—RIGHT OF LEGISLATURE TO DISPENSE WITH.—In the formation of improvement districts, the Legislature might have dispensed with the requirement that an initial petition be signed by ten resident owners; and it is within the power of the Legislature to make valid any ordinance that would otherwise be void because of a failure to file the initiatory petition of ten in compliance with the statutes. Kirby's Digest, § § 5665-6.

7. LOCAL IMPROVEMENT DISTRICTS—PETITION OF MAJORITY.—Local improvements in cities and towns must be based upon the consent of a majority in value of the owners of real property in the improvement district proposed, under art. 19, § 27, Const. 1874, and this fundamental prerequisite can not be dispensed with in the first instance, or cured thereafter.

8. LOCAL IMPROVEMENT—FORMATION—CONSENT OF MAJORITY—VALIDATING ACT.—The failure to obtain the consent of a majority in value of the owners of real property in an improvement district designated in a city ordinance, renders the ordinance and all proceedings thereunder void, and the same can not be validated by legislative enactment.

Appeal from Washington Chancery Court; *L. H. McGill,* Special Chancellor; reversed.

STATEMENT BY THE COURT.

On December 5, 1912, there was presented to the city council of Fayetteville a petition signed by ten resident owners of real property within a proposed improvement district in the city of Fayetteville, praying for an improvement district. The petition described the property as follows: "Dickson street from the west line of the St. Louis & S. F. Ry. Co. right-of-way to the west line of College avenue, Block street from Dickson street, the Public Square, East street from Dickson street to the Public Square, and the Public Square (except the part thereof owned by the United States Government used as a postoffice site), and the parts of Center, Mountain, East and Block streets adjacent to the Public Square."

On December 9, 1912, the city council passed an ordinance, numbered 301, "in compliance with the request of the petition heretofore filed." After reciting the filing of the petition and setting out the description of the

property contained therein as the same was described in the petition, the ordinance creating the district described it as follows:

"Beginning at a point which is one hundred and fifteen feet east and twenty-five feet north of the southwest quarter of the northeast quarter of section sixteen, township sixteen north, range thirty west, and running thence north one hundred and ninety-five feet; thence east twenty-five hundred feet, more or less, to the west line of College avenue; thence south four hundred and five feet, more or less, to the southeast corner of lot A, block one, original town (now city) of Fayetteville; thence west two hundred feet, more or less, to the north line of Spring street; thence west eighty-one feet; thence south one hundred and fifteen feet, more or less, to the south line of Mountain street; thence west one hundred and twenty-five feet; thence south eighty feet; thence west eighty-five feet, more or less, to the west line of East street; thence south ninety feet to an alley; thence west two hundred and seventy feet, more or less, to the west line of Block street; thence south seventy feet to the southeast corner of lot four, block thirty-one, original town (now city) of Fayetteville; thence west one hundred and fifty feet to an alley; thence north sixteen hundred and eighty-five feet, more or less, to the southeast corner of lot two-A block three, original town (now city) of Fayetteville; thence west two hundred and five feet to the west line of Church street; thence south eighty feet, more or less, to the southeast corner of lot three-A, sub-division of block four, original town (now city) of Fayetteville; thence west three hundred and fifteen feet, more or less, to the southwest corner of lot four, in said block four, original town (now city) of Fayetteville; thence north fifty feet; thence west three hundred and sixty feet, more or less, to the southwest corner of lot six in block five, original town (now city) of Fayetteville; thence west four hundred feet to the west line of West street; thence north sixty feet; thence west two hundred and sixty feet, more or less, to the west line of the St. Louis & San Fran-

cisco Railroad Company's right-of-way; thence north to the place of beginning."

The ordinance designated the district as No. 1. At a meeting of the city council held on the 2d of January, 1913, there was presented a petition purporting to be signed by a majority in value of the owners of real property within the proposed improvement district referring to and reciting therein the same description as contained in the petition of ten and praying that the improvement provided for in Ordinance No. 301, District No. 1, be undertaken and that the cost thereof be assessed and charged upon the real property situated within the district. The council considered the petition and ascertained that it contained a majority in value of the owners of real property within the district and adjoining the locality to be affected, and, by its resolution, appointed a board of commissioners for the district who qualified and entered upon their duties.

On the 6th of February, 1913, the city council passed a resolution reciting that Ordinance No. 301, passed on the 9th of December, 1912, creating the improvement district "erroneously described parts and parcels of the lots and blocks of real estate to be improved in said improvement district," and for that reason declared that Ordinance No. 301, creating the improvement district and appointing the board of improvement, was null and void. The council, at the same meeting, passed another ordinance, numbered 304. This ordinance recited that it was based on the petition of ten resident property owners upon which Ordinance No. 301 had been passed, which erroneously described the proposed property embraced in the proposed district and for that reason had been declared void. The ordinance (No. 304) then described the property in the district, the same as it was described in Ordinance No. 301, except that in describing the boundaries of the district the beginning point was properly designated, and the property in the district otherwise laid off by a correct description. In other words, the boundaries of the district, in Ordinance No. 304, were

properly fixed and described. This ordinance designated the district as District No. 1, the same as it had been designated in the ordinance which had been previously declared void by the council; and the ordinance described the kind of material with which the streets were to be paved, and declared that all ordinances and parts of ordinances in conflict therewith were repealed, and that the ordinance take effect from the day that it was passed and approved, February 6, 1913.

The council also, on the same day, passed a resolution naming as the board of commissioners for the improvement district the same men that had been previously named.

The Legislature passed an act, approved March 6, 1913, which provided, "that the ordinance passed by the council of the city of Fayetteville on the 6th day of February, 1913, creating an improvement district and defining the boundaries thereof, be made valid and all acts and proceedings done or had, or to be done or had thereunder, be made legal." The act did not contain the emergency clause.

The board of improvement selected an engineer and duly contracted with him and he proceeded to make plans and specifications for the proposed improvement. The board advertised for sealed bids for paving the streets provided for by the ordinance according to the plans and specifications of the engineer. Thereafter certain property owners who became dissatisfied with the kind of material that was proposed to be used for paving the streets adopted a resolution in which they requested the commissioners "to take no further steps at this time or hereafter until directed by a majority in value of the property owners in the district or create any expense in the formation or completion of said district," * * * and requested the city council to "take no further steps in any matter pertaining to said district at this time or hereafter until requested or directed to do so by a majority of the assessed value of the property owners in the district."

Copies of this resolution were served upon the commissioners and the city council, in the forenoon of August 23, 1913. In the afternoon of the same day the board of improvement entered into a written contract with the Kaw Paving Company, of Topeka, Kansas, to make the improvement according to the specifications, which were attached. It was provided in the contract "that the company should not begin work nor demand payment nor be required to furnish bonds until notified by the board that financial arrangements had been completed whereby the company could be promptly paid."

Early in September, 1913, this suit was instituted by the appellants. They alleged that they were the owners of real property situated within the proposed district, and, among various other things, they alleged that Ordinance No. 304 was not petitioned for; that a majority in value of the real property to be affected by such improvement district did not ask for the improvement to be made; that the act of the Legislature was in no manner binding upon the property owners, and "did not make legal or valid illegal acts and proceedings of the city council; that the act did not take effect until June 4, 1913, and that since June 4, 1913, there had been no petition of the property owners asking the council to assess any benefits to the property situated in said proposed improvement district, and that more than three months had elapsed since the passage of the ordinance and the passage of the act of the Legislature.

The court, among other things, found that the original petition, on which ordinances Nos. 301 and 304 were based, was signed by as many as ten owners of real property within the proposed district, but that the same was insufficient because it did not contain any description of the boundaries of the proposed district, and it could not be ascertained therefrom what territory was intended to be included in the district; that Ordinance No. 301 was in due form and legally passed; that the boundaries of the district, as described therein, could be easily ascertained and distinguished by taking the description as a whole and rejecting the false description as to the beginning

point; that Ordinance No. 304 was founded on the original petition presented to the council on the 9th of December, 1912, and was in legal effect nothing more than Ordinance No. 301 amended; that is, that it amended the error in the description of the beginning point, which Ordinance No. 301 did not correctly set forth; that the act of March 6, 1913, was sufficient to make valid the creation of the improvement district created by Ordinance No. 301 as amended by Ordinance No. 304, and that the legal effect of the act was to cure all omissions prior to the passage of the act which might have been dispensed with by the legislative act, including the failure to describe the boundaries of the district in the original petition.

The court further found that the petition of the property owners presented to the council on January 2, 1913, was signed by a majority in value of the owners of real estate in the proposed district.

The court found that the plaintiffs were not entitled to the relief prayed for in their complaint and entered a decree dismissing the same for want of equity. This appeal has been duly prosecuted.

E. P. Watson, for appellants.

1. Ordinance 301 was void because the petition upon which it was based was a nullity at the time it was presented to the council. No intelligent action could be taken thereon because the description of the boundaries of the territory affected was so vague and indefinite that they could not be ascertained. Kirby's Dig., § 5665; 108 Ark. 144; 71 Ark. 556; 59 Ark. 344; 103 Ark. 269.

2. The petition introduced at the meeting of the city council on January 2, 1913, recites the petition filed December 9, 1912, and the same description as the petition of that date and the passage of Ordinance No. 301. It is necessarily void. It is void for the further reason that it does not specify the kind of material to be used, the cost of the improvement and the amount for which the owners are to be taxed. 103 Ark. 269; 81 Ark. 98; Kirby's Dig., § § 5667, 6717, 6987; 50 Ark. 126; 59 Ark. 344; 95 Ark. 575.

3. Ordinance No. 304, based upon the same petition as Ordinance No. 301, is void for the same reasons. The chancellor's findings that it is in legal effect nothing more than Ordinance No. 301 amended, is clearly erroneous. If intended as an ordinance amending Ordinance No. 301, it should have so stated in its title. Kirby's Dig., § 5481.

If Ordinance No. 301 is void, it can not be amended. 61 Ark. 238; *Id.* 622; 31 Ark. 701; 28 Cyc. 383; *Id.* 391.

4. The curative act of March 6, 1913, Acts 1913, p. 591, is not sufficient to validate these proceedings. If the Legislature can make valid a void ordinance which attempted to create an improvement district in a town or city, it can by act create a district therein, and we deny that it has any such power. The constitutional declaration that the General Assembly shall not be prohibited from authorizing assessments on real property for local improvements in towns and cities *under such regulations as may be prescribed by law,* Art. 19, § 27, Constitution, presupposes that the Legislature must first prescribe a method for the creation of such districts, and that the people who desire to tax themselves for such improvements must follow that regulation. 84 Ark. 390.

If it is jurisdictional that a proper petition of ten real property owners be filed before an ordinance can legally be passed, and the same is not done, the Legislature can not by act cure such fatal defect. It can only cure irregularities in the exercise of a power already legally possessed. Abbott on Mun. Corp., 945, § 387; 10 Am. & Eng. Enc. of L. (2 ed.) 299.

H. L. Pearson and *B. R. Davidson,* for appellees.

1. On the proposition that the boundaries in the petition were not sufficient: It was never contemplated by the statute, Kirby's Dig., § 5665, that the original petition should describe the boundaries with the particularity that the ordinance passed on the petition of ten should describe it. The second petition is required to be made by the property owners within the boundaries described in the ordinance, and includes those "adjoining the locality to be affected," and upon the presentation of

this petition the council is authorized to act and appoint the board. Kirby's Dig., § 5667.

The action of the council in determining the boundaries is conclusive except for fraud or demonstrable mistake. 56 Ark. 107.

In *Boles* v. *Kelly,* 90 Ark. 29-36, it was contended that the lines did not connect by one mile, but the validity of the district was upheld.

The purpose of the act is accomplished if it is sufficient to call the attention of the land owners. 103 Ark. 452-463.

2. Ordinance 301 was valid and Ordinance 304 was simply to correct a clerical error; if, however, Ordinance 301 was void, as contended by appellants, then the petition for that ordinance could be used for the passage of another ordinance.

3. Plaintiffs were estopped from calling in question the legality of the organization of the improvement district. They had signed the petition for the formation of the district, thereby representing that a majority in interest were petitioning; had allowed the board to incur great expense employing an engineer, causing surveys to be made; had allowed a contract to be made with the engineer, allowed advertisements to be made, and insisted on re-advertising. All attended meetings for the purpose of selecting material. They recognized the board in many ways, and stood by and let a party contract to do this work after having made a deposit of money for a long period of time. 50 Ark. 116-130-132; 2 Pomeroy, Equity, § § 801-804; 54 Ark. 491; 38 Ark. 572; 64 Ark. 628; 81 Ark. 143; *Id.* 208-220; 91 Ark. 141.

4. The act of the city council on December 9, 1912, correcting the description in Ordinance 301, said ordinance and that of February 6, 1913, were validated by the Acts of 1913, p. 591.

The first petition required to be presented is simply a matter of procedure. The Legisatlure had the right to do away with the petition entirely if it saw fit to do so. The second petition, requiring a majority in interest to sign, is, of course, jurisdictional under the Constitution.

WOOD, J., (after stating the facts). (1) The court correctly found that the original petition upon which ordinances 301 and 304 were based "was insufficient because it did not contain any description of the boundaries of the proposed district and because it could not be ascertained therefrom what territory was included in the proposed district."

In *Kraft* v. *Smothers,* 103 Ark. 269, 272, we said: "The foundation of the improvement was the petition of the owners of real property situated in the proposed district. Under the statute, the extent and character of the improvement as expressed in the ordinance must substantially comply with the terms of the petition upon which it is based."

And in the later case of *Smith* v. *Improvement Dist. No.* 14, 108 Ark. 141, 144, we said: "Our statutes require, as a prerequisite to the exercise of the authority conferred upon the city council, that a petition be first filed designating the boundaries of the district so that it may be easily distinguished. This is for the benefit of the property owners. * * * A special limited jurisdiction is conferred upon the city council to lay off the district as designated by the property owners in the first petition, and the council must conform strictly to the authority conferred upon it."

In *Board of Imp. Dist. No.* 60 v. *Cotter,* 71 Ark. 556-61, we held that "the filing of the required petition signed by ten resident property owners was mandatory and jurisdictional." See also *Whipple* v. *Tucksworth,* 81 Ark. 403; *Boles* v. *Kelly,* 90 Ark. 34.

(2-3) The court therefore erred in holding that Ordinance No. 301 "is in due form and was legally passed." There was no petition signed by ten property owners in the proposed improvement district, containing such a definite description of the property as to enable the city council to designate the boundaries of the local improvement district proposed so that it could be easily distinguished, as required by section 5665 of Kirby's Digest. The petition asked that the "public square and that part of Center Street, Mountain Street, Block and

East streets known as the Public Square and adjacent thereto" be included in an improvement district. This was too uncertain and indefinite in the way of description to be "foundation" for an improvement district.

(4) There was no initial petition, such as the statute contemplates, and which is jurisdictional for the creation of an improvement district, and ordinances 301 and 304 and the proceedings thereunder were, therefore, void, unless the same were cured by the act of March 6, 1913.

(5-6) The trial court was correct in declaring that the legal effect of the act "was to cure all omissions prior to the passage of the act which might have been dispensed with by legislative act," for this is a well established rule. *Cupp* v. *Welch,* 50 Ark. 294; *Sidway* v. *Lawson,* 58 Ark. 117; *Lanzer* v. *Butt,* 84 Ark. 335. Although the filing of the petition of the ten property owners was a prerequisite to the formation of the improvement district, as held in *Board of Improvement* v. *Cotter, supra,* yet this mandatory and jurisdictional requirement was prescribed, not by the Constitution, but by the act of the Legislature. The Legislature could have dispensed with this initial petition of ten resident owners in the first instance. There is nothing in the Constitution to inhibit the Legislature from providing for the creation of local improvements in cities and towns without such petition. Therefore, it was within the power of the Legislature to make valid any ordinances that would otherwise be void because of a failure to file the initiatory petition of ten in compliance with the statute. Kirby's Digest, § § 5665-6. And if Ordinance 304 was void when passed only because it was not based upon the petition of ten resident property owners, then the act of March 6, 1913, by curing that ordinance, validated the improvement district. But the record shows that the petition of a purported majority in value of the owners of real property in the district asking that the improvement be made contains the same vague and defective description as to the initiatory petition of ten. The petition of the purported majority prays that the improvement provided for by Ordinance 301 be made. But Ordinance 301

was void because it was based upon the insufficient petition of ten, and also because the description contained in the ordinance itself was fatally defective. Ordinance No. 304, of February 6, 1913, expressly declared that Ordinance No. 301 "erroneously described parts, lots and blocks of real estate," and that said Ordinance 301 and the board of improvement were null and void. Ordinance No. 304 then established the alleged improvement district and correctly described it by designating the boundaries thereof. But neither before nor since the passage of this ordinance (304) has there been presented to the city council of the city of Fayetteville a petition signed by a majority of the owners, in value, of the real property in the proposed district designated in Ordinance No. 304, praying for the improvement to be made in the proposed district as described in that ordinance. This was a constitutional, and therefore indispensable, requirement for the validity of the improvement provided for by Ordinance 304.

(7-8) Local improvements in cities and towns must be based upon the consent of a majority in value of the owners of real property in the improvement district proposed. Art. 19, § 27, Constitution of Arkansas. This fundamental prerequisite can not be dispensed with in the first instance, or cured thereafter. *Crane* v. *Siloam Springs,* 67 Ark. 30; *Craig* v. *Russellville Water Works Imp. Dist.,* 84 Ark. 390. The failure to obtain the consent of a majority in value of owners of real property in the improvement district designated in Ordinance 304 to the proposed improvement rendered that ordinance and all the proceedings thereunder void, and the appellants under the evidence in this record were not estopped from setting up the invalidity of the improvement district for the above reason. *Imp. Dist.* v. *St. Louis S. W. Ry Co.,* 99 Ark. 515, and authorities cited; *Craig* v. *Russellville Water Works Imp. Dist.,* 84 Ark. 390. See also, *Watkins* v. *Griffith,* 59 Ark. 360. See, also, *Lewis* v. *Rieff,* 114 Ark. 366, and *Harnwell* v. *White,* 115 Ark. 88, as to powers of improvement districts.

The decree of the chancery court is therefore erroneous, and it is reversed and the cause is remanded with directions to grant appellants the relief they ask.

PINE BLUFF & ARKANSAS RIVER RAILWAY COMPANY v. WASHINGTON.

Opinion delivered January 4, 1915.

1. MASTER AND SERVANT—TORTS OF SERVANT—LIABILITY OF MASTER—CORPORATION—EXEMPLARY DAMAGES.—A corporation may be held liable to exemplary or punitive damages for such acts done by its agents or servants acting within the scope of their employment as would, if done by an individual acting for himself, render him liable for such damages.
2. MASTER AND SERVANT—MALICIOUS TORTS OF SERVANT—LIABILITY—PUNITIVE DAMAGES.—Punitive damages may be awarded against a railway corporation for the wanton and malicious torts of its servants, although the corporation, aside from the conduct of its servants, may be entirely blameless.
3. DAMAGES—PERSONAL INJURIES—PERMANENT INJURY.—Plaintiff was injured by being shot by defendant railway company's servant. The evidence showed that she was confined to her room over a month, and seven months thereafter, at the date of the trial, she suffered great pain and could not raise her arm. *Held*, under the evidence the court was warranted in submitting to the jury the issue of a recovery by reason of pain and suffering endured, and to be endured in the future.
4. MASTER AND SERVANT—LIABILITY FOR SERVANT'S WILFUL TORT—EVIDENCE OF DISCHARGE.—In an action against a railway company for damages resulting from the wilful and malicious tort of its servant, it is not necessary for the plaintiff to prove that the railway company authorized the malicious act of the servant or ratified it, and therefore testimony as to when the railway company discharged the servant after the commission of the tort is immaterial.
5. DAMAGES—MALICIOUS TORT— COMPENSATORY DAMAGES.—Where plaintiff, a passenger on defendant's train, was suddenly and unexpectedly shot, by defendant's brakeman, her arm being broken, resulting in her suffering great pain, and depriving her of her ability to work, compensatory damages in the sum of three thousand dollars are not excessive.

6. DAMAGES—MALICIOUS TORT—PUNITIVE DAMAGES.—Under the above facts, punitive damages in the sum of two thousand dollars, held not to be excessive.

7. MASTER AND SERVANT—MALICIOUS TORT OF SERVANT—LIABILITY—DUTY TO ALL PASSENGERS.—A railway company will be liable to a passenger for punitive damages, when the passenger, a woman, was shot by defendant's servant, without reason or justification, although illicit relations had existed between the plaintiff and defendant's servant. Plaintiff had the same right to protection that any other passenger had.

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

STATEMENT BY THE COURT.

Tom Jackson, a brakeman for the Pine Bluff & Arkansas River Railway Company, shot Lizzie Washington with a pistol while she was riding in a passenger coach of the railway company. Lizzie Washington instituted this action against the railway company to recover damages therefor. She testified substantially as follows:

The Pine Bluff & Arkansas River Railway Company operated a train from Pine Bluff to Reydel. I lived at English. On the 22d day of December, 1913, I had been to Pine Bluff and was returning home in the afternoon as a passenger on the defendant's train. I had paid my fare and the conductor had taken up my ticket. Tom Jackson was the brakeman on the train and he came up to me and asked me to go to Reydel with him that night and stay with him. I told him I was not going with him any more and he said that "If I didn't do him no good I wouldn't do no other —— — — ——— no good." He then rushed out of the car and into the baggage car and came back and said: "Lizzie, I want you to go to Reydel with me." I told him my business was urgent and I couldn't do it. He then said, "You can go with me, you — — ——— — ——, or I am going to pay off with you." He immediately pulled his pistol out of his pocket and shot me. I was sitting down at the time and when I saw him draw his pistol I fell backward and threw up my hands. The pistol ball went through my arm and broke it.

The plaintiff admitted that she was ordinarily termed "the woman of Tom Jackson," and that she had told him she was going to quit him. She said that was why he shot her, and that he told her if she would not have him any more he would kill her.

Several other passengers detailed the shooting in substantially the same way that plaintiff did.

There was evidence tending to show that it was among the duties of brakeman Jackson to see to the comfort and safety of passengers riding in the coach in which he shot plaintiff.

Jackson testified in behalf of the railway company substantially as follows:

On the evening of the shooting a fellow was on the train cutting up and plaintiff sent for me to put him out. I got the man and carried him into the baggage car and I went back and asked the plaintiff if she didn't want to go to Reydel and spend the night with me. She replied that she had other business and I then said, "You are fixing never to walk with me any more." A little later I asked her why she had quit sending my breakfast to me and she replied that she had other business. I then said, "———— ———— your other business; you are always telling me that," and I went and got a pistol which Mr. Hammett had given me to carry to Pine Bluff to have repaired and came back where plaintiff was sitting and took the pistol out of my pocket and attempted to stick it in her muff, meaning for her to return it to Mr. Hammett. The pistol was discharged accidentally and I never had any intention of shooting her.

The jury returned a verdict in favor of the plaintiff for compensatory damages in the sum of $3,000; and for exemplary damages in the sum of $2,000. From the judgment rendered the defendant has duly prosecuted an appeal to this court.

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

1. A carrier is not liable in exemplary or punitive damages for the wanton and malicious assault on a passenger by its servant acting within the scope of his au-

thority, which it has in no way antecedently authorized or subsequently ratified. 147 U. S. 101, 106; 80 S. E. (Va.) 749, 751; 7 Ala. 622; 56 N. Y. 44, 47, 48; 63 Ark. 387, 393; The State Rights, Crabbe, 22, 47, 48; The Golden Gate, McAllister, 104; 7 Cal. 118; 13 La. Ann. 445; 16 Mich. 447; 69 Ill. 478, 481; 75 Ill. 167; 115 Ill. 331; 7 Ala. 622, 629; 69 Ala. 373, 379; 57 Wis. 570; 21 Vroom (N. J.) 481; 99 Pa. St. 63; 72; 1 Exch. 131, 140; 26 Upper Can. Q. B. 422; 13 Cyc. 114.

2. The rule has been stated that if the act was wanton and wilful, or with such gross want of care and regard for the rights of others as that malice may be presumed, the court will instruct the jury that they may find, in addition to a reasonable compensation for the injury, such sum in damages as the circumstances may justify. 42 Ark. 321, 328; 53 Ark. 7; 84 Ark. 241; 87 Ark. 123, 127. Testing the evidence by this rule, it is insufficient to sustain a verdict for punitive damages. There is lacking "that element of wilfulness or conscious indifference to consequences from which malice may be inferred." The shooting was plainly the result of a lovers' quarrel, a quarrel between a man and his paramour, taking place under the stress of undue excitement of passion, and appellee by her own conduct is equally responsible with the brakeman therefor. Nothing which might have been done by appellant would have prevented or tended to prevent the injury. When a passenger gives a carrier's employee cause for irritation, and his conduct is such as would in a measure excuse the acts of the employee, and is a natural result of the passenger's own conduct, punitive damages should not be awarded. 87 Ark. 123, 127; 41 Ark. 295, 299; 94 Wis. 549.

3. In charging the jury the court erred in failing to instruct them that, before appellee could recover, they must find that the brakeman was acting within the line of his employment at the time of the shooting or assault. 84 Ark. 193; 99 Ark. 233, 235; 103 Ark. 362, 366.

4. The exemplary damages awarded are excessive. Watson on Personal Injuries, § 714; *Id.* § 741; 24 Wis. 183, 187; 132 S. W. 503.

5. Appellant's reasons for discharging the brakeman constituted a fact which legitimately might have been considered by the jury in mitigation of punitive damages, and the court erred in excluding proof thereof. Watson on Pers. Injuries, § 737; 68 Me. 279; 8 W. & S. (Pa.) 189.

6. There was no evidence that the injury to appellee was of a permanent character. It was error, therefore, to instruct the jury that compensatory damages might be awarded where "the injury appears to be of a permanent, continuing character." 109 Ark. 29, 31; 106 Ark. 177; 163 S. W. 107.

7. The verdict both for actual and compensatory damages, is grossly excessive. 148 S. W. (Ark.) 261; 90 Ark. 107; 102 Ark. 499; 98 Ark. 425; 87 Ark. 109.

T. Havis Nixon and *Coleman & Gantt,* for appellee.

1. No antecedent authority nor subsequent ratification need be shown to hold a railroad company liable in punitive damages for the malicious acts of its agents, in this State. 7 Labatt, Master & Servant (2 ed.), § 2554, note 4; 57 Me, 202; 36 N. H. 9; 78 Ark. 553, 561; 42 Ark. 321; 56 Ark. 51; Watson, Pers. Injuries, § 730; *Id.* § 731; 147 U. S. 101; 3 Moore on Carriers (2 ed.), 1725, 1726; 82 Ark. 289.

2. The evidence is sufficient to sustain the verdict for punitive damages. The court's instructions to the effect that "if you find that the assault was wilful, wanton, malicious and without cause, then you may award to the plaintiff, in addition to actual and compensatory damages * * * such further sum, *commensurate with the wrong done,* as in your opinion the evidence will justify by way of punitive damages," contains all the elements which this court has said should be given in an instruction bearing on punitive damages. 87 Ark. 127. See also 83 Ark. 9; Watson Pers. Injuries, § 722; *Id.* § 719; 53 Ark. 53 Ark. 7; 59 Ark. 215.

3. In reply to appellant's objection that the court in its instruction should have told the jury that it was necessary for them to find that the brakeman was acting

within "the scope of his employment," etc., it is sufficient to say that its answer raised no such issue; that it raised only a general objection to the instruction; that there was no dispute in the evidence on this point, and that appellant offered no correct instruction covering the point. The brakeman's own testimony shows that it was his duty to go through the train, "with opportunities to come in personal contact with passengers," and that he had duties to perform with reference to their comfort and safety. 82 Ark. 289; 78 Ark. 553; 54 L. R. A. (Ala.) 752; Labatt, M. & S., § 2459; 103 Ark. 361, 367.

4. The exemplary damages awarded in the verdict are not excessive. 103 Ark. 369-370; 130 Ky. 759.

5. The court correctly excluded the testimony offered by appellant to show its reasons for discharging the brakeman. This court has repudiated the doctrine under authority of which appellant sought to introduce this testimony. *Supra,* div. 1. Moreover, appellant did not show what the witness would have testified had be been permitted to answer. 87 Ark. 123.

6. If the appellant desired to object to the use of the language "if the injury appears to be of a permanent, continuing character," on the ground that there was no evidence of a permanent injury, it should have called the court's attention to it by specific objection. 109 Ark. 569, 572.

7. The actual and compensatory damages awarded are not excessive. *Supra;* 38 L. R. A. 432; 65 Pac. 241.

HART, J., (after stating the facts). (1) It is earnestly insisted by counsel for the defendant railway company that a carrier is not liable for exemplary or punitive damages for a wanton and malicious assault upon a passenger by a servant acting within the scope of his authority which it has in no way antecedently authorized or subsequently ratified. There is a division of authorities on this question and counsel have cited a number of authorities to sustain their position, but we do not deem it necessary to discuss or review them for the reason that we have already decided adversely to their contention. This court has adopted what is usually called

the rule of general liability, which has been defined as follows: "A corporation may be held liable to exemplary or punitive damages for such acts done by its agents or servants acting within the scope of their employment as would if done by an individual acting for himself, render him liable for such damages. See case note to 48 L. R. A. (N. S.) page 38.

In the case of *Little Rock Railway & Electric Co.* v. *Dobbins,* 78 Ark. 553, the court held: "A corporation, as distinguished from an individual, is liable in punitive damages for the malicious acts of its agents, done within the scope of their employment, although such acts were not ratified by it."

In that case the allegations and proof on the part of the plaintiff were that a street car conductor maliciously and without provocation subjected one of defendant's passengers to humiliating insults and wrongfully caused him to be arrested and removed from the car in which he was riding.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Dowgiallo,* 82 Ark. 289, this court held: "A railroad company is liable for an assault upon a passenger committed by a brakeman having duties to perform with reference to the comfort and safety of passengers, even though in making such assault, the brakeman departed from his line of duty."

In that case, according to the testimony of the plaintiff, the brakeman on the train came into the car and cursed him and beat him over the head with a lantern. No provocation was given for the assault.

In the case of *St. Louis, I. M. & S. Ry. Co.* v *Robertson,* 103 Ark. 361, one Clint Ruff boarded a freight train which did not carry passengers and the conductor, in attempting to eject him from the train, shoved him from the train into a lake where he was drowned. The testimony on the part of appellee in that case tended to show that the conductor had a gun and that he acted in a malicious and wanton manner in ejecting Ruff from the

train. A recovery for punitive damages in the sum of $2,000 was sustained.

(2) It may, therefore, be taken as settled law in this State that punitive damages may be awarded against a railway corporation for the wanton and malicious torts of its servants, although the corporation, aside from the conduct of its servants, may be entirely blameless. The reason for adopting the rule was given in the cases above cited and the authorities on both sides of the question were there thoroughly discussed. Therefore no useful purpose could be served by again discussing the reasons for the rule.

Counsel for the defendant assigns as error the action of the court in giving the following instruction: "Compensatory damages are such sums as may be awarded as compensation for such physical pain and mental anguish as plaintiff may have sustained by reason of the injury, and for loss of time or diminished earning capacity; and, where the injury appears to be of a permanent, continuing character, for such pain and suffering as may be endured by reason thereof in the future."

The error complained of in this instruction is that the court submitted to the jury the question of the permanent injury of the plaintiff when there was no testimony that her injuries were permanent.

In the same connection, however, the court gave the following instruction: "If you further find from a preponderance of the evidence that she suffered physical pain and anguish by reason of such injury, and that she was deprived of the ability to work and earn money for a period of time, you should award her such sums as the evidence shows would be a fair and reasonable compensation for such physical and mental pain and diminished earning capacity."

(3) According to the record the appellee was shot by the brakeman on the 22d day of December, 1913. Her arm was broken by the shot and she was confined to her bed helpless for three weeks and was confined to her room for about two and one-half months after the shooting. The case was tried on the 27th day of April, 1914, and at

that time the plaintiff was not able to use her arm to any extent and still suffered pain from it. According to her testimony she could not raise her arm naturally and any motion of the arm hurt her. Under these circumstances the court was warranted in submitting to the jury the question as to how much she would be entitled to recover by reason of pain and suffering endured and to be endured in the future. It will be noted that in the part of the instruction complained of the court used the language, "of a permanent, continuing character." We do not think, when the instruction is construed as a whole, that it meant to tell the jury that it might find for the plaintiff for a permanent injury but only for such time as in the judgment of the jury, from the evidence, the plaintiff would suffer pain in the future. This is shown by the other instruction on the same subject which we have set out above.

If counsel for the defendant thought the instruction susceptible of the construction now placed upon it they should have made a specific objection to the instruction and doubtless the court would have changed the language so as to conform to that view. Not having made a specific objection, counsel for defendant are not now in an attitude to complain of the action of the court in giving the instruction.

(4) Counsel for the defendant also insists that the court erred in refusing to permit them to show when the brakeman was discharged by the railway company after the shooting. There was no error in this. The retention of a servant in one's employment after knowledge that his tortious conduct on the occasion in controversy was wilful and malicious would tend to prove ratification. But, as we have already seen, in this State, it is not necessary to prove that the railway company authorized the malicious act of the servant or ratified it, and on that account the testimony is immaterial.

(5) It is also insisted by counsel for the defendant that $3,000 for compensatory damages was excessive. We do not agree with them in that contention. The plaintiff was suddenly and unexpectedly shot by the brakeman of

the defendant on the 22d day of December, 1913, her arm was broken and she has suffered great pain therefrom. She was entirely helpless so that she could not move for three weeks, and was confined to her home two months and a half. At the time of the trial on the 27th of April, 1914, she was still suffering and said she had suffered from the time she was shot. She was unable to do any work, and could not raise her arm naturally at the time of the trial, and said that she could not even sweep with her injured arm. Prior to the time she was shot she had been earning ten to fifteen dollars a week sewing and dressing hair, but has been unable to follow her avocation since the shooting. Under these circumstances we can not say that the verdict for compensatory damages was excessive.

(6-7) The jury also returned a verdict for $2,000 punitive damages, and under all the circumstances detailed, we do not think the amount was excessive. The same amount was allowed in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Robertson, supra.* In that case the plaintiff was endeavoring to ride upon a freight train which did not carry passengers, and it was the duty of the conductor to eject him, but he did so in a wanton and malicious manner which resulted in the death of the person ejected. It is now contended by counsel for the defendant that in that case the conductor was acting directly in the line of his authority, and for that reason the amount recovered was held not excessive. We do not see any difference in principle in the two cases. Here it was the duty of the brakeman to look after the comfort and safety of the passengers and instead of doing this he wantonly and maliciously drew his pistol and shot the plaintiff. It is true that illicit relations had existed between the plaintiff and the brakeman, but this did not constitute any defense for shooting her. She had the right to the same protection at the hands of the railway company as any other passenger in the coach and the company, under the rule we have announced, is liable for the malicious act of its servant in shooting her.

It follows that the judgment will be affirmed.

CHAPMAN & DEWEY LAND COMPANY *v.* WOODRUFF.

Opinion delivered January 4, 1915.

1. MASTER AND SERVANT—INJURY TO SERVANT—DUTY TO WARN OF DANGER—CUSTOM OR AGREEMENT—QUESTION FOR JURY.—Plaintiff, an employee of defendant was engaged in notching trees to be cut down by other employees. He notched the trees on the side in which they were expected to fall, and was injured by the falling of a tree which had been sawed down by other employees. *Held*, if it was the custom of the sawyers to warn plaintiff, who was notching the trees, at the time a tree was ready to fall after being sawed, or if they agreed to do so, and in either event failed to give warning in time for plaintiff to have avoided the danger, the failure would constitute negligence for which the master would be liable, and whether the custom or agreement to give the warning existed, was a question for the jury.
2. PLEADINGS—ANSWER—PERSONAL INJURY ACTION—RIGHT TO AMEND—QUESTION OF FACT.—In an action against a corporation for damages due to personal injuries, the defendant filed an answer admitting that plaintiff was in its employ when injured. *Held*, it was not proper for defendant thereafter to seek to amend its answer, denying that plaintiff was in its employ when he was injured. It was defendant's duty to know when the action was brought whether plaintiff was in its employ, and it can not so amend in the absence of a showing that all the facts were not known to it at the time of making its original answer.

Appeal from Craighead Circuit Court, Jonesboro District; *J. F. Gautney*, Judge; affirmed.

STATEMENT BY THE COURT.

This is a suit for damages for personal injuries alleged to have been received by appellee on account of the negligence of some other servants of appellant company, with whom he was working in felling trees. Appellee notched the trees with an axe on the side in the direction the tree was expected to fall, and Lynne and Harbison were cutting the trees down with a cross-cut saw. They stood or knelt with their backs toward the notch and sawed from the opposite side. Appellee had notched this tree, which was twelve or fourteen inches in diameter and had gone on to another and cleaned the vines away from it, preparatory to notching it. The others sawed this tree through and it fell, making very little noise, and

struck the appellee who was near the other tree, injuring him severely, no warning having been given by the sawyers that the tree was about to fall. He was knocked down, his right leg broken below the hip, his shoulder sprained and a deep gash cut in his head and received other minor bruises and cuts. He was confined to his bed about eight weeks, suffering great pain and the crippled leg is now about an inch shorter than the other.

He alleges that it was the custom of the sawyers, and that they had agreed to warn him by hallooing "timber" or "look out," when the tree was sawed through and ready to fall, that defendant negligently failed to give him any warning on account of which he suffered the injury.

The answer admitted that appellee was employed by the appellant company and engaged in the felling of trees, it being his duty to notch them ahead of the sawyers; alleged that he was an experienced man, knew that the tree would fall in the direction that it was notched; that he had notched this tree, which was a small one, immediately before it was sawed down; knew the size and height of it and the direction it would fall, and it was his duty to protect himself from harm against the falling of it; that he assumed the risk of any danger therefrom and was guilty of contributory negligence in standing within the reach of it.

The injury occurred on January 21, 1911, and on February 10, 1914, appellant filed an amended answer containing the allegations of the original answer except that it denied that the appellee was employed by it at the time he was injured. This amended answer was stricken out upon the motion of the appellee, alleging that the complaint was filed on December 14, 1911, and the answer at the following term, that the complaint alleged that at the time of the injury appellee was in the employ of the defendant which allegation was admitted by the answer, and that the amended answer denied that appellee was in its employ, without stating by whom he was employed. The motion to strike, further alleged that if he was not employed by the Chapman & Dewey Land Company, ap-

pellant, he was employed by the Chapman & Dewey Lumber Company; that both corporations are owned by the same stockholders and had the same officers, the lumber company being engaged in the manufacture of lumber cut from the land owned by the land company, the title to the real estate being held by the land company and the timber manufactured by the lumber company, merely as a convenience. That appellee had been employed about a month prior to his injuries, his wages had been paid in cash, that he did not know by which of these companies he was employed, and that prior to the institution of the suit, the attorney for the land and lumber company informed his attorney that the land company, appellant, was his employer, and the proper defendant to the suit. That he relied upon this information and the admission of his employer in the answer, and had no intimation to the contrary until the filing of the amended answer of February 10, 1914, and that the statute of limitations had run in favor of the lumber company.

An affidavit of the manager of the lumber company, explaining the conditions under which the lands were held and the timber cut was filed with the amended answer, which stated also that the stockholders and the general officers of the two corporations were practically the same. The amended answer was stricken from the files over appellant's objection. Judgment was recovered against appellant company, a motion for a new trial was filed and as an amendment thereto an offer in writing of the Chapman & Dewey Lumber Company to stipulate with appellee that in the event that a new trial was granted herein and suit begun against it, it would not plead the statute of limitations against plaintiff's cause of action.

It appears from the testimony that appellee was twenty-four years old at the time of the injury, was engaged in cutting underbrush and notching trees with an axe to be sawed by Lynne and Harbison. He chopped a notch on one side of the tree, the way it was expected to fall, and it was sawed through from the other side, falling across the notch. That he knew when the tree was going to fall by Lynne and Harbison hallooing "timber"

or "look out," and that he would then get out of the way of the falling tree after being so warned. He stated, "I had no way of knowing when a tree was going to fall, except the signal, unless I would be watching; sometimes I would be behind a tree top from where they were working, and could not see the tree. I first learned that notice would be given when a tree was about to fall, from Lynne and Harbison; they said they would halloo; that was when I first began to work there, and they hallooed always. After I was hurt, Mr. Lynne came to my house while I was in bed, and told me the reason why they didn't halloo that time, was that they just neglected to do it, it being about quitting time."

Harbison testified that he was working with Lynne and Woodruff, appellee, sawing trees with a cross-cut saw; that Woodruff was cutting down the small brush and notching trees ahead of them. The brush was small, there was little to do, and they were sawing the trees down just about as fast as Woodruff could notch them, and "we had always been in the habit of notifying the boy when we had cut the trees so that they were ready to fall, but we failed to notify him in time to save him when this tree fell; when the tree started to fall, we just stepped back and looked around and saw the boy, and it was too late to save him then. The tree was right on him when we hallooed at him; we had been in the habit of notifying him when the trees were ready to fall and had done this every day. Woodruff was about forty-five feet from the tree, which was twelve or fourteen inches in diameter, and we did not halloo at him sooner because it was near quitting time, and we were tired and just neglected to notify him; both Lynne and myself told him at different times that we would halloo at him when the tree was going to fall; he did not know what tree was going to fall. The tree made very little noise when it started to fall; it did not pop, didn't crack any, and we would not have known it was falling if we had not been looking at it."

Lynne testified that he had never hallooed "timber" to the appellee when a tree was about to fall, nor had he ever promised to do so, and said it was appellee's busi-

ness to know the way the tree was going to fall, that as they began sawing it, he said to appellee, "You know which way it is going to fall; look out for yourself;" we sawed the tree, it started to fall and I took my axe and walked out of the way; Harbison had the saw and he said, "Why don't you get out of the way there before that tree will catch you?" I looked around and the tree was twelve or fourteen feet from him, and I said, "Why don't you get out of the way?" Neither Harbison nor I knew where appellee was at the time the tree fell; I didn't know which way he went, didn't know whether he was standing at the side of us, or had walked off. I said, "You can look out for yourself; you know which way the tree is going to fall." The tree was pretty nearly straight.

On cross examination he stated that he had told appellee to look out because he was standing in the way of the falling tree, and further: Q. Had you ever told him before that to look out? A. Oh, I told him several different times. Q. Well, have you done that when a tree began to fall, or when you commenced to saw a tree, or both? A. Well, I can't hardly answer that; when we would start to sawing, I would look up and see which way the tree would fall, and say, "Boys, you must look out for this tree."

The man Harbison who was sawing with me was careless, too. I don't think I hallooed "timber" at any time. I would always halloo "look out." I hallooed several different times. When I went to cut a tree, I would see where they were at. If they were out of the way, I would say nothing, and if they were in the way just before it got ready to fall, I would halloo, "Look out." Yes, I hallooed "Look out," but I never hallooed "timber."

I went to see Woodruff after he got hurt, but don't remember saying to him that he got hurt because we neglected to halloo "look out" as we ought to have done. I don't remember saying that, and I don't think I did it.

Another witness testified that Woodruff, after he was hurt, in a conversation at his home, told him that he notched a tree and walked off, and was not noticing which

way it was going to fall, and that it was through his own carelessness that he was not looking, that he made no complaint at the time about any one not giving him notice or warning about the tree going to fall. This witness was a payroll clerk of appellant company. The appellee and his mother both denied that any such conversation occurred.

The court instructed the jury, refusing appellee's requests numbered 3 and 4, as follows:

"3. The undisputed evidence shows that Woodruff participated in so cutting the tree by notching it that it would fall in the particular direction it did fall, and that he knew it would fall at or about the place it did fall. No notice of fact thus known to all of them was necessary. There was no duty, therefore, resting upon the sawyers to give notice or warning to Woodruff that the tree would soon fall, and failure to give such warning would not justify you in finding that they were negligent, unless they agreed to do so."

"4. Even if the sawyers knew the plaintiff was or had been standing where the falling tree would or might strike him they were entitled to assume that he would remove himself in time to avoid injury. They owed him no duty to warn him away and the failure, if any, to give such warning did not amount to negligence, unless they had agreed to do so, and had time to give the warning."

From the judgment appellant prosecutes this appeal.

Hughes & Hughes and *Hawthorne & Hawthorne,* for appellant.

1. The issue in this case was as to whether or not there was a promise made to warn the appellee when the tree was about to fall, and the instructions should have been confined to that issue. 87 Ark. 243; 90 Ark. 104; 80 Ark. 438; *Id.* 454; 82 Ark. 499; 88 Ark. 292; 76 Ark. 277.

2. Independent of some promise on the part of Harbison and Lynne to notify the plaintiff when the tree was about to fall, there was no duty on the defendant to warn him of danger. It was obvious, and he assumed it. 56 Ark. 271; 3 Labatt, M. & S. (2 ed.), § § 1113-1165; 2 L.

R. A. (N. S.) 840; 82 Pac. 1037; 13 N. W. 513; 133 Ala. 580; 31 So. 848; 41 N. E. 289; 167 Mass. 23; 44 N. E. 1055; 96 Ark. 500.

3. The court abused its discretion in refusing to permit the amended answer of appellant to be filed denying that it was the employer of the appellee, and in excluding testimony offered to prove that it was not his employer.

N. F. Lamb, for appellee.

1. Appellee's right to recover does not depend upon any agreement between himself and Lynne and Harbison. There is no evidence in the record that there was any agreement between these sawyers and appellant that they would warn him; but that there was a custom or habit on the part of the sawyers to warn him when a tree was about to fall is made clear by the evidence.

2. It was the duty of Lynne and Harbison to warn appellee when a tree was about to fall. A rule may be established by custom and become as certain and its observance as obligatory, when based upon uniform custom and habit, as if written or printed. The foreman in charge of the work was present practically all of the time, and actually assisting in the work part of the time. By reason of the uniformity of this custom to warn, and his almost continuous presence, it is certain that the foreman, and, through him, the master knew of the observance of the custom. This established the rule and the master became bound by it. 81 Ark. 591; 77 Ark. 290; 84 Ark. 383; 89 S. W. 29; 78 N. W. 190; Labatt, M. & S., § 213A; 25 Pac. 358.

3. The court did not err in striking appellant's amended answer from the files. 104 Ark. 276; 1 Enc. Pl. & Pr. 449; 31 Cyc. 422.

KIRBY, J., (after stating the facts). It is contended that the court erred in refusing said requested instructions and striking from the files the amended answer. Appellee relied upon the failure to observe the custom or practice and the agreement alleged to exist between him and his co-workers in the felling of the trees, to warn him,

that the tree being sawed was about to fall, in time for him to get out of its way as negligence authorizing him to recover for the injury, and in support of this adduced testimony tending to show that there was an agreement between them to this effect, and that it was the custom to give him the warning in accordance with the agreement. The proposed instructions told the jury that unless there was such an agreement on the part of his co-employees to warn him that the tree being sawed was about to fall, that there was no duty resting upon the sawyers to give him such notice and consequently no negligence authorizing a recovery from appellant for the injury to appellee. If there was no negligence chargeable to appellant company, there of course could be no recovery of damages from it by appellee for his injury. The negligence, carelessness or omission of duty of the other servants of appellant corporation, engaged in the work of cutting the timber with him was the negligence of the corporation, the appellee being in the exercise of due care at the time of the injury, under our statute. Section 1, Act 69, Acts 1907.

Appellee and the sawyers were engaged in cutting the timber, appellee notching the trees ahead of them, and but for their custom of notifying him or their agreement to do so, that the tree they were sawing was about to fall, that he might avoid the danger from it, owed him no duty to give such warning unless they discovered him in a position of peril in time to have given him the warning and enabled him to escape it. But for such agreement or custom he would have been expected to make his own place of work safe and avoid injury while performing it and would doubtless have done so.

It may be that the instructions given by the court upon appellee's request did not clearly and definitely submit this question to the jury, since no duty arose upon the part of the sawyers, or either of them, to notify appellee when the tree was about to fall, but for the custom of doing so or the agreement to do so, until after they discovered him to be in a position of peril. It is not questioned that they did not discover his perilous position until it was too late to save him from being struck by the

falling tree after the warning was given. It was given after such discovery, but not in time for him to avoid the danger.

(1) Said instructions asked by appellee were not correct statements of the law, however, and the court did not err in refusing to give them. If it was the custom of the sawyers to warn appellee who was notching the trees, at the time they were ready to fall after being sawed, or if they had agreed to do so, and in either event failed to give the warning, in time for him to avoid the danger, as the evidence tended to show, the failure would constitute negligence for which the master would be liable.

The instructions refused tell the jury that there was no duty resting upon the sawyers to give notice or warning to Woodruff that the tree would soon fall, and that a failure to give such warning did not amount to negligence and would not justify a finding in his favor, unless they had agreed to give the warning and failed to do so, leaving out of consideration the question of whether it was customary to give such warning.

(2) The court did not err in striking the amended answer from the files, denying that the appellee was its servant at the time of the injury, while its first answer admitted the fact of his employment. It would have changed entirely the issue, and it did not attempt to disclose which corporation was appellee's employer in the service in which he was engaged, nor was it proposed to be made until after a claim for damages against the other company which had not been sued, was barred by the statute of limitations if pleaded. Appellant knew, or should have known, at the time the suit was brought, whether or not appellee was in its employ, and no showing was made that all the facts relative thereto were not as well known to it at the time of making its original answer, as when the amended answer was filed. There was no abuse of discretion in striking it from the files. *American Bonding Co.* v. *Morris,* 104 Ark. 276.

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

TEDFORD v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Opinion delivered January 4, 1915.

1. CARRIERS—FREIGHT—DELIVERY—BILL OF LADING.—Where an automobile was shipped over defendant carrier's line to shipper's order, it is the duty of the carrier to retain possession of the automobile, and to deliver it only upon the surrender of the bill of lading given therefor.
2. CARRIERS—FREIGHT—ERRONEOUS DELIVERY—CAUSE OF ACTION ACCRUES WHEN.—Where a carrier's agent permitted freight to be taken from its possession without the surrender of the bill of lading, the carrier's cause of action to retake the goods or to bring suit for their loss, arose upon the date of their improper delivery by the agent.
3. LIMITATIONS—THREE YEAR STATUTE—BAR.—A carrier brought an action for damages against persons who obtained possession of freight without surrendering the bill of lading. Appellant was made a party defendant. *Held*, three years having elapsed between the time plaintiff's cause of action accrued, and the time appellant was made a party, that the action against appellant was barred.
4. LIMITATIONS—CONCEALMENT.—Where an action by a carrier against appellant for wrongfully obtaining possession of freight without surrendering the bill of lading, is barred by the three year statute of limitations; *held*, under the evidence it was not shown that appellant was guilty of any fraudulent concealment, which would affect the running of the statute.

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

STATEMENT BY THE COURT.

Appellant was engaged in the automobile business in Little Rock and on December 25, 1909, sold to appellee, H. O. Penrose, an Overland automobile, for $1,645.30, and on the 29th of the month, shipped the car at his request to Wheatley, Arkansas, over the Rock Island railroad, which issued a bill of lading showing it consigned to the order of shipper, Tedford Auto Company, notify H. O. Penrose. Appellant attached a draft for the price of the automobile to the bill of lading, deposited it in the Bank of Commerce in Little Rock and took credit therefor and the bank forwarded the draft

with bill of lading attached for collection, to appellee, Hunter State Bank, with instructions to surrender the bill of lading upon payment of the draft only. The Hunter bank returned the draft to the Bank of Commerce detached from the bill of lading. The railroad company transported the automobile to Wheatley and, without a surrender of the bill of lading, delivered it to H. O. Penrose. Shortly after, the Bank of Commerce demanded of the railroad company payment of the draft, producing the bill of lading which had been returned to it by the bank of Hunter and never surrendered to the railroad company. Thereupon the railroad company paid the draft, procured the bill of lading, demanded and finally recovered the automobile from Penrose, which had been damaged, and sold it back to Tedford Company for $1,050, and on the 30th of April, 1910, said railroad company brought this suit against the Hunter State Bank and Penrose for the sum of $690, the difference between the amount of the draft paid by the railroad company and the amount for which the recovered damaged automobile sold.

The complaint alleged that the defendants, Hunter State Bank and H. O. Penrose, wrongfully obtained from the railroad company at Wheatley, the automobile and appliances shipped of the value already stated and retained it in its possession until February 24, 1910, and damaged it in the sum of $624.50, and that defendants refused to surrender possession of the automobile after demand and plaintiff was required to expend the further sum of $67 in regaining possession thereof, judgment being prayed for the whole amount. On the 2d day of March, the Hunter State Bank answered denying that it obtained possession of the automobile wrongfully or at all and that it ever had or retained possession thereof and all the other allegations of the complaint. H. O. Penrose filed a separate answer on the same day, containing like denials.

On the 7th day of March, 1913, the Hunter State Bank and H. O. Penrose filed a joint answer and motion to make Tedford Auto Co. party defendant, alleging that

it was a corporation of the State, doing business in Little Rock, reciting the action to be for damages alleged to have been done to an automobile by the defendants while in their possession and stated that in January, 1911, the said auto company, without authority shipped the car to its own order at Wheatley over the line of the plaintiff railroad company and without authority drew a draft with a bill of lading attached, on Penrose, for the price of the automobile, and forwarded it to Hunter State Bank for collection; that upon receipt of the draft with bill of lading attached, said bank, under instructions from said auto company, returned the draft the said auto company agreeing to have the forwarding bank, the Bank of Commerce, at Little Rock, release the bill of lading; that it failed to have this done and the Hunter State Bank returned the bill of lading to the forwarding bank, and thereupon the Tedford Auto Company, or its agent, applied to the agent of the plaintiff railroad company at Wheatley and secured possession of the automobile without surrendering the bill of lading issued therefor. That the defendants or neither of them ever secured possession of the automobile shipped by the Tedford Auto Company, or ever had possession thereof, and alleged that the Tedford Auto Company, had possession of the automobile from the time it reached Wheatley until it was retaken by the railroad company. It alleged if there was damage to the automobile, it was done by the auto company, which was a necessary party to the suit, and prayed that process be issued and it be made so.

On April 23, 1914, appellant filed a separate answer, admitting that the Tedford Auto Company was now a corporation, but denied that it was, during December, 1909, and January, 1910, at the time the automobile was shipped, he being then sole owner; denied that the automobile was shipped without authority; admitted that it was shipped over the plaintiff's line of railroad to shipper's order, admitted the draft was forwarded, bill of lading attached, to the Hunter bank for collection; denied that the draft was ever returned by its order or

that it instructed either the Hunter State Bank, or Penrose, or any one else to return the draft or bill of lading; denied any agreement with the defendants, the plaintiff, and the forwarding bank to release the bill of lading; denied that it was ever returned to the forwarding bank, that it secured possession of the car from the railroad company without surrendering the bill of lading or that it had possession thereof at all after it was shipped from Little Rock, until it was returned to Little Rock. Alleged the car was sold to Penrose on the 30th of December, 1909, by W. L. Tedford, who was at the time the sole owner thereof and that at his request was shipped as already shown; that the draft with the bill of lading attached was forwarded by the Bank of Commerce for collection; alleged that Penrose was an officer and director in the collecting bank, and directed the bank to order the Wheatley bank, in which he was also a stockholder and director, to have the car released, saying he would take up the draft at a later date, that arrangements were made satisfactorily between Penrose, the Hunter State Bank and the Wheatley bank and the railroad company and the automobile was released without direction or knowledge of defendant, Tedford and without the surrender of the bill of lading; that the car was delivered to H. O. Penrose, who took possession of it and used it for some time; that he afterward repudiated his action in obtaining the automobile, declined to pay the draft, which was paid by said company, which brought suit against the Hunter State Bank and Penrose for the possession of the automobile and, after receiving it, sold it to reimburse itself for the money paid out.

On the 3d day of March, 1914, appellant filed an amendment to his answer, pleading the statute of limitations of three years.

It appears from the testimony that appellant, Tedford Company, sold the automobile to Penrose in December, 1909, and by his direction shipped the same to Wheatley, Arkansas, over the line of railroad of the appellee company, the bill of lading showing it consigned

to itself, notify H. O. Penrose. The seller drew a draft for the price of the automobile and the appliances forwarded, with the bill of lading attached, deposited it in the Bank of Commerce at Little Rock, which gave him credit for the amount and forwarded the draft, with the bill of lading attached, to the Hunter State Bank, of which Penrose, the purchaser of the automobile, was cashier, for collection. The draft was not paid and shortly returned to the forwarding bank, detached from the bill of lading. After some correspondence between the banks and H. O. Penrose, and the failure to answer some letters of the Bank of Commerce, the owner of the draft, a letter was finally addressed to the Hunter bank and the president thereof, H. O. Penrose's father, who denied the purchase of the automobile by H. O. Penrose, or any responsibility of the Hunter bank for the payment of the draft, and shortly thereafter the bill of lading was returned. The railroad company parted with the possession of the automobile without the surrender of the bill of lading and the evidence is in conflict as to whom it was delivered and by what authority, on the one hand tending strongly to show that it was released by order of H. O. Penrose, the cashier of the Hunter State Bank, to which the draft was forwarded for collection, and the purchaser of the car, the freight in fact being paid by the cashier of the Wheatley bank upon instructions from said Penrose.

There was testimony however, tending to show that the agent of the Tedford Company, appellant, unloaded the automobile and that it was stored at his direction, and he had been demonstrating it to Penrose, who was shown to have been riding about in it.

Tedford and his agent testified that this agent was down there only to instruct Penrose about the operation of the automobile, which the railroad company delivered to Penrose by his direction, and that the agent taught him how to operate it. The railroad company paid the draft, regained possession of the automobile at additional expense and sold it back to Tedford Company as already

set out. After the testimony was heard, the instructions given and the argument begun the railroad company on the 3d of March, 1914, obtained leave of the court to amend its complaint, alleging that if the other defendants were not liable, that the defandant Tedford Auto Company wrongfully took possession of the automobile and accessories, described in the complaint, and damaged it in the sum sued for and prayed an alternative judgment against said company therefor.

The jury found a verdict against appellant company in the sum sued for with interest from April 30, 1910, to date, and from the judgment this appeal is prosecuted.

James A. Comer, for appellant.

1. The suit is barred by the three years' statute of limitations. 60 Ark. 452; Kirby's Digest, § 5064; 66 Ark. 360; 69 *Id.* 311.

2. The railway company, by releasing the car without the payment of the draft, became liable for the draft. 89 Ark. 342.

3. The amendment was improperly allowed. 85 Ark. 39; 75 *Id.* 465; 59 *Id.* 165.

Thos. S. Buzbee, Jno. T. Hicks, for appellee.

1. The cause of action is not barred. 96 Ark. 446; 39 N. W. 529.

2. A fraudulent concealment of a cause of action prevents the running of the statute until the fraud is discovered. 92 Ark. 618; 85 *Id.* 584.

3. The amendment set up no new cause of action. Appellant was not misled. Kirby's Dig., § § 6140, 6146, 6145. The case was fairly submitted to the jury under proper instructions.

Comer & Clayton, for appellant in reply.

1. The burden was on plaintiff to show that the action was not barred. 70 Ark. 598. 69 *Id.* 311; 64 *Id.* 26; 53 *Id.* 96; 27 *Id.* 343.

2. The statute began to run December 31, 1909. The bar attached March 7, 1913, and there is no evidence of fraud or concealment. 71 Ark. 314; 68 Kan. 108; 74

Pac. 596; 144 Ill. 197; 33 N. E. 415; 13 Enc. Pl. & Pr. 236-7. Mere ignorance of the facts does not prevent the bar. 85 Ark. 584; 61 *Id.* 527, 545; 84 *Id.* 84, 91; 19 Am. & E. Enc. L. (2 ed.) 213-14. There must be concealment. 61 Ark. 527, 545.

KIRBY, J., (after stating the facts). Appellant contends that the court erred in giving instruction numbered 1, peremptory in effect, taking from the jury consideration of its plea of the statute of limitations, and we agree with the contention.

The railroad company brought suit against the Hunter State Bank and H. O. Penrose, for damages for the wrongful taking of the automobile on December 30, 1909, shipped over its line to Wheatley, Arkansas. This suit was begun on the 30th day of April, 1910, against the said appellees and appellant did not become a party thereto until after the filing of their joint answer on the 7th day of March, 1913, praying that it be made a party defendant.

Appellant answered on the 23d day of April, 1914, denying liability and by amendment on March 3, 1914, pleading the statute of limitations of three years against appellee's cause of action. The amendment of appellee's complaint, asking judgment in the alternative against appellant, was not made until after the hearing of the cause was begun on March 3, 1914.

(1-2) The railroad company had the right to the possession of the automobile shipped over its line to shipper's order, Wheatley, and it was its duty to retain and deliver it only upon the surrender of its bill of lading therefor. *Midland Valley Rd. Co.* v. *Fay & Egan,* 89 Ark. 342. Its agent permitted the taking of the automobile by appellant as the jury found, on December 30, 1910, and its cause of action arose thereupon. Having the right to the possession of the automobile, it could have retaken or brought suit therefor, any time after it was wrongfully received by appellant, its cause of action being then complete. *Rock Island Plow Co.* v. *Masterson,* 96 Ark. 446; *Bruil* v. *Northwestern Mutual Relief*

Assn., 39 N. W. (Wis.) 529; *Nashville, C. & St. L. Ry.* v. *Dale et al.*, 68 Kan. 108, 74 Pac. 596; *Pennsylvania Co.* v. *Chicago, M. & St. P. Ry. Co.*, 144 Ill. 197, 33 N. E. 415.

(3) The suit not having been commenced against appellant until after the filing of the joint answer of March 7, 1913, praying that it be made a party, was not commenced within three years after the cause of action accrued, December 30, 1909, the date of the wrongful taking of the automobile by appellant, and is barred by the statute of limitations. *Richardson* v. *Bales,* 66 Ark. 452.

(4) Neither appellant company, the consignor and consignee, in the bill of lading, nor H. O. Penrose, the alleged purchaser, who was to be notified of the arrival of the shipment, had the right to the possession of the automobile, the bill of lading having been transferred to the Bank of Commerce of Little Rock, and the railroad company being responsible for the shipment and liable for a failure to deliver in accordance with the terms of its contract and bill of lading, was bound to know to whom it was delivered. It does not allege any concealment of its cause of action by the appellant nor does the testimony show any such fraudulent concealment of the cause of action against appellant as would prevent the running of the statute. It shows at most only that the railroad company concluded that the automobile was received and taken by appellees and was uninformed of the taking or receipt of it by appellant, which is not sufficient to remove the bar of the statute. *Hibben* v. *Malone,* 85 Ark. 584; *McKneely* v. *Terry,* 61 Ark. 527.

It follows that the court erred in giving said instruction and since the undisputed testimony shows that more than three years elapsed after the railroad company's cause of action accrued before suit was commenced against appellant company, the court should have directed a verdict in its favor.

The judgment is therefore reversed and the cause dismissed.

DISSENTING OPINION.

McCULLOCH, C. J., and SMITH, J., dissenting. The evidence was sufficient to warrant a finding that the conduct of appellant amounted to concealment of the fact that delivery of the automobile was procured by its own agent without surrender of the bill of lading. The jury found that the automobile was in fact delivered by the carrier to appellant's agent, and the failure to disclose that fact, when the carrier was called on to pay damages on account of the alleged wrongful delivery, was a concealment. The assertion of the claim was equivalent, under the circumstances, to an affirmation that the delivery was wrongful, and since it is found by the jury that the representation was false, it amounts to a concealment of fact which prevented the statute of limitations from beginning to run until the discovery of the fraud. *Conditt* v. *Holden*, 92 Ark. 618.

The judgment should, we think, be affirmed.

LASER v. JONES.

Opinion delivered January 4, 1915.

1. TRESPASS—DESTROYING PROPERTY—TREBLE DAMAGES.—The right of action provided for in Kirby's Digest, § 7976, is not the common-law action for trespass upon real estate, but a statutory action is provided whereby the owner of shade trees and certain other property may recover as damages treble the value of such property against one who wilfully destroys it.
2. TRESPASS—DESTROYING SHADE TREES—DAMAGES—MALICE.—In an action brought under Kirby's Digest, § 7976, to recover damages for pulling up and destroying plaintiff's shade trees, on the matter of damages it is proper for the jury to consider the use which may be, and is, made of the trees, and if the trees add to the value of the land, while their destruction detracts from this value, then this difference in value is the measure of recovery, even against one who, without malice, destroys them; and if the trees are maliciously destroyed, the damages recoverable are treble this value.

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

STATEMENT BY THE COURT.

Appellee was the owner of certain lots in the city of Hot Springs, and sued to recover treble damages on account of certain shade trees growing thereon which were pulled up, and thereby destroyed, under the direction of appellant.

While there is a sharp conflict in the evidence as to all the questions of fact involved, the evidence is legally sufficient to support the finding by the jury that appellant violated the provision of section 7976 of Kirby's Digest, by causing the shade trees to be pulled up, and thereby destroyed.

The court gave, at appellee's request, the following instruction: "If the jury believe, from a preponderance of the evidence, that the defendant actually committed the trespass complained of, or encouraged, advised, or assisted in the commission of such trespass, and that the defendant had no probable cause to believe that the land on which the trespass is alleged to have been committed was his own, then you will find for the plaintiff and assess his damages at three times the value of the trees pulled up, injured and destroyed. You may consider the difference in value of the land with the trees standing on it and the value of the land with the trees pulled up, if any has been shown by the testimony, the purpose for which the owner intended to use the trees, and their reasonable value to him for such purpose, if any has been shown by the testimony."

This instruction was duly excepted to, and the action of the court in giving it presents the only important question in the case, although other exceptions were saved at the trial and are discussed in appellant's brief.

Appellee alleged the value of the trees to be $166.00, and recovered judgment for $300.00, the jury evidently having fixed the value of the trees, under the court's instruction, at $100, and while this verdict was probably contrary to the preponderance of the evidence, there was evidence legally sufficient to support it.

Appellant, pro se.

The case was tried upon the wrong theory and the court erred in its instruction on the measure of damages. The proper mode of proving damages for a trespass of the nature complained of here, where the trees are not of the character usually termed timber, but are ornamental shade trees merely, is the usual mode of proving trespass to real estate. It should be shown by proving what was the reasonable market value of the real estate immediately before the trespass was committed, and the reasonable value of it after the trespass, 57 Mich. 350; 151 N. Y. 623; 85 Ark. 208; 53 N. Y. 185.

Appellee, pro se.

The court's instruction on the measure of damages was favorable to the appellant. He and all his witnesses testified that the land was worth as much with the trees pulled up as it would be with the trees standing, and that there was no difference in the value of the land. Appellant will not be heard to complain of an instruction that was favorable to himself. 38 Cyc. 1155; 101 Ark. 34, 37. However, the court's charge was not erroneous. Kirby's Dig., § 7976; 29 Barb. (N. Y.) 9.

SMITH, J., (after stating the facts). This action was instituted under section 7976 of Kirby's Digest, and so much of that section as is relevant here, reads as follows: "If any person shall cut down, injure, destroy, or carry away, any tree placed or growing for use or shade, or any timber, rails or wood, standing, being or growing on the land of another person, * * * in which he has no interest or right, standing or being on any land not his own, or shall wilfully break the glass, or any part of it, in any building not his own, every person so trespassing shall pay the party injured treble the value of the thing so damaged, broken, destroyed, or carried away, with costs."

(1) It is evident that the action there provided for is not the common law action of trespass upon real estate. On the contrary, a statutory action is provided whereby the owner of the shade trees and certain other property

may recover as damages treble the value of such property, against one who wilfully destroys it.

The question for decision therefore is, What is the measure of damages against one who wilfully destroys shade trees growing and being on the lands of another?

In the case of *Fogel* v. *Butler*, 96 Ark. 87, it was said that the word, value, as here employed, meant market value. The term "market value" is one which has been defined, in its various applications, in many decisions. A number of these definitions are given in Words and Phrases, under that title, and among others so given are the following:

"In estimating the market value of property, all capabilities of the property and all uses to which it may be applied are to be considered. *Seaboard Air Line Ry.* v. *Chamblin,* 60 S. E. 727, 108 Va. 42."

"The 'market value of property' is its value for any use to which it may be adapted, and in estimating its value all the uses of which the property is susceptible should be considered, and not merely the condition in which it may be at the time and the use to which it may have been put by the owner. In re *Westlake Ave.,* 82 Pac. 279, 281, 40 Wash. 144 (quoting and adopting the definition in *Seattle & M. R. Co.* v. *Murphine,* 30 Pac. 720, 4 Wash. 448)."

The statute refers to "any tree placed or growing for use or shade," and this language indicates the intention of the Legislature to permit the jury to consider the use to which any tree was adapted in assessing the damages for its destruction.

It is a matter of common knowledge that there are many trees which have but little value, except for shade; yet such trees would add greatly to the value of any property where shade was desired.

(2) It is, therefore, proper to consider the use which may be, and is, made of the tree, and if the tree adds to the value of the land, while its destruction detracts from its value, then this difference in value is the measure of the recovery, even against one who, without

malice, destroys it. But if the tree was maliciously destroyed, the damages recoverable are treble this value.

The instruction of the court was, therefore, correct and the judgment is affirmed.

McCULLOCH, C. J., and HART, J., dissent.

DISSENTING OPINION.

HART, J. In cases like this the plaintiff may bring his suit for destroying trees under section 7976 of Kirby's Digest and in such action recover the value of the trees, not as a part of the realty, but their intrinsic value as detached and separate therefrom, and proved in the usual mode of proving value. Or, he may bring his action for the injury to his real estate and recover its diminution in value. Each action has its appropriate rule of damages. See *Cleveland School District* v. *Great Northern Ry. Co.* (North Dakota), 126 N. W. 995, 28 L. R. A. (N. S.) 757, and case note. In that case the court said:

"Although the authorities are not uniform, the true rule is believed to be that, where property attached to realty is destroyed by fire, the plaintiff may, at his election, seek to recover its value in its detached form, or as part of the realty, in which latter event the measure would be the difference in the value of the realty before and after the fire. 13 Am. & Eng. Enc. Law, p. 540, and cases cited. The measure of damages for the destruction of fruit, shade, ornamental, or growing trees or shrubbery is the difference between the value of the land before and after they were destroyed. (Citing many authorities). In *Dwight* v. *Elmira, C. & N. R. Co.,* 132 N. Y. 199, 15 L. R. A. 612, 28 Am. St. Rep. 563, 30 N. E. 398, the court says: 'A party may be content to accept the market value of the thing taken, when he is also entitled to recover for the injury done to the freehold. But if he asserts his right to go beyond the value of thing taken or destroyed, after severance from the freehold, so as to secure compensation for the damages done to his land because of it, then the measure of damages is the differ-

ence in the value of the land before and after the injury.' ''

To the same effect see *Bailey* v. *Chicago, M. & St. P. R. Co.,* 19 L. R. A. 653, where the court held that where trees, either growing or mature, are destroyed by the wrongful act of another, the owner may bring his action either for the value of the trees so destroyed, or for the injury to the real estate or his interest in it. The court further held that if the plaintiff bring the former action the proper measure of damages is the market value of the trees destroyed independent of the real estate; if he bring the latter action the measure of damages is the diminished value of the real estate.

I think the rule above announced is in accord with the principles of law announced in the case of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Ayres,* 67 Ark. 371. There the court said:

''As to the measure of damages for the destruction of the trees on the land by reason of the fire, we think the fifth instruction by the court announced the proper measure; that is, that the measure was the difference between the value of the land with the trees unburned and with the trees burned. This means the market value of the land. The trees were a part of the freehold, and could not be replaced in a short time, and only at considerable expense. *Coykendall* v. *Durkee,* 13 Hun. 260. The destruction of the trees was a depreciation in the value of the land of which they were a part, and it was competent to show by evidence what the land was worth before the destruction of the trees, and what it was worth after they were destroyed; and, this being shown, the *quantum* of damage was a matter of computation for the jury. 3 Sutherland on Damages, 612; *Coykendall* v. *Durkee,* 13 Hun. 260; *Railway Company* v. *Combs,* 51 Ark. 324.''

So, too, in *Fogel* v. *Butler,* 96 Ark. 87, which was an action under section 7976 *et seq.* of Kirby's Digest, we said that ''value'' meant market value. An examination of the facts of that case shows that the court meant

the value of the timber cut after severance from the land. It is obvious that shade trees have no value as shade trees after they are cut down.

It follows if these principles of law are correct that the instruction given by the trial court and quoted in the opinion in this case is wrong.

The Chief Justice concurs in these views.

ENGLISH v. SHELBY.

Opinion delivered January 4, 1915.

1. CONTRACTS—CONSTRUCTION—REPUGNANT CLAUSES.—If, in a contract, there is repugnancy between general clauses and more detailed specific clauses, the latter will govern.
2. CONTRACTS—CONSTRUCTION—GENERAL AND SPECIAL PROVISIONS—INTENTION.—Special provisions in a contract will not be permitted to annul general provisions therein, where both can stand together, and where the intention of the parties appears to be that they should so stand.
3. CONTRACTS—CONSTRUCTION—CONTEMPORANEOUS AGREEMENTS.—In the construction of any instrument, where doubt arises as to its meaning, the court may consider the contemporaneous agreements of the parties with respect to the subject-matter.
4. LOCAL IMPROVEMENT—STREET IMPROVEMENT DISTRICT—GUARANTY.—A contract made with a contractor by the board of improvement of a street improvement district, guaranteeing that no repairs would be needed within five years from the completion of the work, and a bond to that effect was given by the contractor; *held*, under the evidence, the bond was a guarantee that the street should remain in perfect condition for the period of five years, and that no repairs would be required within that time.
5. SURETYSHIP—LIABILITY OF PRINCIPAL.—The liability of the sureties on the bond of a contractor under a contract to pave a city street is dependant upon the liability of their principal, the contractor.

Appeal from Pulaski Circuit Court, Third Division; *G. W. Hendricks*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee Shelby entered into a contract, whereby he undertook to build a street according to plans and specifications furnished by the Board of Commissioners of Street Improvement District No. 135 of the city of

Little Rock, and its engineer, E. A. Kingsley. This contract provided that the engineer appointed by the board should be arbitrator between the contracting parties, and should decide all disputes "involving the character of the work, the compensation to be made therefor, or any other question arising under the contract;" and that the engineer should "have the option of making any changes in the line, grade, plan, form, position, dimensions, or material for the work contemplated, either before or after construction is begun, and all other explanations or directions necessary for carrying out or completing satisfactorily the different descriptions of work contemplated and provided for in this contract and specifications."

The contract for the construction of the streets was dated June 9, 1909, and provided that the streets were "all to be built in a good, firm and substantial manner, as shown by plans and specifications prepared by E. A. Kingsley, engineer, and now on file in his office, said plans and specifications being hereby made a part of this contract the same as if copied herein at length; * * * the work to be done in every respect according to plans and specifications, and to be guaranteed by the party of the second part for a period of five (5) years; and the party of the second part hereby agrees that he will furnish a bond of good and sufficient security, to be approved by the party of the first part, for his due performance of this contract, such bond to be in the sum of one hundred thousand dollars ($100,000), and to be covenanted that party of the second part shall in all respects perform this contract.

"Party of the second part further undertakes and agrees that the plan of said work, the composition of the materials specified, and the character in which it will be done by him, are such that no repairs of any kind will be required on any portion of said street, or any of said work for a period of five (5) years from its completion. And it is hereby guaranteed that said street, when completed will remain in perfect repair for a period of five (5) years. If any repairs are needed from any cause

during this period, they shall be done and paid for according to the provisions and specifications, and party of the second part agrees to furnish a good and sufficient bond, to the satisfaction of the party of the first part, on the condition that said street will remain in perfect repair for the said period of five (5) years."

The street was finished in accordance with the contract, and the work was approved by the engineer and accepted by the board, whereupon, in accordance with this original contract, appellee Shelby executed what was known as a "maintenance" bond, dated January 26, 1910. This maintenance bond contained the following guaranty.

"The work shall be done in such a substantial manner that no repairs will be required for a period of five (5) years. Should repairs become necessary, however, during any such period, then the contractor will be required to make good any damage to the work, or any defect in the workmanship, materials or condition of the work which may have occurred during said period, and which made such repairs necessary. The guarantee period shall date from the time of final acceptance of the work by the board. Said contractor shall keep said work in good repair during the time of the guarantee period, and shall make all repairs at such time as directed by the board or city engineer of the city of Little Rock. It shall be the duty of said contractor to notify the board, or, if it has turned the improvement over to the city of Little Rock, then to said city, in writing, at least thirty (30) days prior to the expiration of said guarantee period, to inspect the work, and unless the contractor shall furnish said notice, the obligation to maintain the said work in proper condition shall continue in force until such notice shall have been furnished, and for thirty (30) days thereafter, and until such time as the contractor shall place said work in proper condition, if notified to do so within the thirty (30) days' period. It is understood and agreed that this guarantee shall cover all repairs growing out of the imperfection or unsuitability of material or

composition, all defects in workmanship, and shall cover all other excessive deterioration, more especially described, as follows: Any holes or cracks in the pavement, and any defects resulting from the deterioration of the wearing surface or foundation. The pavement, at the expiration of the guarantee period, shall be in good condition, present a surface so true and even that it will in no way be an obstruction to travel, and have a drainage so perfect that water may collect in no place to a depth of more than one-quarter of an inch. The determination of the necessity for repairs shall rest entirely with the board, or, after it has turned the street over to the city of Little Rock, with the city engineer of said city, whose decision upon the matter shall be final and obligatory upon the contractor; and the guarantee herein stipulated shall extend to the whole body of the improvement, and all its appurtenances, and the repairs required under it may extend to a total reconstruction of the whole body of the improvement, if, in the judgment of the board, or of such city engineer after the board has turned the street over to the city, such total reconstruction shall become necessary, by reason of any defects in the original materials or construction."

It is undisputed that repairs to the street became necessary, the cost of which was admitted to be $3,859.73, and the contractor was called upon to make them, and having declined to do so he was sued, together with his sureties, for the cost thereof.

Appellees contend that, under the terms of the maintenance bond, they were only bound to make repairs that were caused by the fault of the contractor in using defective material, or doing defective work, and that the bond was not liable for any repairs not due to those causes. The contractor further contended that, after the acceptance of the work, he had been required by the commissioners, to make certain repairs, and that he had done so under protest and at a cost to himself of $2,320, and he prayed judgment for this sum. The contractor further contended that the repairs which he made, as well

as those he was called upon to make, were all rendered necessary by the defective foundation, and that this foundation was put in under the supervision and with the approval of the engineer employed by the district, and that a proper foundation would have been constructed had it been required and paid for. The contractor testified that he had never before built, nor had he ever seen a street built, with a foundation like that used in this district, and that the trouble resulted from the use of plans which permitted this foundation, and not from any defective material or workmanship.

The city and the commissioners of the district contended that the object and terms of the bond were to secure a street that would last at least five years, and that if repairs were needed within that time the principal and surety in the bond would make them. The proof on the part of the appellants was to the effect that the street had not been turned over to the city and that this was never done until the maintenance bond had expired.

It was admitted that the sureties signed the bond for a money consideration, and not for accommodation, and it is not contended that there was any disagreement between the engineer of the improvement district and appellee as to the method of building the street.

The cause was submitted to the court sitting as a jury, and the bond was construed as contended for by appellee, *i. e.*, that the contractor and his sureties were liable only for repairs made necessary by defective workmanship or material. The court made findings of fact to the following effect:

1. That the plans were prepared by the commissioners and were executed by the contractor, the work being supervised by the district's engineer and was accepted as having been performed as required by the contract.

2. That the contractor had made all repairs for which he was liable.

3. That the necessity for repairs resulted from the fact that the street was laid in part on a natural

foundation, when the board, under its contract had a right to require it laid on a concrete foundation.

4. The court found the cost of these repairs would be $3,599.73.

The court further found that such repairs as the contractor made had been voluntarily made and refused to allow him anything therefor.

The court was asked to declare the law as follows:

"11. Under the bond that is the basis of this suit, defendants are obligated to make the repairs at the time and in the manner described in said bond without regard to whether the necessity for said repairs was occasioned by poor material and workmanship on the part of the contractor, Shelby, or by faulty plans for the construction of said pavement prepared by the engineer, the obligation of the parties in said bond being absolute that they will make all repairs in said street, whether the necessity for said repairs was occasioned by faulty construction on the part of the contractor, or by faulty plans on the part of the district."

The court refused to make this declaration of law, but declared the law to be that there was no liability against appellees for the cost of the repairs, and judgment was rendered accordingly, and both sides have appealed.

Rose, Hemingway, Cantrell, Loughborough & Miles, for appellants.

1. The bond bound the contractor to maintain the pavement in good condition for five years and to make all necessary repairs to correct bad conditions, whether caused by faulty work or faulty plans. 89 Ark. 95; 35 S. W. 1125; 52 Pac. 28; 103 S. W. 93-100; 38 *Id.* 458-463; 171 Fed. 29, 35-6-7; 101 N. E. 162-3; 45 N. E. 1097-1099; Jones on Const. of Trade Contracts, § 220; 58 N. H. 401; 17 A. & E. Enc. L., p. 25, § 14; 62 Ark. 595.

2. The construction contract defines the conditions of the bond to be given, in accordance with our contention and when read with it removes all doubt and demonstrates the error of the judgment. The guaranty was

intended to mean what the contractor intended it should mean. 171 Fed. 29. The two instruments should be construed together as a whole. 9 Cyc. 580 (6); Lawson on Contracts, § 397; 45 Ark. 17-28; 9 Cyc. 582 (7); 79 Pac. 1095; 171 Fed. 38; 52 Pac. 28.

3. The bond should be interpreted according to the natural import of its language and not so as to favor the surety. 16 Pet. 528-537; 163 Fed. 690-5.

S. L. White and *Coleman & Lewis,* for appellees.

1. All the repairs necessary were due to the failure of the board and its engineer in furnishing insufficient plans and specifications—a failure on their part to put in a concrete foundation. The contractor was only bound for repairs of defects caused by use of bad material or bad workmanship, due to his fault. 107 S. W. 244; 97 *Id.* 1; 58 Pac. 474; 54 N. E. 661, citing fourteen cases in point.

SMITH, J., (after stating the facts). (1-2) There is but little conflict in the evidence, and it is agreed that the decision of this case turns upon the interpretation given the bond sued upon. Various rules of construction are called to our attention to enable us to discharge this duty. Appellee, of course, concedes that the first sentence of the guarantee would impose an absolute liability, if it stood alone; but it is said that the effect of the subsequent recitals of the guaranty is to limit this liability, and to make that liability contingent upon these subsequent recitals. It is a rule of construction that, if there is a repugnancy between general clauses and more detailed, specific clauses, the latter will govern. But this, like all rules of construction, is intended to aid in the ascertainment of the intention of the parties to the instrument construed. And this meaning is to be derived from a consideration of the whole instrument. However, we find here no such conflict between the opening sentence of this guaranty and the remaining recitals thereof, as requires us to give the words there employed any other than their ordinary meaning. The guaranty is first expressed in general terms and afterward with

more detail and particularity, but no actual conflict or repugnancy of recitals appears, and special provisions will not be permitted to annul general provisions, where both can stand together, and the intention of the parties appears to be that they should so stand.

(3) In the construction of any instrument, where doubt arises as to its meaning, we may consider the contemporaneous agreements of the parties with respect to the same subject-matter, and when that is done in the instant case, we find that the bond sued on was executed in compliance with the contract under which the improvement was constructed. The material part of that contract is set out in the statement of facts, and there appears to be no doubt as to the character of the bond then contemplated. The language there employed appears to be susceptible of only one construction. And if, in fact, such a bond was executed, as that contract required, then we may be assured of the proper construction to give it. There was no other purpose in executing this bond. When the work was completed there was no controversy about its having been done as required by the plans, and there is no such controversy now, and if this bond is to be given a construction which makes its execution of value to the district, we must hold that it intended to guarantee the work against the necessity for repairs for a period of five years.

The trouble with the street was that holes and cracks appeared in it and there was a wearing away of its surface, and its foundation was defective. These defects appear to be covered by the terms of the guaranty.

Appellees insist that no liability should be imposed upon the contractor because the foundation used was approved by the engineer. The foundation was, indeed, thus approved; but it was within the terms of the contract and was used without protest on the part of any one. Thereafter the bond sued on was executed, in evident compliance with the construction contract, and no question was made that a foundation had been employed

which would impose a burden the contractor had not agreed to assume.

(4) We think the proper construction of the bond sued on was that it was a guarantee that the street should remain in perfect condition for a period of five years, and that no repairs would be required within that time.

(5) The sureties in this case became such for a money consideration, and their liability is dependent upon the liability of their principal.

It follows, therefore, that the court properly refused to render judgment in favor of appellees for the repairs made by the contractor, and the judgment of the court, dismissing appellants' cause of action for the cost of the repairs which the contractor refused to make, is reversed, and as the cost thereof is undisputed, judgment will be rendered here for that amount.

HASTINGS v. UNITED STATES FIDELITY & GUARANTY COMPANY.

Opinion delivered January 11, 1915.

1. PLEADINGS—AMENDED COMPLAINT—SERVICE OF SUMMONS—NEW PARTIES.—A general demurrer to plaintiff's complaint being sustained, plaintiff filed what was termed an amended complaint, naming appellee and others as defendants. *Held*, a summons being issued upon this complaint against appellee, it was in effect the beginning of a new suit, the plaintiff having the right to join all the parties as defendants, against whom a cause of action could be alleged.
2. APPEAL—STRIKING OUT COMPLAINT—TRIAL—JUDGMENT.—The order of court in striking out appellant's amended complaint, which was in effect a dismissal of appellant's cause of action against appellee, *held*, to be a final judgment from which an appeal may be prosecuted.
3. INSANE PERSON—APPOINTMENT OF GUARDIAN—PROBATE COURT—ACT OF CLERK.—The probate court only has the power to appoint a guardian of an adult insane person, and the clerk's issuance of letters of guardianship without an order and adjudication of said court is without authority and void.
4. INSANE PERSON—GUARDIAN—VOID APPOINTMENT.—Where the appointment of a guardian of an insane person is void, the probate court acquires no jurisdiction of the person or estate of said insane per-

son, and the orders thereof approving and confirming the purported settlements of such guardian are void.

5. GUARDIANSHIP—INSANE PERSON—VOID APPOINTMENT—LEGAL RESPONSIBILITY.—Where the appointment of a guardian for an insane person is void, he may be treated in a court of equity as an equitable guardian and held legally to account for the property coming into his hands.

6. GUARDIAN'S BOND—INVALID APPOINTMENT—LIABILITY OF SURETY.—The surety on the bond of the guardian of an insane person who goes voluntarily on the bond, and induced the delivery of the property of the insane person to the guardian, will be liable on the same, although the appointment of the guardian is held to be void.

Appeal from Benton Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

STATEMENT BY THE COURT.

R. T. Hastings and three other of appellants, brought suit for an accounting against J. C. January as guardian and curator of Sarah E. January, their relative, alleging his failure to account for certain of her estate that came into his hands by reason of his appointment as guardian. A demurrer to the complaint was sustained and appellants on August 21, 1913, joining all the other heirs but one, of Sarah E. January, deceased, as plaintiffs, filed their amended complaint against said January, the appellee bonding company, and Sopha Gadberry, the other heir, defendants.

The complaint alleged that the plaintiffs and Sopha Gadberry, defendant, are the sole heirs at law of Elizabeth January, the same person named as Sarah E. January, who died intestate, May, 1911. That in March, 1906, the defendant, J. C. January, applied to the clerk of the probate court of Benton County for appointment as guardian and curator of the person and estate of said Elizabeth January, as a person of unsound mind. That said J. C. January as principal and the United States Fidelity and Guaranty Company as surety, entered into a bond to the State of Arkansas for the use of said deceased in the sum of $4,000, conditioned that the said J. C. January would well and faithfully perform and dis-

charge his duties as such trustee. A copy of the bond as follows was set out:

"GUARDIAN AND CURATOR'S BOND.

"Know all men by these presents: That we, J. C. January, as principal, and the United States Fidelity & Guaranty Company, as surety, bind ourselves, our heirs, etc., to pay to the State of Arkansas for the use of Sarah E. January, the sum of $4,000.

"But upon condition, that whereas, the said J. C. January has been appointed by the probate court as guardian and curator of the person and estate of Sarah E. January, a person of impaired mind.

"Now if the said J. C. January shall well and faithfully discharge his duties as such guardian and curator according to law, then this obligation to be void, otherwise to be and remain in full force and effect.

"Witness our hands this 16th day of February, 1906.

"J. C. January,
"United States Fidelity & Guaranty Co.
"By W. A. Burks, General Agent."

It was further alleged that said January took charge of the person and estate of said Elizabeth January and collected and received various sums of money, specifying them, including those set out in the first complaint. That the defendant, January, was appointed guardian and curator by the clerk of the probate court, who issued letters of guardianship to him without authority of law or direction of the court, and that said January filed several semi-annual settlements in the probate court, charging himself with certain sums received, including a part of the matters set out in the complaint and asking credit for divers sums against said Elizabeth January, all of which settlements and credits were confirmed by orders of the probate court, without authority of law. That the orders of confirmation were null and void, for the reason that said Elizabeth January was over the age of fifty years at all times aforesaid and had never been adjudged insane by the probate court or any other court or tribu-

nal. That during all the time from March 1, 1906, up to the death of Elizabeth January, the defendant, J. C. January, had full control and management of both her person and estate and kept and maintained her at his home as a member of the family; that the sum of $20 per month was a fair compensation for such maintenance and support; that he had the possession and custody of all her property and funds since receiving the same, and failed to turn over the same to the plaintiffs or any one else for their benefit or to any other person authorized to accept or hold same for the benefit of her estate.

That by reason of the execution of the bond aforesaid, the relatives and heirs of Elizabeth January permitted the defendant, J. C. January, to take full charge, management and control of her person and estate. Prayer that J. C. January be required to fully account for all moneys and property received by him for said Elizabeth January, and, after being allowed a reasonable compensation for her care and support, that they have judgment against him and the appellant bonding company as surety for the remainder thereof.

A summons was issued upon the amended complaint for appellee company and duly served upon it on the same day, August 21, 1913. On the 26th of November, 1913, the appellee guaranty company filed a separate motion to strike the amended complaint from the files, alleging as grounds therefor, first, that it substantially changed the claim sued upon from the one set up in the original complaint; second, because it substituted parties defendant different from those in the original complaint and against whom no cause of action was stated therein, and because the original complaint did not state a cause of action against it and therefore could not be amended so to do.

January filed a like motion. The court overruled January's motion to strike, and sustained the motion of appellee upon the ground that the amended complaint substantially changed the claim sued on from that set up in the original, and ordered it stricken from the files,

in so far as it attempted to allege a cause of action against appellee. Appellants excepted to this ruling and from the judgment appealed.

Walter Mathews, for appellants.

Filing the amended complaint and causing summons to be issued and served amounted to the bringing of a new suit. 59 Ark. 441; 64 Ark. 348; 65 Ark. 495; 81 Ark. 579; 85 Ark. 251; 96 Ark. 524; 97 Ark. 19.

The sufficiency of a pleading must be raised by demurrer and not by motion to strike. 30 Ark. 436.

Dick Rice, for appellee.

Authorities relied on by appellant are not applicable here. Appellee did not file an answer but filed a motion to strike, and only appeared specially for that purpose. The law as announced by this court in *Kansas City Southern Railway Company* v. *Tonn,* we think, applies in this case. 102 Ark. 20, 143 S. W. 577.

If the original complaint did not state a cause of action against appellee, it could not be amended so that it would state one, because an amendment can only be made to a complaint which states a cause of action defectively. 110 Ark. 139.

Walter Mathews, for appellant in reply.

The appointment of a guardian for a person of unsound mind is a court order, after due notice and the person brought before the court and duly adjudged to be insane, and the clerk has no authority in the premises at all. Kirby's Dig., § § 4002, 4005; 32 Ark. 674; *Id.* 97, 104; 19 Ark. 515.

Upon the appointment of January by the clerk and his obtaining possession of the person and property of the insane person, he became a *de facto,* or equitable, guardian, and liable to account for the property in a court of equity. 21 Cyc. 20, and cases cited. The clerk's appointment being void, the probate court acquired no jurisdiction, and the settlements and the orders of the probate court approving and confirming the same are void, and can be attacked in a collateral proceeding. 21 Cyc. 178,

179; 10 N. E. 352; 74 Ark. 82; 50 Ark. 188-190; 48 Ark. 151; 47 Ark. 460; 29 Ark. 47.

Appellee is liable on the bond, notwithstanding January was not legally appointed guardian. 65 Am. St. Rep. 122; 27 Atl. 42; 55 Am. St. 569, and note; 20 Am. Dec. 463; 50 Ala. 315; 49 S. E. 827; 9 Ky. 172; 46 N. E. 1095; 21 Am. St. 461; 31 N. C. 250.

KIRBY, J., (after stating the facts). (1) A general demurrer was sustained to the original complaint and the plaintiffs therein joining all the other heirs, but one made defendant, with themselves, filed what was termed an amended complaint against the defendant in the original complaint, the appellee surety company, and the other heir of the deceased, Sarah Elizabeth January, who was not joined as a party plaintiff. A summons was issued upon this complaint against appellee company and it was in effect the beginning of a new suit, the plaintiffs having the right to join all parties as defendants against whom a cause of action could be alleged. *Ferguson* v. *Carr,* 85 Ark. 251; *Choctaw, Oklahoma & Gulf Rd. Co.* v. *Hickey,* 81 Ark. 579; *Greer* v. *Vaughan,* 96 Ark. 524; *Warmack* v. *Askew,* 97 Ark. 19.

(2) The court erred, therefore, in striking out the amended complaint, which was in effect a dismissal of appellant's action against appellee and a final judgment from which an appeal could be prosecuted.

(3-4) If the motion be treated as a demurrer to the sufficiency of the complaint, which is not the proper practice, it still should not have been sustained. The complaint alleged that plaintiffs were the only heirs and next of kin to the deceased insane person, that her estate had come into the hands of the defendant, J. C. January, as alleged guardian and curator by reason of the execution of the bond by appellee company, that his appointment as guardian was void, being made by the clerk of the probate court only and without authority of law, that he had not accounted for the estate coming into his hands by reason of his appointment; that he was in effect an equitable or *de facto* guardian and should be required so to

do and to pay to appellants all sums of money to which they were entitled, after he was allowed a reasonable compensation for the support and maintenance of the said insane person. The probate court only had the power to appoint a guardian of Sarah Elizabeth January, an adult person of unsound mind, and the clerk's issuance of letters of guardianship without an order and adjudication of said court was without authority and void. The appointment being void, the probate court did not acquire jurisdiction of the person or estate of said insane person and the orders thereof approving and confirming the purported settlements of such guardian were void.

(5) It does not follow, however, that the said January, who acted as guardian and took possession of the estate of the person of unsound mind after his attempted appointment by the clerk of the probate court and his surety upon the bond given before taking such charge, are not responsible for his properly accounting for said estate in accordance with the terms of the bond. He may be treated in a court of equity as an equitable guardian and held legally to account for the property coming into his hands. 21 Cyc. 20; *Hazelton* v. *Douglas,* 65 Am. St. Rep. (Wis.) 122.

(6) The complaint shows in this case, as in *Hazleton* v. *Douglass,* that, although the person attempted to be appointed was never the legal guardian of the person of unsound mind, he was granted letters of guardianship by the clerk of the probate court without authority, and was supposed to be, and that he gave the bond sued upon with appellee company as surety, by which means he obtained possession of her estate. The court there held the complaint sufficient and the bond valid, saying, "The bond was given voluntarily; it contravened no statute; it was not even repugnant to the policy of the law; it induced the delivery to the principal of the supposed ward's entire fortune." The bond herein was given under like conditions, and we see no reason why it did not constitute a valid obligation against the surety. See, also, *Hauenstein* v. *Gillespie,* 73 Miss. 742, 55 Am. St. Rep.

569, note; In re *Doner's Estate,* 27 Atl. 42; *Fridge* v. *State,* 20 Am. Dec. 463; *People* v. *Medart et al.,* 46 N. E. 1095; *Griffin* v. *Collins,* 49 S. E. (Ga.) 827; *Iredell* v. *Barbee,* 31 N. C. 250; *Corbitt* v. *Carroll,* 50 Ala. 315.

It follows that a good cause of action is stated in the complaint. For the error committed, the judgment is reversed and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

HOLUB *v.* STATE.

Opinion delivered January 11, 1915.

1. EVIDENCE—BLOOD HOUNDS—QUALIFICATIONS.—**Evidence of the performance of blood hounds is admissible in a prosecution for grand larceny when the dogs followed the trail to defendant's house, where there is evidence that the reputation of these same dogs for trailing criminals was good, and when witness had seen them perform in trailing criminals, and knew that these were the same dogs.**
2. LARCENY—CONVICTION—SUFFICIENCY OF THE EVIDENCE.—**In a prosecution for grand larceny, evidence held sufficient to warrant a verdict of guilty.**

Appeal from St. Francis Circuit Court; *J. M. Jackson,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant was indicted for grand larceny alleged to have been committed by stealing five hogs, the property of H. Loewer. It appears from the testimony that Loewer was the manager of a stock ranch in St. Francis County and in control and possession thereof and interested jointly with the owners in the live stock on the ranch; that they bought 200 head of hogs in January and February, 1913, and lost about forty head during the two months. One Houghton claimed a sow and four shoats and some pigs that were in Loewer's field, and came Sunday to get them, bringing three boys with him to look through the pasture. He was told by Loewer, who did not know him before, that he did not care to do business on Sunday, and requested to come back at another

time, when they would be given permission to look through the pasture for the hogs. He came back Monday and found where the fence had been torn up and a hole where hogs had gone out. Loewer went immediately to Wheatley and had Mr. Smith, president of the bank, to telegraph for some bloodhounds to be sent from Dyersburg, Tenn. They reached Wheatley that night and were taken to the place where the fence was broken and the hogs had escaped, between 3 and 4 o'clock the next morning. A guard had been placed at this opening Monday evening. The dogs took the trail at the gap, went across the road out on the path and followed it through the prairie and to Holub's house, where he was arrested. Six or seven hogs' heads were found in his smokehouse, and the ears had been freshly cut off from some of them and were not found. A witness testified that he saw several of his hogs in Holub's field with their ears cut off that he identified positively one of them and got him back, but had not been able to get the others.

Before the next term of court, after the indictment was found, Loewer was notified that the sow with the five shoats claimed by Houghton had been found dead in his pasture with their ears cut off, three of them had small bullet holes in their heads. They had been dead for some time and piled up in an old clay root. Holub lived about one and a half miles from Loewer's house on the ranch, and about that distance from where the hogs escaped from the field.

Another witness testified that he helped the defendant to drive thirty or forty hogs out of the Loewer pasture Sunday night, that they drove them about a mile away and left them near a hay stack, and that the next day they went and drove seventeen of them across the creek, back in the woods, in toward Holub's place.

Another witness testified to seeing Evans and Holub driving hogs in the woods across the creek about the time the hogs were charged to have been stolen.

Another testified that he heard shots in the woods back of Holub's house about 4 o'clock on the morning of

the day he claimed to have killed hogs in his pen, and that he saw some hogs out in the woods dead, one of them on the bank of the creek which he afterward saw piled up in the clay root with the others in the Loewer pasture; that he saw puddles of blood where the other hogs had been shot and had been dragged away.

The defendant testified that he did not take the hogs and had never taken any property of Loewer's from the ranch controlled by him; denied that he ever took any hogs from the pasture, with the assistance of Whaley or any one else; denied that he killed the hogs that were found in his smokehouse out in the woods, and stated that they were hogs that had been kept in the pen by the house for some time and fattened and that the ears were cut off the heads of some of them by the boys in cleaning the hogs, because it was difficult to clean them.

Two other witnesses testified also that the hogs which were found at Holub's place were hogs that were kept up and killed there out of the pen and that they had helped to clean them, and, in doing so, found it more convenient to cut the ears off of some of them, and that the ears were cut off solely because they could not be cleaned.

Holub stated that he went down to Wheatley on Sunday morning, and in coming along back home he had gone by the road and the gap in the fence from which the hogs were supposed to have been taken or escaped; that he had gone from there home, explaining thus the dogs taking the trail to his house. When the officers arrived with the dogs and walked in, he came out and said he was expecting them. He did not deny this, but said he thought it was the constable who wanted him to go along to help him make an arrest. He said he went out and spoke to the dogs, and that neither of them manifested any interest in or paid any special attention to him, one of them finally getting up after he snapped his fingers two or three times over its head.

Another witness testified that upon Holub's coming out of the house, one of the dogs sprang the full length of his chain toward him.

The testimony shows that the hogs, the heads of which were found at Holub's house, were shoats, about the size of the ones lost or missing from Loewer's ranch and pasture.

Other witnesses testified that the dead hogs found in the clay root were those claimed by Houghton, and that they had been seen in Loewer's pasture on the Sunday when he and his boys went down to find them. Although they had been dead for some time, the witnesses said the hair was still intact, and they identified them positively as the hogs claimed by Houghton.

The witness testified that in January or February on Sunday night he and Holub turned out of Loewer's pasture thirty-five hogs and drove them away about a mile northeast, where they left them until morning, and then drove them two or three miles into the woods and left them, where they scattered; that he went back and got several of them and took them to his house on Holub's place, and on the next day "we drove these seven hogs across the creek and left them there in the woods." He did not know what became of them. That he got up seventeen of the others the next day, put them in the barn and helped to drive them to the same place where they had taken the seven; that he thought these hogs were in Loewer's mark; that they took these hogs out of the pasture at night at the gate by raising it. That they killed one of the hogs, and he got half of it and Holub the other half.

This witness admitted that he had had trouble with the defendant; that they were not on good terms, and that he had been employed to get up testimony in the case. He said they got the hogs out at the gate about a mile from Loewer's house, between 7 and 9 o'clock at night, and that the gate was locked, and they lifted it up and took some of the staples out and afterward put them back. That they were to divide the hogs that they took out of the pasture, and that he and Holub were good friends until the last term of court.

Appellant objected to the introduction of the testimony relating to the performance of the hounds in trailing from the gate where the hogs were taken out of the pasture to defendant's house and while there, because they were not shown to be accurate and skilled in following the trail of persons.

A witness testified, however, that he knew the dogs and knew they were capable and skilled in trailing people; that he had known them to trail a criminal from a place in Wheatly to Cotton Plant at another time where the hunted man took the train and escaped.

The court instructed the jury, and from the judgment of conviction appellant has appealed.

R. D. Smith, R. J. Williams, W. J. Lanier and *J. W. Story,* for appellant.

1. The verdict is not sustained by the evidence. The ownership was not proven. The only evidence tending to connect defendant with the crime was that dogs trailed to defendant's house, and the testimony of Evans, a self-confessed thief and an accomplice without corroboration.

2. The dogs were not proved to be qualified so as to admit the evidence of trailing defendant. 132 Ky. 269; 116 S. W. 344; 92 N. E. 161; 153 N. C. 591; 16 L. R. A. (N. S.) 285. This evidence was incompetent.

3. Allegations of ownership are material, and must be proved as alleged. 97 Ark. 1; 55 Ark. 244; 58 *Id.* 17; 73 *Id.* 32; 108 *Id.* 418.

4. There was error in refusing witnesses permission to answer questions propounded as to mistakes in testimony given and to show the feeling toward defendant.

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

1. There is ample evidence to support the verdict. The finding is conclusive if there is any legal evidence. *Tiner* v. *State,* 109 Ark. 138; *Easley* v. *State,* 109 Ark. 130.

2. The testimony as to the bloodhounds being *experts* in their line was sufficient.

3. There is no error in the instructions. Exclusive possession by the husband of the wife's property is suffi-

cient to sustain an indictment for larceny of property alleged to be the husband's. 105 Ark. 12; 80 *Id.* 495-7.

4. The court properly refused to permit Henning to answer questions as to mistakes made in the testimony given in the examining court. It was immaterial as the trial in the circuit court was *de novo.*

KIRBY, J., (after stating the facts). It is contended that the court erred in admitting the testimony relative to the action of the hounds in taking the trail at the place where the hogs escaped and following it to defendant's house, because there is no sufficient showing of the qualification of the dogs to accurately trail human beings. Mr. Smith, the president of the bank, who telegraphed for the dogs, stated not only that he had heard a good deal about them running criminals down, that the reputation of the dogs for running criminals was good, but also that he got the dogs and had seen them trail some criminals one time from Wheatley to Cotton Plant, and that they did not catch them, because they took the train there; that he knew the dogs used in this case and they were the same ones.

(1) We think this was a sufficient showing of the qualifications of the hounds, to admit the testimony of their performance in taking the trail at the gap where the hogs were known to have escaped and where witness testified they had been driven out after the posts were raised and the staples pulled by himself and the defendant, and following it around and across the prairie to Holub's house. For a discussion of the admissibility and effect of such testimony, see *Pedigo* v. *Commonwealth,* 103 Ky. 41, 42 L. R. A. 432, 82 Am. St. 566, 44 S. W. 143; *Sprouse* v. *Commonwealth,* 132 Ky. 269, 116 S. W. 344; *State* v. *Norman,* 153 N. C. 591; *Spears* v. *State,* 16 L. R. A. (N. S.) (Miss.) 285, 46 So. 166.

(2) It is next contended that the evidence is not sufficient to sustain the verdict. It is quite voluminous and contradictory to some extent. We do not regard it necessary to set it out more fully or further analyze it, it being, in our opinion, amply sufficient to support the ver-

dict. The instructions upon the whole case fairly submitted the issues to the jury.

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

ROGERS v. OGBURN.

Opinion delivered January 11, 1915.

1. ACTIONS—TRANFER TO EQUITY—ESTATE TAIL—TRANSFER OF HEIR'S INTEREST.—A. devised land to N. "and the heirs of her body." N. executed a deed of gift conveying her interest in the property to R., her son, and later N. and R. both executed a deed to the property to the defendants. In an action at law, after N.'s death, by the heirs of her body to recover the land, *held*, R. by his deed parted with all his interest in the land, and that an allegation by defendant of the above facts would not authorize a transfer of the action to equity.
2. ESTATE TAIL—UNDER ARKANSAS STATUTE.—A devise of property to N. and the heirs of her body, under Kirby's Digest, § 735, gives to N. an estate for life with remainder in fee to her children.
3. LIFE ESTATE—CONVEYANCE BY LIFE TENANT—RIGHT OF REMAINDERMAN.—Land was devised to N. and "the heirs of her body lawfully begotten." N. had two children, one of them with N. conveyed his interest in the property to defendants. After N.'s death, *held*, N.'s other child was seized in fee simple of an undivided one-half interest in the land in controversy.
4. LIMITATION OF ACTIONS—HOW RAISED BY DEMURRER—ACTION AT LAW.—The statute of limitations can not be raised by demurrer in actions at law, except in cases where the complaint shows affirmatively, not only that the statutory period has elapsed, but that no facts exist which would take the case out of the operation of the statute.
5. LIMITATION—ACTION BY REMAINDERMAN OF LIFE ESTATE.—The statute of limitations does not begin to run against the remainderman of a life estate, until the death of the life tenant.
6. LIFE ESTATE—SURRENDER TO ONE REMAINDERMAN.—The conveyance by a life tenant to one of a number of remaindermen who are tenants in common, does not constitute a surrender so as to extinguish the life estate, and there is no merger in that case, and the grantor of the life estate holds, as against his tenant or tenants in common, both estates separately.
7. LIFE ESTATES—CONVEYANCE BY LIFE TENANT—RIGHTS OF REMAINDERMEN—LIMITATIONS.—Where a life tenant of land conveyed away his interest in the same to one of several remaindermen, the grantee

of the life estate has a right to hold the estate for and during the life of the original life tenant and the statute does not begin to run against another tenant in common until the expiration of that estate.

Appeal from Desha Circuit Court; *Antonio B. Grace,* Judge; reversed as to Jackson; affirmed as to Rogers.

Roscoe R. Lynn, for appellant.

1. Both parties claim title through Isaac Adair, deceased. The complaint is sufficient. 53 Ark. 449; 79 *Id.* 532. The seven years statute of limitations is applicable and did not commence to run as to the remaindermen until the death of the life tenant. The suit was brought within two years. 69 Ark. 539.

2. The grant created an estate tail under the earliest decisions. 3 Ark. 147-195. But under Kirby's Dig., § 735, it created a life estate with remainder in fee simple absolute to appellants. 44 Ark. 458, 475; 67 *Id.* 517; 72 *Id.* 336; 75 *Id.* 21; 95 *Id.* 21; 98 *Id.* 570. No conveyance by the life tenant could affect the title of the remaindermen. 49 Ark. 125. If appellees own the half interest of Rogers, they and Ida M. Jackson are tenants in common, and they have totally denied Ida M. Jackson's rights and ejectment will be for her interest and rents and profits. 31 Ark. 345; 40 *Id.* 155.

3. The conveyance from Rogers only conveyed the life estate of the mother. The cause should have been transferred to equity as to Joseph J. Rogers. Kirby's Dig., § 6991; 85 Ark. 208; 87 *Id.* 206, 211; 107 *Id.* 70; 108 *Id.* 283, 291.

F. M. Rogers, for appellees.

1. The deed from Rogers and his mother vested Rogers' interest in fee simple in the appellees. "Living witnesses" can not be heard to explain away the effect of a deed in fee simple, or construe a will. This is for the court.

2. Jackson is barred by limitation. A demurrer raises the question of limitation at law or in equity.

Kirby's Dig., § § 5980, 5981, 6093; 28 Ark. 7; 77 *Id.* 539; 95 *Id.* 333. Especially is this true when the complaint shows that the bar has attached.

3. By her conveyance Mrs. Adair "surrendered" her estate for life. 4 Kent 103; 16 Cyc. 645; 18 Am. & E. Enc. Law (2 ed.) 355; 71 Ark. 254. One tenant in common can oust another, and by holding adversely bar the other and acquire title. 42 Ark. 289.

4. The rule in "Shelly's case" is clearly stated in 4 Kent. 215 and 48 Ark. 303. The life estate was surrendered in 1892, and Jackson's right of entry accrued then. The act of her co-tenant amounted to ouster in law and she is barred.

McCULLOCH, C. J. This is an action to recover possession of a tract of land in Desha County, all of the parties claiming title to the land from a common source. The land was formerly owned by one Isaac Adair, who executed a deed on June 21, 1887, to his wife, Nancy J. Adair, "and the heirs of her body lawfully begotten." The plaintiffs, J. J. Rogers and Ida M. Jackson, are the only children of Nancy J. Adair, and the latter executed to the plaintiff, Rogers, on December 5, 1892, a deed of gift, conveying her interest in the property to him. On August 13, 1904, plaintiff Rogers and his mother, Nancy J. Adair, executed to the defendants a deed, conveying the property, and Nancy J. Adair died in the year 1911. These facts are set out in the complaint, and the defendants demurred.

(1) Plaintiff Rogers parted with his title and all interest in the land by executing a conveyance to the defendants. Therefore the trial court was correct in sustaining a demurrer as to him. It is alleged in the complaint that Rogers signed the deed "to convey only what title she (his mother) had previously conveyed to him, and that he at that time had no other title to convey, he having no further right or title until his mother's death." It is argued now that this allegation constituted grounds for transfer of the cause to equity.

We are unable to understand how this allegation can be construed as a statement of facts constituting grounds for equitable relief. It is shown in the complaint that the plaintiff Rogers conveyed away his interest in the land to the defendants, and the language quoted above does not impair the effect of his conveyance or afford any grounds for setting it aside.

(2) The case stands in a different attitude so far as concerns the rights of plaintiff Ida M. Jackson. The conveyance of Isaac Adair created what would at common law have constituted an estate tail, but which under the statutes of this State is converted into a life estate with remainder in fee to the persons to whom the estate tail would have passed. Kirby's Digest, § 735. In other words, Nancy J. Adair took an estate for life with remainder in fee to the plaintiffs, who are her only children. *Wilmans* v. *Robinson,* 67 Ark. 517; *Wheelock* v. *Simons,* 75 Ark. 19; *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18; *Dempsey* v. *Davis,* 98 Ark. 570.

(3) It is argued that the language of the conveyance brings it within the operation of the rule in Shelley's case, as discussed in the case of *Hardage* v. *Stroope,* 58 Ark. 303, but the language of the conveyance is different and does not fall within the rule. This is fully explained in *Wilmans* v. *Robinson, supra,* where the language of the two conveyances is distinguished. It follows, therefore, that plaintiff Ida M. Jackson is seized in fee simple of an undivided half of the lands in controversy, which interest was by the death of her mother freed from the life estate which encumbered it.

(4) It is urged, however, that the complaint shows on its face that the right of action of said plaintiff is barred by the statute of limitation, and for that reason the ruling of the court in sustaining the demurrer should be affirmed. The statute of limitation can not be raised by demurrer in actions at law, except in cases where the complaint shows affirmatively, not only that the statutory period has elapsed, but that no facts exist which takes the case out of the operation of the statute.

Collins v. *Mack,* 31 Ark. 684; *Hutchinson* v. *Hutchinson,* 34 Ark. 164; *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 49 Ark. 253.

(5) We deem it proper, however, in view of the fact that the case must be remanded for further proceedings, to say that according to the facts set forth in the complaint the action is not barred. The statute did not begin to run until the death of the life tenant, which occurred less than two years before the action was instituted. *Morrow* v. *James,* 69 Ark. 539.

(6-7) It is insisted that the conveyance by the life tenant to one of the remaindermen operated as a surrender of the life estate and extinguished it, and for that reason the statute of limitation began to run in favor of the defendants, who occupied the lands adversely from the time of the conveyance to them. That is undoubtedly the rule where there is such a surrender of the life estate as extinguishes it by merger into the estate in remainder. "Surrender," said Chancellor Kent, "is the yielding up of an estate for life or years, to him that hath the next immediate estate in reversion or remainder, whereby the lesser estate is drowned by mutual agreement." 4 Kent Comm. (14 ed.) p. 114. The existence of that rule has been recognized by this court. *Hayes* v. *Goldman,* 71 Ark. 251. So if there had been a surrender to the remaindermen which extinguished the life estate, the statute of limitation might run against the remaindermen. The conveyance by the life tenant to one of a number of remaindermen who are tenants in common does not, however, constitute a surrender so as to extinguish the life estate, as there is no merger in that case and the grantee of the life estate holds, as against his tenant or tenants in common, both estates separately. *Sperry* v. *Sperry,* 8 N. H. 477. The grantee of the life estate has, under those circumstances, a right to hold the estate for and during the life of the original life tenant and the statute does not begin to run against another tenant in common until the expiration of that estate.

The judgment is affirmed as to the plaintiff J. J. Rogers, but reversed as to plaintiff Ida M. Jackson and the cause remanded with directions to overrule the demurrer to the complaint.

HOLLAND BANKING COMPANY v. HEARN.

Opinion delivered January 11, 1915.

SALES—STALLION—TERMS OF CONTRACT.—Under the terms of a contract for the sale of a stallion, the seller guaranteed the stallion to be a sure breeder, and provided that if he did not prove satisfactory because of not being a sure breeder the purchaser should deliver him to the seller by March 1, 1911. The sale was made on April 18, 1910. In an action on purchase money notes, it was prejudicial error to submit to the jury the issue, whether the contract was unreasonable and unconscionable in its terms, as the purchaser knew about the breeding of horses, and the period for determining the value of the stallion as a breeder, was agreed to by the purchaser with knowledge of the facts.

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

STATEMENT BY THE COURT.

This suit was instituted by appellant against the appellees upon certain promissory notes given for the purchase money of a certain stallion. The execution of the notes is not denied by the appellees. They denied that appellant was the innocent holder of the notes, and set up in their answer that the notes were obtained by fraud in this. That the agent of the Holland Stock Farm who negotiated the sale procured the signatures of the appellees to the notes representing that neither he nor his principal, the Holland Stock Farm, had sold or would sell or place a similar stallion or a stallion of any kind within a radius of twenty-five miles of Greenwood, and that by way of further inducement the agent contracted with the appellees "that the stallion purchased was a sure foaler and would foal at least seventy-five per cent of the mares which he served;" that these agreements were part of the consideration which moved

the appellees to sign the notes, and but for such contracts they would not have purchased the horse and signed the notes; that they so stated to the agent of the Holland Stock Farm at the time; that they were deceived and misled by these representations, which were untrue; that at the time of the sale and the execution of the notes in suit the agent had already sold and placed a stallion of similar character at Midland and within a few days thereafter sold and placed similar stallions at other places in violation of the agreement and representations; "that by virtue of said false and fraudulent representations so made by said agent, he fraudulently obtained their signatures to the notes as aforesaid."

The testimony on behalf of the appellants tended to prove that the notes in suit were executed April 18, 1910; that the owner of the Holland Stock Farm sold same to the appellant for the face value thereof, less the accumulated interest, on the 17th of September, 1910.

Charles Holland, who was the owner of the Holland Stock Farm and of the notes in suit, stated that at the time he sold the notes to the appellant he was one of the directors of appellant and a brother-in-law of the cashier, but that, although an officer of the bank, his relation was merely nominal. He did not attend the board meetings, and the stock carried in his name was never delivered to him.

The notes were introduced in evidence, and also a guaranty contract between the Holland Stock Farm and appellees. This contract, after reciting the sale, specified: "We guarantee the above named stallion to be a satisfactory sure breeder provided the said stallion keeps in as sound and healthy condition as he now is and has proper care and exercise. If the above named stallion should fail to be a satisfactory sure breeder with the above treatment, we agree to replace him with another stallion of the same breed and price upon delivery to us at our stables at Springfield, Missouri, of the above

named stallion in as sound condition as he is at present by March 1, 1911."

W. B. Sanford testified that he was cashier of the appellant, and that the notes in suit were acquired by the appellant before any of them were due, the appellant paying therefor their face value; that appellants had no notice of any infirmity in the paper and acquired the same in good faith; that the Holland Banking Company, at the time of the purchase of the notes by it, was not in any way interested in the Holland Stock Farm.

The notes were indorsed, "Without recourse. Holland Stock Farm, by Chas. Holland, proprietor."

There was testimony on behalf of the appellees, introduced over appellant's objection, tending to prove that at the time of the sale of the horse the agent of the Holland Stock Farm represented to the appellees that they had not placed another horse in the county of Sebastian, and would not do so; that they at that time had already placed a similar horse at Midland, in Sebastian County, and they had later placed horses at Bonanza and Barling in Sebastian County, and at Charleston, in Franklin County, all within twenty-five miles of Greenwood; that but for these representations, made by the agent of the Holland Stock Farm, appellees would not have signed the notes in suit.

Among other instructions, the court gave, on its own motion, the following:

"A contract which is unreasonable and unconscionable in its terms is void; and, if you find from the evidence in the case that the contract of guaranty introduced in evidence was unreasonable and unconscionable by reason of its terms in requiring a return of the property before it was possible in the course of nature in breeding animals of the horse species to determine the qualities of this animal ascribed to him in said contract of guaranty; and, if you so find, then you will be at liberty to disregard said contract. And if you should further find that after sufficient time had expired in the course of nature for defendants to determine the qualities of

said animal ascribed to him in said contract of guaranty as a sure foal-getter, and find that said animal failed to possess the qualities ascribed to him in said contract of guaranty, and the defendants immediately thereafter offered to return him, this would constitute a compliance on their part with that part of their agreement."

The verdict and judgment were in favor of appellees, and this appeal has been duly prosecuted. Other facts stated in the opinion.

L. E. Mefflin, for appellant.

1. Appellees provided their own remedy by contract and have failed to exercise it and can not now complain. 101 S. W. 1179; 138 *Id.* 635; 97 *Id.* 18; 157 *Id.* 390; 166 *Id.* 953.

2. All *oral* representations were merged into the written contract. 138 S. W. 635; 158 *Id.* 500; 83 Ark. 283; 165 S. W. 637; 166 *Id.* 953.

3. Oral testimony can not be introduced to vary the terms of a written contract. 95 Ark. 131; 154 S. W. 1140; 158 *Id.* 500; 157 *Id.* 390; 141 U. S. 510; 80 Ark. 505; 94 *Id.* 130; 153 U. S. 233; 61 Ark. 86; 165 S. W. 637. Hence instruction No. 1 should have been given.

4. Appellant is an innocent purchaser of the notes, before due and for a valuable consideration. 94 Ark. 100; 61 *Id.* 81; 166 S. W. 943; 166 S. W. 953.

5. The fact that Charles Holland was an officer in the bank does not affect the good faith of the acquisition of the note. 149 S. W. 845; 154 *Id.* 512; 157 *Id.* 142; 5 Cyc. 461-C, 463-C; 166 S. W. 953.

6. Notice to the bank must be proved. 10 Cyc. 1063; 5 *Id.* 461-C; 65 *Id.* 543; 166 S. W. 953.

Holland & Holland, for appellees.

1. Appellant was not an innocent purchaser. 122 Am. St. 1017; 136 Iowa 390; 15 Am. & E. Ann. Cases, 665; 82 Ark. 86; 95 *Id.* 144; 145 S. W. 707-9; 105 Ark. 136.

2. The notes were secured by fraud. Jones on Ev. (2 ed.) 547; 2 Enc. of Ev. 498; 87 Ark. 614; 75 *Id.* 79.

3. The contract is unconscionable and the remedy provided in the contract is not exclusive. 132 U. S. 406; 33 L. Ed. 93.

WOOD, J., (after stating the facts). The court erred in submitting to the jury the issue as to whether the guaranty contract was unreasonable and unconscionable in its terms. This was not an issue, under the evidence, proper for the jury to pass upon. The terms of the contract were ambiguous and its construction was for the court and not the jury. Moreover the conditions in the contract which appellees claim rendered the same unreasonable and unconscionable were not so in fact or in law. The seller of the horse had the right to guarantee the horse to be a sure breeder and to exact that if he did not prove satisfactory to the purchasers because of not being a sure breeder that the purchasers should deliver him to the stables of the seller at Springfield, Missouri, by the 1st of March, 1911, as specified in the contract. There was nothing in the language of this provision to warrant the court in submitting to the jury to determine the question as to whether the contract was unreasonable and unconscionable, and certainly there was nothing in this language itself to warrant the court in declaring as a matter of law that it was an unreasonable and unconscionable contract because of such stipulation. The parties were dealing at arms length. If the time fixed by the contract for the return of the horse did not give appellees time in the course of nature to test his breeding qualities and to determine whether he was satisfactory to them, appellees should have demanded a longer time in which to make such test. They had the same knowledge of the period required for gestation in animals of the equine species as the agent of the Holland Stock Farm had. The purchasers were bound by the common knowledge of the required period for gestation the same as the seller. It is not pretended that the seller of the horse practiced any deception or

fraud upon the appellees by which the time for the return of the horse, in case he proved unsatisfactory, was fixed. As above stated, there is nothing in these terms themselves to show that they were unreasonable and unconscionable, and the appellees could not prove by oral testimony that they were unreasonable and unconscionable by showing that according to the time of gestation in animals of the horse species the time specified in the contract for the return of the horse was too short to test his breeding qualities. The instruction was, therefore, abstract, misleading and prejudicial.

Appellant contends that the undisputed evidence shows that the appellant was an innocent purchaser of the notes in suit, and that, therefore, the court erred in submitting that issue, and in also permitting testimony to be introduced tending to show fraud in the exection of the notes. Inasmuch as the case must be reversed for the error in giving the instruction above mentioned, and since the cause must be remanded for a new trial, we will not pass upon the issue of fact as to whether the evidence was sufficient to sustain the verdict of the jury on the finding that appellant was not an innocent purchaser and also on the issue as to whether or not fraud entered into the sale and the execution of the notes. These issues will be left open for such development as may be had on a new hearing.

For the error indicated the judgment is reversed and the cause is remanded for a new trial.

STIEL & COMPANY v. IDE & COMPANY.

Opinion delivered January 11, 1915.

1. PLEADING—SUFFICIENCY OF ALLEGATIONS—DEMURRER—MOTION TO MAKE MORE SPECIFIC.—In an action on an account the complaint stated in general terms that the defendant was indebted to the plaintiff on account in a certain sum, and an exhibit to the complaint was filed containing an itemized statement of the account duly verified; *held*, the complaint was sufficient to notify the defendant that the amount was due on account, and a demurrer thereto was properly overruled. An objection to the complaint should have been made by motion to make more definite and specific.
2. PLEADING—DEMURRER—JUDGMENT.—Where the defendant in an action on an account, after his demurrer to plaintiff's complaint was overruled, refused to plead further, and failed under oath to deny the correctness of the account, it is the duty of the court to render judgment in favor of the plaintiff.
3. MOTION TO SET ASIDE JUDGMENT—ABSENCE OF DEFENDANT—DILIGENCE OF COUNSEL.—In an action on an account, the court overruled defendant's demurrer to the complaint, and, the defendant refusing to plead, rendered judgment against the defendant. *Held*, the judgment will not be set aside on motion upon the allegation that defendant was absent when the judgment was rendered, and that it was rendered without his knowledge, since the attorney who represented the defendant at the time the judgment was rendered was his duly accredited attorney, and no diligence was shown in making any defense that the defendant might have had.

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

Morris M. and *Louis M. Cohn*, for appellant.

1. The complaint practically is barren of allegations required by law. 3 Ark. 389, 592. Allegation of demand was necessary; its absence ground of demurrer. 3 Ark. 592; Newman Pl. & Pr. (1871) 367. The demurrer should have been sustained.

Hutton & Harkey, for appellee.

1. The appeal should be dismissed and judgment entered here. The demurrer was properly overruled, as was the motion to set aside the judgment. Kirby's Dig., § 3151; 46 Ark. 498; 95 *Id.* 403.

2. Demand is not necessary before suit on an account. 8 Ark. 147; 13 *Id.* 69. Failure to demand is no

ground of demurrer. 13 Ark. 69; Norton on Bills and Notes (3 ed.) 366-7, and note 110; 13 Pet. 136.

HART, J., Ike Stiel Co. prosecutes this appeal to reverse a judgment on account.

This suit was instituted in the circuit court by Geo. P. Ide Co. against Ike Stiel Co. The complaint, omitting the caption, is as follows:

Plaintiff states that the defendant is indebted to them on account in the sum of three hundred and twenty-seven dollars and eighty-eight cents. An itemized verified account of said indebtedness is filed herewith and made part of this complaint.

Wherefore plaintiff prays judgment in the sum of $327.88 and for interest and costs and all proper relief.

Attached to the complaint was an itemized statement of the account which was duly verified by the plaintiff. The defendant filed a general demurrer to the complaint which was overruled by the court. The defendant elected to stand on its demurrer and refused to plead further. Whereupon the court rendered judgment in favor of the plaintiff for amount with accrued interest. The defendant has duly prosecuted an appeal to this court.

(1-2) It is contended by counsel for the defendant that the court erred in overruling its demurrer. We do not think so. In the case of the *Arkansas Life Insurance Co.* v. *American National Life Insurance Co.*, 110 Ark. 130, the court said: "In testing the sufficiency of a pleading by general demurrer every reasonable intendment should be indulged to support it." The court further stated that if the facts stated, together with every reasonable inference therefrom, constituted a cause of action, then the demurrer should be overruled. The complaint states in general terms that the defendant was indebted on account to the plaintiff in the sum of $327.88. This was a sufficient allegation to notify defendant that it was due to the plaintiff that amount of money on account and the court properly overruled the general demurrer to the complaint. At most it was a complaint

defectively stated. An objection to it should have been made by motion to make more specific and definite instead of by general demurrer. The exhibit filed to the complaint contained an itemized statement of the account, duly verified by the plaintiff in accordance with the provision 3151 of Kirby's Digest. When the defendant refused to plead further and failed under oath to deny the correctness of the account, either in whole or in part, it was the duty of the court, under the provisions of the statute just referred to, to render judgment in favor of the plaintiff.

(3) On a subsequent day of the court the defendant made a motion to set aside the judgment on the ground that the president of the defendant company was out of the city and that judgment had been rendered without his knowledge or consent. That through some misunderstanding, the attorneys of the defendant permitted the judgment to be entered against the defendant, and that the defendant had certain rights which could only be set up by answer. The court refused to open the judgment and there was no error in the action of the court in this respect. The attorney who represented the defendant at the time the judgment was rendered was its duly accredited attorney and no diligence in making any defense the defendant had is shown. Therefore the the court did not abuse its discretion in refusing to open the judgment. See *Hershy* v. *McGreevy & Yantis,* 46 Ark. 498.

It follows that the judgment must be affirmed.

SUMMERS, RECEIVER, *v.* CARBONDALE MACHINE COMPANY.

Opinion delivered January 11, 1915.

1. SALES—RESERVATION OF TITLE—CHANGE IN TERMS OF CONTRACT.—A vendor of personal property who sells the same with a reservation of title may grant an extension of time, or change the manner of payment without waiving his reservation of title, provided he did not thereby cancel the debt thus secured.
2. CONFLICT OF LAWS—CONTRACTS—PURCHASE OF PERSONAL PROPERTY. B. in Arkansas purchased machinery from C. in Pennsylvania. The order was accepted in Pennsylvania but delivery, acceptance

by purchaser, and payment of the notes was to take place in Arkansas. *Held*, the contract was to be performed in Arkansas, and the validity of its provisions is to be determined by the laws of this State.

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

STATEMENT BY THE COURT.

U. S. Bratton operated an ice plant at Augusta under the name of the Arkansas Public Service Company, and a creditor sued and recovered judgment against him, and at the instance of this creditor a receiver was appointed for the concern, who took charge of its assets, including the machinery used in making ice. Appellee filed an intervention in that suit, in which it claimed title to this machinery, under a reservation of title clause in the contract of sale. The contract price of this machinery was $4,500.00, and the court found that payments had been made which reduced this indebtedness to the sum of $3,345.00, and that Bratton had an equity in this property to the extent of his payments, and that equity was ordered sold, after the court had decreed that the title to the property had never passed from appellee. All of the creditors of this public service company resisted appellee's intervention, and have appealed from the decree of the court.

The contract of sale was a lengthy one and contained the following stipulation:

"The machinery and apparatus herein contracted for shall remain personal property and the title, ownership and right of possession to the same shall remain in us until full and final payment therefor, and of all notes, if any, shall have been made in cash.

"This proposal shall become a contract when accepted by you and approved in writing by the president and secretary of the Carbondale Machine Company, at its home office in the city of Carbondale, State of Pennsylvania."

It is urged, because of this stipulation, that the contract of sale is a Pennsylvania contract and should be construed according to the laws of that State and that,

if so construed, this reservation of title in invalid, because the laws of Pennsylvania provide that a contract retaining title is void as against creditors.

It is further contended that the machinery was not sold and delivered in accordance with the provisions of this written contract of sale, but that, upon the contrary, the terms and manner of payment were changed and this written contract thereby annulled, and that, therefore, there was no reservation of title. Under the terms of this written contract payments were to be made as follows: One-fourth cash upon shipment; one-fourth cash when the plant was ready to be charged with ammonia, after its installation; and the balance in two equal notes, bearing interest at 6 per cent., to be dated when the plant was ready to be charged with ammonia, and maturing at 60 and 120 days from date.

It was contemplated that the machinery should be shipped immediately after the approval of the order, but the shipment was delayed so that the machinery was not installed until August 25, and during this time a controversy over this delay was pending between Bratton and appellee. The contract of sale provided that Bratton was to deduct all freight charges and the expenses of erecting the plant from his last payment, and it was further provided therein that, upon the installation of the plant, Bratton was to give appellee an acceptance in writing showing an adjustment of any outstanding matters of dispute. This acceptance was made necessary by the following clause in the contract: "We agree and guarantee to construct the plant in all its parts in a thorough and workmanlike manner, using the best materials of their several kinds, and to deliver the plant to you upon completion." This acceptance in writing was to be given to show compliance with the conditions of the contract. This contract further provided that this machinery should be delivered f. o. b. cars Augusta, Arkansas.

Litigation over the delay in shipping the machinery was threatened, but a settlement was made by the terms

of which Bratton paid a fourth of the purchase money in cash, and executed notes for the balance, but deducted from the second note, instead of the last, the amount of the freight and installation costs. These notes were not paid when due, and an extension of time was given for payment, and it is insisted that this extension of time, together with the changes in the terms of sale operated to waive the reservation of title.

The contract of sale was approved by appellee on June 5, 1913, on which date Bratton was notified that "We will ship immediately upon receipt of the signed contract which we are sending you today, or upon word from you that the same has been properly signed and mailed." Bratton executed the contract of sale in duplicate and returned the original to appellee.

Manning, Emerson & Morris, for appellants.

1. The contract was made under the laws of the State of Pennsylvania. 20 Fed. 357; 68 Fed. 467; 44 Ark. 230; 110 Ark. 123.

2. The law of Pennsylvania provides that a contract retaining title is void as against creditors. 87 Fed. 976; 134 Fed. 924, 927; 139 Fed. 52; 166 Pa. 217; 31 Atl. 102, 105, 107; 64 Pa. St. 499; 92 *Id.* 53; 95 *Id.* 508; 108 *Id.* 481.

3. Under the rules of private international law a contract is construed according to the law of the State where it is made. 13 Mass. 1; 7 Am. Dec.. 106, 108-9. Under the principle announced in the case just cited, when the contract was entered into, the parties must be presumed to have contracted with the laws of Pennsylvania in mind, and the appellee must be presumed to have known that its contract retaining title was of no effect as against creditors of the purchaser.

In considering this question, the substantive law is not to be confused with mere rules of procedure, for, though the law of the State where the contract is made, the *lex loci,* governs as to its nature, interpretation and construction, it is clear that the law of the State where

the action is brought, the *lex fori,* governs in all matters of mere procedure. 2 Mass 84; 3 Am. Dec. 35-7; 91 U. S. 406; 23 Law Ed. 245; 44 Ark. 213; *Id.* 230-34; 4 Ark. 76; 46 Ark. 50, 66; 14 Ark. 610; 22 Ark. 125; 35 Ark. 261; 61 Ark. 1, 5; 70 Ark. 493; 107 Ark. 70, 73.

Creditors, pro se, and *Elmo CarlLee* for Bratton.

1. It is undisputed that Bratton from the first emphasized the fact that he must have the machinery by June 1; that on May 9 he advised appellee that time was of the essence of the contract, and that shipment was guaranteed in thirty days. Bratton's testimony further shows that his loss was at least $1,500.00 by reason of the delay in shipment of the machinery. He undoubtedly had a valid claim against appellee for damages. This claim was taken up with appellee's representative, and after certain negotiations an entirely new contract was made, Bratton waiving his claim for damages. No title was attempted to be retained in the new contract. Plain notes of hand were accepted for the amount due for the settlement, and in that manner the matter was closed up. Novation may be accomplished either by express or implied agreement, and the court erred in not holding that there was a new contract. 97 Pac. 438; 75 Atl. 920; 7 Ky. Law Rep. 358.

2. As to the rights of creditors and the effect of the attempt to retain title in the original contract under the laws of Pennsylvania, see argument on behalf of the receiver and Smith.

Harry M. Woods, for appellee.

In reply to the brief for Bratton and the creditors: (1) Bratton is contradicted by both witnesses, Holcomb and Roe. (2) He is contradicted by the contract and notes in existence, and by the fact that there is no change in the contract, except a minor one, which constitutes neither a deduction in price, interest or terms. (3) Bratton's letter of April 4, 1914, shows he recognized the possession in appellee under the written contract.

The deduction of the freight from the second note instead of the last, and the subsequent renewal of the notes to extend the time, under all the facts as shown by the testimony, did not accomplish novation. The testimony shows that there was no intention upon the part of either party to abrogate or set aside the written contract in the case. 29 Cyc. 1130-1135; 107 Ark. 337, 340.

1. The position of the appellants, that the *signature to the writing* is conclusive as to the *place of contract,* within the meaning of the term *lex loci contractus,* can not be maintained. The whole structure of their argument is based upon the fact that the contract could not be effective until signed by the appellee at Carbondale, leaving out of consideration the very nature of the agreement; that it was finally accepted in Arkansas by Bratton; that it was made with a view of performance in Arkansas; that the delivery was to be made f. o. b. cars at Augusta, Arkansas; that possession of the property was not delivered until erected and completed in Arkansas, and that the notes were dated and payable in this State.

The laws of this State control as to the place of performance of this contract. 2 Wharton on Conflict of Laws, 860-865; Story on Conflict of Laws, (8 ed.) 376; 2 Parsons on Contracts, (9 ed.) 734; Mechem on Sales, § § 648, 650; 35 Cyc. 93, 94; 80 Ark. 403; 64 Ark. 29; Tiedeman on Sales, 109; 46 Atl. 874; 93 Ala. 257; 161 S. W. 286; 57 N. J. 490; 86 Me. 456; 96 Ga. 489; 7 Atl. 418; 93 U. S. 664.

2. Under the laws of this State, conditional sales, such as is evidenced by the contract in this case, are valid as between the parties and as against innocent purchasers and creditors. 42 Ark. 363. Appellee retained title to the machinery, both as against Bratton, his receiver or creditors, and this court has held that such instruments are not mortgages. 48 Ark. 160; 60 Ark. 133.

SMITH, J., (after stating the facts). Two questions are presented. The first is, whether the change of method

of payments and extension of time for payments operated to waive the reservation of the title to the machinery. And the second question is, whether the contract of sale shall be construed according to the laws of this State, where a reservation of title is valid against creditors, or according to the laws of Pennsylvania, where such a reservation is invalid against creditors.

(1) The first question is settled by the decision of this court in the case of *Hollenberg* v. *Bankston,* 107 Ark. 337. We there held, in effect, that a vendor might grant an extension of time, and might change the manner of payments, without waiving his reservation of title, provided he did not thereby cancel the debt thus secured.

The second is the real question in the case. Appellants lay stress upon the provision in the contract that it should not be binding "until accepted by you (Bratton) and approved in writing by the president and secretary of the Carbondale Machinery Company at its home office in the city of Carbondale, State of Pennsylvania." But the fact must not be lost sight of that, after its installation, the machinery was to be finally accepted in this State by Bratton and that the whole contract was made with a view to its performance in this State, where the purchase money notes were executed and dated and were made payable.

It is conceded that, if this contract is to be construed according to the laws of the State of Pennsylvania, the reservation of the title to the machinery is void as to the intervening creditors. But shall it be so construed?

The principle which controls here was discussed in the case of *Midland Valley Railroad Co.* v. *Morgan Bolt & Nut Mfg. Co.,* 80 Ark. 403, where it was said:

" 'The place where an obligation originates is often accidental; is remote, sometimes receding from spot to spot, as we search for it; and is extrinsic to the essence of the engagement, and to its subsequent development and efficiency.' 2 Wharton, Conflict of Laws, § 398. 'It is different, however, with the place of performance,

which enters into the vitals of the obligation, so far as concerns its fulfillment.' *Id.* § 399.

"In this case there was an express agreement that part of the material should be delivered at Shady Point, I. T., by appellee to Kelly for use in construction of appellant's road in the Indian Territory, and part for like purpose for the road in Arkansas, at Montreal, Arkansas. Notwithstanding there is but one contract, when it is to be performed in different jurisdictions, the law of each jurisdiction enters into the essence of the performance in the respective jurisdictions. 2 Wharton on Conflict of Laws, § 815a. Therefore the law of this contract was in Arkansas for so much of it as was to be performed in Arkansas, and in the Indian Territory for so much of it as was to be performed in the Indian Territory. Wharton, *supra;* Story on Conflict of laws, § 280, and note."

(2) It appears that the order for the machinery was accepted by appellee in Pennsylvania and was shipped from that State; but everything else in connection with this transaction was to occur in Arkansas. The final delivery was to take place upon completion of the plant, when an acceptance was to be given. The provisions of the contract, including the payment of the notes, were to be performed here, and this State was, therefore, the place of performance of the contract, and the validity of its provisions will be construed according to the laws of this State.

The decree is therefore affirmed.

BUENA VISTA VENEER COMPANY *v.* HODGES, RECEIVER.

Opinion delivered January 11, 1915.

CORPORATIONS—USE OF FUNDS BY PRESIDENT—PRINCIPAL OWNER.—The president of a corporation, although the owner of practically all the stock in the same, can not use the funds of the corporation to purchase stock in another corporation, in his own name and for his own use.

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

STATEMENT BY THE COURT.

This suit was brought by the receiver of the Des Arc Bank & Trust Company, hereinafter called the bank, against the appellant to recover the amount of an alleged overdraft.

Prior to April 6, 1913, Emmett Vaughan had been the president, and the owner of the majority of the stock of the bank, and had undertaken in various ways to interest one Herman Romunder in the purchase of some of this bank stock, and finally concluded a trade with him, by the terms of which Mr. Romunder was to purchase 743 shares of the bank stock, of the par value of $25 each, for the sum of $3,670. This agreement was in writing and provided for the reorganization of the bank, and for the election of Romunder as president, and Vaughan as cashier and secretary. As an inducement to this agreement, Vaughan had furnished Romunder a statement which showed the bank to be in a very prosperous condition, but the agreement contained the following stipulation:

"Ninth. Above matters are to be adjusted as stated and above reorganization made as designated on verification of statement on which the understanding is based and performance is to take place, on or before July 1, 1912."

It was further provided that, after this verification, Romunder was to give his demand note for this stock, payable at the bank, with interest at the rate of 6 per cent. per annum from its date until paid. This verification of the bank's condition was never made, and the note provided for was never executed, and no actual transfer of the stock ever took place. Vaughan, however, testified that after some controversy and further negotiations with Romunder, the requirement of verification and the giving of the note were waived, and he testified that the stock was, in fact, reissued to Romunder, although it was never delivered to him. These state-

ments are all sharply denied by Romunder, who testified that he never at any time waived the verification of the bank's statement and that he declined to consummate the deal for the stock by the execution of the note, or otherwise, until this requirement had been met, and that, although Vaughan had stationery and calendars and other advertising matter printed, on which his name appeared as president of the bank, this was all done without his consent. He further testified that he stood ready at all times to complete his purchase, but had never done so because of Vaughan's failure to have the books of the bank audited. The evidence shows that Vaughan introduced Romunder to the president of their correspondent bank in the city of Little Rock as the future president of the bank, and that he was frequently referred to as such. But it does not appear that Romunder ever attended any meeting of the board of directors of this bank, nor that he ever at any time undertook in any way to act as president of the bank, nor to exercise any control over its management. There was introduced in evidence the record of a meeting of the directors of the bank, held at the home of Vaughan, and these minutes recited the election of Romunder as president. But Romunder testified that he was not present at this meeting and had not authorized the action there taken, and knew nothing about it until some time later.

It further appears that the statement furnished Romunder did not reflect the true condition of the bank and that so far from being in a prosperous condition, its stock was worthless at the time Romunder agreed to purchase it. It was finally agreed that an auditor should check up the affairs of the bank, and one was secured for that purpose, but before he could complete his labors Vaughan applied for, and secured, the appointment of a receiver.

Romunder was the principal owner of the stock of the appellant company, and the statement filed by it in the office of the county clerk disclosed the following ownership of its stock: Herman Romunder, 250 shares

common stock; Robert H. Romunder, 1 share common stock; Louis H. Hammersmith, 1 share common stock; Henry P. Dailey, 3 shares common stock; Cannie W. Jones, 1 share common stock; balance of shares in the hands of the president, 492. It does not appear, however, what the ownership was of the shares reported in the hands of the president. Romunder lived in Indiana, but spent considerable time at Des Arc, and had the active control and absolute management of the affairs of the appellant company. Both this company and Romunder carried accounts with the bank, but these accounts were always kept separate, and it does not appear that Romunder ever checked against the account of the company for his own personal use. In the latter part of June the veneer company discounted with the bank a note for $10,000, and the proceeds of this note, less the discount, were deposited with the bank to the credit of the veneer company. As soon as this deposit had been credited to the account of the veneer company, Vaughan deducted $3,670, the purchase price of this stock, and this litigation grows out of that action. On the 1st of July following, when the bank book of the veneer company was balanced, its bookkeeper was informed of the manner in which the proceeds of this note had been applied, and Vaughan explained to her that he had taken this action in accordance with the oral direction given him by Romunder. This direction was oral, and it is not contended that any check or other writing ever evidenced that direction. This bookkeeper testified that when she explained to Mr. Romunder what had been done he "got after her about it" and told her to charge it back against the bank and to check it out, which she did. Romunder testified that, as soon as he heard about this transaction, he told Vaughan that it was wrong and that Vaughan would have to replace the money, and that the veneer company was going to check it out, and thereafter the books of the veneer company were kept as if this sum had never been charged to it. The books of the bank, however, show that from the date of the discount of this

note, the veneer company's account stood overdrawn until the 2d of April, at which time the bank closed its doors.

In its answer the veneer company denied that its account at the bank was overdrawn, but alleged that the bank owed it a balance of $155, for which sum it prayed judgment.

There was a trial before the jury, where these questions of fact were submitted, and by its verdict the jury has decided these questions of fact against the contention of Romunder.

Thweatt & Thweatt and *Trimble & Trimble,* for appellant.

If Romunder ever gave any oral instructions to Vaughan to apply any part of the money deposited by the veneer company to his personal debt, he was without authority to do so, and any such application of the deposit could not affect the veneer company, and its check against the amount so erroneously applied would not create an overdraft. 85 Ark. 185; 86 Fed. 742; 71 Fed. 797; 39 L. R. A. 84; 164 N. Y. 281; 52 L. R. A. 790; 136 S. W. 716; 65 Ark. 546; 95 Ark. 368; 62 Fed. 356.

W. A. Leach, for appellee.

1. The questions at issue in this case were determined by the jury upon conflicting evidence against the contentions of the appellant and in arriving at the correctness of their verdict, this court will construe the evidence in the light most favorable to the verdict, and if there is any evidence legally sufficient to sustain the verdict, it will not be disturbed. 87 Ark. 109; 74 Ark. 478; 97 Ark. 453; 76 Ark. 115; 102 Ark. 200.

2. If Romunder purchased and paid for the stock in question, he could have rescinded the contract and recovered back the money upon discovering that a fraud had been committed upon him. 31 Pa. St. 489; 10 Cyc. 421-432, and note 83; *Id.* 439, and notes; 4 Thompson on Corporations, (2 ed.) § 4148; 79 Pac. 503; 64 N. E. 1074; 74 N. E. 445; 109 N. Y. 574.

3. Romunder could, and did, bind the veneer company when he orally authorized the purchase price of the stock to be charged to the veneer company. Clark on Corporations, 509; 2 Thompson on Corporations, § 2049; 129 Fed. 327; 63 N. H. 230; 95 Ark. 374; 103 Ark. 283; 79 Ark. 45.

Out of a total of 750 shares of the veneer company's stock, the record shows that Romunder had in his name and in his hands, 742 shares. Notwithstanding his denial that he told Vaughan that he owned all the stock, but stated that it was all in his name, the conclusion is irresistible that he was the sole party in interest. His acts bound the corporation because he was the corporation.

SMITH, J., (after stating the facts). Various questions are raised in the briefs, but we find it necessary to discuss only one of them, that being the authority of Romunder to purchase the bank stock with the assets of the veneer company. We think he had no such authority. It is true he was the controlling spirit in the veneer company and dictated its policies and either owned or held in his name as president the great majority of the stock. Notwithstanding the jury, by its verdict, must have found that Romunder directed Vaughan to deduct from the veneer company's deposit the purchase price of the stock, the fact is undisputed that the books of the appellant company showed that this sum had been credited back to it, and no other stockholder of this company ever knew of that action. Romunder's knowledge of this transaction could not be imputed to other stockholders of the corporation who had no actual knowledge, because the contract was for Romunder's personal advantage and against the interest of the veneer company. *Bank of Hartford* v. *McDonald,* 107 Ark. 232.

It is not contended that the veneer company could derive any benefit or advantage from this transaction, and it is sought to bind that company only upon the theory that Romunder was the veneer company, but it has been shown that he was not the owner of all the

stock. This deposit constituted in part, the assets of the veneer company and, such assets constitute a trust fund for the benefit of any creditors there may be. Even if Vaughan's version of this transaction is accepted as reflecting the truth, which must be done in view of the verdict of the jury, the fact stands undisputed that the bank knew it was taking assets belonging to the veneer company, and not to Romunder personally, with which to pay Romunder's personal obligation, and Romunder could not authorize this action.

In a discussion of the principle involved here, in the case of *American Bonding Co.* v. *Laigle S. & L. Co.*, 111 Ark. 155, it was said: "Now, it must be conceded that the note executed by Forsythe in the name of his principal, to secure his own debt, was not a valid obligation of the Bradley Lumber Company, for it is not within the real or apparent scope of authority of an agent of a corporation, or even of its officers, to bind the corporation by the execution of negotiable paper for accommodation. *Simmons National Bank* v. *Dilley Foundry Co.*, 95 Ark. 368. Nor did Forsythe have authority to use the funds of the corporation in payment of his private debt. Anders knew, when the note was executed by Forsythe, that the name of the Bradley Lumber Company was signed merely as an accommodation, and, therefore, the paper was not binding on the Bradley Lumber Company."

A number of authorities on this subject were reviewed in the opinion in the case of *Simmons National Bank* v. *Dilley Foundry Co.*, 95 Ark. 368, where the law on this subject was stated as follows:

"It follows, from this, that no corporation has the power to divert its funds or assets from the purposes for which it was created, and it therefore has not the power by any form of contract to become a surety for or otherwise to lend its credit to another person or corporation. It has the power to make all contracts necessary or incidental to its own business; and therefore a corporation organized for the purpose of carrying on

a manufacturing business, such as the Dilley Foundry Company, has the implied power to borrow money and make negotiable paper for use within the scope of its own business; but it has no power to become a party to a bill or note for the accommodation of another person or corporation. The officers of a corporation have no power to bind it by the execution of such accommodation paper, and it can not be held liable thereon when it is known by the payee or holder that it was executed only for accommodation. 3 Thompson on Corporations, § 2225; *West St. Louis Savings Bank* v. *Shawnee County Bank,* 95 U. S. 557; 7 Cyc. 679; 10 Cyc. 1115; *El Dorado Improvement Co.* v. *Citizens Bank,* 85 Ark. 185; *Park Hotel Co.* v. *Fourth National Bank,* 30 C. C. A. 409; *Owen* v. *Storm,* 72 Atl. 441."

It follows, therefore, that the court erred in rendering judgment upon the verdict of the jury for the amount of the alleged overdraft, and that judgment will be reversed and judgment entered here for the appellant company for $155 and interest from the 2d day of April, 1913.

LUCIUS v. STATE.

Opinion delivered October 12, 1914.

1. CRIMINAL LAW—DEFENDANT AS WITNESS—CREDIBILITY—QUESTION FOR JURY.—In a criminal prosecution the jury is the exclusive judge of the weight to be given to the testimony of the defendant, when he appears as a witness, and the jury may take into consideration the interest of the defendant witness, in the result of the verdict.
2. INSTRUCTIONS—PRACTICE IN CRIMINAL CASE.—In a criminal prosecution it is the defendant's duty to ask a correct instruction upon any phase of the case that he wishes presented to the jury, before he can complain of the ruling of the trial court in denying such a request.
3. LARCENY—PETIT LARCENY—INSTRUCTION.—It is not error to refuse an instruction on the issue of petit larceny, when the court read to the jury § 1826, of Kirby's Digest, which covered the issue of the value of the property stolen and the penalty.

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

X. O. Pindall, for appellant.

1. The evidence does not support the verdict. It is too unsatisfactory and indefinite as to the asportation; does no more than raise a suspicion, and is so completely lacking in convincing force as to a criminal intent, that the presumption of innocence stands undisturbed. 137 Ind. 474; 45 Am. St. Rep. 212; 85 Ark. 360; 91 Ark. 492; 100 Ark. 184; 96 Ark. 148.

2. It was reversible error to refuse the instruction to the effect that the defendant was entitled to the same consideration as any other witness, and that the fact that he was the defendant charged with a crime did not alone impeach him. Kirby's Dig., § 3088; 110 Ark. 226; 144 Mich. 17; 40 Cyc. 2259; 44 Me. 11; 13 Vt. 362; 21 U. S. 488; 46 Ark. 141; 56 Ark. 4; 58 Ark. 513; 58 Ark. 473; 66 Ark. 53; 62 Ark. 543; 207 Mass. 240; 20 Am. Cases, 1269.

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

1. We think the evidence is sufficiently clear to show both the asportation and the criminal intent, and that the evidence is sufficient to sustain the verdict. 109 Ark. 130; *Id.* 135; 96 Ark. 400.

2. The instruction requested by the defendant with reference to the consideration to be given to his testimony was not a correct declaration of the law, and he, therefore, can not complain of the court's ruling in refusing it. 62 Ark. 543; 69 Ark. 558; 78 Ark. 36; 74 Ark. 444; 87 Ark. 528; 91 Ark. 43; 95 Ark. 291; 97 Ark. 180.

HART, J., Appellant, R. L. Lucius, was indicted, tried before a jury, and convicted of the crime of grand larceny, charged to have been committed by stealing forty oak logs, the property of John Shadwell. From the judgment of conviction he has duly prosecuted an appeal to this court.

It is contended by counsel for the appellant that the evidence is not sufficient to warrant his conviction. He insists that the evidence goes no further than to raise

a suspicion of guilt. We can not agree with him in this contention. It is true the appellant testified positively that he did not take any of Shadwell's logs and introduced evidence tending to corroborate his testimony. He also introduced evidence to show that he was careful not to take any of Shadwell's logs and that, during the process of loading his own logs, he laid aside some logs there that belonged to Shadwell and said that he did not wish them loaded.

But in determining the guilt or innocence of the defendant the jury had a right to consider the testimony in its strongest probative force against appellant. Both the appellant and Shadwell hauled some logs to the station on the railroad to be shipped out. A negro named Ben Caraway hauled about 129 or 139 logs for Shadwell there and piled them in three piles. He says that he marked all the logs he hauled there for Shadwell "B. C." with blue keel.

Shadwell testified that the logs hauled for him by Caraway and marked "B. C." with blue keel scaled from 250 to 700 feet each. He said they were worth $12 per thousand and that the average value of each log was about $4.80. He did not help Caraway haul the logs but knows that there were about 129 logs there marked "B. C." with blue keel when he counted them.

Appellant shipped out some logs and in a few days Shadwell counted his logs again and found in the neighborhood of about forty of them missing. He stated that he did not give appellant permission to ship any of his logs.

Appellant admitted that he pointed out to his loaders what logs should be shipped. One of the witnesses testified that appellant told them to load all of the logs marked in pencil "J. L." Another witness said that he saw the defendant marking his logs with a pencil with the letters "J. L." and that he was marking one or two logs which had already been marked with the letters "B. C." with blue keel. It was also shown that five or six logs marked with blue keel with the letters "B. C."

and with pencil, "J. L.," were shipped out by the appellant. We think this testimony was sufficient to warrant the conviction of appellant.

It is insisted by his counsel that if he shipped out any logs marked with blue keel with the letters "B. C." it was done by mistake. The jury were the judges of the credibility of the witnesses and of the weight to be attached to their testimony. As we have already shown, the appellant himself admitted that he directed what logs should be shipped out. It was shown on the part of the State that he directed the loaders to load on the car all logs that were marked with a pencil "J. L.," and that five or six of the logs so marked were also marked "B. C." with blue keel. It was a question for the jury to say whether these logs were marked and shipped out by mistake or whether it was done under the direction of the appellant with the intent to steal them. It is true Shadwell only knew what logs had been delivered there for him through what Caraway told him. Caraway testified, however, that he did not mark any logs with the letters "B. C." with blue keel except those that he hauled there for Shadwell. It is not shown that any one else had logs there marked "B. C." with blue keel. As above stated, five or six logs so marked were loaded on the cars and shipped out by appellant. It may be, as argued by appellant, that Caraway marked logs with the letters "B. C." which did not belong to Shadwell, but there is nothing in the record to show that he did so. He testified positively that he only so marked logs which he hauled there for Shadwell. It does not appear from the record that any other logs were so marked except the ones Caraway hauled there for Shadwell.

Shadwell says his logs were worth $12 per thousand, and that the scale varies from 250 to 700 feet. If it is conceded that they scaled only 250 feet per log, five logs of this dimension would amount in value to more than $10, and there is no testimony in the record tending to show that they were worth less than the value placed upon them by Shadwell.

Again, it is contended by counsel for the appellant that the logs were piled so close together that if appellant shipped out any of Shadwell's logs he did so by mistake and not with the intent to steal them. The jury might have properly so found from his evidence, but they believed the testimony of the witnesses for the State and the testimony on the part of the State tends to show that the logs were piled in separate piles and that there was no occasion for the logs to have become so intermingled that appellant would have shipped out Shadwell's logs by mistake. Therefore we are of the opinion that there was some testimony of a substantial character to establish the guilt of the appellant, and under the settled rules of this court, we are not at liberty to disturb the verdict of the jury on appeal.

It is next contended by counsel for appellant that the court erred in refusing to give instruction No. 3, asked by the appellant. That instruction is as follows:

"The law lets the defendant become a witness on the same plane it lets any other witness testify. When he becomes one, he assumes no extra burden from the fact that he is the defendant, and stands charged with a crime. His credit is for the jury to determine, just as the credit of any other witness, and he is not to be suspected or discredited on the ground alone that he is the one accused. While the jury are not required to give his testimony any greater weight than any other witness, it goes with no less weight because of the fact that he is the defendant."

(1) The court properly refused to give the instruction. In the first place, it is argumentative and for that reason it was not error to refuse it. The instruction is otherwise erroneous. The jury were the exclusive judges of the weight to be given to the testimony of the defendant and in determining what weight should be given it, this court has held that the jury has a right to take into consideration the interest of the appellant in the result of the verdict. *Hamilton* v. *State,* 62 Ark. 543;

Blair v. *State,* 69 Ark. 558; *Weatherford* v. *State,* 78 Ark. 36.

(2) The instruction, as requested by appellant, in effect, told the jury that they should receive the testimony of the appellant with no less weight because of the fact that he was a defendant in the case. This was in plain violation of the decisions which we have just cited. The jury, in considering his testimony and in determining what weight should be given it, had a right to take into consideration his interest in the result of the verdict and the instruction should have been so framed. Under our rules of practice it is well settled that it is appellant's duty to ask a correct instruction upon any phase of the case that he wishes presented to the jury before he can complain of the ruling of the trial court in denying such a request. *Allison* v. *State,* 74 Ark. 444; *Smith* v. *Weatherford,* 92 Ark. 6; *Holmes* v. *Bluff City Lumber Co.,* 97 Ark. 180; *Jackson* v. *State,* 92 Ark. 71, and cases there cited.

(3) Finally it is contended by counsel for the defendant that the court erred in refusing to give the following instruction: "If it has developed to your satisfaction from the evidence that in this case the logs of Shadwell, if any of his are taken, do not amount in value to as much as ten dollars, or if you have reasonable doubt about their being of that value, even though you should find that what logs of Shadwell were taken were unlawfully and with criminal intent taken by defendant, you can not convict of a higher offense than that of petit larceny, and assess a fine against defendant in a sum not more than three hundred dollars nor less than ten dollars, and imprisonment in the county prison not more than one year."

The court read to the jury section 1826 of Kirby's Digest. That section is as follows: "Whoever shall be guilty of larceny, when the value of the property stolen exceeds the sum of ten dollars, shall be punished by imprisonment in the penitentiary not less than one nor more than five years. And when the value of the prop-

erty stolen does not exceed the sum of ten dollars, by imprisonment in the county prison not more than one year, and shall be fined in any sum not less than ten nor more than three hundred dollars."

By a comparison of the section read with the instruction refused, it will be noted that every advantage the defendant could have derived from the giving of the instruction asked he obtained by the reading to the jury of section 1826 of the digest.

The court in other instructions had fully instructed the jury on the question of reasonable doubt and the section of the digest quoted plainly told the jury that if the value of the property stolen did not exceed the sum of ten dollars the defendant could only be punished by imprisonment in the county prison and by fine.

The judgment will be affirmed.

WILLIAMS v. BOWEN, EXECUTOR.

Opinion delivered October 26, 1914.

APPEAL—APPEAL FROM PROBATE COURT—PREREQUISITES—WAIVER—Where an effort was made to perfect an appeal from the probate court to the circuit court, but the record does not show any presentation of an affidavit or prayer for appeal to the probate court, or any order of that court granting an appeal, it will be held that the circuit court acquired no jurisdiction, and the failure of the probate court to make an order granting an appeal is a prerequisite to its jurisdiction which can not be waived.

Appeal from Mississippi Circuit Court, Osceola District; *A. F. Barham,* Special Judge; reversed.

J. T. Coston, for appellants.

There was no appeal granted by the probate court, and the circuit court had no jurisdiction to try the case. The order granting the appeal could not be waived. 128 S. W. (Ark.) 855.

Appellees, pro se.

Appellants entered their appearance generally and went to trial on the merits of the case in the circuit court.

They, therefore, waived any defect or want of process, and any question of jurisdiction. 3 Cyc. 155; *Id.* 519-20, 524-5; 2 Ark. 33; *Id.* 26; 5 Ark. 424; 34 Ark. 409; 56 Ark. 241; 1 Ark. 376; 22 Ark. 356; 95 Ark. 302. .

McCULLOCH, C. J. Appellants are children and legatees under the last will and testament of L. D. Rozzell, late of Mississippi County, Arkansas, and instituted this proceeding in the probate court for a distribution of some property bequeathed to appellants in the will. The executor and the other children and legatees resisted the order and there was a trial in the probate court upon the issue presented, which resulted in a judgment favorable to appellants. The executor and the other legatees attempted to prosecute an appeal to the circuit court. They filed an affidavit and the transcript of the proceedings was lodged in the circuit court, but the record does not show any presentation of the affidavit or prayer for appeal to the probate court, or any order of that court granting an appeal.

No motion was made below to dismiss the appeal on account of there being no order of the probate court granting it, but the cause proceeded to trial before the court sitting as a jury and the judgment of the court was against the petitioners, who appealed to this court. They raise here for the first time the question of the court's jurisdiction on account of there being no order of the probate court granting an appeal, and insist that the judgment of the circuit court should be reversed for lack of jurisdiction. On the other hand, it is insisted by appellees that this omission was waived by the parties proceeding to a trial without moving to dismiss the appeal.

This question was expressly decided by this court in the case of *Speed* v. *Fry,* 95 Ark. 148, where we said that "the order of the probate court granting the appeal is a prerequisite to the right of the circuit court to exercise jurisdiction, and for that reason can not be waived." Other decisions of this court bearing on that question are cited in the opinion.

In the later case of *Drainage District No.* 1 v. *Rolfe,* 110 Ark. 374, we held, under a statute prescribing methods for appeals from county courts in the matter of formation of drainage districts, that where there was no order of the county court granting the appeal, appearance in the circuit court without objection to the jurisdiction would not operate as a waiver, and that a judgment of the circuit court under those circumstances would be reversed, even though the question of jurisdiction was raised here for the first time.

It follows that the circuit court was without jurisdiction, and that the judgment must be reversed. The case will not be dismissed here, for the reason that if an order of the probate court was in fact made, the omission from the transcript can be supplied so as to give the court jurisdiction to proceed to another trial of the cause. If, however, the omission be not supplied, it will be the duty of the circuit court to dismiss the appeal for want of jurisdiction.

Reversed and remanded for further proceedings not inconsistent with this opinion.

SOUTHERN COTTON OIL COMPANY v. COLEMAN.

Opinion delivered October 26, 1914.

1. STATUTE OF FRAUDS—SALE—WRITTEN CONFIRMATION.—Defendant wrote plaintiff a letter confirming the purchase at a certain price, of a certain amount of sound, clean cotton seed; *held,* the letter was a sufficient confirmation to take out of the statute of frauds an oral contract of sale as claimed by the plaintiff, for the purchase of such an amount of cotton seed, at such a price, without provision as to the seed being sound and clean, the writing not asserting that the confimation was on condition of the seed being sound and clean.
2. EVIDENCE—SALE—WRITTEN CONFIRMATION—ORAL PROOF.—A writing of confirmation which takes out of the statute of frauds an oral contract of purchase, may be proved by oral testimony of the writing and that it can not be found.

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

STATEMENT BY THE COURT.

On December 11, 1912, an agent of appellant made an oral agreement with appellee to purchase about twenty-two and one-half tons of cotton seed at $28.00 per ton, and notified appellant of the fact. On December 12, 1912, appellant wrote to appellee concerning the purchase as follows:

"Referring to report of Mr. Jesse H. Webb, we hereby confirm purchase from you as follows: One car, about twenty tons, sound, clean cotton seed. Price: at $28.00 per ton of 2,000 pounds. Basis, carload lot, f. o. b. cars, Coy, Arkansas. Terms: Weight on track scales at mill to govern. Settlement by check, promptly upon receipt and unloading. Shipment, prompt."

The appellee brought this suit in the justice court, which was appealed to the circuit court, in which he claims that the appellant was due him for breach of contract for failing to accept and pay for the seed which he had sold to appellant, resulting in his damage in the sum of $56.89. The cause was tried without a jury and judgment was rendered in favor of the appellee, and the appellant has duly prosecuted this appeal. (Other facts stated in the opinion).

Ratcliffe & Ratcliffe, for appellant.

1. The contract comes within the statute of frauds, and was not binding unless there was a note or memorandum of the contract signed by the parties.

2. The letter of confirmation, dated December 12, 1912, constituted a note or memorandum signed by the defendant. Whether it be treated as a memorandum under the statute of frauds, or as a written contract, the terms of the contract must be gotten from the letter. Wigmore on Evidence, § 2425 and 2424 (b); 20 Cyc. 258; 45 Ark. 17. The contract, therefore, was for the purchase of "sound, clean cotton seed," and there is no contention that the seed shipped were of that kind.

Vaughan & Akers, for appellee.

WOOD, J., (after stating the facts. (1) The appellee testified, over the objection of appellant, that he sold to

appellant's agent a car of cotton seed to be delivered as soon as he could get them from the gin, at $28.00 a ton. Appellant contends that the contract was within the statute of frauds, and that this testimony was incompetent, but the letter set forth in the statement was a sufficient confirmation of the contract, as claimed by appellee, to take it out of the statute of frauds. It will be observed from a reading of the letter that it purports to confirm the purchase as claimed by appellee, but states in the letter that the purchase was as follows: "One car, about twenty tons, sound, clean cotton seed. Price: at $28.00 per ton of 2,000 pounds," etc. The letter, while stating a confirmation of the purchase, does not assert that this confirmation was upon the condition that the seed should be "sound, clean cotton seed," etc. The court was therefore warranted in finding that the letter was a confirmation of the contract as alleged by the appellee.

(2) But there was testimony to warrant the court also in finding that there was another letter written to the appellee, which constituted a memorandum or basis of the contract, that did not mention that the seed were to be "sound, clean seed," etc. Appellee testified concerning this as follows: "After I had sold the seed to Mr. Webb, the Southern Oil Mill at Little Rock wrote me a letter confirming the sale at $28.00. That letter got misplaced, I reckon; I have made a diligent search for it."

Appellee further testified that there was nothing said with regard to the quality of the car of seed, nothing said as to the foreign matter in it. While this testimony is not very convincing, it is sufficient to warrant the court's finding that there was a confirmation of the contract as appellee stated it.

Moreover, there was evidence tending to show that the seed were shipped to appellant on or before December 28, 1912, under the terms of the contract as detailed by appellee. If the seed were delivered to appellant under the contract as set up by the appellee, then the appellant could not refuse to accept and pay for the same on

the ground that the same were not "sound, clean cotton seed;" and the court was correct in its finding that the appellant broke its contract by refusing to accept and pay for the car of seed in question on January 11, 1913. It was a question of fact as to whether or not under the terms of the contract the seed sold by appellee to appellant were to be "sound, clean cotton seed" as contended by the appellant and denied by the appellee. It is unnecessary to detail the evidence bearing on this issue. Suffice it to say that the evidence was sufficient to warrant the finding of the court that the contract as to the sale of the seed shipped by the appellee to appellant was for the sale of the average quality of cotton seed for the season.

Appellant does not question the correctness of the amount of appellee's claim, if his contention as to the contract be sound. Appellant only disputes here that the contract was as claimed by appellee.

We find no error in the judgment of the court, and it is therefore affirmed.

MEYER v. HOLLAND.

Opinion delivered November 30, 1914.

BROKER'S COMMISSIONS—REAL ESTATE.—M. listed lands with H., reserving the right to sell the lands himself. H. introduced one E. to M. as a prospective purchaser. In reply to H.'s question as to whether M. had sold to E., M. said to H., "I will take care of your commissions if E. and I trade." E. did not purchase from M., but M. did sell the land to one S. who was introduced to him by E. *Held*, under the evidence M. was liable to H. for his commissions on the sale.

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

C. Floyd Huff, for appellant

Rector & Sawyer, for appellee.

The case of *Scott* v. *Patterson*, 53 Ark. 52, settles the law of this case, we think. See also 52 Mo. 249; Fitch, Real Estate Agency, 119; 55 N. Y. 319.

SMITH, J. Appellee recovered judgment for commissions claimed by him upon a sale of real estate owned by appellant.

The evidence is not abstracted fully by appellant, but his contention is that the evidence at the trial developed the following facts: That appellant listed certain lands with appellee, but reserved the right to sell the lands himself, if he found a purchaser. That appellees showed the property to one Epps, who was himself a real estate dealer, and subsequently introduced Epps to appellant. That appellant and Epps were unable to trade, but appellant listed his lands with Epps, who subsequently procured one Swan as a purchaser, with whom he traded.

Appellee abstracts the testimony offered in his own behalf, and it appears that his testimony in the trial below was substantially as follows: That prior to November 11, appellant listed with him for sale, certain real estate in Hot Springs, valued at $11,000, and appellee was to find a purchaser for said property at that price, or for the consideration of $6,000 and the assumption of an indebtedness secured by a deed of trust in the sum of $5,000. That about the 15th of November, Mr. Epps came to his office and said that he wished to buy or trade for a home in Hot Springs, that he had lands in this State and other States which he would be glad to exchange for property in Hot Springs, and that he had listed with him for sale real estate belonging to his clients and that if none of his own lands would suit a customer he could possibly make a trade on some of the lands listed with him. Appellee told Mr. Epps about appellant's lots and stated to him that he thought he could negotiate a trade for some of his lands, and that he took him to the property, and Mrs. Meyer showed them through the house; that Epps was well pleased and he went with him to appellant's store, and stated to him at the time that Mr. Epps owned lands in this and other States and wanted to trade for property in Hot Springs; that he had shown appellant's property to Epps and

hoped they could get together on some of these lands, but if they could not that Epps had lands belonging to others listed with him for sale or trade and they could possibly find something that they could get together on; that he said to appellant at the time that, if he and Epps traded for lands owned by Epps, or listed by others with him for trade, he would expect his commission, and appellant said, "I will take care of your commissions if Epps and I trade. I like to pay commissions," and that he left appellant and Epps discussing certain lands in Kansas owned by Epps, and that some time thereafter he called appellant over the phone and asked him how the trade was progressing, and was told, "The man you brought me didn't trade for my property, but got me a man." Appellant traded with one A. D. Swan who assumed the $5,000 mortgage debt and conveyed to Meyer certain lands owned by him. Epps testified that at the time he first met Holland the Swan lands were listed with him, and had been for some time.

Appellant has not set out the instructions given by the court in this case, and we must assume that the case went to the jury under instructions correctly declaring the law.

According to appellee's version of this transaction, there was an express promise on appellant's part to pay the commissions, the amount of which is not in controversy, if appellant traded with Epps for any lands owned by Epps, or listed with him for sale, and a sale was made by trading for certain lands owned by Swan, which were listed with Epps at the time the promise was made. The judgment of the court is, therefore, affirmed.

HORTON & COMPANY v. BEALL.

Opinion delivered December 7, 1914.

BROKER'S COMMISSIONS—SALE OF REAL ESTATE.—B. listed lands with H. for sale, reserving the right to make a sale himself. H. corresponded with one C., another broker, looking to a sale, but nothing

was accomplished. Later B. consummated a sale through C. *Held,* H. was not entitled to any commissions in this sale, as there was nothing in his contract with B. whereby B. would become liable to him.

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

Steve Carrigan, Jr., and *Etter & Monroe,* for appellants.

1. If appellants' efforts in bringing about negotiations between appellee, acting for himself, and Colter & Company, acting for their client, was the cause originating in a series of events which, without break in their continuity, resulted in the sale or exchange of the land, appellants, in contemplation of law, are the procuring cause of the sale, and are entitled to their commission. 76 Ark. 375; 84 Ark. 462, 467; 53 Ark. 49; 89 Ark. 203; 71 Conn. 590; 44 L. R. A. 321, and note; 27 L. R. A. (N. S.) 198; 165 S. W. 503; *Id.* 1119; 14 S. W. 256; 157 S. W. 427; 60 S. W. 269; 61 N. W. 503; 154 S. W. 806; *Id.* 894; 23 L. R. A. (N. S.) 164.

2. The court was not warranted in directing a verdict for the appellees. In determining the correctness of that action, the evidence should be viewed in the light most favorable to the appellants, against whom the verdict was directed. 89 Ark. 372; *Id.* 589; 63 Ark. 94; 36 Ark. 451; 35 Ark. 146; 62 Ark. 63; 84 Ark. 57; 95 Ark. 561; 103 Ark. 231.

O. A. Graves, for appellee.

The facts in evidence, viewed in the light most favorable to appellants, make it clear that appellants are not entitled to a commission. A real estate broker who has no exclusive authority to sell, takes his chances with other agents who have like authority. The owner owes the commission to that agent only who is actually the procuring cause of the sale. 166 S. W. 537.

McCULLOCH, C. J. This is an action instituted by appellants against appellees to recover commissions alleged to be due on the sale of a plantation in Hempstead

County, Arkansas, owned by appellees. Appellants are real estate brokers at Hope and appellees entered into a contract, giving them exclusive right during a period of six months, to sell the plantation for a commission. That period expired without any progress being made toward a sale, and thereafter appellees continued the auauthority of appellants to sell or exchange the property and agreed to pay them a commission, but the agreement did not contemplate an exclusive privilege on the part of appellants. On the contrary, appellees reserved the right to list the lands for sale or exchange with other dealers, and did place them with other dealers.

An exchange of the lands for other real estate was finally made with one Aiken, and the trade was brought about and consummated through Colter & Co., a firm of real estate brokers at Muskogee, Oklahoma, with whom appellee had listed the lands. Some months prior to that time, appellants had corresponded with Colter & Co., with reference to an exchange of the lands for real estate in Muskogee owned by a man named Robinson, and Colter & Co. endeavored to bring about the exchange but failed. It was after the failure to effect that exchange (appellees having, after examining the Robinson property, declined to enter into the trade), that Colter & Co. brought appellees and Aiken together for the trade which was consummated. Appellees agreed to pay a commission to Colter & Co. and executed their note for the stipulated amount. When appellants asserted a claim to the commission, the note was held up until it could be determined whether or not they were entitled to the commission. Upon this state of facts, adduced in evidence at the trial, the circuit court peremptorily instructed the jury to render a verdict in favor of appellees, which was done, and judgment rendered accordingly.

The question for review is whether the testimony, in any phase of it most favorable to appellants, warranted a submission of the issues to the jury. Our conclusion, after considering the testimony, is that there was

no evidence tending to justify a recovery by appellants, and that the court was correct in giving a peremptory instruction. The contract between appellants and appellee was that the latter should pay appellants a commission for bringing about or negotiating a sale or exchange of the lands, and it is undisputed that the exchange was not brought about through the efforts of appellants. In other words, they did not procure the exchange and are not entitled to a commission.

We have had cases where the parties agreed that a commission should be paid if the broker procured a sale or procured some other person to bring about a sale, and in those cases we held that where one broker procured a sale or exchange through another broker he was entitled to a commission. *Simpson* v. *Blewitt,* 110 Ark. 87; *Meyer* v. *Holland,* 116 Ark. 271. There is no contention that such was the effect of the contract in this case between appellants and appellees, and in order to entitle them to a commission it must appear that they procured a sale or exchange for appellees. This they did not do. Appellees reserved the right, as before stated, to place the lands in the hands of other dealers for sale or exchange, and under this reservation they had the right to accept a purchaser brought to them by Colter & Co., or any other dealer, and pay the latter a commission, without becoming liable to appellants, even though appellants originally brought that firm of brokers and appellees together. Colter & Co. were not acting as the agents of appellants in negotiating the exchange between appellees and Aiken, but were proceeding independently. It may be that Colter & Co. did not act in good faith with appellants, and there is some testimony of admissions on the part of Colter & Co. which tend to establish that fact. But that does not render appellees liable, for they had the right to employ Colter & Co. to make the sale or exchange, and did so, and agreed to pay them a commission. So there is no theory deducible from the evidence in this case upon which appellants are entitled to recover from appellees

a commission for the exchange made with Aiken. They did not bring about the exchange and their contract with appellees was not broad enough to entitle them to a commission on an exchange brought about by Colter & Co., or any other brokers.

The judgment is therefore affirmed.

GARRETSON-GREESON LUMBER COMPANY *v.* GOZA.

Opinion delivered December 7, 1914.

1. APPEAL AND ERROR—INSTRUCTION—SPECIFIC OBJECTION.—An objection to the wording of an instruction which otherwise properly states the law of the case should be specifically made at the trial.
2. MASTER AND SERVANT—SAFE PLACE TO WORK.—A master is under the duty to furnish his servant with a safe place in which to work, and whether he has performed that duty is a question for the jury.
3. MASTER AND SERVANT—SAFE PLACE TO WORK.—Plaintiff, defendant's servant, was injured while working in defendant's saw mill, due to defective machinery; *held*, it was proper under the facts to instruct the jury on the issue of defendant's duty to furnish plaintiff a safe place in which to work, and not defendant's duty to warn plaintiff of danger.
4. MASTER AND SERVANT—DUTY OF CARE—LIABILITY FOR NEGLIGENCE.—A servant of defendant becoming sick, at the suggestion of defendant's manager, the servant hired plaintiff to do his work; *held*, the master owes to plaintiff the same duty of care as if he had been hired by defendant's manager, and any arrangement made between the two employees as to payment of wages to plaintiff does not affect defendant's liability.
5. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.—Plaintiff was injured while working in the course of his employment in defendant's saw mill. *Held*, under the evidence, it was a question for the jury, whether defendant was guilty of negligence, causing the injury.

Appeal from Union Circuit Court; *Charles W. Smith*, Judge; affirmed.

Wynne & Harrison, for appellants.

1. Plaintiff knew of the danger and risk and the mere fact of minority does not, of itself, create an absolute duty on the part of the employer to go through the form of instruction and warning, and is not liable for

failure to do so. 104 Ark. 499; 56 Ark. 232; 1 Labatt, Master and Servant, § 291. The minor assumes all ordinary risks known to him. 73 Ark. 49-56; 39 *Id.* 37; 40 N. E. 80; 43 Atl. 106; 32 N. E. 654.

2. Defendant owed plaintiff no greater duty than it would have owed to an adult. *Supra.*

3. It was error to instruct the jury as to extraneous issues or matters not raised by the proof. 74 Ark. 22; 88 *Id.* 38.

Aylmer Flennekin and *Neill C. Marsh,* for appellee.

1. The evidence shows that the minor did not appreciate the dangers incident to his work, and his youth and inexperience demanded warning and instruction. 56 Ark. 232; 104 *Id.* 499.

2. The evidence tended to establish (1) that defendant was negligent in providing a reasonably safe place to work and (2) in failing to warn a minor. *Ubi supra.*

HART, J. Ben H. Goza, by his next friend, E. B. Goza, instituted this action against the Garretson-Greeson Lumber Company to recover damages for injuries suffered by him on account of the alleged negligence of the defendant company. At the time of his injury the plaintiff was a minor eighteen years of age and was employed by the defendant to haul sawdust away from its mill, and to clean up around the boiler. Prior to that time he had worked at a sawmill for three weeks at the cut-off saw and, except for that, had never worked around a sawmill during his life. He was substituted for another employee on the morning of the day of his injury and was injured about 3 o'clock in the afternoon. His duties were to haul sawdust from behind the boiler and also from a place under the mill to which it had been conveyed and deposited by means of a trough. The sawdust was carried from the saw through a trough or box by means of an endless chain working over a sprocket wheel. The wheel was fastened to large blocks which were in turn fastened to upright posts, so that the en-

tire diameter of the wheel, which was about eighteen inches or two feet, extended out beyond the posts. The trough did not quite come to the wheel and the chain dragged along the bottom of the trough. When it emerged therefrom it passed on over the sprocket wheel into a trough leading back toward the saw. The conveyor chain dragged loosely along the trough and by that means carried the sawdust along with it. The sawdust was deposited in the space between the mouth of the trough and the post where the conveyor chain passed over the sprocket wheel.

One of the witnesses stated that when the chain passed over the mouth of the trough and came up over the sprocket wheel it had cogs on it which tightened up and caused the chain to further sag or jump at the point where it caught into the cogs of the sprocket wheel, and that one side of the chain was very much worn, causing it to run unevenly.

According to the testimony of Ben H. Goza, he would first haul away a load of sawdust in a cart from behind the boiler and would then go to the space between the end of the trough and the sprocket wheel and carry away a load of sawdust from there. The sawdust accumulated there very rapidly while he was carrying away the sawdust from behind the boiler. At the time he was injured he was standing beside the face of the sprocket wheel shoveling sawdust into the cart and stated that this was the only way in which he could do the work. He had noticed that when the chain left the end of the trough and came up to fasten into the cogs of the sprocket wheel, it tightened up and jumped. This caused the chain to sag down. In some manner, while he was shoveling the sawdust into the cart, his arm got caught in the space between the chain and the sprocket wheel and he was severely injured. He stated that there was not room enough for his arm to have caught in that space unless the chain tightened up and sagged down. He knew that if his arm should be caught it would be injured, but said that he was doing his work in the only practicable

way it could be done, and that he did not appreciate the danger from having his arm caught between the chain and sprocket wheel. He had not been warned or instructed that there was any danger in doing the work this way. He also stated that there were cogs on the sprocket wheel and that when the chain passed over the end of the trough and caught in these cogs it would tighten and then sag.

Evidence was adduced in behalf of the defendant tending to show that the sprocket wheel had no cogs on it and that the chain was carried over it by means of the friction of the chain passing over the wheel.

The jury returned a verdict in favor of the plaintiff in the sum of $1,250.00 and the defendant has appealed.

It is first contended by counsel for the defendant that the court erred in giving instruction No. 2, at the request of the plaintiff. The instruction is as follows:

"You are instructed that if you find from a preponderance of the evidence in this case, that the plaintiff while in the discharge of his duties as an employee of the defendant, and while exercising the care which a reasonably prudent man would have exercised under like circumstances, was injured by the negligence of the defendant in failing to exercise reasonable care to provide him a reasonably safe place in which to work and discharge the duties of his employment, and failed to exercise reasonable care in hooding or protecting the sprocket wheel complained of, then your verdict will be for the plaintiff."

(1) Counsel for the defendant insist that the instruction is erroneous because, they claim, it in effect assumes that the defendant was guilty of negligence in failing to hood or protect the sprocket wheel. We do not think the instruction is open to that objection; on the other hand, we are of the opinion that it left that open as a question of fact to be determined by the jury. If counsel for the defendant thought it susceptible of the construction now complained of, they should have made

a specific objection to the instruction on that ground. Then, doubtless, the court would have changed the wording of the instruction to meet their objection. It is apparent from all the instructions given by the court that this question was submitted to the jury as a question of fact. It will be noted that the sprocket wheel extended out eighteen inches or two feet beyond the post to which it was fastened and that there was no covering of any kind to protect an employee whose duty it was to shovel away the sawdust which accumulated near it. Goza testified that he placed his cart into which he was shoveling sawdust at the only place where he could perform his work and that he was standing in the only position in which he could stand and shovel the sawdust into the cart. The sprocket wheel was wholly unguarded and the plaintiff testified that it would have been guarded by nailing a piece of tin to the post to which it was fastened, and that the tin would not have in any way interfered with the operation of the chain over the sprocket wheel.

(2) This evidence on the part of the plaintiff was not denied, so that it will be seen that it was practicable to keep a guard over the cog wheel, and this simple and inexpensive device would have afforded complete protection to any one whose duty it was to carry away the sawdust. It was the duty of the defendant to exercise ordinary care to furnish a reasonably safe place for the protection of employees whose duty it was to haul away the sawdust, and we are of the opinion that under the circumstances the question of whether the defendant was negligent in failing to place a guard around the sprocket wheel was a question of fact for the jury, and that it was properly submitted to the jury.

It is also contended by counsel for the defendant that the court erred in refusing to give instruction No. 5, asked by it, the instruction being as follows:

"You are instructed that under the testimony in this case, the question of the defendant's negligence has narrowed down to one issue; that is, whether the defendant was negligent in not warning and instructing the plain-

tiff as to the dangers to be encountered by him in coming in contact with the dust conveyor chain in question, and whether such failure to so warn and instruct the plaintiff was the proximate cause of plaintiff's injury."

(3) Counsel contends that this instruction should have been given because the only question of negligence was whether or not the defendant ought to have warned or instructed Goza in regard to the dangers connected with working near the sprocket wheel. We do not agree with them in this contention. The evidence shows that one side of the chain was worn and that this caused the chain to work unevenly. It also shows that when the chain left the mouth of the trough and passed over the sprocket wheel it tightened up and jerked or sagged. Jerking and sagging would, to some extent, occur in any event, but, on account of one side of the chain being very much worn, so that the chain passed unevenly over the sprocket wheel it naturally caused the chain to sag more; at least, the jury were warranted in finding this to be a fact, and, on that account, it was proper to submit to the jury the question of the negligence of the defendant in failing to furnish Goza a safe place in which to work.

(4) Again it is insisted by counsel for the defendant that it owed the plaintiff no greater duty than it owed to Thompson, who hired plaintiff, as a substitute in his place. Thompson was the regular employee whose duty it was to remove the sawdust from under the mill, and for this service and the use of a mule which he furnished, he was paid $2.50 per day. On the morning of the day plaintiff was injured, Thompson was sick and asked that he be relieved from work. Hughes, the man who employed him, pointed out the plaintiff and told Thompson to hire him in his place and Thompson did so. He says that when he hired a substitute to take his place it was his custom to pay the substitute and the defendant would pay him his regular wages. The manner of this payment of plaintiff's wages did not in any way change his relation to the defendant. He was hired by Thompson at the suggestion of defendant's manager and

the defendant owed him the same duty as if its manager had employed him.

(5) It is also earnestly insisted by counsel for the defendant that the court erred in not directing a verdict in its favor. It is admitted that no warning or instruction was given Goza in regard to the danger of working near the sprocket wheel. It was his duty to shovel sawdust away from that place and it accumulated so rapidly that it was necessary for him to give his whole time and attention to his work in order that he might keep it from accumulating to such an extent that it would retard the work of sawing. The plaintiff was a youth, eighteen years of age, and had practically no experience in working around a saw mill, and no experience whatever in doing the work he was engaged to perform. The end in view to be accomplished by instructions from the master is to make the servant aware of the danger and the means of avoiding it. Goza says he knew, and he must be held to have known, that if his sleeve should get caught between the sprocket wheel and the chain his arm would be hurt. But it is a different question whether he should be held to have understood and appreciated the risk that his arm or sleeve might be drawn in between the cog wheel and chain while he was at work. Goza stated that there was not room enough for his arm to have been caught between the chain and the sprocket wheel unless the chain sagged to such an extent that his arm or his sleeve might be caught between them. Of course, when the chain emerged from the mouth of the trough and passed over the sprocket wheel it would tighten up and jump to some extent, but the undisputed testimony shows that one side of the chain was very much worn so that the chain was uneven. Naturally this had something to do with the sagging of the chain. The jury might have found that the chain sagged to a greater extent because it passed unevenly over the cogs of the sprocket wheel. Therefore we are of the opinion that the question whether the plaintiff had knowledge and appreciation of the danger were matters to be determined by the

jury from all the facts in the case, taking into consideration his youth and his inexperience in the work which he was performing and the character of the dangers attending it, and the failure of the defendant to give him any warning or instruction concerning them.

We think the case was fairly submitted to the jury under the well settled principles of law which this court has repeatedly held to apply under a similar state of facts. We find no prejudicial error in the record and the judgment will be affirmed.

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

Opinion delivered December 14, 1914.

1. APPEAL AND ERROR—SUBMISSION OF ISSUES—PREJUDICE—REVERSAL—NEGLIGENCE.—Where the trial court submitted to the jury for consideration all of the alleged acts of negligence of defendant in a personal injury action, if it be found that testimony was wanting with respect to any one of said acts, then the court will be held to have committed prejudicial error, calling for a reversal of the case.
2. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.—In an action for damages for personal injuries, the evidence held insufficient to show that the master was guilty of negligence in not supplying plaintiff, who was a skilled machinist, and familiar with the work he was doing, with sufficient help to do his work, and as plaintiff knew that in performing certain parts of the work that he would require assistance, and when plaintiff undertook to do the work without calling assistance, he will be held to have assumed the risk of the same.
3. MASTER AND SERVANT—INJURY TO SERVANT—OBVIOUS DEFECTS.—A machinist is not bound to inspect for defects a lathe, at which he is put to work, but is only held to ordinary care to take notice of obvious dangers.
4. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE MACHINERY—INSPECTION.—Where portions of a lathe at which a skilled workman is put to work, are defective, and he is injured thereby, it is a question for the jury to determine whether he was guilty of contributory negligence in proceeding with his work without discovering the condition of the machine, or whether he assumed the risk by proceeding with his work after he discovered its condition.

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

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

1. There was no negligence on the part of the company or its foreman; the employee assumed the risk; 3 Labatt, Master and Servant, § 1166; 53 Am. St. 127; 108 Minn. 199; 25 L. R. A. (N. S.) 362; 158 Ind. 634; 92 Ga. 77; 167 Ill. 156; 97 Ark. 486; 68 *Id.* 316; 160 Fed. 887. See, also, 144 Ky. 465; 184 Mass. 274; 106 S. W. 865; 147 U. S. 238; 54 Ark. 389, etc.,

Manning, Emerson & Morris, for appellee.

1. This case arose under the Federal Act. 106 Ark. 421.

2. There was negligence in failing to furnish sufficient help, and in furnishing defective machinery. 116 U. S. 642; *Ry. Co.* v. *Hall,* U. S. Sup. Ct., January 5, 1914; 229 U. S. 114.

3. There was no assumed risk. 48 Ark. 334; 91 *Id.* 102; 92 *Id.* 350; 88 *Id.* 548; 99 *Id.* 265; 170 U. S. 665; 93 Ark. 564; 95 *Id.* 588; 98 *Id.* 145-240-8; 101 *Id.* 197; 104 *Id.* 506; 103 *Id.* 61-509; 107 *Id.* 118; 105 *Id.* 319, 434-7; 107 *Id.* 476; 109 *Id.* 288; 116 U. S. 642.

4. Every principle necessary to affirm this case is settled in 91 S. W. 561; 113 S. W. 86; 125 S. W. 276.

McCULLOCH, C. J. This is an action against the railway company to recover damages for personal injuries alleged to have been sustained by plaintiff's intestate while working in the shops of defendant in Argenta. Deceased, William Middleton, was a machinist, and while working at one of the machines in the shop, handling a heavy metal appliance of a locomotive engine which he was repairing, it fell on his hand and mashed the flesh from one of his fingers. Blood poisoning resulted from the injury and the injured man died from the effects. The piece of machinery he was working on was a part of an engine used by the railway company in interstate commerce and the action is based upon the Federal

statute which provides for compensation for employees of common carriers who are injured while engaged in interstate commerce. Appellant concedes that under the facts of the case the deceased was employed in interstate commerce, and that if there is any liability at all it falls within the terms of the Federal statute.

Deceased was an experienced machinist, having served an apprenticeship of several years, and when he received his injury had been working in the shops as a fully equipped machinist for six or eight months. He worked under a foreman of the department named Harris and was accustomed to working at any machine to which he was assigned. He had worked at the particular machine where he was injured several times before this occasion. The machine he was working at was a thirty-six inch turning lathe, and he was engaged in boring a heavy metal appliance called the rod brass of an engine. The appliance weighed from 100 to 125 pounds and was placed in the lathe for the purpose of boring a hole in it to fit the pin, and facing off the side. It was held in place in the lathe by three jaws, which were tightened up by means of a screw and nut. The job was what was termed a rush order, which we understand to mean that it was work to be done not necessarily with special haste but that it was to have precedence over other work. Another man was on the job and had placed the brass in the lathe, when he was called off and Middleton was assigned to complete the job. He went to work at it and worked there for a period of time, when he completed one side of it, and it became necessary to loosen up the jaws, remove the brass from the lathe, and turn it round and put it back in the lathe so as to face the other side. He removed it from the lathe and while attempting to put it back, after having turned it round, it slipped out of the jaws and when it fell to the platform on which the machine rested it struck one of his fingers and mashed off some of the flesh. The only witness who stood near Middleton and was able to describe the way in which the injury occurred, says that Middleton had taken out the

brass and turned it around and put it back in position, and was holding it there in place with one hand while attempting to screw down the nut so as to tighten the jaws with his other hand, and the brass appeared to slip out of the jaws and fall.

There are three allegations of negligence in the complaint; one that the employer failed to furnish sufficient helpers to the mechanics, and particularly that no helper was furnished to Middleton to aid him in handling the brass; next, that the jaws of the lathe were permitted to become worn smooth so that they would not hold the piece of brass, but would allow the same to slip out; and third, that shavings of dirt were allowed to accumulate around the screw with which the jaws of the lathe were tightened, so that when Middleton attempted to screw down the nut it would not work and tighten the jaws, and that Middleton was thus misled into believing that the nut had gone down far enough to tighten the jaws, whereas it had been retarded and stopped by the dirt and metal shavings around the screw. The plaintiff was awarded damages by the verdict of the jury, and the defendant has appealed. The case was submitted to the jury on an instruction with respect to the acts of negligence named in the complaint in failing to furnish sufficient help, and also in failing to exercise care in furnishing a safe place to work, in that the jaws were allowed to get smooth and out of repair, and that the shavings and dirt were allowed to accumulate around the screw.

(1) It is insisted by counsel for defendant that according to the undisputed evidence there was no negligence of the employer in any of the particulars named, and that even if there was, Middleton assumed the risk of the danger. Inasmuch as the court, over the objection of the appellant, submitted to the jury for consideration all of the alleged acts of negligence, if it be found that testimony was wanting with respect to any of them then the error of the court was prejudicial and calls for a reversal of the case, for we have no means of determin-

ing which one of the acts of negligence the verdict of the jury was based upon.

(2) After a careful analysis of the testimony in the case, we are of the opinion that there was no evidence to warrant a submission of the alleged act of negligence of the employer in failing to furnish a helper, and that the court erred in submitting that issue to the jury. We are also of the opinion that even if there had been evidence on that issue, the deceased assumed the risk of the danger and can not recover. The testimony is conflicting as to the number of helpers furnished in that department, and whether the number furnished was sufficient, but we do not regard that point as material. In doing the work assigned to him on this particular occasion, Middleton did not need help except when it came time for him to shift the brass piece in the lathe. He worked on it for a considerable time, boring the hole for the pin and facing the surface of the brass, and when it became necessary to change it he needed help to lift it out of the lathe and put it back. It was not necessary nor, according to the testimony, was it usual, for a helper to stand in waiting when not needed, and from this state of facts it necessarily follows that it was the duty of Middleton to seek help or call on his foreman for it when he needed it. The testimony disclosed no competent evidence to establish the fact that he called on the foreman for any help. The only testimony on the subject is that of two witnesses, one of whom was a brother of Middleton, who was also a machinist in the shop; and these witnesses testified, over the objection of defendant's counsel, that Middleton spoke to his brother about needing help and that his brother told him to go to see Harris, the foreman, about it, and that they (the witnesses) saw him go over to Harris in another part of the room, but they could not hear what was said between the two. Harris denied that deceased had any conversation with him at all about help. The plaintiff sought to discredit the testimony of Harris by showing contradictory statements, but if it be conceded that Harris' testimony was so discredited that the

jury had the right to disregard it, the record is still left without any affirmative testimony to the effect that deceased ever called upon Harris for help or communicated to him the necessity for the services of a helper at that time. It is purely a matter of conjecture, too vague to base a verdict upon, that deceased, when he went across the room, made request of Harris for help. If the statements of deceased to his brother are admissible for any purpose, they are certainly not admissible to establish the independent fact that he called upon Harris for help. In addition to that, we are, as before stated, convinced that under the law if deceased called upon Harris for help, which was denied, he assumed the risk by proceeding with the work of lifting the metal piece out of the lathe. It must be remembered that he was a skilled workman and had worked several times at this particular machine. He knew the weight of the metal piece and he knew his own strength and capacity for handling it. Those matters were entirely within his own knowledge, more so than within the knowledge of the foreman. He was not, according to the testimony, compelled to proceed with his work, but had the right to wait for a helper when he needed one. Therefore, if he was refused help and proceeded with the work of attempting to handle the heavy piece of metal without help, he assumed the risk himself and could not complain. That he appreciated the danger of handling the heavy piece of metal by his own effort, and without help, is too plain for controversy. This, of course, leaves out of the question the act of negligence of the master in permitting the lathe to get out of repair and become unfit for reasonably safe use in doing that work. Of course, if there was negligence in that respect, it presents another phase of the case upon which a recovery may be based. But so far as the mere failure to furnish help in lifting the piece out of the lathe, deceased assumed the risk by attempting to proceed without the assistance of a helper. This is so because, as we have already said, he was a skilled machinist, was fully advised as to the size and weight

of the piece to be removed, and knew of his own strength and capacity to handle it.

(3-4) So far as the issue concerning the alleged act of negligence of the master in allowing the jaws of the lathe to become smooth so that the heavy piece of metal was likely to slip while the screws were being drawn, we think there was sufficient evidence to warrant a submission to the jury, both as to the act of negligence and the question as to assumption of risk. Witnesses testified that the jaws were made with a rough surface, having ridges so that heavy pieces of metal would not slip while being put into the lathe or taken out, and that the jaws had become smooth. Middleton and the other machinists were shifted about frequently from one machine to another and it was not the duty of each of them to see that every machine in the shop, or any one of them so far as that is concerned, was kept in repair. As a matter of fact, the testimony shows that Middleton did not work regularly at this machine, but that there was another man who worked regularly there, Middleton only being substituted occasionally. When he was called to finish up the job at this machine, the piece of metal was already in the lathe and he had no opportunity at that time to discover whether or not the jaws of the lathe were in reasonably safe condition. It is true he might have examined and discovered the condition when he lifted the piece out of the lathe, but he was not bound to inspect the machine, but was only held to ordinary care to take notice of obvious dangers. And it was a question for the jury to determine whether he was guilty of contributory negligence in proceeding with his work without discovering the condition of the jaws, or whether he assumed the risk by proceeding after he discovered their condition. We can not say as a matter of law that the danger from proceeding with the work was so obvious that Middleton is deemed to have assumed the risk even if he did observe the condition of the appliance. We are of the opinion, therefore, that that question presents an issue for submission to the jury.

It is not so clear that the allegation of negligence with respect to allowing to become clogged the screws which were used in tightening the jaws of the lathe is supported by evidence sufficient to warrant its submission to the jury. There is sufficient evidence, it is true, that the screws were clogged up with metal shavings which probably prevented the tightening of the jaws, but it appears from the testimony of witnesses, as we interpret it, that it is the duty of the machinist while operating the machine to see to freeing the screws from such obstacles, inasmuch as the screws were liable to be clogged up at any time by the shavings falling from the metal as the work proceeded. The testimony is that it was customary to strike the lathe heavily with a hammer from time to time so as to jar the shavings out, and cause them to fall from around the screws. Now, if it be true, as that testimony tends to show, that it was the duty of Middleton himself to see that the screws were kept free from such obstacles, then it follows that an act of negligence on the part of the master or fellow-servant can not be predicated upon the presence of such obstacles around the screws. These observations concerning this branch of the case are thrown out for guidance in another trial of the case when this branch of it may be more clearly and definitely explained in the testimony.

For the error of the court in submitting the issue of negligence of the defendant's foreman in failing to furnish a helper, the judgment is reversed and the cause is remanded for a new trial.

LEWIS v. YOUNG.

Opinion delivered December 21, 1914.

SCHOOL DISTRICTS—CHANGE IN DISTRICT—PUBLICATION OF NOTICE.—Where a change is proposed in a school district which affects land in two districts, under Kirby's Digest, § 7540, the notice of the change required by the statute must be given in each of the districts affected by the change, and part of the property in a district in

which the notice has not been posted can not be taken from the district.

Appeal from Columbia Circuit Court; *W. E. Patterson,* Judge; reversed.

A. D. Pope and *Stevens & Stevens,* for appellants.

1. Proof without allegations is unavailing. 23 Cyc. 816; 29 Ark. 500; 76 *Id.* 146; 46 *Id.* 96; 41 *Id.* 393.

2. Proper notices were not given as required by law. Kirby's Digest, § 7540; 105 Ark. 49; 104 *Id.* 298; 168 S. W. 1088.

C. W. McKay, for appellee.

When every elector in district No. 64 signed the petition, that was sufficient notice. But the court had jurisdiction, notwithstanding no notice was given in District 64. Kirby's Digest, § § 7545, 7544; 54 Ark. 134.

HART, J. Section 7544 of Kirby's Digest provides that the county court shall have the right to form new school districts or change the boundaries thereof upon a petition of the majority of all the electors residing upon the territory of the districts to be divided.

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

Under these statutes, appellees, who are electors of school district No. 3 in Columbia county, Arkansas, filed a petition with the county court and gave the notice providing that a new school district would be formed out of school district No. 3 and the boundaries of the new district were described in the petition and notices. After the notices were posted and while appellees were circulating the petition they discovered from the county court

records that a part of the territory included in the description of the proposed new district was in district No. 64, instead of district No. 3. Both of these districts were common school districts. There were fourteen electors living in district No. 64, who believed themselves to be living in district No. 3. For many years they had voted and paid their taxes on personal property in district No. 3. These fourteen persons were white persons and the remaining electors in district No. 64 were negroes. After the mistake was discovered the petition was presented to the electors in school district No. 64 and every one of them signed the petition.

Appellants filed a counter petition remonstrating against the formation of the new district. The county court made an order changing the boundaries of the districts so as to form the new district prayed for in the petition. Upon appeal to the circuit court the judgment of the county court was affirmed. The case is here on appeal.

It is conceded that a majority of the electors in school districts Nos. 3 and 64 signed the petition and also that no notice as prescribed by the statute was posted in district No. 64.

The giving of the notices prescribed by the statute was a prerequisite to the exercise of jurisdiction by the county court, and this is the effect of our decision in the the case of *McCray* v. *Cox,* 105 Ark. 47.

A part of the territory in the new district was in district No. 64 and the action of the county court in dismembering districts No. 3 and No. 64, both common school districts, to form a new district out of a part of the territory of both of these districts, was without validity, because the court acquired no jurisdiction to deal with any part of district No. 64, the notice required by the statute not having been given. This principle of law is recognized by counsel for appellee but they contend that it is not applicable under the facts in the present case because all of the electors residing in district No. 64

signed the petition and to have given notice would, they say, have been a useless thing.

But it may be that property owners within district No. 64 did not reside within the district, and, therefore, did not sign the petition. They were interested in the question as to whether or not a school district in which their property was situated should be dismembered, and for that reason notice should have been given so that, in the event they saw fit to do so, they might have used whatever influence they might have had with their tenants and other electors residing within the district to cause them not to sign the petition.

Therefore it can not be said that giving of the notices required by the statute would have served no useful purpose. The notice required by the statute, not having been posted in district No. 64, the county court had no power to take a part of the territory embraced in that district and transfer it into another district, or to form a new district with it and a part of district No. 3.

The judgment will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

WORTHEN v. STEWART.

Opinion delivered January 4, 1915.

1. BROKERS—COMMISSIONS—QUESTION FOR JURY.—The owner of land wrote to a broker who held an option to purchase the same, a letter stating that other land would be accepted from a prospective purchaser in the place of a cash payment which was required in the option. The broker communicated this fact to the purchaser and he received a telegram stating that the purchaser had closed the deal. This telegram was shown to the owner who refused to sign an agreement to pay commissions, prepared by the broker, but an agreement was executed by the owner in which he agreed to pay a specified commission on "deal now pending—on condition that said deal is finally closed." The owner testified that he understood that no commission was to be paid until the sale was completed by proper conveyances made to the purchaser. *Held*, if there were any grounds for an understanding by the broker that the agreement provided that he should receive commission if he

found a purchaser ready, willing, and able to buy, the question as to the meaning of the contract was properly submitted to the jury.

2. EVIDENCE—SALE OF LAND—CONDITIONS—PAROL EVIDENCE.—In an action by a broker for commissions earned on the sale of lands, parol evidence is admissible to show that certain conditions to the sale were prerequisite, and were to be performed before an instrument, providing for the payment of commissions, was to become effective.

3. BROKERS—EVIDENCE—COMMISSIONS—BAD FAITH.—Where the owner of land is dissuaded from writing in an agreement with a broker covering commissions, certain conditions relative thereto, parol evidence is admissible which tends to show bad faith on the part of the broker, to the effect that he neglected to notify a prospective purchaser of the conditions in the sale.

4. BROKERS—COMMISSIONS—FAILURE TO COMPLETE SALE.—As a condition to the payment of commissions to a broker for the sale of land where the contract of sale provided that the owner shall inspect certain lands of a prospective purchaser to be taken in "trade." The broker agreed to notify the purchaser of this condition. *Held*, where the broker failed to notify the purchaser of this condition, and the purchaser later refused to complete the trade, the broker will not be entitled to commissions within a contract whereby the owner agreed to pay commissions when the deal was finally closed, even though the owner's inability to convey a good title was one of the reasons why the trade was not made.

5. BROKERS—COMMISSIONS—QUESTION FOR JURY.—In an action by a broker for commissions earned in negotiating a sale of land to one S., which sale was never completed, evidence by the owner to the effect that he agred to pay the broker commissions on a sale of a portion of the land to another purchaser because of the failure of the proposed trade with S., is admissible and made a question for the jury, as to whether there was an accord and satisfaction as to the broker's claim for commission on the trade with S., by the payment of the commission on the subsequent sale.

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

STATEMENT BY THE COURT.

Appellant brought this suit for commission for the sale of certain real estate upon the following contract:

"Pine Bluff, Ark., March 12, 1912.

"I agree to pay to W. M. Worthen, the sum of $1,000—as his commission deal now pending between

myself and T. C. Skeen, of St. Louis, said commission to be paid either in city property or in lands or a note either way we may agree to—this is on condition that said deal is finally closed."

(Signed) "M. R. Stewart."

It is alleged that Skeen agreed to buy the property at the price made and was able to pay it, that the deal was closed and that the defendant refused to perform the contract.

The answer denied an agreement to pay the thousand dollars commission or any other sum except upon condition that the sale of the Hoffman place, negotiations for which were pending between Skeen and appellee was made and the deeds conveying same executed, that the agreement was intended to reflect this fact, and denied that the deal was closed and alleged that Skeen refused and failed to perform the contract of sale according to its terms.

The answer was amended alleging that Worthen continued as appellee's agent for the sale of the lands and finally sold same and after a discussion between them of the failure to close the deal with Skeen, he agreed to pay Worthen a commission of five per cent upon the sale, made of a portion of the lands and executed two notes in pursuance of such agreement, one of which had been paid, and that it was understood that the notes were executed in full payment of any commission due said Worthen because of his efforts to dispose of the Hoffman Plantation, and same was pleaded as an accord and satisfaction.

Worthen testified that he had an option from Stewart, dated February 15, 1912, to purchase within two months, for the price designated, the property known as the Hoffman Plantation, containing 1,628 acres, under the terms specified therein. Stewart was to furnish an abstract of title, showing the place free from liens and for delay in perfecting the title the holder of the option was authorized to cancel it or extend the time. On the 22d day of February, Worthen transferred this option

by endorsement on the back of it, to T. C. Skeen for ten days for a recited consideration of $1.00. He testified further that Skeen examined the land, agreed to take it and pay the price demanded, $7,000 in cash, but later substituted therefor 822 acres of land in Poinsett County which Stewart agreed to accept for the cash payment in the following letter:

"Pine Bluff, Ark., February 24, 1912.

"W. M. Worthen, Pine Bluff, Ark.

"Dear Sir:—Referring to my Option Contract to you dated February 15, 1912, covering 1,628 acres of land known as the Hoffman Plantation at Swan Lake in Jefferson County, Arkansas. In lieu of the $7,000 mentioned therein to be paid in cash, I will accept clear from incumbrance, the 822 acres of land in Poinsett County, Arkansas, the most of which is in the vicinity of Fisher, as per letter of February 21, to you from Mr. Skeen, and this will authorize you to make the Option Contract so read.

"Yours very truly,

"M. R. Stewart."

After this Skeen wired and wrote that he was ready to close the deal then, by lettergram of March 11, as follows:

"W. M. Worthen,

"Pine Bluff, Ark.

"I have closed the deal on Hoffman Plantation at Swan Lake for you and Stewart. Papers to be exchanged this week. Get abstracts complete and wire me immediately when you or you and Stewart can be here with same, together with deed executed as I will direct. Then await my advices, that everything here may be ready. Hurry, as I am going away soon.

"T. C. Skeen."

After receiving this telegram Worthen showed it to Stewart and told him he was satisfied he could close the deal and wanted to know what commission he would receive and the agreement set out to pay $1,000 was executed. Stewart said it was all right and began to figure

upon getting his abstracts and asked Worthen to secure the deed and abstract of the Poinsett County land, saying he found no objection to that except a lien for $50 which Skeen agreed to pay. Skeen sent the deed of the Poinsett County land but Stewart never executed the deed to his place and the trade was not consummated.

The deal was closed between Stewart and Skeen on March 12, 1912, and he had not been paid his commission. He tried to help Stewart get up a good abstract to his Swan Lake place, but they failed to do so. He stated further that Stewart asked him what the Poinsett County lands were worth and he replied that he knew nothing whatever about them but there were good lands in that county and Stewart said, "They were worth taking a shot at." He denied that Stewart agreed to sign the letter of February 24, only on condition that he inspect the Poinsett County lands and approve their value and the title. He admitted he continued to act as Stewart's agent and finally sold the place, but denied that the notes taken in payment for commission were in satisfaction of the commission due for the sale claimed to have been made with Skeen.

Skeen testified that he took up the proposition of the sale of the Hoffman Plantation with Worthen who had an option to purchase from Stewart which was assigned to him. That under the option he had the right to purchase within two months from February 15; and was prepared to take the land over and ready and able to pay for it, and would have done so had not Mr. Stewart defaulted in his contract and refused to perform it. He complied with all the conditions of the option contract upon his part, extended it sixty days upon an agreement with Stewart and that the sale was closed. "By virtue of the contract and under its terms we finally closed the deal. We closed the contract. The land was never taken over. The title to a portion of it failed, and Mr. Stewart refused to clear it." That he afterward sued Stewart for breach of contract and the case was compromised.

An identified letter to Stewart reads as follows: "Referring to your letter of the 26th inst. The contract speaks for itself and that is what I stand on. (Signed) T. C. Skeen."

He stated the option contract was not changed except as to the extension of time agreed upon and for the substitution of the land in Poinsett County for the $7,000 cash payment. That he received the letter, already set out, of Stewart's to Worthen agreeing to take the Poinsett County lands and there was no condition attached relative to the inspection or appraisement of them, that Worthen may have said something about it subsequent to that, but not at the time.

Stewart testified that Worthen was acting as his agent, and he gave him the option contract to purchase the Hoffman place for $7,000 cash, and the payment of the $20,000 indebtedness due on it, which was later transferred to Skeen of St. Louis. Shortly afterward Skeen sent the letter to Worthen for him to sign, agreeing to take 822 acres of Poinsett County land in lieu of the $7,000 cash payment, and when Worthen presented it for signature "I said I don't know anything about those lands in Poinsett County, they may be covered with water, we will have to inspect them, and I will write under here 'Subject to inspection,' " and Worthen said no, I don't believe I would do that, that might delay the trade, I will write to Skeen and explain that to him, that it is subject to inspection, and with that understanding I signed the agreement. I instructed him to communicate this to Mr. Skeen and told him I would take the land only under that condition. He told me that he communicated this to Skeen and afterward I suspected that he had not done it and asked him to show me a copy of the letter to Skeen. He stated he never made an inspection of the Poinsett County lands and did not have the abstract of title examined and passed on, but that he told Skeen that he was ready at any time to inspect the land and wrote him that. He read copies of letters to Skeen in which he stated he was as anxious to get the matter

closed up as Skeen could be, that he was doing all that could be done to clear the title to the Hoffman place. In the letter of July 26, he stated, "I am as anxious over the matter as anyone can be, but I want to say that I can't agree with your contention that the trade is already consummated and contingent only on perfecting the title, as I have never agreed to take the Poinsett County lands in full payment for my equity in the Swan Lake place until I have inspected the lands and passed on their value and title."

He stated that in reply to this letter he received the one from Skeen saying "the contract speaks for itself and that is what I stand on." The contract in regard to the commission was written in Worthen's office and he objected to the first one, saying he did not want to pay the thousand dollars without the trade went through and dictated another, the one set out, to pay only on condition that "the deal was finally closed," and it never was closed. He said further that Worthen had never made any demand on him for this commission until the suit was bought, that he never inspected the Poinsett County lands and approved the title, nor agreed to accept them and that no deed was tendered him for them, and he waited for them to show him the lands but it was never done. Later in September Worthen told him at his office that he could sell 1,238 acres of the Hoffman place for $21,000, the indebtedness against it if Stewart would pay him $500 commission, which he declined to do, saying, since there was no profit in it he could not afford to pay a commission, but that if he would reserve thirty acres from the sale, he would pay him $100 commission, that the thirty acres were not reserved and he authorized him to make the sale, but understood that Whitener, the purchaser, paid him a commission. In December Worthen told him he could sell the 300 acres and they closed the deal for $25 an acre for 390 acres, Worthen saying, "you are going to pay me a pretty good commission for this, ain't you?" and I said "Yes, I feel under obligation to pay you a full 5 per cent. commission on this trade, as we

fell down on the Skeen trade. He never had up until that time said a word about the Skeen transaction. I did not know he demanded it until I was served with summons. I never said to him that "the Poinsett County lands were worth $10 any way and I would take a shot at them without seeing them."

Worthen being recalled stated that when Skeen sent the letter of February 24, to him for Stewart's signature, that he, Stewart, took it off in the morning and in the afternoon came back and said he had investigated the lands and talked with some Poinsett County people and, "as it is practically velvet, I will just take a shot at it." Mr. Stewart did not state that he would only accept the proposition contained in my letter conditioned that he first be allowed to examine the land in Poinsett County, nor did he undertake to write on the letter, "subject to inspection." I did not tell him not to put it on there as it might delay the trade, nor that I would communicate it to Skeen by letter. I returned the letter of the 24th inst. to Skeen after Stewart signed it and some time after that Stewart began to talk about an inspection of the Poinsett County lands. He denied having a conversation with Stewart in the office of Jones in Pine Bluff in which he stated that Stewart signed the contract, conditioned on the inspection of those lands and that he started to write "subject to inspection" on the letter.

The court refused to instruct the jury at plaintiff's request, that if they found from the evidence that Skeen and Stewart closed their deal and that Skeen agreed to accept the property from Stewart as per terms of the option contract and amendment thereto, that they should find for the plaintiff without regard to the terms of the contract or whether they carried it out or not or whether the failure to consummate the deal was due to the act of the seller or purchaser, that if the deal was closed the plaintiff had fulfilled his contract and was entitled to recover and also that Stewart agreed to accept the Poinsett County land by the amendment of the option contract dated February 24, and it was not incumbent upon the plaintiff to show the lands to Stewart.

It gave, over his objection, instruction numbered 3, submitting the question of whether or not Stewart in signing the letter of February 24, agreed to the substitution of the Poinsett County lands for the cash payment only on condition that he should be allowed to first inspect said lands and the assurance of Worthen upon his not amending the letter, showing the fact, that he would communicate the condition to Skeen, that so far as Worthen, plaintiff, was concerned, a fulfillment of this condition was essential to the completion of the contract without regard to whether Worthen communicated the condition to Skeen or not and if while the negotiations were pending, Skeen repudiated that condition, stating that he stood upon the contract as written, then Worthen would not be entitled to recover and to find for the defendant.

The court also submitted to the jury in instruction numbered 1 on its own motion the question of the meaning of the agreement to pay, in the commission contract "on condition that said deal is finally closed," stating each party's contention in regard thereto.

A. H. Rowell, for appellant.

1. The rule is that where a contract is reduced to writing, it is presumed to contain all the terms of the contract, verbal or otherwise, and extrinsic evidence is inadmissible to vary, contradict or add to the written instrument. Appellee's testimony that he accepted the Poinsett County land "subject to inspection," was, therefore, inadmissible. Because, the agreement attempted to be proved by parol is entirely inconsistent with the written agreement, because, in the written agreement appellee attaches no condition whatever to his statement "I will accept," etc. 21 Am. & Eng. Enc. of L., 1093; *Id.* 1090; 96 Ark. 135; 12 Met. (Mass.) 275; 12 O. St. 201; 6 *Id.* 1-4; 35 Ark. 156; 80 Ark. 505; 24 Ark. 210; 30 Ark. 284; 90 Atl. 667; 168 S. W. 1119; 108 Ark. 506; 105 Ark. 455.

2. If Skeen and Stewart closed their deal, and Skeen agreed to accept the property from Stewart according to the terms of the option contract and the

amendment thereto, it was immaterial, so far as appellant was concerned, what the terms of that contract were, or whether it was carried out or not, or whether the failure to finally consummate the deal was due to the act of the principal or of the purchaser. Appellant on the closing of the deal between those parties had fulfilled all that his contract required, and was entitled to his commission. 44 L. R. A. 593; 20 L. R. A. 398; 130 N. Y. 676; 6 L. R. A. (N. S.) 855; 87 Ark. 507; 89 Ark. 290.

Taylor, Jones & Taylor, for appellee.

1. The authorities cited by appellant to sustain the elementary rule with reference to the alteration of written instruments by parol testimony, can have no application in this case. There is no effort here to vary the terms of the writing, but merely to show that certain conditions were to be fulfilled before the obligations, or agreements, should become binding. And that was a legitimate matter of proof. 82 Ark. 219; 76 Ark. 140; 78 Ark. 586; 88 Ark. 383; 94 Ark. 575; 100 Ark. 365; 39 Ark. Law Rep. 27.

The condition imposed by appellee was plainly admissible in evidence under the rule that where the agent is guilty of fraud, dishonesty or unfaithfulness in the transaction of his agency, such conduct is a bar to the recovery by him of compensation. 31 Cyc. 1498, and cases cited in note 5; 1 Clark & Skyles, Law of Agency, 819; Story on Agency, § § 333, 334; Mechem on Agency, § § 643, 798; Tiffany on Agency, 418; 96 Ark. 451.

2. There was ample testimony to warrant the submission of the question of accord and satisfaction. However, a general exception to an instruction, as was the case here, is not sufficient. 78 Ark. 279. When Stewart informed Worthen that he was going to pay him five per cent. commission because they had fallen down on the Skeen trade, it was Worthen's duty to object then to such a statement, and he is now estopped to deny that it was an accord and satisfaction. 98 Ark. 269; 100 Ark. 250.

KIRBY, J., (after stating the facts). Appellant insists that the agreement for payment of the commission

with the option contract and amendment, all in writing, definitely expressed the terms upon which the sale should be made, that he furnished a purchaser, ready, willing and able to buy the lands and did in fact sell them to him in accordance with the terms of the contract, and earned his commission and was entitled to it, and that the court erred in not so instructing the jury, and in allowing the introduction of parol testimony to establish a condition to the unqualified letter of acceptance of the Poinsett County lands, in substitution for the $7,000 cash payment requested by the option contract.

(1) This is not a case of a real estate broker earning his commission by finding a purchaser, willing and able to buy the land offered for sale. By the terms of agreement the commission was only to be paid on condition that the deal pending was finally closed, the appellant having already negotiated for the sale of the lands and received the telegram from Skeen that the deal had been closed, which was shown to appellee before the execution of the agreement to pay commission.

If the deal was closed at the time of the execution of the agreement to pay commission, there was no necessity for stating that it was pending, and that the commission would be paid on condition that it was finally closed, for the commission was already earned in accordance with the contention of appellant and the obligation to pay would doubtless have been written without condition at all. Appellant stated that the option contract had been transferred to Skeen; and the letter of February 24, from Stewart of unconditional acceptance of the Poinsett County lands had already been sent to him and he had received a telegram from Skeen that the deal was closed, which he showed to appellee before he executed the commission agreement. Appellee stated that he did not like the form of agreement to pay commission already prepared by appellant and dictated the one set out herein, agreeing to pay commission on condition that the deal pending was finally closed, understanding thereby

that it should be finally consummated and the lands duly transferred by proper conveyances.

Appellant understood the contract differently, and the court did not err in permitting the jury to pass upon its meaning under proper instructions. Its terms were ambiguous certainly if there is ground for appellant's understanding of its meaning and with his statements that he showed the telegram to Skeen, stating the deal had been closed and the conveyances should be prepared and delivered, to Stewart, before the commission agreement was executed furnishing grounds certainly for his, Stewart's, understanding of the meaning of the contract contended for by him, that the commission should be paid on condition that the deal was finally completed and the lands conveyed.

(2-3) Appellant's contention that the court erred in not declaring appellant's letter of the 24th an unconditional acceptance of the Poinsett County lands, in lieu of the $7,000 cash payment, without any duty on his part to show the lands to appellee for his inspection was erroneous and the court did not err in refusing it.

The answer alleged and the testimony tended to prove that this letter prepared by Skeen, addressed to appellant was signed by the appellee upon condition that the lands should be inspected and accepted by him only if their value and title were approved, in lieu of the $7,000 cash payment required by the option.

Appellee testified that it was signed on this condition, "that he started to write, 'subject to inspection' on the letter and was dissuaded from doing so by appellant, who said he feared it might interfere with the consummation of the sale," and agreed to notify Skeen that such was the condition at the time of returning the letter to him and was instructed to do so by appellee. Appellant denied this, it is true, but he is concluded by the jury's finding upon the question. This testimony does not come within the rule of the admissibility of parol contemporaneous evidence to contradict or vary the terms of a valid written instrument, but within the rule allowing the ad-

mission of such testimony to show that certain conditions or prerequisites were to be met or performed before the instrument executed should become effective.

In *Barr C. & P. C.* v. *Brooks-Ozan Merc. Co.,* 82 Ark. 219, our court quotes with approval from *Ware* v. *Allen,* 128 U. S. 590: "We are of the opinion that this evidence shows that the contract upon which this suit was brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument whether delivered to a third person as an escrow, or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter." In *Burke* v. *Dulaney,* 153 U. S. 228, that court said: "In an action by the payee of a negotiable promissory note against the maker, evidence is admissible to show a parol agreement between the parties, made at the time of the making of the note, that it should not become operative as a note until the maker could examine the property for which it was to be given, and determine whether he would purchase it."

The rule is well established and has been frequently recognized in our decisions. *Graham* v. *Remmel,* 76 Ark. 140; *Barton-Parker Mfg. Co.* v. *Taylor,* 78 Ark. 586; *Main* v. *Oliver,* 88 Ark. 383; *William Brooks Medicine Co.* v. *Jeffries,* 94 Ark. 575; *American Sales Book Co.* v. *Whitaker,* 100 Ark. 365; *Pickler* v. *Arkansas Pkg. Co.,* 39 A. L. R. 127.

The testimony is also admissible under the rule requiring fidelity on the part of the agent in the transaction of his agency. As stated in *Doss* v. *Long Prairie Levee District,* 96 Ark. 451, "The rule is well settled, both by the text writers and adjudicated cases, that where the agent is guilty of fraud, dishonesty or unfaithfulness in the transaction of his agency, such conduct is a bar to the recovery by him of wages or compensation." 31 Cyc. 1498; 1 Clark & Skyles on the Law of Agency, 819; Story

on Agency, § § 333 and 334; Mechem on Agency, § § 643, 798; Tiffany on Agency, 418.

(4-5) It may be that the trade was not consummated because of appellee's inability to convey a good title to the lands, and the evidence indicates such was one of the causes, but as between the parties to this suit the condition relative to the acceptance of the Poinsett County lands in lieu of the cash payment had not been performed and certainly the deal was not finally closed within the meaning of the contract for the payment of commission. Neither do we think the court erred in instructing the jury relative to the accord and satisfaction by the payment of a certain commission for the sale of a portion of the plantation included within this transaction. There was sufficient testimony to warrant the giving of the instruction.

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

THE LINN-MCCABE COMPANY v. WILLIAMS.

Opinion delivered January 11, 1915.

1. APPEAL AND ERROR—GROUND FOR REVERSAL NOT IN MOTION FOR NEW TRIAL.—A ground for reversal of a judgment of the circuit court will not be considered on appeal where it does not appear in the motion for a new trial.
2. PLEADING—WARNING ORDER—APPEARANCE OF DEFENDANT.—The appearance of the defendant waives the defect in the proceedings of the plaintiff's failure to file an affidavit for a warning order.
3. APPEAL—WANT OF PROCESS—EFFECT.—Taking an appeal to the circuit court from a judgment of a justice court, and the prosecution of the appeal there, operates as a general appearance on defendant's part, and such an appearance waives the want of process or any defect therein.
4. EVIDENCE—ADMISSIBILITY—RELEVANCY—OBJECTION.—A general objection to the admission of evidence reaches only to its relevancy and competency, and not to the sufficiency of the foundation laid for its introduction.
5. EVIDENCE—ADMISSIBILITY—OBJECTION.—An objection to the admissibility of a letter in evidence, on the ground of failure of proof of its authenticity can not be made for the first time on appeal.

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

Sam Dent Bell, for appellant.

1. No warning order was issued, nor personal service had. The record fails to show that any legal proof of publication was made of any warning order. The court acquired no jurisdiction and the circuit court had none on appeal. 87 Ark. 313; 40 *Id.* 124; 50 *Id.* 433.

2. The defendant only appeared *specially* to take an appeal and waived no errors as to jurisdiction. 77 Ark. 412.

3. The letter admitted was irrelevant and incompetent as evidence and outside this letter there is no evidence to sustain the verdict.

Park Crutcher, for appellee.

1. Appellant entered his appearance in justice's court and prayed an appeal, thus waiving service. 19 Ark. 484; 43 *Id.* 545; 53 *Id.* 181; 45 *Id.* 295; 46 *Id.* 251.

2. The court sitting as a jury settled the fact of appellee's indebtedness. 25 Ark. 474; 23 *Id.* 131; 40 *Id.* 168. This court will not disturb a verdict or finding of a court, if supported by any legal evidence. Cases *supra.*

MCCULLOCH, C. J. The defendant (appellant) is a foreign corporation and the plaintiff instituted this action against it before a justice of the peace in Crawford County, Arkansas, to recover the amount of an alleged debt for commissions on the sale of pumps which were manufactured and placed on sale by the defendant. An order of general attachment was issued at the commencement of the action and levied on certain personal property of the defendant found in Crawford County, and a warning order was published. Judgment by default was rendered and the property was ordered to be sold to satisfy the judgment. The defendant appeared later by attorney and took an appeal to the circuit court. A trial in the circuit court resulted in a verdict in favor of the plaintiff and an appeal has been prosecuted to this court.

(1) Defendant filed a motion for a continuance, and the action of the court in overruling the motion is urged here as one of the grounds for reversal; but as the motion does not appear in the bill of exceptions, that ruling of the court is not subject to review.

(2-3) The principal ground urged for reversal is that the record fails to show that there was an affidavit for warning order, but the appearance of the defendant waived that defect in the proceeding and it is too late now to complain that the warning order was issued without an affidavit having been filed. Taking an appeal to the circuit court, and the prosecution of the appeal in that court, operated as a general appearance, and such an appearance waived the want of process or any defect therein.

The case was heard by the court sitting as a jury, and the only testimony adduced was that of the plaintiff himself. He testified that he commenced selling pumps for the defendant pursuant to an agreement with one Trusty, of Fort Smith, who claimed to be the general agent or State agent of the defendant. His testimony further shows that he sold a certain number of pumps, which would entitle him to the amount of commission he recovered under the court's judgment.

(4-5) In course of the examination of the plaintiff, a letter was introduced in evidence, directed to him and purporting to be signed by the defendant. This letter is sufficient to establish a contract of the defendant with the plaintiff whereby the latter was to sell pumps in this State for a stipulated commission. There was a general objection to the introduction of the letter on the ground that it was "irrelevant, incompetent and immaterial and injurious to the rights of the defendant herein." The objection made here is that the letter was introduced without sufficient proof of its execution, but we are of the opinion that that objection comes too late. A general objection to the admission of evidence reaches only to its relevancy and competency, and not to the sufficiency of the foundation laid for its introduction. *Vaughan* v.

State, 58 Ark. 353; *Railway Company* v. *Murphy,* 60 Ark. 333; *Railway Company* v. *Sweet,* 60 Ark. 550. The specific objection made here should have been made to the court below in order for it to avail anything. If the objection had been made there, the plaintiff would have had an opportunity to lay the proper foundation by first proving the execution of the letter. There is no hint in the record that any question was made as to the authenticity of the letter. Therefore it would operate unjustly to the prejudice of plaintiff to permit that objection to be made now for the first time.

Judgment affirmed.

BOWDEN v. WEBB.

Opinion delivered January 11, 1915.

1. ELECTION—CONTEST—ORDER OF CIRCUIT JUDGE—FINALITY—REVIEW—CERTIORARI.—On an appeal to the circuit court from the county court, in a cause contesting the validity of an election concerning the removal of a county seat, the circuit judge in vacation made an order requiring certain election commissioners to appear before the clerk, and to file the election books containing the names of those who voted at the election, and requiring that said books be kept by the clerk. *Held,* the order of the circuit judge was final and subject to review, and there being no provision for an appeal from an order of a circuit judge in vacation, a writ of certiorari is the appropriate method of bringing up the record for review.

2. ELECTIONS—COUNTY SEATS—RETURNS, HOW MADE.—Returns of county seat elections are to be made to the county election commissioners, the same as required by the statute in general elections and a contest of such an election must originate in the county court.

3. ELECTIONS—POLL BOOKS—CONTEST—JURISDICTION OF CIRCUIT JUDGE.—Where the result of an election is contested, the circuit judge in vacation, when the contest is pending in the circuit court, on appeal from the county court, may require the election commissioners to discharge their duty by allowing a reasonable opportunity to contestants and those interested in the result of the election, to inspect the poll books.

4. ELECTIONS—POLL BOOKS—INSPECTION.—The original, as well as the duplicate poll books, made at an election, are public records, in the sense that they must be kept open for the inspection of those who are interested in them and have a right to see them.

5. MANDAMUS—PUBLIC OFFICER—REMEDY.—Mandamus is an appropriate remedy for requiring a public officer to discharge his duty.

6. ELECTIONS—CONTEST—INSPECTION OF RECORDS.—In a contest over a county seat election, where fraud in the election is alleged by contestants, an inspection of the records is indispensable, for the records are presumed to be correct until overturned by evidence showing that they are not correct.

7. CIRCUIT JUDGES—POWERS IN VACATION.—Circuit judges in vacation, may exercise only such judicial powers as are conferred by statute.

8. ELECTIONS—CONTEST—INSPECTION AND CUSTODY OF RECORDS—POWER OF CIRCUIT COURT.—While, in an election contest, the circuit judge may order the production of the poll books to be used as evidence, the circuit judge in vacation has no power to order the relinquishment of the custody of the same by the election commissioners.

Certiorari to Hempstead Circuit Court; *R. G. Haynie,* Judge; judgment quashed.

Jas. H. McCollum, T. C. Jobe and *O. A. Graves,* for petitioners.

1. The circuit *judge* had no power or authority to make the order. Kirby's Dig., § § 2832-3; 163 S. W. 1173; New Standard Dictionary, p. 2559. "Competent Tribunal" means a *court* of justice. 2 Words & Phrases, 1362; 2 Ark. 229; 30 *Id.* 764; 38 *Id.* 213; 86 *Id.* 259; 103 *Id.* 571; 23 Cyc. 543-5; 26 U. S. (L. Ed.) 1111; 2 Words & Phrases, 1678; 23 Cyc. 543.

2. Neither judge nor court has the power to order the issuance of a *subpoena duces tecum* for the production of the books for inspection. Kirby's Digest, § 2838; 75 Ark. 455; 32 *Id.* 553; 49 Am. St. 557; 16 L. R. A. (N. S.) 1062; 40 Cyc. 2168; 128 Am. St. 749; 40 Cyc. 2170; 6 L. R. A. (N. S.) 325, note; 12 *Id.* 636; 31 L. R. A. (N. S.) 835; 15 Cyc. 429.

3. Should the order be carried out the integrity of the poll books would be destroyed and they would be useless as evidence. 50 Ark. 85; 11 Am. St. 787; 49 *Id.* 557; 16 L. R. A. (N. S.) 1062; McCrary on Elections, § § 471-4, 480-1.

4. Before a *subpoena duces tecum* will be ordered for books, it must appear that they contain material evidence. 66 Ark. 229; 37 Am. Rep. 426; 128 Am.

St. 749, note; 41 U. S. (L. Ed.) 87; 40 Cyc. 2169; 31 L. R. A. (N. S.) 835. As to whether or not the writ is really a subpoena d. t. see 16 L. R. A. (N. S.) 1062.

5. *Certiorari* is the proper remedy. 29 Ark. 173; 38 *Id.* 159; 39 *Id.* 126; *Ib.* 347; 61 *Id.* 605; 69 *Id.* 587; 73 *Id.* 604; 80 *Id.* 200; 103 *Id.* 571; 109 *Id.* 100; 50 L. R. A. 787; 7 *Id.* (N. S.) 512.

Etter & Monroe, Dan W. Jones and *D. B. Sain,* for respondents.

1. This application was made to the circuit judge in vacation under Kirby's Dig., § § 3074 to 3078. The circuit judge in vacation has power to make the order. Kirby's Dig., § § 2883, 3074 to 3078. The provisions of these statutes were fully complied with. See Kirby's Dig., § 1125, and 73 Ark. 270; Kirby's Dig. § 2838. The only competent evidence are the ballots and certificate showing how each elector voted. The production of the poll books does not interfere with the secrecy of the ballot or certificates.

2. The books, when produced, are under the control of the court, and the control of the election commissioners ceases. 75 Ark. 452.

3. The circuit court had jurisdiction over the contest by appeal, and had authority to make any necessary order for preserving the ballots and using them as evidence. 86 Ark. 272; Kirby's Dig., § 2838; 81 Ark. 543.

4. Nothing in section 2838, Kirby's Digest, is mentioned with reference to poll books, but only the ballots and certificates. There is no statute requiring *poll books* to be kept secret.

5. The petition for subpoena d. t. is specific as to the particular books desired.

McCULLOCH, C. J. An election was held in Hempstead County on August 15, 1914, to decide the question of removal of the county seat from Washington to Hope; and the majority being, on the face of the returns as certified by the election commissioners, in favor of removal, a contest was instituted by those opposed to such re-

moval. The county court decided against the contestants, and an appeal was taken to the circuit court, where the case is now pending, and stands for hearing at the next term of that court, to be held in April, 1915.

While the case was pending in the county court, an order was made by the court on the judges of election of the different townships requiring them to file with the clerk of the court the duplicate poll books kept by them pursuant to the election laws of the State, and that order was complied with except by the judges of election in nine of the voting precincts, who reported that the duplicates kept by them had been lost or destroyed and that the same could not be produced. After the appeal was taken the contestants made application to the circuit judge in vacation for a subpoena *duces tecum,* requiring the election commissioners of the county "to appear before the clerk of the circuit court on a day to be fixed * * * and to bring with them and to produce and file with the clerk of the Hempstead circuit court the poll books containing the names of the persons who voted at the election" in the townships specified where the judges had not complied with the order with respect to delivery of the duplicate poll books, and "also to testify on behalf of the contestants" in the proceedings pending in the circuit court. Notice was given of this application, and on hearing thereof the judge made an order in compliance with the petition, directing the clerk of the court to issue the subpoena *duces tecum* requiring the election commissioners to appear before the clerk on the 15th day of December, 1914, "and to bring with them and file with the clerk of the Hempstead circuit court in said cause on said day the poll books containing the names of the persons who voted at the election held in Hempstead County, Arkansas, on the 15th day of August, 1914, upon the question of the removal of the county seat from Washington, Arkansas, to Hope, Arkansas, and said poll books so filed by said election commissioners shall be safely kept by said clerk for the inspection of all parties to this suit and shall remain in his office until further orders." It

will be seen from a comparison of the prayer of the petition and the order of the court, that the latter goes beyond the former in requiring the commissioners not only to produce the poll books, but that the same be filed and remain in the custody of the clerk until further orders of the court.

(1) The commissioners, through their attorneys, have presented a petition to this court for a writ of *certiorari* to bring up the order of the circuit judge for review, and they challenge the jurisdiction of the judge to make such an order, particularly that part of it which changes the custody of the poll books from the election commissioners to the clerk of the court. The order of the circuit judge is to that extent a final one, which is subject to review, and as there is no provision for an appeal from an order of the circuit judge in vacation, the writ of *certiorari* is the appropriate method of bringing up the record for review. *State* ex rel. v. *Neel,* 48 Ark. 283; *Jackson,* Ex parte, 45 Ark. 158; Ex parte *Helmert,* 103 Ark. 571.

(2) Returns of county seat elections are to be made to the county election commissioners, the same as required by the statute in general elections, and a contest of such an election must originate in the county court. *Pitts* v. *Stuckert,* 111 Ark. 388.

The statutes governing elections provide that judges of election shall, after counting the ballots, prepare and sign in duplicate a certificate showing the number of votes given for each person, etc., and that "after making such certificate, the judges, before they disperse, shall put under cover one of said tally-sheets, certificates and poll-books and seal the same, and direct it to the board of county election commissioners." Kirby's Digest, § 2832. The election judges are further required to send up the ballots in a package separate from the certificates and poll-books. Section 2833. The duties of the election commissioners, with respect to the returns made to them, are prescribed in section 2838 as follows: "The county election commissioners shall retain the custody of and

safely keep all ballots and certificates returned to them from the several precincts for a period of six months, after which time the same shall be destroyed, unless the commissioners shall be sooner notified in writing that the election of some person voted for at such election and declared to have been elected, has been contested, or that criminal prosecution has been begun against any officer of election, or person voting thereat, for any fraud in said election, before a tribunal of competent jurisdiction, in which event, so many of said ballots and certificates as may relate to matters involved in said contest, or any prosecution, shall be preserved for use as evidence in such contest or prosecution. During the time such ballots may be retained, the package containing same shall not be opened by any one, unless directed to do so by some competent tribunal before which an election contest or prosecution is pending, in which such ballots are to be used as evidence."

(3) It will be observed from reading the terms of the statute, that the ballots are to be kept in separate packages and not opened until ordered by a court of competent jurisdiction in a contest or a criminal prosecution, but that the package containing the certificates and poll-books are to be opened by the election commissioners for the purpose of casting up and certifying the total result of the election in the county. Thus the election commissioners are by statute made the custodians of the certificates, poll-books and ballots, and the ballots are to be kept secret, but the poll-books and certificates are public records about which there is no secrecy, and which are subject to inspection like any other public records. The legal custody of all these records continues with the election commissioners, unless those custodians are required to appear and produce the records as evidence in court. In that event, the court, in the exercise of its inherent powers, may retain the custody of the records and place them in the hands of the custodian of its own selection. It is in that way only that the custody can be changed, and, as we said in the case of *Lovewell* v. *Bowen,* 75 Ark.

452, "the control of the election commissioners over the ballots ceases when they produce them in court. Then they become evidence in the cause, and pass under the dominion and control of the court." The court was there speaking about the ballots, but the statement applies with equal force to the other records, such as poll-books and certificates. The statutes provide that the ballots shall not be opened except on the order of "some competent tribunal before which an election contest or prosecution is pending," which means, of course, the court and not the judge in vacation. This proceeding does not relate at all to the custody of the ballots and there is no effort to have them opened under orders of the circuit judge or to change their custody. The proceedings relate only to the poll-books and it is sought to change them from the custody of the commissioners to the clerk. The poll-books being, as we have already seen, public records, subject to inspection by interested parties, it can not be doubted that the circuit judge in vacation has the power to require the officers to discharge their duty by allowing a reasonable opportunity to those who are contestants, and thus interested in the result of the election, to inspect them.

(4) The fact that the election judges are required by statute to keep the duplicate poll-books for inspection does not affect the status of the originals, as public records, when delivered into the hands of the election commissioners. They are all public records—not permanent records, it is true—but nevertheless public records in the sense that they must be kept open for the inspection of those who are interested in them and have a right to see them.

(5) Mandamus is an appropriate remedy for requiring a public officer to discharge his duty. *Boylan* v. *Warren, Clerk,* 39 Kan. 301; *State* ex rel. v. *King, Auditor,* 154 Ind. 621; *Aitcheson* v. *Huebner,* 90 Mich. 643; *State* ex rel. v. *Williams,* 110 Tenn. 549. That remedy was accorded to a voter to enforce his right to inspect registration records in the hands of election officers by the

New Jersey court in the case of *Higgins* v. *Lockwood,* 74 N. J. L. 158.

(6-7-8) In addition to that, the statute expressly provides that the court or the judge thereof may require a witness "to bring with him any book, writing or other thing under his control which he is bound by law to produce in evidence." Kirby's Digest, § 3111. It is said here in argument that the effort of the contestants to obtain an inspection of the poll-books is a mere "fishing expedition," which neither the court nor the judge could give any aid to. That is not a correct characterization of the proceedings, for the contest is a *bona fide* one, so far as anything to the contrary appears, and there is an allegation of fraud in the election. An inspection of the records is indispensable in a contest, for they are presumptively correct until overturned by evidence showing that they are not correct. *Powell* v. *Holman,* 50 Ark. 85; *Condren* v. *Gibbs,* 94 Ark. 478. Contestants are entitled to see the poll-books and to have the election commissioners produce them as evidence so that the presumption of their correctness may be overcome by other testimony. It is within the power, therefore, of the circuit judge to order the production of the poll-books to be used as evidence in the case, and the commissioners have no legal right to deny the contestants the privilege of inspecting those records. It is quite another thing, however, to order the books taken out of the custody of the officers who are by the statutes of the State constituted the custodians. We are of the opinion that the judge has no power to make such an order, and that if the custody is changed at all it must be by an order of the court when the records are produced in court as evidence. The judge of the court can in vacation exercise only such judicial powers as are conferred by statutes, and there is no power conferred either expressly or by implication on the judge of a court in vacation to order the relinquishment of the custody of public records. That authority obtains only in the court itself and is a necessary part of

the power to control the proceedings and to preserve the evidence before it.

It follows that that part of the order of the circuit judge directing the election commissioners to surrender possession of the poll-books to the clerk of the court is void and will be quashed. It is so ordered.

HART and KIRBY, JJ., concur in the judgment but express the view that the circuit judge has the power, under section 2838, Kirby's Digest, while the contest is pending, to compel the election commissioners to permit contestants to inspect the poll-books.

ARKANSAS LOGGING COMPANY v. MARTIN.

Opinion delivered January 11, 1915.

MASTER AND SERVANT—INJURY TO SERVANT—ACT OF LOANED SERVANT—LIABILITY.—Appellant purchased a machine from C., the contract providing that appellant should have the "services of a man to superintend and assist in the erection of the machine." One S. was sent by C. in compliance with the terms of the contract, and while S. was engaged in the operation of the machine, under the direction and control of appellant's manager, appellee, an employee of appellant, was injured. *Held*, S. was, as to this service, loaned to appellant, who had full charge and control over him and all its employees, and that therefore appellant was liable to appellee for damages due to an injury caused by S.'s negligence.

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

STATEMENT BY THE COURT.

This is an appeal from a judgment for $20,000. The appellee alleged that he was in the employ of the appellant; that appellant was engaged in the logging business; that appellee was a laborer on one of its skidders; that while the skidder was being operated upon appellant's dummy line it was negligently and carelessly turned over and pinned appellee to the ground; that the exhaust pipe burst, causing steam from the pipes to flow upon appellee's body and left leg for about an hour and a half, during all of which time he was conscious and endured great pain and anguish.

The appellant defended on the ground that the appellee, at the time of the injury, was in the employ of the Clyde Iron Works and not in the employ of appellant, and therefore the appellant was not liable.

The appellant, so far as the issues here are concerned, does not deny the negligence and the injuries as alleged, and does not contend that the verdict is excessive. At least, the appellant does not urge any of these as grounds for reversal. We need not, therefore, set out any of the testimony bearing upon these issues.

The appellant offered in evidence a contract under which the skidding machine was purchased by the appellant from the Clyde Iron Works, which contains, among others, the following provision:

"Price to include, without cost to us, services of a man to superintend and assist in the erection of the machine at our railroad at Lorays, Arkansas, and, in addition, his services long enough to properly instruct our men in its manipulation, his board to be furnished by us."

And the testimony of witness Maars, substantially as follows:

That there was a man in the employ of the Clyde Iron Works at the time of the accident, in charge of the skidding machine, whose name was Saltwick. Saltwick was sent there after the stuff arrived to put it together. He took the machine off the two cars and erected it upon one car, that is, he assembled it on one car. All of the men down there at the time Saltwick constructed this machine were in the employ of the Arkansas Logging Company. The logs the men were unloading belonged to the appellant company. The work was being conducted for the benefit of the Arkansas Logging Company. The plaintiff was paid by the company. The men were told where to go to work. They were told that Saltwick was the man to tell them what to do, and they were directed to go down there and undertake to operate this machine under Saltwick. Saltwick told witness to come in and learn how it worked.

The contract made an exhibit to the witness' deposition, which the court excluded, was sent to the appellant company and received by it. Witness did not know what officer received it, but knew it was a contract with the Clyde Iron Works because it was presented to witness. Witness was not an officer of appellant, but it was submitted to witness to look at and read because he read all of appellant's correspondence. Witness was not present when the contract was made; did not see the man sign it, and did not know where the man was that did sign it.

The court excluded the above testimony, to which the appellant duly excepted.

The testimony on behalf of the appellee tended to show that he was employed to work for appellant by one Sofge, who was appellant's superintendent. At the time he was injured he was working for appellant, and was paid by appellant for that day's work. He then described the manner of his injury, which it is unnecessary to set out, as the appellant does not deny that the injury was caused through negligence. Appellee says that just before the skidder turned over he called the attention of the man that was there and had charge of the skidder. His name was Saltwick. He came up and took hold of the lever and threw it on and it turned over and appellee was pinned under. Appellee never saw the man before that was working there. Appellee was directed to work that morning by Mr. Sofge, the Arkansas Logging Company's superintendent. He was directed to work on the skidder that day under the man who had charge of it to demonstrate it. Appellee did not know the name of the demonstrator of the machine at that time or where he came from. His name was Saltwick. The superintendent and general manager of the logging company was there representing the company. The manager was 150 yards away from the machine when it turned over. He instructed everybody and told them what to do when he came down there and they did it. He lived in Memphis. On the skidder with appellee at the time it turned over were two others and Mr. Saltwick. Mr. Sofge had been

around just before the skidder turned over. Saltwick's business on the machine was pulling the drum. When appellee found the drum would not work he spoke to Saltwick. Saltwick got on the machine. Appellee was the lever man. When Saltwick got on the machine he said: "Leave me have it, Mr. Martin," (meaning the lever). He took it and threw it wide open and the machine turned over. He further testified that he was directed by Sofge to work with Hallock and Mr. Saltwick on the skidder. He called on Saltwick when he could not operate the lever, because he thought he was the proper one to call on. There was no one else there that had had any experience with that kind of machinery, and Saltwick was the man under whom appellee was directed to work.

Another witness for the appellee testified that he was working on the loader just before the skidder turned over, and Mr. Maars and the president of the appellant company were with witness, and witness said to the president, "That skidder is turning over down there; what must we do?" and he said, "Go down there and see about it." Witness further testified that the secretary and treasurer of the appellant company directed the men to go down there that morning to work on the skidder; that they were working for the appellant, hauling logs for it, and it was appellant's track on which the skidder was set. Saltwick was the man sent there by the Clyde Iron Works. Mr. Martin was directed to work under Saltwick, the demonstrator for the Clyde Iron Works.

The manager of the appellant testified that Saltwick was the demonstrator of the machine and had no other business down there except with that particular skidder, operating and demonstrating the machine; he did not do anything else.

At the conclusion of the testimony, the appellant presented the following prayer for instruction:

"In going upon the skidder, plaintiff assumed all risks incident to such work, and is not entitled to recover, unless you find from a preponderance of the evi-

dence that defendant was guilty of gross negligence in not providing plaintiff a safe place to work."

The court refused the prayer and appellant duly excepted.

The appellant asked the court to instruct the jury as to the law of contributory negligence on the part of the plaintiff. The court refused and appellant excepted.

The court then instructed the jury, over the objection of the appellant, as follows:

"If you find from a preponderance of the evidence that on the 26th day of August, 1912, the plaintiff was employed as a laborer by the defendant company, and was directed by its foreman or manager to work on the skidder under the direction of one Saltwick, and that while so engaged the skidder was overturned by reason of the negligence and carelessness of said Saltwick in operating the same, and that plaintiff was injured thereby, then you should find for the plaintiff, and assess his damages as hereinafter directed."

Then follows an instruction on the measure of damage, to which no objection is urged in appellant's brief.

De E. Bradshaw, Lewis Rhoton and *T. E. Helm,* for appellant.

It was error to exclude the deposition of Maars, and to refuse to permit the introduction and evidence of the contract which contained the stipulation in reference to the erection of the skidder. This evidence showed that at the time of the injury the person causing the same was in no way connected with the appellant as its servant, agent or employee, and its exclusion was reversible error. 165 S. W. 282; 16 Ill. App. 322; 24 Pa. Sup. Ct. 241; 30 N. E. 294; 36 L. R. A. 382; 53 *Id.* 172.

The contract did not create the relation of master and servant between appellant and Saltwick, the employee of the iron company. 88 Pac. 439; 95 Pac. 398; 104 S. W. 495.

The ordinary relation of master and servant does not subsist in the case of an independent employee or

contractor who is not under the immediate direction of the employer. 109 S. W. 240; 113 S. W. 914.

If the relation of master and servant did not exist between appellant and Saltwick, the injury to appellee was, necessarily, not the act of appellant's agent, and hence it would not be liable. *Supra;* 57 L. R. A. 712; 37 L. R. A. 33; 24 L. R. A. 963; 22 So. 359; 62 N. E. 245; 144 N. W. (Minn.) 938.

E. E. Hopson, James C. Knox and *Robert C. Knox,* for appellee.

1. The court properly excluded the purported contract offered as an exhibit to the testimony of the witness, Maars, it amounting to nothing more than hearsay, because he was not an officer of the company, had nothing to do with passing upon it, did not see it executed, and knew nothing about it further than that he had read it and it had been told that it was the contract between the parties. There was no proof of its execution. 4 Enc. of Ev. 289a; 13 Ark. 63; 81 Ark. 1; 115 Fed. 678; 25 S. E. 526; 114 S. W. 277; 17 S. W. 979; 43 S. W. 852; 40 S. W. 422; 48 S. W. 751; 20 S. W. 63; 112 S. W. 430; 2 Ark. 315; 21 Ark. 349; 4 Ark. 251; 17 Ark. 203, 218.

2. The fact that Saltwick was at the time of the injury in charge of appellant's property makes a *prima facie* case that he was the servant of appellant, and the burden, therefore, rested on appellant to show that he was not in its employ. 41 N. Y. 42; 109 Pac. 329.

Where the determination of whether or not the relation of master and servant exists depends upon the construction of a written contract, it is a question for the court alone. 1 Labatt, M. & S., 17; 2 Parsons on Contracts 492.

The wording of the contract shows that it was the intention of the parties to lend Saltwick to the appellant company. The use of the word "assist" shows that he was to be under the control and direction of the logging company; and his being in control and possession of its property with its knowledge and consent, would make appellant liable, regardless of whose servant he

was. 98 S. W. 84; 103 Mass. 194; 74 Pa. 316; 81 Conn. 493, 71 Atl. 572; 23 Times, L. R. 433; 1 Labatt, M. & S., 26; *Id.* 31a.

WOOD, J., (after stating the facts). Conceding that exceptions were properly saved to the ruling of the court in rejecting the offered testimony of witness Maars and that this testimony was competent, there was no prejudicial error in the ruling of the court, for the reason that if the testimony and the part of the contract offered had been read the result could not have been different. For, as we view the undisputed evidence, considering the excluded testimony and the paragraphs of the contract as a part of the evidence, the court correctly instructed the jury that if the appellee was employed by the appellant and was directed by its foreman or manager to work on the skidder under the direction of one Saltwick, and that the skidder was overturned by reason of the negligence of Saltwick in operating the same, resulting in appellee's injury, that the appellant would be liable in damages therefor. In other words, the excluded testimony, including the provisions of the contract, when the latter are properly construed, did not tend to show that Saltwick at the time of the injury, was not, as to the service he was performing, the servant of the appellant. On the contrary, we think the clauses of the contract under review and the undisputed evidence show that at the time of appellee's injury Saltwick, who was there for the purpose of operating the machine and for the purpose of demonstrating the same, in order to see whether it worked properly, and for the purpose of instructing appellant's employees how to manipulate it, was, while in the performance of that service, the servant of the appellant.

The provisions of the contract under review show that the appellant was to have the "services of a man to superintend and assist in the erection of the machine," and "to properly instruct our (appellant's) men in its manipulation." This provision of the contract clearly shows that this man, furnished by the Clyde Iron Works,

was to perform services for or to be in the service of the appellant, superintending and assisting in the erection of the machine and instructing appellant's men as to how to operate the same. While performing this service for appellant and as appellant's servant in so doing, under the contract with the Clyde Iron Works, the cost of the service, or wages, to be paid the servant, except the item of board, was to be borne by the iron works. But Saltwick's relation to the appellant, as we view the undisputed evidence, while engaged in the work of demonstrating and operating the skidder, was that as already stated of servant of the appellant. The case is ruled by the following excerpt from *Coughlan* v. *Cambridge,* 166 Mass. 268, 44 N. E. 218: "It is well settled that one who is the general servant of another may be lent or hired by his master to another for some special service, so as to become, as to that service, the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired."

We quoted this language in the recent cases of *Arkansas Natural Gas Company* v. *Miller,* 105 Ark. 477, and *St. Louis, I. M. & S. Ry. Co.* v. *Yates,* 111 Ark. 486. In the latter case we also quoted the following from Sherman & Redfield on Negligence, (4 ed.), 269: "Servants who are employed and paid by one person may, nevertheless, be *ad hoc* the servants of another in a particular transaction, and that, too, where their general employer is interested in the work. They may, without consulting their master, but in good faith, assist a person independently employed to do something which shall benefit their master, but with which neither he nor they have any right to interfere, and in which they act entirely under the control of such other person. In none of these cases is the nominal master responsible to strangers for their acts or omissions."

Since appellant does not deny that appellee was injured through the negligence of Saltwick, it follows that

if Saltwick, while operating and demonstrating the skidder, *ad hoc* was the servant of appellant, then the latter would be liable. Treating the evidence of Maars and the contract as a part of this record, the undisputed facts present a typical case for the application of the above doctrine. Saltwick was in the general employ of the Clyde Iron Works, and paid by it, but under the contract of sale between it and the appellant the Clyde Iron Works was not to erect the skidder nor to superintend its erection. It had no duties to perform with reference thereto as an independent contractor. It was not in the control of the operation of the machine. It did not have the control of the erection of the machine; nor while it was being operated by its agent Saltwick, for the purpose of demonstrating and assisting the employees of appellant in understanding the same, was it under the control of the Clyde Iron Works. While under the contract between appellant and the Clyde Iron Works, it was contemplated that the appellant should have the "services of a man to superintend and assist in the erection of machine," the contract shows plainly that the services of this man were to be performed for appellant and that as to these services the man was appellant's servant. The contract did not even require that the man should be a general servant of the Clyde Iron Works. For aught that appears in the contract to the contrary, appellant might have employed any man to superintend and assist in the erection of the machine, regardless of whether he was in the general employ of the Clyde Iron Works or not. The contract only provided that pay for this service was included in the contract price which appellant had agreed to pay the Clyde Iron Works for the machine. The contract specified that the purchase price included the services of a man to "superintend and assist" in the erection of the machine, but it did not specify, and it was not necessarily implied, that such man should be selected or furnished by the Clyde Iron Works. The proof does not show that the appellant relinquished control over the work of erection and operation of the ma-

chine, nor the work of demonstration under the superintendence of Saltwick, in order to show appellant's employees how they should operate the machine. The supreme control of the operation of this machine at the time appellee received his injury was under appellant, and not the Clyde Iron Works. The latter company, as an independent contractor, owed appellee no duty; and if it had been sued along with the appellant, no judgment could have been recovered against it.

While the case of *Tuttle* v. *Farmers' Handy Wagon Co. et al.*, 144 N. W. 938, relied upon by the appellant, is quite similar in some of its features, yet in essential particulars it is differentiated from the facts of the case at bar. In that case a man by the name of Clow had purchased from the Farmers' Handy Wagon Co. a silo. By the terms of the contract "Clow was to relieve himself from the responsibility of superintending the work of erection, and had imposed that responsibility upon the company. Under the contract, the man to superintend the work was to be selected and paid by the company. Clow had no voice in his selection and was not given any control over him. * * * He was not directed to report to Clow for orders, nor to perform such duties as might be assigned him by Clow, but was sent to take charge of and direct the work for the purpose of fulfilling the obligation assumed by the company. So far as appears he acted wholly under and pursuant to the instructions of the company. He did not place himself under the orders of Clow, and Clow made no attempt to exercise control over him. * * * Assuming to act as the representative of the company, he took entire control of the work and of the workmen furnished by Clow at his request."

Now, under the contract here, the facts are different. Here appellant's general manager was on the ground. Its superintendent was present, directing its employees, and its skidder foreman was in charge of the skidder. Saltwick was merely superintending and "assisting" these men in the work of operating and demonstrating

the machine after the same had been erected. He was, as to that service, simply for the time being, loaned or furnished to the appellant, and appellant had full charge and control over him and all of its employees, including appellee, that were working at the time under the directions of Saltwick. The facts are so closely analogous to the facts in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Gates, supra,* as to make the doctrine of that case applicable and controlling here. Saltwick occupied the same relation to appellant here, that Claus did to the railway company in the above case.

The court did not err in refusing to give an instruction on the law of contributory negligence. There was no evidence to warrant such an instruction. Appellant's prayer for instruction on assumed risk was not in correct form and was not the law applicable to the facts proved.

The record is free from error, and the judgment is therefore affirmed.

COOK v. WORTHINGTON.

Opinion delivered January 11, 1915.

1. WILLS—UNCERTAINTY IN TERMS.—Uncertainty as to either the subject or object of a devise in a will is fatal to its validity.
2. WILLS—UNCERTAINTY.—Where the intended subject-matter of disposition consists of an indefinite part or quantity, the gift necessarily fails for uncertainty.
3. WILLS—RULE OF CONSTRUCTION—INTENTION OF TESTATOR.—The rule on the construction of wills is to give effect to what appears to be the intention of the testator, in view of all the provisions of the will.
4. WILLS—CONSTRUCTION—AMBIGUITY—ORAL EVIDENCE—INTENTION OF TESTATOR.—In the construction of wills, the intention of the testator must be gathered from the language, when unambiguous, used in the will itself, and not from oral testimony.
5. WILLS—CONSTRUCTION—INTENTION OF TESTATOR—TRANSPOSITION OF WORDS.—In the construction of wills, when there is an obvious clerical misprision in the use of a word, or when the words, by reference to the context, can better effectuate the intention of the maker by trasposition to other parts of the instrument without destroying the sense, or where there is an obvious omission of a

word or words, shown by reference to the others used, then the rules of construction will permit the court to transpose or to supply these in order to effectuate the manifest purpose of the maker of the instrument, when ascertained from the instrument taken as a whole.

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

STATEMENT BY THE COURT.

W. H. Cook, a citizen of Lonoke County, Arkansas, died on the 13th day of February, 1913. A few days after his death the following instrument (omitting merely formal opening and conclusion) was offered for probate as his last will and testament, towit:

"Section One. I do hereby constitute and appoint my friend L. S. Gartrell to be the sole administrator of my last will, directing my said administrator to pay all my just debts and funeral expenses and the legacies given, out of my estate.

"Section Two. After the payment of my said debts and funeral expenses I give to each of my nephews, Mack and DeWitt Worthington, five dollars each, and to my niece, Wilmer Agnes Fisher, *nee* Worthington, five dollars, and to my cousin, T. D. Cook, and my friends, Willie and Cleveland Short to the aforesaid T. D. Cook and Willie Short and Cleveland Short to share *to share* and share alike."

The will was admitted to probate before the probate court, and on appeal the circuit court found "that said will, on its face, is null and void and of no effect for uncertainty," and set aside the judgment of the probate court allowing the will to be probated. The appellants duly prosecuted this appeal.

Charles A. Walls, for appellants.

1. The intention of the testator should govern in the construction of the will, and where that intention may be gathered, either expressly or by necessary implication, from the language of the will, such construction should be given as best comports with the purposes and objects of the testator. 3 Peters, 346; 40 Cyc. 1388-1396; 13 Ark.

513; 31 Ark. 580; 98 Ark. 561; 104 Ark. 439; Page on Wills, 460; Gardner on Wills, 369.

In order to effectuate the intention of the testator, which is clearly apparent but which has been defectively expressed in the will, the court may supply such words or phrases as it is evident the testator intended to use. 40 Cyc. 1399-1402.

2. The testator will be presumed by law to have intended to dispose of his entire estate, and the law favors a will that will vest title as early as possible. 104 Ark. 439; 90 Ark. 152.

3. The words "to share *to share* and share alike" indicate an intention on the part of the testator that T. D. Cook and Willie and Cleveland Short should have the remainder of the estate, in equal parts *per capita,* after the payment of the testator's debts, funeral expenses and the legacies mentioned in the other part of the will. 29 N. Y. 32; 93 N. C. 362; 66 N. Y. Supp. 218; 49 Mass. 450; 62 Ill. 417; 70 N. Y. 512.

J. W. & J. W. House, Jr., and *A. F. House,* for appellee.

1. The purported will is void. The intention of the testator must be obvious from the language of the will. "Courts are not at liberty in the construction of wills to travel outside and seek evidence of the testator's intention." 91 N. E. 507. The intention which is to be sought for in the construction of a will is not that which existed in the mind of the testator, but that which is expressed by the language of the will itself. *Id.;* 23 Ark. 378; 66 Me. 360; 32 Atl. 316; 68 N. E. (Ill.) 515; 111 Ill. App. 207; 20 N. E. 779; 67 Barb. 501; 2 How. Prac. 76; 83 Va. 724; 21 S. E. 464.

2. The language of the second clause of the instrument is so ambiguous that it is impossible to determine the testator's intention with any degree of certainty. Any attempt to construe it in a certain way would be mere conjecture, which is never allowed in the construction of wills. "Words and limitations may be transposed, supplied or rejected when the immediate context or the gen-

eral scheme of the will warrants it, but not merely on a conjecture or hypothesis of the testator's intention." 26 Ind. 511; 3 Metc. (Ky.) 155; Fed. Cas. No. 17179.

3. The will, if interpreted according to appellants' contention, would have the effect to disinherit persons of the testator's own blood, and cast his property upon strangers; and the courts will not indulge in strained or doubtful construction to accomplish this end. 12 Ga. 155; 56 Am. Dec. 451; 93 N. Y. 295; 2 Grant, Cas. 240; 35 Pa. 393; 116 Pa. 500; 9 Atl. 936; 5 Pa. Dist. Orph. Ct. 285; 26 N. E. 56; 127 Ind. 276; 26 Pa. Sup. Ct. 443; 36 S. E. 364; 48 W. Va. 208; 47 Ind. 341; 5 Pa. Sup. Ct. 336.

WOOD, J., (after stating the facts). (1) The will, so far as appellants are concerned, is void for uncertainty.

"To the validity of every disposition," says Mr. Jarman, "as well of personal as real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal." 1 Jarman on Wills, p. 454, chap. 14.

(2) Now an inspection of the sections of this *will* will discover that no devise or bequest of all or any portion of the estate of Wm. H. Cook was made to the appellants. After giving $5 each, the language of section two does not give or bequeath to the appellants the remainder of the estate and have them to share alike in that. It is manifest from the whole instrument that the deceased did not intend to will to appellants his entire estate, for it provides for the payment of debts and funeral expenses, and a legacy of $5 each to his niece and his two Worthington nephews. So, it could not be construed that W. H. Cook intended that the appellants should share and share alike in his whole estate. No language is used in the instrument by which it can be ascertained what portion of his estate W. H. Cook intended to go to the appellants. The will could reasonably be construed as indicating an intention upon the part of the deceased to will to appellants an interest in his estate. This is shown by the use of the words "to share," which means

"to partake of," "enjoy with others," "to have a portion of." Webster's Dictionary, "Share." And it could be also construed that he meant that the appellants should all have an equal share, or like share, but as to what portion or as to what character of the estate, whether real or personal, is not mentioned in the instrument, and it is impossible to ascertain from the language employed as to what the intention of the maker of the so-called will was in these particulars. The subject of the alleged bequest, in other words, is too vague and indefinite to constitute a valid will. "Where the intended subject-matter of disposition consists of an indefinite part or quantity, the gift necessarily fails for uncertainty." 1 Jarman on Wills, p. 457.

Now, it would be entirely within the province of the court, in arriving at the intention of the deceased Cook, to transpose the words "out of my estate" from the first section to the second section, and have the second section read, "to my cousin, T. D. Cook, and my friends, Willie Short and Cleveland Short, share and share alike out of my estate," if such transposition would discover the intention of the testator. But even with the words "out of my estate," so transposed, the subject of the alleged disposition would be in as hopeless confusion as ever because of vagueness and uncertainty both as to what portion as well as the character of the estate was intended to be disposed of. If the words "out of my estate" were so transposed we might say that it was the intention of W. H. Cook that appellants should share and share alike "out of his estate." We know from dispositions made of other portions of the estate that he did not intend for appellants to share the whole of the estate. Then, what portion did he intend that they should "share and share alike?"

(3) Over and over again we have said that the rule in the construction of wills is to give effect to what appears to be the intention of the testator in view of all the provisions of the will. See *Campbell* v. *Campbell,* 13 Ark. 513; *Cockrill* v. *Armstrong,* 31 Ark. 580; *Bloom* v.

Strauss, 73 Ark. 56; *Parker* v. *Wilson,* 98 Ark. 561; *Booe* v. *Vinson,* 104 Ark. 439; *Galloway* v. *Darby,* 105 Ark. 558; *Webb* v. *Webb,* 111 Ark. 54; *Gist* v. *Pettus,* 42 Ark. Law Rep. 406.

(4-5) But this court has held steadily to the rule, which is sustained by the authorities generally, that the intention of the testator must be gathered from the language, when unambiguous, used in the instrument itself, and not from oral testimony. See *Robinson* v. *Bishop and Wife,* 23 Ark. 378. Where there is an obvious clerical misprision in the use of a word, or where the words, by reference to the context, can better effectuate the intention of the maker by transposition to other parts of the instrument without destroying the sense, or where there is an obvious omission of a word or words, shown by reference to the other words used, then the rules of construction will permit the court to transpose or to supply these in order to effectuate the manifest purpose of the maker of the instrument, when ascertained from the instrument taken as a whole. But further than this the court will not go.

The rule and the reason for it is stated by Mr. Jarman as follows: "The most unbounded indulgence has been shown to the ignorance, unskilfulness and negligence of testators; no degree of technical informality, or of grammatical or orthographical error, nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together; but if, after every endeavor, he finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence. Conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of deposition,

it would be unjust to allow the right of this ascertained object to be suspended by the claim of any one not pointed out by the testator with equal distinctness. The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication." 1 Jarman on Wills, p. 453. See also, 2 Jarman on Wills, pp. 2205-6.

And, as expressed by Mr. Jarman in another place, in arriving at the testator's intention as the governing principle, "the judges submit to be bound by precedents and authorities in point; and endeavor, as we have seen, to collect the intention upon grounds of a judicial nature, as distinguished from arbitrary occasional conjecture." 2 Jarman on Wills, pp. 2205-6, quoted in *Webb* v. *Webb, supra.* Other authorities to the same effect are cited in the brief of counsel for the appellees.

Our conclusion is that the instrument under review was void as to the appellants, and that is all we are called upon to decide. The judgment is therefore affirmed.

KIRBY, J., dissents.

LITTLE ROCK GAS & FUEL COMPANY v. COPPEDGE.

Opinion delivered January 11, 1915.

1. WITNESSES—HUSBAND AND WIFE AS JOINT PLAINTIFFS—COMPETENCY AS WITNESSES.—The fact that the husband and wife are joint plaintiffs in an action does not prevent either of them from testifying in his or her own case.
2. ACTIONS—CONSOLIDATION—ACTION BY HUSBAND AND WIFE.—The act of May 11, 1905, providing for the consolidation of causes of action for trial, does not prohibit the consolidation of actions where both a husband and wife are parties plaintiff, the only limitation in the statute being that the actions shall be of a like nature or relative to the same question, and in such cases the court may consolidate the causes when it appears reasonable to do so.
3. EVIDENCE—HUSBAND AND WIFE AS PLAINTIFFS—HUSBAND AND WIFE AS WITNESSES.—Where two actions in which a husband and wife are parties plaintiff are consolidated and tried as one, the testimony of the wife can not be considered in the case of the husband, and

the testimony of the husband can not be considered in the case of the wife.

4. NEGLIGENCE—GAS—PERSONAL INJURIES—QUESTION FOR JURY.—In an action for damages due to injuries received by escaping gas, due to negligence, although the evidence was conflicting, *held*, it was sufficient to warrant a verdict holding the defendants liable for negligence in permitting the escape of the gas.

5. GAS—PERSONAL INJURIES—NEGLIGENCE—SIMILAR OCCURRENCES.—In an action for damages against a gas company for damages resulting from the escape of gas, due to negligence of the defendant company, it is not error to permit witnesses to testify that a few days prior to the date of the accident that the pressure of gas in the vicinity had become so low that their stoves went out, where the witnesses received gas from the same line of pipe that supplied plaintiff.

6. MARRIED WOMEN—SEPARATE RIGHT OF ACTION—PERSONAL INJURIES—RIGHT OF ACTION OF HUSBAND.—A married woman may sue in her own name for damages growing out of personal injuries, without joining her husband, and such right does not deprive the husband of his common-law right to sue for the loss of the services, society and companionship of his wife, resulting from her injuries.

7. HUSBAND AND WIFE—INJURY TO WIFE—RIGHT OF HUSBAND TO SUE.—Kirby's Digest, § 6287, gives to a husband the right to recover for the loss of the services and society of his wife, where death resulted to her by the wrongful act or negligence of another; it does not, however, take away the husband's common-law right to recover for the loss of her services and companionship from injuries sustained by her from the negligent act of another, where death did not ensue.

8. DEFINITION—"SERVICES"—HUSBAND AND WIFE.—Where a husband is entitled to recover for the loss of his wife's services, due to the negligent act of another person, the word "services" *held*, not to contemplate merely that wages should be paid the wife for the work actually performed by her, but rather to imply whatever assistance, aid or comfort she would be expected to render her husband in all the relations of domestic life.

9. DEFINITIONS—"CONSORTIUM"—HUSBAND AND WIFE.—The word "consortium" includes aid, society, companionship, assistance and affection.

10. HUSBAND AND WIFE—INJURY TO WIFE—HUSBAND'S ACTION—DAMAGES.—In an action for damages against defendant, by a husband, for damages occasioned by loss of the "services" and "consortium" of his wife, caused by defendant's negligence, the two elements of damage may be considered, and where plaintiff's wife was rendered unconscious, by the escape of natural gas, suffered great pain, and was

obliged to submit to the amputation of one leg, and a verdict in favor of the husband for $7,500, will not be held to be excessive.

11. EVIDENCE — GAS — PERSONAL INJURY — EXPERIMENTS — DISCRETION OF COURT.—Where plaintiff was injured by the escape of natural gas, it is within the discretion of the trial court to refuse to permit defendant to make experiments in plaintiff's home, by permitting natural gas to escape into rooms where persons were exposed thereto.

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

Bradshaw, Rhoton & Helm, for appellants.

1. The court erred in consolidating the causes. Necessarily the husband and wife must both testify for themselves and for each other. 86 Ark. 130.

2. In order to recover, two things must be established. (1) Negligence of defendant and (2) that this negligence was the proximate cause of the injury. Plaintiffs failed in both respects.

3. Evidence as to the presence of gas at other times and places was not admissible. 19 Ind. App. 663; 49 N. E. 1085; 53 N. E. 486-7; 59 *Id.* 413.

4. It was error to refuse to require the plaintiffs to permit defendants to make experiments in plaintiffs' residence. 32 N. E. 874; 22 N. W. 176; 53 Am. Rep. 14; 11 Neb. 363; 9 N. W. 548; 17 Cyc. 291-294.

5. The verdict is excessive. Kirby's Dig., § 6288. The court erred in refusing the instructions asked for defendants.

Coleman & Lewis, for appellees.

1. The causes were properly consolidated. Act May 11, 1905; 90 Ark. 482. The court carefully instructed the jury *not* to regard the husband's testimony in the wife's case, nor the wife's in the husband's case. There could be no prejudice.

2. There is no error in the court's charge, and the evidence is ample to sustain the verdict.

3. Evidence of gas pressure at other times and places was admissible. 49 N. E. 1085; 59 *Id.* 413; 32 S. E. 327; 110 Ark. 188; 99 *Id.* 597; 199 Fed. 742.

4. It is in the discretion of the court to require or refuse to permit a party to submit to experiments or tests. 60 Ark. 485; 11 Am. Cas. 844, note.

5. The verdict is not excessive in the husband's case. Rogers on Domestic Relations, § 267; Watson on Damages for Personal Injuries, § 489; etc. It is not even necessary to prove the value of the wife's companionship and society. Watson Pers. Inj., § 319; 102 Mo. 669.

HART, J.. P. N. Coppedge and Anna Coppedge, his wife, instituted separate actions against the Little Rock Gas & Fuel Company and the Pulaski Gas Light Company to recover damages for injuries sustained by Anna Coppedge on account of the alleged negligence of the defendants. Over the objection of the defendants the cases were consolidated and tried together. The jury returned a verdict for the plaintiff, P. N. Coppedge in the sum of $7,500.00, and in favor of Anna Coppedge in the same sum. Judgments were rendered upon the verdicts and the defendants have appealed.

The cases were ordered consolidated by the court under the act of May 11, 1905, which is as follows: "When causes of action of a like nature or relative to the same question, are pending before any of the circuit or chancery courts of this State, the court may make such orders and rules concerning the proceedings therein as may be conformable to the usage of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so." Acts of 1905, page 798.

The action of the court in consolidating the two causes of action is assigned as error by counsel for the defendants. The reason given is that under the fourth subdivision of section 3095 of Kirby's Digest the husband and wife can not testify for or against each other.

Hence they insist that the action of the court in permitting husband and wife to testify in his or her own case was necessarily prejudicial to the rights of the defendants in the other case. We can not agree with them in this contention.

In the case of *Railway Co.* v. *Amos,* 54 Ark. 159, the opinion in which was rendered before the act in question was passed, a joint action was instituted by husband and wife against the railway company to recover damages for personal injuries sustained by them by the alleged negligence of the railway company. No objection was made, it is true, to the joinder of the two causes of action, but objection was made to the plaintiffs testifying in the case. The court said: "But either was a competent witness in his or her own behalf, and the rule is settled by the previous decisions of this court that, in cases in which a party may be a witness for himself, marriage is not a disqualification as to his interest in the cause, notwithstanding the other party to the marriage is a party to the suit."

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *McCullough,* 101 Ark. 254, which was decided subsequent to the passage of the act in question, the court held: "Where a husband and wife sued jointly for personal injuries to the wife, the husband was a competent witness in his own behalf, and a general objection to his testimony was insufficient to call attention to the fact that he was incompetent to testify in his wife's behalf."

(1) So, it may be taken as settled by these two decisions that the fact that the husband and wife are joint plaintiffs in an action does not prevent either of them testifying in his or her own case.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Raines,* 90 Ark. 482, the court held: "1. The object of the act of May 11, 1905, providing for the consolidation of causes, was to save a repetition of evidence and an unnecessary consumption of time and costs in actions depending upon the same or substantially the same evidence or arising out of the same transactions."

"2. Where separate actions by husband and wife against the appellant were tried together the husband was competent to testify in his own action, and a general objection to his testimony was insufficient to call for an instruction that it was not competent in the wife's action."

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Broomfield,* 83 Ark. 288, the court, in considering the act in question, held that it was not necessary that the parties should be identical and said that the act leaves it to the discretion of the trial court as to the consolidation of actions of a like nature or relative to the same question pending before the court, without any reference to the identity of the parties and without restriction as to the causes of action which may be joined in the same suit, so, too, in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Harden,* 83 Ark. 255, the court held there was no error in consolidating the two cases for the purpose of trial. There, as here, there were separate verdicts and judgments, and damages were distinct and separate, but the main issues in the cases were the same.

The causes of action now before us were relative to the same question and grew out of the same alleged act of negligence on the part of the defendants. The court gave the following instruction:

"The cases of *Mrs. Anna Coppedge* v. *Pulaski Gas Light Company et al.,* and *P. N. Coppedge* v. *Pulaski Gas Light Company et al.,* have been consolidated for trial, but remain separate and distinct suits. Under the laws of this State a husband can not testify for or against his wife; nor can the wife testify for or against the husband. The court, therefore, charges you that you will not consider the testimony of P. N. Coppedge for any purpose in the case of *Mrs. Anna Coppedge* v. *Pulaski Gas Light Company et al.,* and you will not consider the testimony of Mrs. Anna Coppedge for any purpose in the case of *P. N. Coppedge* v. *Pulaski Gas Light Company et al.*

(2) It will be presumed that the Legislature, when it passed the act in question, had in mind the statute forbidding husband and wife from testifying for or against each other and it will be noted that no exception was made to the consolidation of actions where both husband and wife were parties plaintiff. The only limitation in the statute was that the actions should be of a like nature or relative to the same question, and that in such cases

the court might consolidate the causes when it appeared reasonable to do so. We are of the opinion, therefore, that the court did not err in consolidating the two causes for the purpose of trial.

At the time the injury was sustained, P. N. Coppedge and Anna Coppedge, his wife, resided at 3215 Bishop street in the city of Little Rock. They had lived at that place about five years. They occupied a four-room cottage and the rooms had doors opening into each other. The defendants supplied them with natural gas and in the dining room the gas was connected with a No. 83 Odin stove which had three burners. About 10 o'clock on the evening of December 11, 1912, P. N. Coppedge returned to his home and found the house dark and the doors locked. He went around the house and heard his wife groaning. He then broke open one of the doors, rushed into the house, and found his two little children lying on the bed dead and his wife lying there unconscious. Mrs. Coppedge did not regain consciousness until the second morning after this occurred. After she regained consciousness she complained of intense pain throughout her bronchial tubes and in her lungs for about a week. She then suffered severe pains in her legs and her right leg became so diseased that it was necessary to take her to a hospital where, on January 1, 1913, it was amputated just below the knee. A few days later she has a similar attack in her left leg which caused her a great deal of pain but she recovered without having to have that leg amputated.

At the trial Mrs. Coppedge testified substantially as follows: I am twenty-nine years old. On the 11th day of December, 1912, my husband, after breakfast, left for his business down town. There was a fire in the gas stove in the dining room at breakfast time but after breakfast I turned it out. I relighted it about 9:30 or 10 o'clock in the morning that my children, aged five and three years, might play in there. The stove had three burners and I lighted the two north burners. The children played in the dining room until about 11:30 o'clock.

I turned out the fires in the other stoves in the house and we had lunch about 12 o'clock. At that time only two of the burners in the stove in the dining room were burning. After lunch the children and I went into the adjoining bed room and laid down. It was cold and the wind was blowing. The door between the two rooms was open. None of the windows was open. About 1 o'clock Mr. Coppedge talked to me over the telephone. I then turned down the two burners which were burning so that they would not make such a roaring sound but left both of them burning freely. I then lay down on the bed again with my children. I went to sleep and do not remember anything else until I regained consciousness about two days later.

P. N. Coppedge testified: I left home for my work on the morning of the accident about 7 o'clock. I usually light the fires in the morning and the gas was burning in the dining room when I left home. I talked with my wife over the telephone about 1 o'clock, but did not get home until about 10 o'clock that night. My house was dark when I reached it and I heard my wife groaning. I broke open the door and when I got into the house smelled an odor which I thought was gas. When I got in the house and passed through the dining room I heard the gas roaring through the burners and turned one of them off. My children were dead. My wife was carried out on the front porch and later brought back into the house. She remained unconscious for two days and suffered great pain until she was carried to the hospital where, after the amputation of one leg, she finally recovered.

Two of the neighbors of Mr. Coppedge testified that they went into the house right after him on the night of the accident and that the gas was then rushing through one of the burners of the stove in the dining room.

Another witness for the plaintiff's testified that he went to their home between 10 and 11 o'clock on the morning of the accident and that the fire in the gas stove in the dining room was burning at that time.

The pipe line of the defendant which furnished gas to the plaintiff was on what is called a dead end. By a "dead end" pipe line is meant one which is not connected with any other line so as to make a complete circuit. One end is connected with the main line and extends out from it and the other end is closed up.

Other witnesses for the plaintiff, who were furnished gas from the same dead end line, and who had stoves of a similar kind to that of the plaintiffs, testified that the pressure became so low on different days in December, 1912, that the fires which they had burning in their stoves went out. There was also testimony adduced for the plaintiffs which tended to show that there might have existed what is known as "back firing" in the stove of the plaintiffs at the time the injury occurred. That is, that the gas might have been burning in the stove in a way that would not have been apparent and yet there might have been a partial combustion which would have created a poisonous gas.

The testimony on the part of the defendants is substantially as follows: The defendants piped gas to the city of Little Rock from their gas fields in the State of Louisiana and in the southwest corner of the city have a reduction plant where they reduce the pressure of the gas, and from there distribute it out over the city in pipe lines to their various customers; that water never accumulates in a pipe line with a dead end; that on the day of the accident there was not any lowering of the pressure of the gas different from that which happened on other days; that it was impossible to have at all times a uniform pressure of the gas; that when gas which is burning in a stove is turned down too low carbon monoxide may be formed; that carbon monoxide is a very poisonous gas and is free from color or odor and is of almost the same density as air; that the natural gas used by the defendants consists of 97-8/10 per cent of methane by volume, 1-25/100 per cent. of carbonic acid gas, and 95/100 of one per cent. of nitrogen; that gas coming from the same wells would remain practically the same for

a good many years; and that not a single one of these constituents is poisonous to the slightest extent.

Experts for the defendants made a test by permitting gas to flow through a stove similar to that used by the plaintiffs in a closed room for several hours and testified that they with others remained in the room during the whole time and felt no inconvenience whatever from the escaping gas.

Other evidence showed that if natural gas was supplied in a closed room in sufficient quantities a person there might become asphyxiated.

It was also shown on behalf of the defendants that the flue of the stove in the dining room of the plaintiffs was choked up with soot and the witness who examined it stated that it had become so hard that he could not pull it out with his fingers but had to get up on the roof and punch it out with a stick.

In rebuttal P. N. Coppedge testified that he reached up in the flue of the stove in the dining room with his hand and pulled out the soot which was loose and denied that it had become so hard that it had to be punched out from the top with a stick and denied that the witness for the defendant had punched it out from the top.

Other evidence for the plaintiffs tends to show that the soot in the flue was loose and was raked out with the hand from the inside of the room.

C. P. Langford, for the plaintiff, testified that he worked in the natural gas business from 1903 until 1913, that he helped put in gas lines in various cities in Arkansas, that the gas for which he laid lines was from the defendant's fields in Louisiana, and that in laying pipe lines for gas dead ends are avoided as far as possible because where there is a dead end, the main line is likely to draw the gas out of the dead end and water then accumulates in the dead end.

Langford testified that if gas was passing through the main line at low pressure it would have a tendency, by suction, to draw the gas out of the dead end; that where there is a complete circuit there is a more nearly

uniform pressure, but that there is not the same pressure in a dead end that there is in the main line; that the gas from the Caddo or Louisiana fields has not much odor but that it will affect one who works in it, producing a headache and, if enough is inhaled, putting one to sleep; and that to inhale the fumes of it would make one sick.

An expert chemist also testified for the plaintiffs that he turned gas into a box with openings in it in which was placed a rabbit and that the rabbit soon died from the effects of the gas.

(3) With much force it is insisted by counsel for the defendants that the evidence is not sufficient to warrant the verdict. No objection was made by counsel for the defendants to the testimony of Mrs. Anna Coppedge but, as we have already seen, the court instructed the jury that the testimony of husband and wife could only be considered in his or her own case. So, in testing the sufficiency of the evidence to warrant the verdict, the testimony of Mrs. Coppedge is not to be considered in the case of the husband; and the testimony of Mr. Coppedge is not to be considered in the case of the wife. Though the testimony may not be altogether satisfactory, it is not open to the objection that the verdict of the jury rested mere upon surmise. There were facts testified to in each case which, if believed by the jury, would account for plaintiffs' injuries being sustained by reason of the negligence of the defendants. If we could see that the verdict of the jury in either case could only have been reached by conjecture, it would be our duty to reverse the judgment; but if there is any substantial testimony, however conflicting, it is our duty to uphold the verdict.

The evidence in the case of Mrs. Coppedge tends to show that she lay down on the bed with her children some time after 12 o'clock and that she was called to the telephone about 1 o'clock. When she got up the fire was burning with a roaring sound through the stove and she turned it down "about medium," as she expressed it. The fire was still burning freely when she again went to

lay down. She went to sleep and does not remember anything more until she regained consciousness about two days later.

Other evidence tends to show that the plaintiffs were supplied with gas from a line which had a dead end and that in such cases there was a tendency, when the gas in the main line was at a low pressure, for the main line to draw the gas out from the pipe line with a dead end and thus lower the pressure in that line.

Evidence on the part of the plaintiffs also shows that other patrons of the defendant who were furnished gas on the same line had had trouble by the pressure being so low that the gas in their stoves went out; there was also testimony tending to show that when the pressure of the gas was lowered so that perfect combustion was not had carbon monoxide, a very poisonous gas, might be formed.

Evidence for the plaintiffs further showed that when the pressure was very low there would not be a proper mixture of the gas and air and this would create what the witness called "back firing" and would result in fumes of poisonous gas being formed.

(4) The testimony on the part of the defendants, it is true, tends directly to contradict this evidence, but the jury were the judges of the credibility of the witnesses and the weight to be given to their testimony. This being the case, it can not be said that the verdict of the jury rested upon speculation merely; but from the evidence the jury might have found that the injuries sustained by the plaintiff resulted from the causes which we have just described and that the defendants were guilty of negligence in permitting these conditions to exist.

It is apparent that the testimony of the husband was not necessary to establish the cause of action in favor of the wife. Mrs. Coppedge testified that she lay down at 1 o'clock; that she turned the gas down and left it burning and flowing through the burners at a medium rate, and that it was burning freely.

One of the neighbors who came into the house right behind the husband testified that the gas was pouring

through one of the burners of the stove. It was claimed by the defendant that soot had accumulated in the flue so that air could not pass freely through it, but one of the witnesses for the plaintiff, other than the husband, testified that the soot was loose in the flue and not packed together as the witness for the defendant described it and the jury might have inferred that the soot had not stopped up the flue of the stove.

Neither was the testimony of Mrs. Coppedge necessary to enable the husband to recover. One of the neighbors testified that when he went there to deliver some groceries between 10 and 11 o'clock in the morning, the fire in the dining room stove was burning and that it was a cold day. The husband testified that when he came into the house there was no gas escaping from any of the stoves except the one in the dining room and that the doors were open between the dining room and the room where Mrs. Coppedge and her children were found. He said that the gas was rushing through two of the burners in the stove in the dining room and that he turned one of them off as he rushed into the room where his wife lay. In this he is corroborated by neighbors who came in right behind him and who said that gas was coming through one of the burners in the dining room stove.

(5) The next assignment of error is that the court erred in permitting witnesses to testify to the effect that a few days prior to this time the pressure of the gas had become so low that their stoves went out. We do not think there was any error in admitting this testimony. The object of legal inquiry is to ascertain the truth of the facts in issue in the pleadings, prohibiting collateral issues. This rule only requires that the evidence be relevant. It was the contention of plaintiffs that Mrs. Coppedge left the stove burning freely when she went to bed and that the pressure of the gas became so low that the fire went out, and in so doing, there was an incomplete combustion of the natural gas which caused a poisonous gas to be formed which escaped in the room and caused the injuries sustained by Mrs. Coppedge and the

death of her two children, or, that when the fire went out, the natural gas itself, when the pressure became greater, again came into the room in such quantities that the two children of the plaintiffs were asphyxiated and Mrs. Coppedge was so overcome by the quantity of gas which escaped into the room that her injuries resulted.

On the other hand it was the contention of the defendants that there was no more variation of the pressure of the gas on that day than on any other day and that the fact that the plaintiffs received their supply of gas from a pipe with a dead end in no sense caused the pressure of the gas to vary during the day, and that as a matter of fact their gauge showed that the pressure of the gas did not vary on that day.

The condition of the pipe line which supplied the plaintiffs with gas thus became a material issue in the case. The witnesses who testified for the plaintiffs received their supply of gas from the very same pipe which supplied the plaintiffs. Their stoves were in no essential respect different from that used by the plaintiffs. They testified that on other days, near to the date of the injury, the fires in their stoves had gone out because the pressure of the gas had become so low. This testimony, then, was not collateral to the issues joined by the pleadings and tended to establish the fact contended for by the plaintiffs. That is to say, that the gas furnished by the pipes which had a dead end varied greatly in the pressure and that this was caused by the main line drawing the gas out of the pipe line with a dead end and that water would then be formed in the pipe with the dead end. The conditions described by them were in all essential respects similar to the conditions described by the plaintiffs. Therefore the testimony was relevant and the objections of the defendants thereto go more to the weight of the testimony than to its relevancy.

The next assignment of error is that the verdict of the jury in the case of P. N. Coppedge is excessive. He recovered $7,500. The testimony shows that he expended more than $1,400 in medical services for his wife after

she was injured. It is the contention of counsel for the defendants that he was only entitled to recover this amount and that he could not recover anything for the loss of consortium of his wife.

It is true that in this State the wife may prosecute her suit independently of her husband for injuries inflicted upon her by the negligence of another. *Railway Co.* v. *Amos,* 54 Ark. 159.

(6) In the case note to 23 American and English Annotated Cases, at page 1125, it is said: "The rule prevailing in the great majority of the states is that the statutes generally known as the 'Married Women's Property Act' authorizing a married woman to sue for personal injuries in her own name without joining her husband and making the amount recovered her separate property, do not deprive the husband of his common-law right to sue for the loss of the services, society and companionship of his wife resulting from her personal injuries." Many cases are cited in support of the rule.

The same rule is announced in a case note to 33 L. R. A. (N. S.), at pages 1046 and 1047, and numerous cases are there cited in support of the rule.

(7) It is also contended by counsel for the defendant that the husband is not entitled to recover for the services and companionship of his wife, except in case of her death, as provided in section 6287 of Kirby's Digest. This section gives a husband the right to recover for the services and society of his wife where death resulted to her by the wrongful act or negligence of another person. It did not, however, take away his common law right to recover for her services and companionship from injuries sustained by her from the negligent act of another where death did not ensue.

The husband has a right to the services and society of his wife by virtue of the marital relation and they are purely personal to him. See *Billingsley* v. *St. Louis, I. M. & S. Ry. Co.,* 84 Ark. 617.

(8) The word "services" does not contemplate merely what wages should be paid the wife for the work

actually performed by her, but it rather implies whatever assistance, aid or comfort she would be expected to render her husband in all the relations of domestic life.

(9-10) The word "consortium" includes aid, society, companionship, assistance and affection and the law does not attempt to separate these elements of damages. So, it can not be said that the amount of damages recovered by the plaintiff, P. N. Coppedge, is excessive.

(11) It is also contended that the court erred in not requiring plaintiffs to permit the defendants to make experiments in their home as they did in other places by permitting natural gas to escape into the room where persons were exposed. This was a matter in the discretion of the court, and we do not think the court abused its discretion. As we have already stated, the defendants made experiments under what they testified were similar conditions at other places.

Complaint is also made of the refusal of the court to give certain instructions asked for by the defendants. We do not deem it necessary to set out these instructions or to comment on them at length. We have carefully examined the instructions given by the court at the request of the defendant and are of the opinion that the matters embraced in the refused instructions were contained in those given by the court, and it has been repeatedly held that it is not prejudicial error for the court to refuse to repeat instructions.

We have carefully examined the record in this cause and though we think there was a close question of fact presented to the jury in regard to the negligence of the defendants, we think the case was fairly and properly submitted to the jury, and there being evidence of a substantial nature to support the verdict, the judgment must be affirmed.

FOWLER v. FRAZIER.

Opinion delivered January 11, 1915.

1. PROBATE COURT—JURISDICTION—TITLE TO PROPERTY.—**The probate court is without jurisdiction to try contested claims of title to property.**
2. ADMINISTRATION—PARTNERSHIP ACCOUNT—JURISDICTION OF PROBATE COURT.—**The probate court has no jurisdiction to adjust partnership accounts between an executor or administrator of a decedent and a surviving partner.**

Appeal from Arkansas Circuit Court, Northern District; *Eugene Lankford,* Judge; reversed.

STATEMENT BY THE COURT.

Appellee filed the following claim or statement of account against the estate of G. W. Frazier, in the probate court of Arkansas County:

To one-half interest in one gin stand	$ 80.00
To one-half interest in one boiler	60.00
To one-half interest in one engine	45.00
To one-third interest in American pump	20.00
To one-third interest in one rice drill	21.00
To one-third interest in one Derring binder	21.00
To one-third interest in one Peerless thresher	208.00
To one portable engine and boiler	405.00
To one American pump	35.00
	$895.00

AFFIDAVIT.

State of Arkansas, County of Arkansas.

I, Silas Frazier, state that nothing has been paid or delivered toward the satisfaction of the demand, except what is credited thereon, and that the sum of $895.00 is justly due.

Silas Frazier.

Subscribed and sworn to before me this 18th day of April, 1913.

I. C. Gibson, County Clerk.

After hearing the testimony, the court rendered a judgment in his favor. A motion to dismiss was made there, challenging the jurisdiction of the court and overruled. Upon an appeal to the circuit court, the cause was tried by a jury, which returned a verdict in appellee's favor in the sum of $805, for which judgment was rendered.

It appears from the testimony that appellee was in partnership with his father, the deceased, for several years in rice growing, and likewise interested with him in the cotton gin. He testified that he got one-half the profits from the rice business and that he owned the different interests in the machinery, as shown by the claim filed, while his father, the deceased, owned the remainder. The administrator took charge of the machinery and sold it, appellee purchasing some of it at the sale.

There was no showing of any settlement of the partnership accounts before the filing of the claim against the estate, nor at all. Appellee made the following answers to the court's questions: "You said you were a partner with your father? A. Yes, sir. Q. Why did you file that claim with the administrator, then? A. I concluded that was the only way that I had to get it. Q. Are you asking for the property, or allowance for the claim against the estate? A. I am asking for the property. Q. You claim these specific articles? A. Yes, sir."

Appellant then moved to dismiss the suit for want of jurisdiction, which was overruled. Appellee finally stated that the administrator had taken charge of the property and sold it and that he filed the claim against the estate for his interest therein, acquiescing in and ratifying the sale by the administrator. The appellant, after moving to dismiss the suit for want of jurisdiction, declined to introduce any proof. He also asked the court to instruct the jury to find in his favor, the court being without jurisdiction, which the court refused to do. From the judgment against the estate, the administrator has appealed.

Rasco, Botts & O'Daniel, for appellant.

1. The probate court had no jurisdiction to determine contested claims of title to property or to wind up a partnership. The probate court having no jurisdiction, the circuit court acquired none on appeal. 55 Ark. 222; 15 *Id.* 386; Ark. L. R., vol. 37, 192; 38 *Id.* 471; 57 Ark. 299; 22 *Id.* 547; 44 *Id.* 423;

2. There was a partnership (93 Ark. 521; 63 *Id.* 518); and if the probate court had no jurisdiction the circuit court acquired none. 38 Ark. 932..

3. There is error in the court's charge. As soon as it developed that matters of equitable jurisdiction were involved the cause should have been transferred to equity. Appellee is estopped to claim title if he stood by and saw the property sell and made no objections, but encouraged the sale by bidding and buying. 16 Cyc. 762, 802; 34 Ark. 499; 39 *Id.* 131; 48 *Id.* 409; 24 *Id.* 371; 18 *Id.* 142; 14 *Id.* 505; 10 *Id.* 211.

Jas. E. Ray, for appellee.

1. The question of jurisdiction was not raised in the probate court. Our contention is that they were joint owners and not partners. The jury found that the engine and boiler was the individual property of appellant and was sold by the administrator. The presumption is in favor of the regularity and validity of the court's proceedings. 11 Ark. 529.

2. After a balance is struck one partner can sue the other. 11 Ark. 529; 44 *Id.* 423; 18 Am. St. 282; 11 L. R. A. 136. Whether a partnership or not is a question for the jury. 11 L. R. A. 136; 80 Ark. 23.

In order to constitute a partnership, it is necessary that there shall be something more than joint ownership. 91 Ark. 26.

3. If the circuit court had jurisdiction of even a part of the controversy, it had jurisdiction of the whole. 55 Ark. 222, is not applicable.

KIRBY, J., (after stating the facts). (1) It is well settled that the probate court is without jurisdiction to try contested claims of title to property. In *Shane* v.

Dickson, 111 Ark. 357, the court said: "The probate court has no jurisdiction of contests between an executor or administrator and third parties over property rights or the collection of debts due the estate. Its jurisdiction is confined to the administration of assets, which come under its control, and incidentally to compel the discovery of assets." *Moss* v. *Sandefur,* 15 Ark. 381; *Fancher* v. *Kenner,* 110 Ark. 117, 161 S. W. 166; *Mobley* v. *Andrews,* 55 Ark. 222.

(2) It is also unquestionably true that the probate court has no jurisdiction to adjust partnership accounts between an executor or administrator of a decedent and a surviving partner. In *Choate* v. *O'Neal,* 57 Ark. 299, the court held, quoting syllabus: "The probate court has no jurisdiction to settle partnership accounts between a decedent and his surviving partner." See, also, *Nelson & Wife* v. *Green,* 22 Ark. 547; *Tiner, Admr.,* v. *Christian, Admrx.,* 27 Ark. 306; *Culley & Son* v. *Edwards, Admr.,* 44 Ark. 423.

The probate court was without jurisdiction to try the question of title to the property and render judgment for it or the value thereof, or to adjust the partnership accounts and make a settlement thereof and allow the claim for any amount found to belong to the surviving partner. The testimony tended to show that the suit was for the recovery of specific articles of property, or the value thereof, or for the appellee's share and interest in the partnership property, no settlement of the partnership having been shown to have been made between the partners by agreement or otherwise, nor ascertainment of such interest.

It follows that the probate court was without jurisdiction of the cause, and since upon appeal the circuit court tries the case *de novo* and renders such judgment or makes such order as the probate court should have made, it acquired no jurisdiction on appeal.

The court erred in not granting appellant's motion to dismiss the suit for want of jurisdiction. The judgment is reversed and the cause dismissed.

HALEY v. THOMPSON.

Opinion delivered January 11, 1915.

1. COUNTY OFFICERS—SETTLEMENTS—DISCHARGING SETTLEMENT.—Proceedings to set aside the judgment of the county court confirming settlements made by the collector of the county, in which he accounted for certain assessments collected by him for various drainage districts in the county, are authorized by Kirby's Digest, § § 7174 and 7175, which provide that where any error in the settlement of a county officer made with the county is discovered, the court may, at any time, within two years from the date of the settlement, reconsider and adjust the same.
2. COUNTY OFFICERS—SETTLEMENTS—ERRORS OF LAW.—Under Kirby's Digest, § 7174, which provides that "where any error shall be discovered" in the settlement of a county officer the same may be corrected within two years from the date of the settlement, the language of the statute *held* to include errors of law as well as errors of facts.
3. DRAINAGE DISTRICTS—COLLECTOR—FEES.—The general drainage district statute contains no provision for the payment of any commission to a collector, and there is no authority in law for the allowance of a commission to him.

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

STATEMENT BY THE COURT.

Proceedings were instituted in the county court of Greene County by the State of Arkansas, for the use of certain drainage districts in that county, and W. C. Thompson, as treasurer of said county; the districts, on behalf of which the proceedings were brought, having all been established under the general drainage statutes of this State; sections 1414 *et seq.*, Kirby's Digest. The proceedings were instituted by filing in the county court motions to set aside the judgments of the court confirming settlements which had been filed by appellant as collector of that county, in which he accounted for the assessments collected by him for the years 1911 and 1912 for the various drainage districts of that county.

The proceedings were had under the authority of sections 7174 and 7175 of Kirby's Digest, and the hearing was had on April 2, 1913, at which time the court sus-

tained the motions, opened the settlements and surcharged them to the extent of rendering judgment against appellant for the amount which had been allowed him as commissions for collecting said assessments. A similar judgment was rendered by the circuit court upon appeal to that court, and this appeal has been prosecuted from that judgment.

At the trial below, the county judge, who had approved the settlements, testified that he allowed the commissions under the apprehension that appellant was entitled to them, and that the calculation of these commissions on these assessments was made just as they were made on the other taxes collected by appellant.

It is urged that these proceedings were not authorized by law; that there was a defect of parties; and that the provisions of sections 7174 and 7175 of Kirby's Digest do not apply, because the error complained of was an error of law, if an error at all, and, finally, that the commissions deducted were proper credits.

Block & Kirsch, Geo. A. Burr and *R. E. L. Johnson,* for appellant.

1. These proceedings were not authorized by law. Kirby's Dig., § § 7174-5.

2. The provisions, *supra,* do not apply here because the error complained of was an error at law, if an error at all. The statute only contemplates the correction of errors of fact.

3. Any taxpayer has the right to appeal. 39 Ark. 485; 90 *Id.* 219; 30 *Id.* 603.

4. The commissions deducted were proper credits. 102 Ark. 106; Kirby's Dig., § 1437; *Ib.* § § 1435, 7072.

5. The demurrer should have been sustained upon the grounds of nonjoinder and defective parties, and that the county court obtained no jurisdiction either of the person or subject-matter. Kirby's Dig., § § 7174-5. The commissions were properly chargeable as matter of law.

Appellees, pro sese.

1. There is no defect of parties. 30 Ark. 603-8.

2. The court had power to correct any errors growing out of questions of law or of fact. Kirby's Dig., § § 7174-5; 51 Ark. 212; 100 *Id.* 571; 101 *Id.* 358.

3. The collector was not entitled to charge commissions on the funds. Kirby's Dig., § § 1437, 7072, 6872-7222; 102 Ark. 106; 57 *Id.* 487.

SMITH, J., (after stating the facts). (1) There was no defect of parties; and the provisions of sections 7174 and 7175 of Kirby's Digest authorized this proceeding. By section 7174 it is provided that "Whenever any error shall be discovered in the settlement of any county officer made with the county court, it shall be the duty of the court, at any time within two years from the date of such settlement, to reconsider and adjust the same." Section 7175 provides for giving notice.

(2) It is insisted that this statute does not apply because the error made was one of law, and not one of fact, and that any taxpayer of the district might have made himself a party to this settlement and had the right to have it corrected upon appeal to the circuit court. Relief, no doubt, might have been had in this manner; but the section quoted does not limit the right of the court to correct errors of fact only. The language of the statute is "Whenever *any* error shall be discovered," and this language must necessarily include errors of law as well as those of fact.

The final and important question in the case is whether any error was committed in the approval of this settlement. It appears that the drainage districts in question are the same districts against which a commission was claimed by the treasurer of Greene County, which claim was passed upon by this court in the case of *Honey* v. *Greene County,* 102 Ark. 106. It was there held that the county treasurer was not entitled to such commissions, for the reason that the drainage district fund was not a county fund, but a fund belonging to the drainage district. That each district levies and disburses its own funds, and that as no provision had been made for the payment of commissions, none could be charged. It

was there said that "To authorize a county court to allow a claim of fees for services rendered by an officer, there must be specific statutory authority to the officer to make a charge for the services," a question which had been so decided in several previous decisions of this court.

(3) No provision is contained in the general drainage statute, under which these districts were established, for the payment of any commission to the collector, and the same rule would necessarily apply to him which applies to the treasurer, and there was, therefore, no authority in law for the allowance of these commissions. *Fuller* v. *State* ex rel. *Drainage Dist.*, 164 S. W. 770; *Helena Special School Dist.* v. *Kitchens*, 108 Ark. 137.

The judgment of the circuit court is, therefore, affirmed.

SONS *v.* STATE.

Opinion delivered January 18, 1915.

RECEIVING STOLEN PROPERTY—UNEXPLAINED POSSESSION—QUESTION FOR JURY—EVIDENCE.—The unexplained possession of property recently stolen constitutes evidence legally sufficient to warrant a conviction of larceny or the crime of knowingly receiving stolen property; but in a prosecution for the latter crime, an instruction that such evidence is sufficient to sustain a conviction amounts to an instruction on the weight of the evidence and is, for that reason, an invasion of the province of the jury.

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

Stuckey & Stuckey, for appellant.

1. The gist of the offense is knowledge that the property was stolen. It is so charged in the indictment. There must be proof of knowledge and intent to deprive the true owner of the property. Instruction No. 3 was misleading. 34 Ark. 446; 58 *Id.* 578.

2. The testimony of an accomplice must be corroborated, unless confederacy be proved *aliunde*. Wharton, Cr. Law (8 ed.), § 982a.

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

1. Instruction No. 3 was correct. 92 Ark. 587, 593.

2. The evidence was sufficient to sustain the conviction. Even if the thief was an accomplice, his evidence was sufficiently corroborated. 90 Ark. 457.

McCULLOCH, C. J. Appellant was convicted of the crime of receiving stolen property, under an indictment which charged that he knowingly received twenty-four boxes of thread, of the value of $14.40, which had been stolen from one Heinemann, the owner. The evidence shows that Lawrence Clark stole the property from the store of Heinemann, where he was working as porter, and sold it to appellant, and that upon information given by Clark an officer found it in appellant's possession. Appellant admitted that he received the property from Clark, but claimed that he purchased it in good faith from the latter in reliance on his statement that he had found the property in a vacant store house which he was cleaning out. Clark testified that he stole the property and sold it to appellant, and he was corroborated by circumstances adduced in evidence which were sufficient to warrant a finding that appellant received the property with guilty knowledge that it had been recently stolen from the owner. The evidence was sufficient, therefore, to sustain the verdict.

Error of the court is assigned in giving the following instruction, over appellant's objection:

"3. I further instruct you that the possession of goods recently stolen is *prima facie* evidence tending to establish the guilt of one in whose hands such goods are so found, and may be considered by you as tending to establish the guilt of the defendant in this case, unless the defendant has made an explanation to you explaining his possession. And such explanation is a reasonable one."

We have held in repeated decisions that unexplained possession of property recently stolen constitutes evidence legally sufficient to warrant a conviction of larceny or of the crime of knowingly receiving stolen property;

but that an instruction that such evidence is sufficient to sustain a conviction amounts to an instruction on the weight of the evidence and is, for that reason, an invasion of the province of the jury.

In *Duckworth* v. *State,* 83 Ark. 192, the instruction told the jury that "the possession of property, recently stolen, unexplained, is evidence of the defendant's guilt," and that if such unexplained possession is corroborated by other evidence tending to connect the accused with the larceny, "then you will find them guilty."

In *Thomas* v. *State,* 85 Ark. 138, the court charged the jury that "the possession of property recently stolen, unexplained, * * * would be sufficient under this indictment to sustain a conviction."

In each of those cases, we held that the instructions given were erroneous for the reason that they were on the weight of the evidence.

In *Boykin* v. *State,* 34 Ark. 443, the court charged the jury that "possession of stolen property recently stolen is *prima facie* evidence of the guilt of the party in whose possession the property is so found, unless the possession is satisfactorily accounted for by the evidence." The court, in discussing that instruction, said: "The instruction given by the court is literally correct. Possession of property recently stolen, without reasonable explanation of that possession, is evidence of guilt to go to the jury for their consideration. In this sense, it is *prima facie* evidence, but not in the sense that it is such evidence as must compel the jury to a conviction, unless it be rebutted. It would have been better to have modified the instruction complained of, so as to impress upon the jury the idea that the evidence went to them for their consideration, under all the circumstances, to be weighed as tending to show guilt, but not imperatively imposing upon the jury the duty of conviction, unless rebutted. The defendant, however, asked no such explanation, and the instruction is not erroneous."

The instruction given in that case was, as is readily seen, stronger and more objectionable than the one given

in the present case, for it told the jury unqualifiedly that "possession of stolen property recently stolen is *prima facie* evidence of the guilt of the party."

The instruction in the present case merely states that "the possession of goods recently stolen is *prima facie* evidence tending to establish the guilt," etc. The effect of that instruction, when fairly interpreted, was to state the proposition that unexplained possession of property recently stolen warranted the consideration of that fact as evidence tending to establish guilt. It does not mean that proof of such fact constitutes *prima facie* evidence of guilt sufficient to sustain a conviction.

In *Hogue* v. *State,* 93 Ark. 316, which was a murder case, the trial court charged the jury that certain facts in proof were "circumstances which tend to establish the defendant's guilt," and it was insisted here that this constituted an instruction on the weight of the evidence. In disposing of that contention, we said: "Now, to say that a thing tends or has a tendency to establish a certain state of facts is not a declaration as to the weight to be given to it, but is a mere statement that it is directed toward or moves in the direction of a certain result, the degree of its force not being mentioned. To say that a circumstance tends to prove the issue is no more than saying that it may be considered for the purpose of determining the issue." The objection made by appellant to the instruction under consideration was a general one, and the court was not asked to modify or explain it, nor was the objection now made to it specifically called to the attention of the court. The court, in another instruction, told the jury that they were "the sole judges of the weight and sufficiency of the evidence." We are of the opinion, therefore, that the record does not present any error of the trial court which calls for a reversal of the judgment. Affirmed.

HART, J., dissents.

LANDRETH v. HENSON.

Opinion delivered January 18, 1915.

1. GUARDIAN AND WARD—FOREIGN GUARDIAN—SALE IN ARKANSAS—VALIDITY—CONFLICT OF LAWS.—Under Kirby's Digest, § 3793, which provides that all probate sales of real estate, made pursuant to proceedings not in substantial compliance with statutory provisions shall be voidable, a sale of a minor's property in Arkansas under order of a local probate court, would be void, if the appointment of the foreign guardian in another State was not legally made.
2. DOMICILE—PARENT AND CHILD—DECEASED FATHER.—The last domicile of a deceased father of an infant constitutes the legal domicile of the infant, and the domicile of the infant can not be changed or removed by his own act until he reaches his majority.
3. GUARDIAN AND WARD—FOREIGN GUARDIAN—LEGALITY OF APPOINTMENT—SALE OF WARD'S LAND.—A father died, having a minor son and some land, the latter situated in this State. The minor had removed with his mother to another State; *held*, the minor had acquired a domicile in that State so that a guardian could properly be appointed for the minor in the foreign State, and that the authority of the probate court in that State to order a sale of the ward's property in this State, was valid.
4. GUARDIAN AND WARD—FOREIGN GUARDIAN—SALE—COMPLIANCE WITH STATUTE.—Where a foreign guardian of a nonresident ward seeks to sell property in this State belonging to the ward, under order of the probate court of the other State, under Kirby's Digest, § 3793, the sale to be valid must be in substantial compliance with the statutes of this State relative thereto.
5. GUARDIAN AND WARD—BOND—NONRESIDENT GUARDIAN—SALE OF WARD'S PROPERTY.—Under Kirby's Digest, § 3813, a nonresident guardian will not be authorized to sell the ward's land, in the county where it is located unless he offers to the court a copy of his bond, property authenticated. *Held*, the statute is substantially complied with, so as to render a sale valid, when the proof made of a nonresident guardian's bond made in another State, was a certificate to that effect, made by the judge of the court appointing him, and where the bond was filed.
6. APPEAL AND—ERROR—TRANSFER OF ACTION—HARMLESS ERROR.—Although an action is improperly transferred from law to equity, where the material facts are undisputed, and the decision of the chancellor is found to be correct, and the result could not have been otherwise at law, it will be held that there was no prejudicial error in transferring the same.

Appeal from Hot Spring Chancery Court; *Jethro P. Henderson*, Chancellor; affirmed.

Jabez M. Smith and *D. D. Glover,* for appellant.

1. The transfer to equity was improper because the questions involved were purely legal. 93 Ark. 376; 92 *Id.* 46; 100 *Id.* 399.

2. The public administrator of Pike County, Missouri, is not shown to have jurisdiction.. Mo. Stat. 1909, vol. 1, § 302; 115 Am. St. Rep. 472, 477; 198 Mo. 174.

3. The probate court of Hot Spring County had no jurisdiction. The law was not complied with and its orders are void on collateral attack. 70 Ark. 343. All the acts of the guardian are void. Black on Judg., 928-9; 47 Ark. 120; 1 Greenl. on Ev., § 548; 78 Ark. 246; 90 Ark. 35; 32 *Id.* 97-104; Kirby's Digest, § § 3781-2, 3813; 115 Am. St. Rep. 38. Our statute requires a copy of the record of the appointment of the guardian and of his bond duly authenticated. The selling of land by a foreign guardian is statutory, and the order must show affirmatively that the statutes have been complied with; no presumption is indulged. 64 Ark. 110; 103 *Id.* 450; 59 *Id.* 486-7; 74 *Id.* 86; 106 *Id.* 566.

4. The requirements of the statute can not be omitted or wholly disregarded. 89 Ark. 284, and cases *supra.*

5. The domicile of the father was the domicile of the minor. 16 Ark. 377; 29 *Id.* 280; 80 *Id.* 358. A minor can not waive his homestead right. Const. Ark., art. 9, § 6; 29 Ark. 633; 37 *Id.* 316; 47 *Id.* 445; 51 *Id.* 429; 53 *Id.* 402; 65 *Id.* 358.

E. H. Vance, Jr., for appellee. *Albert W. Jernigan,* of counsel.

1. Davis was the legally appointed guardian. The Missouri court had jurisdiction. Kirby's Dig., § § 3810-3817. The statutes are merely declaratory of what at common law courts of equity could do.

2. It is true an infant's domicile is the last domicile of his father. 72 Ark. 299; 16 *Id.* 377; 29 *Id.* 280; 80 *Id.* 350; 77 Am. Dec. 534. The presumption is that the father consented that the care, custody and management

of the minor was given to his grandfather in Missouri. If not, then plaintiff's domicile was in Hot Spring County, Ark., although he was residing elsewhere. 80 Ark. 357. Then he was a non-resident minor of Arkansas. Pomeroy Eq. 1305-6. The jurisdictional facts are settled by the probate court and not open to collateral attack. 84 Ark. 34; 66 *Id.* 416; 70 *Id.* 88; 117 S. W. 628; 15 A. & Eng. Enc. 37; 78 Ark. 193; Kirby's Dig., § 3771; 80 Ark. 357; 84 *Id.* 35; Kirby's Dig., § 3793; Const. Ark., art. 7, § 34; 52 Ark. 341; 86 *Id.* 368; 89 *Id.* 288; 135 S. W. 821; 26 *Id.* 421. All the essential elements and requirements of the statutes were complied with. This is sufficient on collateral attack. 89 Ark. 284; 131 Am. St. 93; 26 Ark. 421; 44 Ark. 414; 51 *Id.* 338; 53 *Id.* 37; *Ib.* 224; 38 *Id.* 78.

3. The record being silent the presumption is that the court first inquired into all jurisdictional facts. 84 Ark. 34; 117 S. W. 628; 67 Am. Dig. 745; 67 Am. Dec. 693.

4. The advertisement was a substantial compliance with the law. 89 Ark. 289.

5. Want of jurisdiction must appear in the record. 51 Ark. 358; 53 *Id.* 37; 52 *Id.* 341.

6. The court had the right to order the sale for support, education and maintenance, even of a homestead. 65 Ark. 355; 54 *Id.* 480-4; 5 La. Ann. 180; 31 Ind. 444; 49 Mo. 116; 51 Wis. 487. See also in support of jurisdiction, 65 Mich. 362; 39 Neb. 483; 90 Ark. 170; 26 *Id.* 421; 89 *Id.* 289.

7. Mere irregularities are cured by confirmation. 84 Ark. 277; 81 *Id.* 172; 32 *Id.* 97; 66 *Id.* 367; 74 *Id.* 324; 51 *Id.* 338; 76 *Id.* 146; 118 S. W. 194; 75 Ark. 9; 33 L. R. A. (O. S.) 770; 86 Tenn. 32; 88 Me. 310; 9 Dana 526; 39 Neb. 843; 59 N. W. 522; 47 Am. St. 627.

McCULLOCH, C. J. This suit involves the title to a tract of land in Hot Spring County, Arkansas, and appellant claims the land by inheritance from his father, George W. Landreth, who died in the year 1896, while a resident of Hot Spring County. The land in controversy

was the homestead of George W. Landreth, and he left no other children. It was sold in the year 1901, under an order of the probate court of Hot Spring County, upon petition of appellant's guardian, appointed in the State of Missouri, and was purchased by appellee at the sale. The validity of the sale is the point at issue in the case.

Appellant's father and mother separated while he was an infant, or perhaps a few months before his birth, and they were divorced by a decree of the chancery court of Hot Spring County a few years later. Appellant's mother removed to another county in the State, and he resided with her until her death, when he was taken by one of his maternal grand-parents to the State of Missouri, and has continued to reside there throughout the period of his minority. Appellant's father continued to reside in Hot Spring County and occupied the land in controversy as his homestead until his death in 1896, and an administrator was appointed there to wind up his estate. There has been no guardianship of appellant in this State, but the public administrator in Pike County, Missouri, where appellant resided with his grand-parent, was ordered to take charge of the estate as guardian. The statutes of Missouri provide that "The public administrator shall be *ex-officio* public guardian and shall have charge of all estates of minors that may, by the order of the probate court be placed in his charge, and in such cases he shall be known and designated as public guardian." Section 464, Revised Statutes of Missouri, 1909. In the year 1901, the Missouri guardian made application to the probate court of Hot Spring County, pursuant to the statutes of this State authorizing sale of infant's land by a nonresident guardian, for an order of sale of the tract of land in controversy, and the probate court made such an order and the land was sold to appellee; the sale being subsequently reported to and confirmed by the probate court. This inquiry, therefore, constitutes a collateral attack upon the validity of the sale.

Our statute on the subject reads as follows: "When a nonresident minor owns real estate in this State, and

had a guardian in the State or Territory in which he resides, the court of probate in the proper county may authorize such guardian, either in person or by his agent acting under power of attorney, to sell such real estate and receive the proceeds of such sale. Provided, before any order shall be made for the payment of money to a nonresident guardian, or for the sale of the property of his ward by him, he shall produce satisfactory evidence to the court that he has given bond and security as guardian, in the State in which he and his ward reside, in at least double the amount of the sum to be paid to him, or in double the amount of the appraised value of the property to be sold; and the proof shall consist of a copy of the record, setting forth his appointment as guardian, and also a copy of his bond executed as such, duly authenticated." Section 3813, Kirby's Digest.

(1) The first question presented is whether or not the probate court of Missouri had jurisdiction to appoint a guardian for appellant. The act of April 8, 1891 (Kirby's Digest, 3793), provides that "all probate sales of real estate, made pursuant to proceedings not in substantial compliance with statutory provisions shall be voidable." It follows, as the necessary effect of that statute, that if the guardian in the State of Missouri was not legally appointed, or at least if the court there had no jurisdiction to appoint a guardian, the proceedings here for the sale of the land would not be in substantial compliance with statutory provision and would be void. Further discussion of the effect of that statute will be made a little later in this opinion, in deciding another phase of the case with respect to the validity of the sale.

(2) This court has announced and adhered to the rule which prevailed at common law that the last domicile of the deceased father of an infant constituted his legal domicile and so remained, and that the domicile of the infant can not be changed or removed by his own act until he reaches his majority.

The earliest case on that subject is *Grimmett* v. *Witherington,* 16 Ark. 377. That case involved the con-

flict between a guardian appointed here and one appointed in the State of Texas concerning the custody of property of the minor in this State, and the court in its decision upheld the authority of the domestic guardian, holding that the domicile of the father being in this State, the legal domicile of the infant followed it. That case was followed, and the rule re-announced in *Young* v. *Hiner,* 72 Ark. 299. In the opinion in that case, there is a suggestion of exceptions to the rule, and we find upon examination of the authorities that there are many exceptions recognized by the courts. The Supreme Court of California, in the case of In re *Vance,* 92 Cal. 195, decided that where the father abandoned his child under the age of fourteen years he could no longer claim the custody, and that the domicile of the child might be changed by the act of another person standing in *loco parentis.* The Supreme Court of the United States, in *Lamar, Executor* v. *Micou, Administratrix,* 114 U. S. 218, laid down the rule that an infant having a domicile in one State, who after the death of both parents takes up his residence at the home of a grand-parent and next of kin in another State, acquires a legal domicile there. This subject is fully discussed by Mr. Rodgers, in his work on Domestic Relations, § 656, *et seq.,* where the exceptions to the general rule are mentioned. There are, too, authorities to the effect that although the legal domicile be elsewhere, a residence in fact is sufficient to confer jurisdiction upon probate courts of such *de facto* residence of a minor to appoint a guardian. Tiffany on Domestic Relations, § 159.

(3) There is not involved in this case any question of conflict of authority between a domestic guardian and one appointed in a foreign jurisdiction, and the question is solely whether the Missouri court had jurisdiction to appoint a guardian so that the courts of this State might in consequence thereof authorize a sale of land here to be made by such guardian. The judgment of the Missouri court in appointing the guardian there is at least presumptively decisive of the question of jurisdiction,

and we think, under the authorities cited, the court had, upon the facts shown in this case with respect to the legal domicile and residence, jurisdiction to make the appointment. There was no guardian in this State and the probate court here possessed the power to authorize the Missouri guardian to make the sale of the land in this State.

The only other point of attack made upon the sale, which we deem necessary to discuss, is that the order of sale was made without requiring the production of a copy of the bond of the guardian as required by the statute. It is undisputed that the guardian had given bond in the State where the appointment was made, and the record in the probate court shows that proof was made of that fact by certificate of the judge of the Missouri court. The statute of this State, however, provides that before any order of sale shall be made upon petition of a nonresident guardian, "he shall produce satisfactory evidence to the court that he has given bond and security as guardian, etc.," and that the proof shall consist of "a copy of his bond executed as such, duly authenticated." A certificate of the judge of the foreign court is certainly not a literal compliance with the statute, but whether or not it is a substantial compliance calls for discussion. The evidence adduced by appellant shows that so far as the records of the probate court reveal the proof that was made, when the order of sale was applied for, there was no copy of the bond presented. None is found on the files now, and the evidence justifies the conclusion, we think, that no copy was filed.

(4) It is insisted that notwithstanding the act of 1891, providing that probate sales shall be voidable unless made in substantial compliance with the statute, there is a conclusive presumption of the regularity of sales so far as relates to matters which preceded the judgment of the court ordering the sale, and that such judgment is conclusive of those matters. Many decisions of this court are cited which sustain that contention, but they all antedate the act of April 8, 1891, which wrought

an important change in the law on that subject. The Legislature intended to change that rule pursuant to the admonition of this court in the opinion of Judge SANDELS in the case of *Apel* v. *Kelsey,* 52 Ark. 341. If we were to hold that there is a conclusive presumption attending the judgment of the probate court, little effect would be given to the act of 1891. In order to give it any effect at all, we are forced to the conclusion that the Legislature meant to destroy the incontrovertible verity of the judgment of the court for the purpose of showing that the proceedings were not in fact in substantial compliance with the statutory provisions with respect to probate sales. That much is decided in the recent case of *Mobbs* v. *Millard,* 106 Ark. 563, where we held that notwithstanding the judgment of confirmation of a probate sale, it should be declared void on collateral attack where it is shown that the land was sold for less than the appraised value. Now, if we were going to give a conclusive presumption to the judgment of the probate court, we ought to have held in that case that the judgment of confirmation was conclusive of the fact that the land was sold for three-fourths of its appraised value. But we held to the contrary, and it necessarily follows from that decision that we construe the statute to allow the presumption arising from the judgment of the probate court, concerning compliance with statutory provisions, to be overcome by proof that those provisions were not in fact substantially complied with, and that upon such proof being made it defeats the validity of the sale. We are of the opinion, therefore, giving the proper effect to the act of 1891, the sale should be set aside if it is found that the statutory provisions were not substantially complied with.

(5) The further question then arises as to whether or not failure to produce evidence in the form provided by the statute, with respect to the bond given in the foreign jurisdiction, is a substantial departure from the statutory provisions so as to defeat the sale. The statute provides that an order of sale shall not be made unless satisfactory evidence be produced that the guar-

dian has given bond in the court where he was appointed, and we are clearly of the opinion that unless such bond has in fact been given the order of the sale will be void. But the form of the proof of the execution of that bond is quite another thing, and it does not follow that a departure from the method of proof amounts to a substantial departure from the statutory provisions. It is error for the probate court to make an order of sale without proof of the execution of the bond in the form prescribed by the statute. But, after all, this provision concerning the kind of proof to be introduced relates to form and not to substance, and it ought not, we think, to be regarded as substantially within the meaning of the act of 1891. In *Harper* v. *Smith,* 89 Ark. 284, we held the method of giving notice of sale was a mere irregularity and not a substantial departure from the requirements of the statute. A guardian's sale for less than three-fourths of the appraised value of the land is undoubtedly a substantial departure from the provisions of the statute, and we so held in *Mobbs* v. *Millard, supra.* Our conclusion is that the variance in the form of proof adduced before the probate court to obtain the order of sale was not a substantial departure from the statutory provision and does not void the sale ordered by the court and subsequently confirmed.

(6) This action originated in the circuit court of Hot Spring County and was, on motion of appellee, transferred to equity. It is insisted that the transfer was improper because the questions involved were those to be decided by a law court, and the court erred in ordering the transfer. The material facts are, however, undisputed, and since the decision of the chancellor is correct, and could not have been otherwise in a court of law, there was no prejudice in transferring the cause.

Decree affirmed.

QUEEN v. QUEEN.

Opinion delivered January 18, 1915.

1. DEEDS—EXPRESS TRUST—ORAL PROOF.—Oral proof can not be heard to engraft an express trust upon a deed absolute in form.
2. LOST INSTRUMENT—HOW PROVED—ACTION ON.—In order to sustain an action on a lost or destroyed instrument, the contents of the instrument must be shown by clear and convincing evidence.
3. DEEDS—DECLARATION OF TRUST—LOST INSTRUMENT—ORAL EVIDENCE.—J. deeded property to his son A., the deed recited a consideration and was recorded. In an action by the heirs of J., against the heirs of A., the former sought to have the deed set aside and undertook to prove a declaration. *Held*, the evidence of the written declaration was too vague and uncertain to warrant a finding that the deed from J. to A. was not intended to be absolute.
4. TRUST EX-MALEFICIO—SUFFICIENCY OF THE EVIDENCE.—In an action to set aside a deed absolute in form, evidence held insufficient to show that the grantee was guilty of any fraud or deceit, so as to raise a trust *ex-maleficio* in himself.

Appeal from Scott Chancery Court; *W. A. Falconer*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellants instituted this action in the chancery court against appellees for the purpose of setting aside a deed executed by John H. Queen, now deceased, to his son, Albert Queen, also deceased. The facts so far as are necessary to determine the issues raised by the appeal, briefly stated, are as follows:

Appellants, who were the plaintiffs below, are the heirs at law of John H. Queen; appellees, who were the defendants in the court below, are the widow and children of Albert Queen, who was a son of John H. Queen. The tract of land in controversy is situated in Scott County, Arkansas, and was formerly owned by John H. Queen. John H. Queen and his children removed to the Indian Territory, now the State of Oklahoma. John H. Queen and his son Albert lived in the eastern part of the Territory but some of the other children lived in the western part of it. On the 17th day of January, 1895, John H. Queen and Nancy Queen, his wife, by warranty deed, conveyed the land in question to his son Albert Queen.

The consideration recited in the deed was $1,000. John H. Queen resided with his son, Albert Queen, from the time of the execution of the deed until his death some time in December, 1895. His widow continued to reside with Albert Queen until her death in 1911. Albert Queen died intestate on the 7th day of September, 1913. The deed from John H. Queen to Albert Queen was filed for record on the 17th day of February, 1898.

The deposition of H. R. Ryburn was taken in May, 1914. He testified that he had known the land in controversy for twenty years and had lived on it fourteen years; that he first bought the place, held it for a year and then let it go back to John H. Queen; that he bought it before he moved on it and that he held it as a renter for fourteen years under a contract between him and John H. Queen and his son, Albert; that the contract was drawn up and signed by John H. Queen and his son, Albert Queen, at his house and acknowledged before a justice of the peace; that it was witnessed by Bill Dodd and himself; that it was executed about twenty years ago, was given to him and that he kept it up till about the time of his wife's death; that after that time his children disposed of it in some way or other; and that the reason he kept the contract was because he was to have the place under the contract as long as he wanted it. He was asked to state as fully as possible the contents and provisions of the contract, and he answered as follows:

"Well, the rent of the place was to go to Albert Queen after old man Queen's death, for the support of Albert's mother, as long as she lived with Albert. If, for any cause, she went any place else, the rent was to go wherever she went. That is the main part of the contract about the rent. This contract called that at Albert's mother's death that if he would pay $1,000 as stated in the contract and the deed, that he could hold the place. This deed was held by Albert Queen and was made by his father, John H. Queen. If Albert did not pay this $1,000, it was to go to the children. This contract further provided that I was to keep the land and the rent to go to

Albert's mother. Under the contract Albert could not sell the land, and I kept him from selling it twice. Albert could not rent the land as long as I stayed on it.

"I paid the rent to John H. Queen one year. He died before the second crop, and I paid the rent to Albert Queen thereafter. I paid the taxes on the land while I had it, and took the taxes out of the rent. I can not state exactly how much rent I paid each year, but it was something like $200, after deducting taxes and expenses. The last year I paid $303.90 above expenses and taxes."

Bill Dodd testified that he was acquainted with the land in question; that he saw the contract at Ryburn's house and that as well as he remembered Ryburn was living on John Tull's place at that time; that he signed the contract as a witness and that there were present John H. Queen, Albert Queen and Henry W. Ryburn and his boy; that the contract was not read to him and that he did not know anything about its contents; and that this was about a year and a half before John H. Queen's death.

There was other testimony on the part of appellants tending to show that John H. Queen before his death spent a part of his time each year in western Oklahoma with some of his children and that he spent the remainder of it with Albert Queen, who resided in eastern Oklahoma.

The testimony on the part of appellees tended to show that John H. Queen resided with his son, Albert, until he died and that after his death his widow continued to reside with him until she died; that Albert Queen subsequently died and that during all the time from the date of the execution of the deed until his death he claimed the land in controversy.

The chancellor found the issues in favor of the appellees; and to reverse the decree entered of record appellants have prosecuted this appeal.

Carmichael, Brooks, Powers & Rector, for appellants.

1. That parol evidence is inadmissible to engraft an express trust upon a deed absolute in form is con-

ceded; but there is also a well established rule that is admissible to prove a trust in opposition to a deed or other written instrument, where the evidence is sufficiently positive to leave no doubt of the fact. 11 Ark. 82; 111 Ark. 45. In this case there was no attempt to establish a trust by parol. The facts show that at the time of the making of the deed there was a separate contract in writing, explaining how the land was to be held by Albert H. Queen.

All the papers executed in relation to a matter of contract, constitute the entire contract. If there was any doubt about what the contract meant, testimony showing the understanding of the different members of the family was competent to show how John H. Queen intended that Albert H. should hold the property. We think the testimony clearly shows that Albert H. Queen held the property in trust and recognized the trust up to the time of his death. 110 Ark. 394; 103 Ark. 58.

There is sufficient writing shown in this case to create an express trust, and the writing testified to by witnesses Dodd and Ryburn takes the case out of the statute of frauds and meets the requirements laid down in *Gainus* v. *Cannon,* 42 Ark. 503. See also 101 Ark. 451; 71 Ark. 302; 64 Ark. 155; 54 Ark. 499.

2.. The evidence establishes a trust *ex maleficio.* 3 Pomeroy, Eq. Jur., § 1053; 73 Ark. 310; 84 Ark. 189; 92 Ark. 55.

A. G. Leming, for appellees.

1. Appellants will not be permitted to rely in this court upon an issue not pleaded in the lower court. They did not plead nor otherwise disclose to appellees any intention to prove or establish a contemporaneous written contract made at the time of, or prior to, the execution of the deed. No foundation was laid for the introduction of evidence to establish the contents of the alleged contract, and no testimony was introduced regarding its provisions, save only the testimony of the witness Ryburn, and he is wholly uncorroborated. The chancellor's finding is against the existence of such a document, and no

suggestion that the complaint be amended or considered as amended so as to include it was made in that court. 75 Ark. 465, and cases cited; 94 Ark. 392, and cases cited.

2. The evidence is wholly insufficient to show that a trust was ever intended. 75 Ark. 446; 89 Ark. 182; *Id.* 542; 105 Ark. 323; 71 Ark. 373; 3 Pom. Eq. Jur., § 1040; 104 Ark. 37.

A trust *ex maleficio* is not established by the evidence, as that trust is defined and approved by this court. 73 Ark. 310; 92 Ark. 55; 84 Ark. 189.

HART, J., (after stating the facts). The deed of John H. Queen to his son, Albert Queen, to the land in controversy, executed on the 17th day of January, 1895, was a warranty deed in common form and conveyed a fee simple title to the lands to Albert Queen.

(1) It is conceded by counsel for appellant that the deed being absolute in form an express trust can not be engrafted upon it by oral testimony, and that is the effect of our decisions upon the question. It is well settled by the decisions of this court that oral proof can not be heard to engraft an express trust upon a deed absolute in form. *McDonald* v. *Hooker,* 57 Ark. 632; *Veasey* v. *Veasey,* 110 Ark. 389, and cases cited.

It is contended, however, by counsel for appellants that the proof brings this case within that class of cases where there is an absolute conveyance on the one hand and in return a written declaration of trust upon which the property is held. That is to say, that John H. Queen made an absolute conveyance to Albert Queen, the proposed trustee, and that there was also a written contract of the purposes or trust upon which Albert Queen was to hold the property. To sustain this contention they rely chiefly upon the testimony of H. W. Ryburn. We have copied his testimony in relation to the written contract which was executed at his house between himself and John H. Queen and Albert Queen and do not deem it necessary to repeat it here. It is true he testified that the contract which was executed on that occasion was

lost; and if it be conceded that his testimony was sufficient to admit secondary evidence of the contents of the lost instrument, we think the testimony is too vague and indefinite and that the substance of the contract is not satisfactorily proved.

(2) In a case note to 2 American and English Annotated Cases, at page 41, it is said that to sustain an action on a note, bond, deed or other instrument which has been lost or destroyed, the contents of the instrument must be shown by clear and convincing evidence. A number of cases from many states are cited to support the rule. Among the cases cited is that of *Hooper* v. *Chism*, 13 Ark. 496. In that case the court held:

"Where such bill of sale is alleged to be lost, and its contents as alleged are denied by the answer of defendant, they should be substantially proven, where no copy is produced, by a witness who has seen or read the instrument, or is otherwise enabled to speak with some degree of accuracy as to its contents, and identify it as the one executed by the party to be charged."

It will be noted that Ryburn gave his deposition in May, 1914. He said that the contract in question was executed about twenty years before. The deed from John H. Queen to his son, Albert, was executed in January, 1895. If the contract in question was executed twenty years before Ryburn's testimony was given it was executed in 1894, prior to the execution of the deed from John H. Queen to his son, Albert. John H. Queen died in December, 1895.

Bill Dodd, who also witnessed the contract, said that he did not remember anything about its contents because it was not read over to him, and that the contract in question was executed about a year and a half before old man Queen died. This would also place the execution of the contract at a date earlier than the date of the execution of the deed.

Ryburn also testified that prior to the execution of the deed to Albert Queen he had made a contract with John H. Queen for the purchase of the land and had let

the land go back, because he was unable to pay for it. It may be the contract he is testifying to now is the one executed when he purchased the land. In any event, the testimony shows that it was executed before the deed from John H. Queen to his son, Albert Queen, was executed. There is nothing in the record tending to show that it was executed contemporaneously with the deed or with reference to it. It may be that prior to the execution of the deed John H. Queen had entered into some kind of written contract with his son, Albert, and that later the contract was changed by the execution of the deed in question.

It is true the consideration recited in the deed is $1,000 and it is shown that Albert Queen had no means with which to pay for the land. The record shows, however, that John H. Queen at the time he executed the deed was an old man and was not able to work. It may be that he intended to provide a home for his wife and himself during their old age and the testimony shows that he lived with his son, Albert, until he died and that his widow lived with him for several years thereafter until she died.

The deed was acknowledged before L. E. Hoover, a justice of the peace. The contract about which Ryburn testified was acknowledged, he says, before Squire Youman, a justice of the peace. Thus it will be seen, there is nothing to show that the deed and the contract in question were executed at the same time, or that Albert Queen, the grantee in the deed, subsequently executed a written declaration of trust covering the land embraced in the deed.

(3) Moreover, we are of the opinion that the substantial contents of the instrument were not proved by such clear and satisfactory evidence as is required by the rule above announced, and that the court did not err in finding that there was no written declaration of trust as contended for by counsel for the appellants. Where parties reduce their contracts to writing, the obligation and duties of which are described and limited by the in-

strument itself, the security which is expected from the written instrument would be much impaired if the contract could be established upon such uncertain and vague impressions as have been testified to by the witnesses in this case.

(4) Again, it is contended by counsel for appellants that Albert Queen was a trustee *ex maleficio* within the rule announced in *Bragg* v. *Hartney,* 92 Ark. 55, and like cases. We do not think it necessary to make any extended comment on this contention. It is sufficient to say that we have read the record carefully and that there is a total absence of any testimony tending to show that Albert Queen practiced any actual fraud whatever upon his father to procure the deed. Neither do we think the record establishes that he procured the deed through undue influence, or by taking advantage of his father's old age or necessities. As far as the record shows, the execution of the deed was a free and voluntary act on the part of John H. Queen and his wife, who were at the time of sound mental condition.

The decree will be affirmed.

THE CITY OF FORREST CITY v. BANK OF FORREST CITY.

Opinion delivered January 18, 1915.

1. MUNICIPAL CORPORATIONS—WATER SUPPLY—CONSTRUCTION—RIGHT TO BORROW MONEY.—A city council, under Kirby's Digest, § 5442, has the power to borrow money to pay the expense of moving the pumping station of its water supply from one site to another.
2. MUNICIPAL CORPORATIONS—WATER SUPPLY—NOTES.—A municipal corporation has the right to borrow money to purchase necessary machinery for constructing and taking care of its water supply, and to pay the cost of moving its pumping station, and will be liable to the lender on notes given for the money so borrowed.
3. MUNICIPAL CORPORATIONS—CONTRACTS—PAYMENT — NOTES.—Where a municipal corporation has, under the statute, the power to create a debt by contract, the right carries with it the right to execute a note in payment thereof.
4. MUNICIPAL CORPORATIONS—EVIDENCES OF DEBT—INTEREST.—Under art. 16, § 1, of the Const. of 1874, a municipal corporation can not issue interest-bearing evidences of indebtedness, but the Constitution

does not prohibit the issuance of evidences of indebtedness not bearing interest, therefore when a municipal corporation issued interest-bearing notes to E. in consideration of a loan of money, borrowed from E. for a legitimate purpose, E. may recover the amount of the notes but can not recover any interest thereon.

5. MUNICIPAL CORPORATIONS—DEBT—NOTES—INTEREST.—Where a municipal corporation borrowed money for a purpose authorized by statute, and gave an interest-bearing note therefor, the provision in the note calling for the payment of interest is in excess of the authority of the city council, and may be regarded as surplusage.

Appeal from St. Francis Circuit Court; *J. M. Jackson,* Judge; affirmed.

W. W. Hughes, for appellant.

1. The city had no power to borrow money in the absence of express authority in the Constitution or from the Legislature. Kirby's Digest, § § 5436-7, 5442-3; 1 Dillon on Mun. Corp. (5 ed.), § § 289, 290; 19 Wall. 468; 89 Ala. 641; 102 Iowa 69; 117 Md. 122; 29 Am. Cases 73; 29 La. Ann. 973; 37 N. J. L. 191; 6 Ann. Cases 754, and note; 119 N. Y. 280; 61 Tex. 316; 85 *Id.* 520, 540; 94 Va. 668; 28 W. Va. 288; 144 U. S. 173, 549; art. 12, § 3, Const.

No power is given to borrow for any other purpose than to extend the time of payment of indebtedness theretofore incurred. The maxim *inclusio unius exclusio alterius* is applicable. 54 Ark. 509, 513; 71 *Id.* 4, 8, 9.

2. Nor has the city power to issue negotiable paper. 2 Dillon, Mun. Corp. (5 ed.), § § 870, 878; 144 U. S. 173; 56 Fed. 197; 71 Ark. 4, 8, 9; 82 Fed. 568; 83 *Id.* 669; 67 *Id.* 137; 59 *Id.* 221, 227; 73 *Id.* 395-9; 112 Mich. 102; 70 N. W. 412; 49 La. Ann. 1758; 22 So. 1012. Such power must be specially conferred 70 N. W. 412; 148 S. W. 680; 15 Wall. 566; 5 Dill. 165; 10 Fed. Cases 3276; 131 Iowa 540; 9 Ann. Cases 1117; 141 Fed. 941.

3. No city can issue interest-bearing evidences of debt. Const., art. 16, § 1. The cases cited by appellees, 67 Ark. 542, and 74 *Id.* 190, against the right to plead *ultra vires* are distinguishable from this case. So are 87 Ark. 389; 89 *Id.* 95, and 49 Am. Dec. 416. Here the

notes were issued in violation of law and the city is not estopped to plead *ultra vires.*

4. The resolution was not legally passed. Kirby's Dig., § 5473; 50 Ark. 105; 28 Cyc. 334.

5. There was no power in the city to renew the notes except by ordinance or resolution authorizing the renewal. 2 Dill. Mun. Corp. (5 ed.), § 939; 82 Fed. 568; 138 U. S. 673; 192 Ill. 355.

6. The bank was not a *bona fide* purchaser of the notes. One can not be an innocent holder of paper issued by a municipality without authority. Joyce on Com. Paper, § 87; 32 Ark. 619; 94 U. S. 225; 131 Iowa 540; 9 Ann. Cases. 1117; 144 U. S. 173; 192 Ill. 355; 83 Fed. 669; 107 Mich. 409; 65 N. W. 376; 115 Wis. 340; 91 N. W. 1104; etc.

7. The notes are entire contracts and not severable. 1 Page on Cont., § 509; 54 S. W. 655; 197 Ill. 346; 5 Am. Rep. 664; 164 S. W. 1092; 62 Ark. 370, 375.

8. The notes are barred. 73 S. C. 83; 6 Ann. Cases 754.

R. J. Williams and *James P. Clarke,* for appellees.

1. The facts justify a judgment for appellees, regardless of the court's findings and declarations of law. 64 Ark. 236; 62 *Id.* 228.

2. Kirby's Dig., § 5473, only applies to the passage of ordinances or resolutions entering into a contract. 75 Ark. 340. Courts presume that unauthorized persons are not allowed to participate in council meetings, and take judicial notice of the persons whose names are cited in the order. 66 Ark. 180.

3. The record of the proceedings of the council were introduced in evidence without objection. It is too late to object now. Kirby's Dig., § 1233; 75 Ark. 342; 68 *Id.* 71. Besides, the objection is too general. 62 Ark. 208.

4. The motion for new trial does not state specifically the objections to the finding of the court. 65 Ark. 278.

5. The notes are not barred. 22 Ark. 217; 66 *Id.* 464.

6. A municipality has the right to issue written evidences of indebtedness. 103 Fed. 424; 74 Ark. 503; 131 Iowa 540; 9 Ann. Cases 1117; 111 U. S. 408; 74 Fed. 528; 5 Dillon 338; 61 Ark. 402; 87 *Id.* 390; 76 Fed. 282; 80 Ark. 126; 47 *Id.* 283; 3 Dillon, Mun. Corp. (late ed.), § 1303; 23 Fla. 203; 98 Ark. 510; 50 *Id.* 416.

HART, J. This suit was instituted in the circuit court by Eugene Williams and the Bank of Forrest City against the city of Forrest City, to recover the sum of $5,196.43 alleged to be due plaintiffs by the defendant. The pleadings and proof introduced established the following state of facts:

Forrest City is a city of the second class and on the 8th day of June, 1906, its common council passed a resolution whereby its mayor was authorized and directed to execute to Eugene Williams, two notes, one for $3,160, due and payable February 8, 1907, for cash borrowed, and one for $2,196.43, due and payable one year after date, being for the purchase of material and stock for an electric light plant, said notes to bear 8 per cent. interest from maturity. The yeas and nays were called on the passage of the resolution and it was duly adopted. At a subsequent meeting of the council the mayor reported that, pursuant to the first resolution, he had executed the two notes to Eugene Williams, that one was for $2,196.43, due twelve months after date, for stock and merchandise on hand at the light plant at the time of delivery and not included in the purchase price of the plant; that the other one was for $3,160, due eight months after date, and that the loan was made for the purpose of removing the pumping station of the water plant to the lot occupied by the light plant. His report was accepted and approved by the council.

On the 20th day of September, 1910, the council passed a resolution authorizing the mayor and recorder to renew said notes. The yeas and nays were not called on this resolution. Pursuant to the resolution the mayor and recorder executed renewal notes in place of the orig-

inal notes. On September 24, 1910, a payment was made on the notes.

The case was tried before the court sitting as a jury and the court found that the city was not liable for interest and rendered judgment in favor of plaintiffs for the sum of $5,196.43, the amount of the principal of the notes. The defendant pleaded the statute of limitations and to reverse the judgment relies upon the statute of limitations of three years.

It is the contention of counsel for the defendant that because section 1 of article 16 of our Constitution prohibits a municipal corporation from issuing interest-bearing evidence of indebtedness, it thereby prohibits municipal corporations from executing any written evidence acknowledging its debt and stipulating therein the terms of payment.

Counsel admit that under section 5443 of Kirby's Digest which provides in effect that municipal corporations shall have power to provide for and construct or acquire works for lighting its streets, alleys, parks and other public places, the city council had authority to incur the indebtedness of $2,196.43 for the material purchased by it from Williams for its light plant. But they insist that it had no authority to issue its promissory note in evidence of said debt.

Section 5473 of Kirby's Digest provides that on the passage of every by-law or ordinance, resolution or order to enter into a contract by any council of any municipal corporation, the yeas and nays shall be called and recorded.

It will be noted that the original contract was entered into with Williams on the 8th day of January, 1906, and the yeas and nays were called on the passage of the resolution authorizing the contract. The renewal was provided for by resolution passed on September 20, 1910, but the yeas and nays were not called on the passage of the resolution.

The present suit was instituted on the 4th day of March, 1914. This was more than three years after the

passage of the resolution on September 20, 1910, authorizing the renewal. It is the contention of counsel for the defendant that the notes executed by the city are void and that the city was only liable on its contract for the purchase of the material for the electric light plant and that the claim therefor is barred by the three years statute of limitations.

The same contention is made in regard to the procurement of the loan of $3,000 and in addition counsel for the defendant contend that the city had no authority whatever to borrow $3,000 for the purpose of moving the pumping station to the electric light plant. In regard to this latter contention it may be said that section 5442 of Kirby's Digest provides in effect that municipal corporations shall have power to provide a supply of water by constructing or by acquiring by purchase or otherwise, wells, pumps, cisterns, reservoirs or waterworks, to regulate the same, and to prevent unnecessary waste of water, etc.

(1-2) The power expressly conferred by this section carries with it as a necessary incident the authority to make such subsidiary contracts as are necessary to effectuate the purposes of the act. Therefore we are of the opinion that the city council had the power to borrow the money to pay the expense of moving the pumping station of the water plant to the site of the light plant. Hence, the right to recover on both notes is the same.

In the case of *Merrill* v. *Monticello,* 138 U. S. 673, the court held that the implied power of a municipal corporation to borrow money to enable it to execute powers expressly conferred upon it by law, if it exists at all, does not authorize it to create and issue negotiable securities to be sold in the market and to be taken by a purchaser freed from equities that might be set up by the maker. Under the authority of this decision and others to the same effect, it is contended by counsel for the defendant that the notes originally given by the municipal corporation sued on herein were void.

After stating the facts in the case of *Merrill* v. *Monticello, supra,* Mr. Justice Lamar said: "The decisive question presented by the record in this case is, did the town of Monticello have authority, under the laws of Indiana, to issue for sale in open market, negotiable securities in the form of bonds and coupons on which recovery is here sought. After discussing the question thoroughly the court held that it did not. In the course of the discussion, however, the learned justice said:

"It is admitted that the power to borrow money, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness, by the corporation, to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants and, perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defenses."

Judge Dillon in his work on Municipal Corporations stated the rule to be as announced by the Supreme Court of the United States and among the cases cited is the case of *Merrill* v. *Monticello, supra.* See Dillon on Municipal Corporations, vol. II, § 872.

In section 873 of the same volume the learned author added the following: "It is the generally accepted doctrine that, when a municipal corporation has the power to contract a debt, such power carries with it, by implication where there is nothing to rebut it, the right to give an appropriate acknowledgment of the debt and to agree with the creditor as to the time and mode of payment; and it has been frequently declared that, in the absence of any statutory provision, there is no rule of law limiting the extent of the credit. From this broad general principle it has been laid down that where a municipal corporation has lawfully contracted a debt, and especially where it is expressly authorized to borrow money, it has

the implied power, unless restricted by its charter or by statute, to evidence the same by an appropriate written acknowledgment."

We also think the language of our court in the case of *Altheimer* v. *Board of Directors of Plum Bayou Levee Dist.*, 79 Ark. 229, has a direct bearing on the questions of law raised by this appeal. In that case at page 233 the court said:

"We think it is clear that the Legislature meant to provide for the building and maintenance of a levee sufficient to protect the real property in the district, and that the cost thereof was not limited to the amount of money which the directors were authorized by the statute to borrow and to issue bonds to cover. The primary duty and power of the board of directors is to cause the levee to be constructed, and the power to bind the district for the payment of the cost thereof necessarily follows, whether it exceeds the amount of money the board is authorized to borrow or not. The limitation upon the power to borrow money and issue bonds does not restrict or impair the power to construct and maintain the levee and to contract debts in the performance of that duty. *Hitchcock* v. *Galveston,* 96 U. S. 341.

"The board, therefore, having the power to contract debts for the construction of the levee, it may also issue written evidences of the indebtedness to the creditors of the district. Such writings do not enlarge the liability of the district, but only evidence the liability. *Merchants Nat. Bank* v. *Citizens Gas Light Co.,* 159 Mass. 505; *City of Williamsport* v. *Commonwealth* ex rel., 84 Pa. St. 487. 'The power to contract a debt,' says the Pennsylvania court, 'carries with it by necessary implication the right to give appropriate acknowledgment of such debt, and to agree with the creditor as to the time and mode of payment; that, in the absence of any statutory provision, there is no rule of law limiting the extent of the credit.' "

We think the principles of law in the authorities above cited sustain the finding of the circuit court rather than call for a reversal of its judgment. In the case be-

fore us the facts are that the note was transferred by Williams to the Bank of Forrest City, but there is no claim of any equities between Forrest City, the maker of the note, and Eugene Williams, to whom it was payable. Williams is a party plaintiff to the action.

(3) We think it follows from the above authorities that if the municipal corporation had the power to make the contract for which the notes were given, such power carried with it the right to agree with the creditor as to the time and mode of payment of the debt, and to give a proper written acknowledgment thereof.

As we have already stated, the municipal corporation had the authority to execute the contract and as a necessary incident thereto it had the power to execute its note for the amount of the indebtedness.

It is true that under article 16, section 1, of our Constitution it was prohibited from issuing interest-bearing evidence of indebtedness, but it is neither expressly nor impliedly prohibited from issuing any evidence of indebtedness.

(4) The act of the city in binding itself to pay interest being forbidden by the Constitution, its attempted exercise of such power was in excess of its authority and the circuit court was right in holding that the city was not liable for interest. It does not follow, however, because it provided that the notes should bear interest, that this tainted the whole transaction and rendered the notes themselves void.

(5) The provision in the note calling for the payment of interest was in excess of the authority of the city council and may be regarded as surplusage.

The payee in the note was the plaintiff in this action and had a right to recover upon the notes.

The record shows that a payment was made in September, 1910, and this payment prevented the action from being barred by the statute of limitations.

It follows that the judgment must be affirmed.

JACKSON v. COLUMBIA COUNTY.

Opinion delivered January 18, 1915.

ANIMALS—HORSE STABLES—RACE HORSES—STALLIONS—NUISANCE—BURDEN OF PROOF.—In an action by a property owner to abate the maintenance of stables by a fair association where race horses and stallions were kept, the burden is upon the plaintiff to show by a preponderance of the evidence that the keeping of the stables deprived plaintiff of the comforts of home, or rendered life in the same uncomfortable. *Semble*, the keeping of stallions in close proximity to plaintiff's home and used there for breeding purposes would constitute a nuisance which could be abated.

Appeal from Columbia Chancery Court; *James M. Barker*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellant brought this suit against the Fair Association to enjoin as a nuisance the keeping of horses in a stable erected on the fair grounds near her home in the town of Waldo. There are thirty or forty box stalls, constituting a solid wall on the south, 225 feet in length, to the southeast of her residence, the southwest corner of same being within sixty-two feet thereof, from which point a wall or high fence continues on to within about thirty feet of her home.

It is alleged that the stables were built and maintained for stabling horses and from eight to sixteen horses were constantly kept therein, that two stallions were also kept in them for a greater portion of the time, that the stench and odor arising from the animals and their droppings are disgusting and offensive, so much so as to cause plaintiff and other members of her family to suffer from nausea; that they are disturbed in their sleep and forced to close the windows in their home in order to shut out the stench; that on account of the waste and refuse from the stables, swarms of flies congregate there and spread to her premises; that the continual neighing and stamping of the stallions are both offensive and annoying to plaintiff. That the association is the owner of other stables in which horses could be kept, so

located as to cause no annoyance or injury to plaintiff or to others.

The defendant admitted the construction of the stables as alleged, that from twelve to fifteen horses and four stallions were kept therein; denied all the other allegations of the complaint, and alleged that the stables were kept in a clean and sanitary condition.

It appears from the testimony that from ten to fifteen horses are kept in the stables and three or four stallions the most of the time, that the horses are stabled in the west end, nearest the home of the appellant, that the droppings and waste are carried from there and put in the stables in the east end. The place is not used as a livery stable, but rather as a feed and training stable, and it is not clear whether the stallions are kept for training or breeding purposes. The testimony does show, however, that a horse trainer was in charge at the stables.

On the part of the appellant several witnesses testified that the stench and odor arising from the animals and stables was strong and offensive, and especially so in and about the home of appellant, where she and her two grown daughters dwelt. That the wind from the east, south and southeast gathered the odor, beginning at the east end and coming down on through the whole length of the stables to the end of the high fence, extending from the west end thereof to within about twenty feet of appellant's home, where it was carried directly across to her premises. That swarms of flies were bred and congregated about the stables and spread to her premises and that the neighing and squealing of the stallions was also disturbing to the comfort of the dwellers in the home.

Some of the witnesses testified that appellant's property was reduced in value as much as 50 per cent. by reason of the keeping and maintaining of the stables there.

Other witnesses on behalf of appellee testified that the stables were always kept in a clean and sanitary condition, that no unusual odor nor stench arose therefrom and polluted the air about appellant's premises, several

of them saying the odor was very slight and could not even be detected walking along the street in front of her home, at times.

The mayor testified that upon complaint they had investigated the premises, and the board of health reported that the stables were sanitary.

The court found "from a preponderance of the testimony, that the keeping of the horses or permitting them to be kept in the barns on the present location, in the manner in which they were kept, did not constitute a nuisance," and dismissed the complaint for want of equity and from the judgment this appeal is prosecuted.

Killgore & Joiner, for appellant.

The stables in question, as appears by the testimony of those who are in a position to know, is a private nuisance, a source of annoyance which works damage to the property adjoining and inconvenience and injury to the occupants thereof. 29 Cyc. 1152. The question of negligence is not involved, and need not be shown in order to establish liability for the maintenance of the nuisance, or plaintiff's right to an injunction; and a showing that there is no negligence will not defeat a recovery. 29 Cyc. 1155; 131 Ill. 322; 74 Me. 268; 85 Ark. 554; 102 Ark. 293. The annoyance created by a private nuisance need not be such as to endanger health, but it is sufficient if it is offensive to the senses, and renders the enjoyment of life and property uncomfortable, or even causes a well-founded apprehension of danger. 17 Tex. 483; 9 L. R. A. 723; 85 Ark. 553; 9 Ga. 425. See also 29 Cyc. 1157, 1162, 1161; Wood on Nuisances, 594.

While a livery stable in a city or town is not necessarily or *prima facie* a nuisance, it may become so by the manner in which it is constructed or conducted; and we contend that the stable in this case is a nuisance from the manner of its construction, and will remain such as long as horses are kept there. 85 Ark. 522; 9 Ga. 425; 50 Ia. 571; 49 Am. Dec. 421; 17 Tex. 489; 3 Blackstone, Com. 215.

C. W. McKay, for appellee.

1. Appellant having conceded that a livery stable in a town or city is not necessarily or *prima facie* a nuisance, the issue to be determined here is whether or not the evidence before the chancellor showed that the stable in this case had become a nuisance through the manner of its construction or maintenance. Since the appellant's abstract fails to disclose all the evidence adduced at the trial affecting this issue, the lower court's findings will not be disturbed.

2. If the horses were kept in the stable in such manner as to constitute a nuisance, there is no liability on the part of the appellee. The evidence set out in the record discloses the fact that appellee did not own the horses and had nothing to do with their being kept in the stables. Bare ownership of the stables is not sufficient to fix liability on the appellee for the nuisance. It would be necessary to show that appellee was instrumental in causing the nuisance. 29 Cyc. 1203.

KIRBY, J., (after stating the facts). In *Durfey* v. *Thalheimer,* 85 Ark. 552, the court said:

"A livery stable, even in a city or town, is not necessarily or *prima facie* a nuisance. It may become so by the manner in which it is constructed or conducted. It is the duty of every one to so use his property as not to injure that of another; and it matters not how well constructed or conducted a livery stable may be, it is nevertheless a nuisance if it is so built or used as to destroy the comfort of persons owning and occupying adjoining premises, creating annoyances which renders life uncomfortable; and it may be abated as a nuisance."

Cyc. says: "A private nuisance is anything done to the hurt, annoyance or detriment of the lands, tenements or hereditaments of another, and not amounting to a trespass, thus any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, constitutes a private nuisance." 29 Cyc. 1152.

In *Blass* v. *Reinman,* 102 Ark. 293, the court said:

"A livery stable in a town or city is not necessarily a nuisance * * *, but if it is conducted or kept or used in an improper manner, if by the unwarrantable and unreasonable use thereof it destroys the comfort of the adjoining owner so as to palpably and sensibly diminish or destroy the lawful use and enjoyment of his property, then the livery stable becomes a nuisance."

The keeper of a jack in a town was held to be a nuisance in Ex parte *Foote,* 70 Ark. 12.

The burden of proving that the keeping of the stable deprived appellant of the comforts of home or rendered life in her home uncomfortable, rested upon her and it was necessary to show it by a preponderance of the testimony, as said in the *Durfey* case, *supra.*

There was testimony introduced, supporting the allegations and contention, but the majority of the court is of the opinion that the finding of the chancellor is not against the clear preponderance of the testimony and it will not be disturbed. If it could be shown that the stallions were kept in such close proximity to appellant's home and used there for breeding purposes, it would have constituted a nuisance that could have been abated, but from the testimony it does not appear that they were so used, but may have been kept in training for racing only, these being stables of the fair association where a track was maintained and racing conducted. The stables can be abated by appropriate proceedings hereafter if they shall become a nuisance.

Finding no error in the record, the decree is affirmed.

TOWN OF DARDANELLE *v.* GILLESPIE.

Opinion delivered January 18, 1915.

1. LICENSE—AUTHORITY—CITY ORDINANCE.—The mayor of an incorporated town can not issue any license unless some ordinance of the town authorizes him to do so.

2. POOL HALLS—LICENSE—AUTHORITY OF CITY COUNCIL.—A city council can not prohibit the maintenance of a pool hall without legislative sanction.

3. POOL HALLS—REGULATION—AUTHORITY OF CITY COUNCIL.—Under Kirby's Digest, § 5438, a city council has not authority to declare a pool hall to be a nuisance, when it is not such in fact, and where it is not used for gaming as covered by the statute.

4. POOL HALLS—REGULATION—NUISANCES—SHOWING.—In the absence of any showing that a pool hall operated by appellee was operated for the purpose of gaming, or was so conducted as to be a nuisance, a town council has no authority to pass an ordinance prohibiting the maintenance of the same.

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

Town of Dardanelle, pro se.

If the town had the right to enact and enforce the ordinance, the subsequent granting of a license was no justification or protection. 43 Ark. 361. The necessity for regulating and the power to prohibit public places of amusement where games are played has long been recognized. 5 Ark. 412; 13 *Id.* 752; 16 *Id.* 489; 44 *Id.* 134; 46 *Id.* 497; Acts 1911, p. 62; 109 Ark. 429; Kirby's Digest, § 5438; 70 Ark. 221; 34 *Id.* 372.

Bullock & Davis, for appellee.

1. The only authority to enact the ordinance to suppress the game of pool is found in Kirby's Digest, § 5438. It was a game alone for innocent amusement and not an instrument used for "gaming." The ordinance is oppressive and unreasonable and not authorized by the Legislature. 20 Cyc. 671; 86 Ark. 356; 84 Ala. 13.

2. As to whether or not a thing is a suppressable nuisance is a question of fact and never of law. 14 N. E. 677; 47 N. J. Law 286; 60 Miss. 451.

3. There is no proof to show that the pool hall was a loafing place for the idle, vicious or immoral. 70 Ark. 12; 52 *Id.* 23, 25; 12 S. W. 412. In this case defendant had a license from the town and the hall was not used for gaming.

SMITH, J. This cause was tried upon the following agreed statement of facts:

"It is agreed by counsel representing the plaintiff and defendant that the town of Dardanelle, prior to the arrest of the defendant herein, had enacted an ordinance prohibiting any person from keeping a pool hall or operating a pool table in the incorporated town of Dardanelle, and the mayor of the town, without the repeal of the ordinance, had issued a license to the defendant, permitting the defendant to keep a pool hall and operate pool tables therein; that said table or said pool hall was not used as a gambling device, and no gambling was allowed at the playing of the said pool games therein, but the same was carried on alone for the amusement of the customers, each of whom paid — cents for the use of the table to the owner on each game played."

Under this agreed statement of facts the court, sitting as a jury, found the appellee not guilty and ordered him discharged, and the town has prosecuted this appeal from that judgment.

(1) Appellee can claim no immunity under the license issued to him by the mayor. The mayor could issue no license unless some ordinance of the town authorized him so to do, and from the agreed statement of facts it appears that there was, not only no such ordinance, but that keeping a pool hall or operating a pool table was declared to be an unlawful act in said town.

(2) We think, without question, the Legislature might declare the keeping of a pool hall to be unlawful, and it might, no doubt, confer upon town councils the authority to prohibit them; but no such action can be taken by the council without legislative sanction. In re *Jones,* 31 L. R. A. (N. S.) 548, 109 Pac. 750. It is urged that this authority is conferred by section 5438 of Kirby's Digest. So much of that section as is applicable here reads as follows:

(3-4) "They (town councils) shall have power to license, regulate, tax, or suppress (various occupations named) * * * billiard tables or other instruments used for gaming," and in the same sentence there is also named tippling houses, dram shops, gaming, gambling

houses, etc. But it has been held that the authority to license dram shops could be exercised only when this could be done without violating the laws of the State, and that "license could never be issued to authorize gambling," because gambling was a violation of the laws of the State, and those laws are supreme. The authority here is not to tax, regulate, or suppress billiard tables, but to tax, regulate, or suppress "billiard tables or other instruments used for gaming." The town council has the authority to prohibit the keeping of pool or billiard tables for gaming, but the agreed statement of facts shows that appellee's pool hall was not kept for that purpose and that no gambling was allowed in playing games in his place. Pool halls and billiard parlors are uniformly held to be proper subjects for police regulation. They are places which may become nuisances, but are not such places as must necessarily be so, and the town council has no authority to declare that to be a nuisance which is not a nuisance in fact. *Arkadelphia* v. *Clark,* 52 Ark. 23. If a pool hall or billiard parlor was so conducted as to become a nuisance the town council could order its suppression. But, not being nuisances *per se,* town councils would have no authority to prohibit their maintenance, unless that authority was conferred by express legislative enactment, or unless their maintenance was made unlawful by the laws of the State. In the absence of any showing that appellee's pool hall was operated for the purpose of gaming, or was so conducted as to be a nuisance, the town council would have no authority to pass the ordinance in question, and the court below, therefore, properly discharged appellee. Judgment affirmed.

KIRBY, J., dissents.

NEWTON v. WARREN VEHICLE STOCK COMPANY.

Opinion delivered January 18, 1915.

1. TIMBER CONTRACT—REMOVAL OF TIMBER—BREACH.—Where appellee contracted to purchase and remove timber within a certain

time, the fact that misfortune overtook the appellee will not excuse it for liability for a breach of the contract.

2. TIMBER—CONTRACT FOR REMOVAL—CONSTRUCTION.—Appellant sold certain timber to appellee, the appellee agreeing to "cut and remove said timber as expeditiously as possible, and * * * unless it shall have removed all the same within a period of ten years from the date hereof," that appellee should pay all taxes on the said land until the timber is removed and the land returned to appellant. *Held,* the contract did not give absolutely and at all events any definite time for the removal of this timber, but required that it be removed expeditiously, and sufficient time therefor was given, and the right to cut and remove the timber expired when a reasonable time had been given for its expeditious removal.

Appeal from Bradley Chancery Court; *Zachariah T. Wood,* Chancellor; reversed.

J. R. Wilson, for appellant.

Appellant's right to prevail in this suit depends upon the construction given to the "expeditious clause" of the deed. That clause was construed in *Earle* v. *Harris,* 99 Ark. 112, in favor of appellant's contention.

The evidence fails to disclose any reasonable excuse for the failure to remove the timber. No act of God is shown, nor that of a public enemy, to excuse the failure; and the showing by their witnesses that if they had worked as expeditiously as possible they could have removed the timber, but that it would have been poor business, resulting in great financial loss, is no sufficient excuse. 93 Ark. 452; 7 Ark. 123; 82 Ala. 302; 3 Paige on Contracts, § 1440; 145 Fed. 296. As to the reasonable time rule, see *Earle* v. *Harris, supra,* and *Yelvington* v. *Short,* 111 Ark. 253.

D. A. Bradham, for Stock Company; *B. L. Herring,* for the Lumber Company, appellees.

On the face of the deeds the chancellor's decision is right and should be affirmed. By its timber deed, appellee stock company acquired an estate in the timber. 77 Ark. 116, 119. This estate continues for the time named in the deed. *Id.;* 93 Ark. 5, 10; 99 Ark. 112.

The parties to the deed did not mean or intend by the language "to cut the timber as expeditiously as pos-

sible," that the grantee was bound at all hazards, save the acts of God, to begin cutting and removing the timber at once after the date of the deed and to continue cutting and removing it with the same haste, without interruption, until it was cut and removed. This court has said that "this clause determined the time in which the timber should be removed, which meant 'a reasonable time,' the grantee proceeding as expeditiously as possible." 163 S. W. (Ark.) 522. See also 165 S. W. (Ark.) 633. A reasonable time is a fact to be determined from the peculiar circumstances of each case, and the conditions surrounding the parties at the time the deed is made. 77 Ark. 116, 120. See also 104 Ark. 466, 473.

SMITH, J. On August 4, 1906, appellee Warren Vehicle Stock Company purchased from one Mrs. Heath the timber on 400 acres of land owned by her for a consideration of $900 cash. On November 7, 1912, Mrs. Heath conveyed the timber on the same lands to appellant, and this litigation involves the title to that timber.

The deed to appellee, Warren Vehicle Stock Company, appears to have been what is called an "Expeditious Timber Deed." This deed contained the following stipulation:

"The party of the second part shall cut and remove said timber as expeditiously as possible, and it is agreed that unless it shall have removed all the same within a period of ten years from the date hereof, that it shall be responsible for and pay to the first party the full amount of taxes assessed against said lands after the expiration of said period of ten years from this date until such times as said timber is removed and said possession returned to said first party. The said second party shall have free and uninterrupted possession of said land during the term of this indenture for the purpose herein set forth, and shall have free ingress and egress thereto and therefrom, with the right to build and operate tram or railroad on to or across said land for the purpose of transporting the timber therefrom, or for transportation of timber belonging to or that may belong to said second

party, and to this end shall be regarded as the holder of said land, to sue for and recover the same from all persons whatever, holding or attempting to hold the same; provided, that the said first party, its heirs or legal assigns, may retain such possession of said land, at all times, as shall not interfere with the rights of the second party under this deed for the purpose aforesaid." The provision for free and uninterrupted possession of the land, with the right of ingress and egress, does not add anything to the time given for the removal of the timber, but only undertakes to deal with the question of possession.

By comparison it will be seen that the contract for the sale of the timber is identical with the instrument set out in the case of *Earl* v. *Harris,* 99 Ark. 112, except that in that case the period of removal was limited to five years, whereas in the instant case ten years were given for that purpose.

Appellee cut and removed some of the oak timber, but says that the larger and more valuable portion of it still remains standing thereon. As an excuse for its failure to remove the timber, it offered evidence tending to establish the following facts: It operated the mill until the panic of 1907, when the lumber market was so affected that the mill began to lose money, and continued to operate at a loss until September, 1908, by which time the company's capital was wiped out and it was insolvent, and for the want of funds with which to run, and a market for its output, the company closed the mill down, expecting to again operate it as soon as it could recover, and the price of the products should go up, but its intention was, preferably, to sell out its holdings and get another company to operate its plant. In its efforts to sell and get another mill in operation and get the Heath timber off, a sale was effected to a concern, which was made a party to this proceeding, known as the Texas Hardwood Lumber Company, in December, 1912. After cutting and removing some of the timber the vehicle company ceased cutting it entirely for several years, during all

of which time it was apparently waiting for an improved market, or an advantageous opportunity to sell its interest.

(1) The excuse given for appellee's failure to remove the timber was insufficient. *Ingham Lumber Co.* v. *Ingersoll,* 93 Ark. 447.

But appellees insist that, under the terms of their contract, they had at all events at least ten years in which to remove the timber, and as much longer as might be necessary, providing they were proceeding expeditiously to remove it.

This contract was construed in the case of *Earle* v. *Harris, supra,* where it was said: "Viewed in this way, we think that by this provision (the one set out above) the parties intended that the defendant should cut and remove the timber from the land as expeditiously as possible, and that it was within the contemplation of the parties at the time that it might take the defendant longer than five years from the date of the deed in which to cut and remove the timber, although he proceeded with all possible expedition. One of the primary purposes, however, of this stipulation, we think, was that the defendant should begin to cut and remove the timber promptly after the contract was made, and that he should continue to cut and remove the same as expeditiously as possible from that date until it was all cut and removed. While this was considered essential, yet it was thought by the parties that, under the conditions and circumstances then surrounding the land and removal of the timber therefrom, it might take the defendant longer than five years in which to cut and remove the same, though he proceeded with proper dispatch; and in that event it was agreed that he should have longer than five years in which to cut and remove the same; and, the length of time which he should have after the five years not being specified, defendant had a reasonable time after the five years in which to remove the timber if he proceeded during all such time as expeditiously as possible. The specification of five years was made, we think, only for

the purpose of fixing the amount which the defendant should pay for the timber. If, by proceeding with all possible expedition, he should cut and remove the timber within the period of five years, he should pay no further consideration than that which was named in the deed; but, if, while proceeding with all possible expedition, he should require longer than said five years in which to cut and remove the timber, then he would be required to pay an additional sum therefor, which was the amount of the taxes assessed against the land. In any event he was required to cut and remove the timber as expeditiously as possible, and he did not therefore have either five years or any other definite time in which to cut and remove the timber if he did not proceed continuously with all possible expedition from the date of the deed."

A contract with similar, if not identical, provisions was again construed by this court in the case of *Yelvington* v. *Short,* 111 Ark. 253, in which it was said (to quote the syllabus):

"Where a contract for the sale and removal of timber provides, that the vendee shall cut and remove the timber as expeditiously as possible, and that unless it is removed within a period of two years the vendee shall be responsible for the taxes until it is removed, the grantee is required to cut and remove the timber as expeditiously as possible, and he did not have either a period of two years or any other definite time in which to cut and remove the timber, if he did not proceed expeditiously and continuously from the date of the deed. *Earl* v. *Harris,* 99 Ark. 112, followed."

(2) Upon the authority of those two cases we must hold that the contract in suit did not give absolutely and at all events any definite time for the removal of the timber. The purpose of this contract was to require the timber to be removed expeditiously, and sufficient time for that purpose was given. This might exceed ten years, or it might not require that length of time, but the right to cut and remove the timber expired when a reasonable time had been given for its expeditious removal.

The case of *Earl* v. *Harris, supra,* explains the provision in reference to the payment of taxes and need not be repeated here.

The decree of the chancellor is, therefore, reversed and the cause will be remanded with directions to set aside the decree cancelling the deed of appellant and to dismiss this cause at the cost of appellee.

HART, and KIRBY, JJ., dissent.

ON RE-HEARING.

SMITH, J. It is earnestly urged in the petition for rehearing that we have imposed a harsh rule upon purchasers of timber in regard to its cutting and removal. But no change whatever in the statement of the rule as to the rights and duties of such purchasers has been made, and none is intended.

A study of the evidence in this case makes it manifest that appellee construed this contract to give it ten years under any circumstances in which to remove the timber. This is the construction which it now insists should be given the language employed in the deed to the timber, and the correctness of this contention is, we think, the controlling, if not the only, question in the case. More than six years elapsed between the date of appellee's purchase from Mrs. Heath and her conveyance to appellant, and for the last four years of that time nothing was done by appellee in the way of removing this timber. It is true that during this time the market was not as favorable as it had previously been, nor as favorable as appellee thought it might thereafter be, but this fact can not excuse such delay as occurred here.

It is urged that, if there was a forfeiture, there was also a waiver. The deed from Mrs. Heath to appellee contained the following paragraph:

"It is mutually agreed that should party of the first part (Mrs. Heath) desire to clear any part of the lands herein described, not to exceed 20 acres, the party of the second part shall remove the timber therefrom within six months after notice of such intention to clear."

On October 23, 1911, Mrs. Heath addressed and sent a letter to appellee to clear and remove the timber from a twenty acre tract there described, and it is urged that under the case of *Liston* v. *Chapman & Dewey Land Company*, 77 Ark. 116, this letter constituted a waiver of any prior forfeiture. But the facts in this case are very different from the facts in that case. There the vendor in the timber deed executed a subsequent deed conveying the land, in which last-named deed there was an express recognition of the first vendee's rights and an express reservation in his favor of his right to cut and remove the timber by him so purchased.

It was there held that that deed, with its recitals, constituted a waiver of any previous forfeiture. But here Mrs. Heath testified she did not know what her rights were under her contract with appellee, and it is not claimed that there was any consideration whatever for this letter. The proof shows that Mrs. Heath had made other efforts to induce appellee to cut the timber, but it remained inert. However, appellee did not act upon this letter and made no attempt to comply with its directions prior to the sale to appellant, a period of over one year. It is true the contract required appellee to clear *any* particular twenty acre tract within six months after being notified so to do, and it is true the notice was given under the contract, and had appellee proceeded to comply with this provision of the contract we would have a different question from the one now presented. Upon the contrary, appellee failed to comply with this notice and now seeks to assert a waiver founded on its own breach of the contract. We think this should not be permitted, and the petition for rehearing is, therefore, overruled.

BARTON v. WILSON.

Opinion delivered January 18, 1915.

1. DOWER—VESTS WHEN—DEATH OF WIDOW.—Upon the death of her husband the widow takes absolutely an undivided interest in fee simple in her husband's estate, and it is such an interest as im-

mediately vests, and without assignment becomes subject to transmission by conveyance or inheritance.

2. DOWER—ASSIGNMENT OF—DEATH OF WIDOW—WHO MAY INHERIT.—The dower interest of a widow under Kirby's Digest, § 2709, vests in her immediately upon the husband's death, whether the same is ever assigned to her or not, and upon her death will descend to her heirs, whether lineal or collateral.

3. DOWER—INTEREST OF WIDOW—WIDOW TAKES, HOW.—Under Kirby's Digest, § 2709, a widow does not take an interest in her deceased husband's real property as heir, but she takes as widow, the same being a new acquisition.

Appeal from Pope Chancery Court; *Jordan Sellers,* Chancellor; affirmed.

J. G. Wallace & Sons, for appellants.

Our position is two-fold.

1. That the widow having died before her dower was assigned, and without asserting her claim or right to have dower assigned, she was not vested, immediately upon the death of her husband, with an estate of such character as would pass at her death to her heirs or legal representatives. Kirby's Digest, § 2709; Tiedeman on Real Property, § 85; 61 Ark. 61; 84 *Id.* 558; 15 Pet. (U. S.) 21; 21 Ark. 347; *Ib.* 62; 31 *Id.* 334; 62 *Id.* 313; 60 *Id.* 478; 14 Cyc. 961; 59 Hun. 538; 49 N. J. Eq. 66; 16 S. W. 119; 105 Ark. 653; 98 *Id.* 118; 11 *Id.* 212; 5 *Id.* 608; 14 *Id.* 421; 53 *Id.* 279; 60 *Id.* 169; 30 *Id.* 775; 55 *Id.* 235; 2 Scribner on Dower, 27.

2. The intention of the act giving the widow title in fee simple to one-half the real estate of which her husband died seized, when said estate is a new acquisition, and one-half of the personal estate absolutely, makes her statutory heir of her husband and vests title in her by descent, which would, at her death, without issue or direct descendants, revert to his heirs. 32 Ind. 497; 74 Ind. 563; 13 Ind. 508; 117 *Id.* 194; 19 N. E. 776; 136 Ind. 391; 16 *Id.* 437; 143 Mass. 389; 9 N. E. 747; 52 Fed. 371, etc.

As to personal property it is held that the husband or wife are heirs to each other. 29 Ill. App. 643; 62 Ill. 471; 52 Ill. 62; 126 *Id.* 158; 5 Kan. 384; 64 Conn. 240;

38 Oh. St. 473; 100 Mich. 215. 83 Ark. 293 is not in point. It is clear that the widow takes by descent and not by purchase. Cases *supra.*

R. B. Wilson and *O. James Ferguson,* for appellees.

1. The assignment of the widow's dower under section 2709, Kirby's Dig., in the lifetime of the widow is not essential in order for her heirs to inherit her dower estate. Her dower at common law and by our statute, section 2687, Kirby's Dig., vested on the death of the husband and before any assignment. 14 Cyc. 960; 74 Ga. 278; 57 Ia. 66; 60 N. J. 234; 37 Vt. 9; 53 Neb. 375; 68 Am. St. 608; 134 *Id.* 397; Tiffany, Modern Law of Real Prop., p. 469; 14 Cyc. 896; 98 Ark. 118; 31 *Id.* 576; 53 *Id.* 279; 60 *Id.* 169; 29 *Id.* 650; 62 *Id.* 51; 84 *Id.* 558; 60 *Id.* 478.

2. Under the common law prior to assignment of dower the widow had no vested freehold estate. 14 Cyc. 961; 21 Ark. 62. At common law and under section 2687, Kirby's Digest, dower was a *life estate* and was confined to real estate. Wash., Real Prop., 174; 60 Ark. 476. There was no interest in personal property during the husband's lifetime. 2 Bl. Com. 433; 2 Kent Com. 130; 42 Ark. 164; 32 *Id.* 443. But after the husband's death, the widow may claim her distributive share. 2 Bl. Com. 515-16; 2 Kent Com. 427; Schouler, Dom. Rel., par. 205.

3. But her dower estate is now enlarged by statute to an absolute estate. Act April, 1887; Kirby's Dig., § 2709; 14 Cyc. 63; 38 Ill. 522; 21 Mo. 519; 8 Ind. 54; 41 Vt. 467; 26 Conn. 349; 57 Ia. 66; 19 Fla. 778; 5 Ark. 612; 52 *Id.* 8; 16 S. W. 119; 75 *Id.* 240; 80 *Id.* 262; 98 *Id.* 118. The case of 83 Ark. 29 settles the controversy here.

4. The widow is not an heir of the husband. Kirby's Dig., § 2636; 53 Ark. 261; 8 *Id.* 9; 5 *Id.* 618; 88 Ill. 251; 89 N. E. 896; 50 *Id.* 873; 137 S. W. 924; 42 Ia. 464; 18 Mass. 189; 98 Ark. 118, 120.

5. The widow's dower is a new acquisition. 98 Ark. 93, 99. Her estate is not ancestral. Walker's Am. Law (4 ed.) 409; 31 Ark. 576; 98 Ark. 118; 98 Ind. 429;

37 S. C. 285. The widow is not blood kin to the husband, and marriage is a valuable consideration. 98 Ark. 99, and 102, and cases *supra.*

Jas. H. Johnson, for the Travis heirs.

1. Lands which come by purchase do not descend as an ancestral estate. 14 Cyc., § 4, p. 32; 15 Ark. 555; 20 *Id.* 19; 98 *Id.* 93.

2. The half blood inherit equally with the whole blood. 14 Cyc., par. H, p. 45; 15 Ark. 555; 20 *Id.* 19; 53 *Id.* 261; Kirby's Dig., § § 2709-2710. The assignment of dower is as essential now as at common law.

3. For dower under the common law, see Co. Lit. 30-A; 2 Bl. Com. 130; 4 Kent Com. 35; Wash., Real Prop., 146; 53 Ark. 279; 53 *Id.* 235; 60 *Id.* 169. Prior to assignment the dower right is not assignable to a person not vested with the fee. 14 Cyc. 964; 62 Ark. 51; 31 *Id.* 334. It is merely a right to a chose in action. 14 Cyc. 960, par. 2; 21 Ark. 62.

4. Dower dies with the widow. Tiedeman, Real Prop., § 141, p. 111. When she dies without asserting her claim, neither her personal representatives, nor those of her assignee, can maintain an action to have dower admeasured. 59 Hun. 538; 49 N. J. 66; 98 Ark. 118. Dower must be assigned before the death of the widow, if not her dower abates as to her collateral heirs and representatives. Cases *supra.*

McCULLOCH, C. J. Appellant M. F. Barton instituted this action in the chancery court of Pope County to establish and quiet her title to certain lands lying in that county, and also a large amount of personal property, all of which she claims by inheritance from her brother, J. K. Bowers, who died without lineal heirs. A portion of the lands owned by decedent, J. K. Bowers, came to him by inheritance from his father, and therefore constituted an ancestral estate; the remaining portion of the lands, which is quite the largest part of his estate, were lands which he acquired himself by purchase. J. K. Bowers died in Pope County on November 27, 1912, and

was survived by his wife, who died one day later without having had her dower assigned to her. Mrs. Barton was the only collateral heir of J. K. Bowers of the full blood, but he left other heirs of the half blood, namely, descendents of his half brother, W. A. Travis. Mrs. Bowers was a Boyd before her marriage and she died childless, leaving collateral heirs who were made parties to this proceeding. The Travis heirs were also made parties, as was the administrator of the estate of said decedent.

The court in its decree awarded the ancestral lands to the appellant, Mrs. Barton; and divided the personal property and the land constituting the new acquisition, one-half to the Boyds, as heirs at law of the widow of J. K. Bowers, and one-fourth to appellant, Mrs. Barton, and the other fourth to the Travis heirs. The Travis heirs have cross-appealed from that part of the decree which awards a portion of the estate to the Boyd heirs and also from the part of the decree which awards all of the so-called ancestral lands to appellant.

The contention of appellant is that because the widow died before her dower was assigned, and without asserting a claim of her right to have it assigned, she did not become immediately vested with an estate of such a character that it passed at her death to her heirs; and it is also contended that if the widow took any interest in the land, it was as heir of the decedent in the nature of an ancestral estate, which upon her death went back to the source whence it came, *i. e.*, the blood of the original donor, and that her heirs took nothing by inheritance.

The controlling statute on the subject of widow's dower reads as follows: "If a husband die, leaving a widow and no children, such widow shall be endowed in fee simple of one-half of the real estate of which such husband died seized, where said estate is a new acquisition, and not an ancestral estate; and one-half of the personal estate, absolutely and in her own right, as against collateral heirs, but, as against creditors, she shall be endowed with one-third of the real estate in fee simple

if a new acquisition and not ancestral, and of one-third of the personal property absolutely. Provided, if the real estate of the husband be an ancestral estate she shall be endowed in a life estate of one-half of said real estate as against collateral heirs, and one-third as against creditors." Kirby's Digest, § 2709.

(1) The argument of appellant is based upon decisions of this court to the effect that the widow's dower right, before allotment to her in severalty of her share, is not transferable to a stranger so as to confer any rights enforceable at law. *Jacoway* v. *McGarrah,* 21 Ark. 347; *Jacks* v. *Dyer,* 31 Ark. 334; *Weaver* v. *Rush,* 62 Ark 51; *Flowers* v. *Flowers,* 84 Ark. 557. From this premise it is argued that, under the present statute, if the widow dies without asserting her claim, neither her personal representatives nor heirs can maintain an action to recover the land nor for personal property not assigned to her as dower before her death. The statute quoted above was enacted in 1891 and worked a very material change in the law on that subject. Prior to the passage of that statute, the widow took only a life estate, but now, in certain instances, she takes land in fee simple. It has always been the law of this State that the widow's right to dower in personal property is not lost by her death, but descends to her personal representatives for the benefit of her creditors or heirs, and this is so for the reason that her dower right in personalty is absolute. The statute now under consideration gives the widow an absolute estate, and therefore it necessarily follows, for the same reason, that the interest conferred by the statute vests immediately upon the death of the husband and descends to the heirs of the widow, whether the assignment is made before her death or not. She takes absolutely an undivided interest in fee simple, and it is such an interest as immediately vests and without assignment becomes subject to transmission by conveyance or inheritance.

The following is laid down as the rule with respect to personal property, and we think it is equally appli-

cable to real estate where an interest is conferred in fee simple: "If the surviving spouse of an intestate dies before a distribution of the intestate's personalty has been made, the survivor's distributive share vests on the other's death, both at common law and under the statutes, and passes to the survivor's personal representatives." 14 Cyc. 63.

In Indiana, where there is a similar statute, the courts of that State held that the widow's one-third dower vested at the moment of the husband's death. *Mills* v. *Marshall,* 8 Ind. 54. Such is the construction of a similar statute in Vermont. *Johnson* v. *Johnson,* 41 Vt. 467. Under a statute in Iowa which provides that "one-third in value of all the legal or equitable estates in real property possessed by the husband at any time during marriage, * * * shall be set apart as her (the wife's) property in fee simple if she survives him," the Supreme Court of that State in construing the statute said: "Upon the death of the husband the widow was vested with the legal title to one-third of the real estate of which her husband died seized. This being so, the estate would naturally descend to her heirs, whether her interest had been set apart or not. The estate vests immediately upon the death of the husband, or it doesn't vest at all. Being a fee simple estate, it must of necessity descend to the heirs of the widow, unless she has in some manner disposed of it in her lifetime. Such an estate can not be obliterated or destroyed by the mere passive act of the owner unless there is some statute which so declares." *Potter* v. *Worley,* 57 Ia. 66. The Supreme Court of Florida so construed a similar statute in the case of *Woodberry* v. *Matherson,* 19 Fla. 778. Mr. Freeman, in his notes to the case of *Sanders* v. *McMillan,* 39 Am. State Rep. 19, said: "In some parts of the United States the estate has been changed by statute to one in fee, and it is a necessary result of this change that if the widow does not procure an assignment in her lifetime her heirs must be permitted, after her death, to prosecute the proceedings requisite to an assignment, for, if such were not the

case her estate in fee would be converted into an estate for life only by her mere inaction."

(2) We think, too, that the question is decided by this court in *Drinkwater* v. *Crist,* 83 Ark. 293. After quoting the statute (Section 2709) of Kirby's Digest), it was said: "It follows that the mother of appellee was the owner of one-half of the lands in controversy, and appellee, when her mother died, inherited her estate." The statement of facts in that case shows that the property was never assigned to the widow as her dower, yet the court held that the interest of the widow descended to her heirs, and the opinion constitutes a construction of the statute which ought to be taken as final. No authorities were cited in the opinion, but an examination of the authorities now demonstrates the correctness of the decision. It is contended that that decision doesn't apply here for the reason that the widow left lineal heirs, whereas in the present case there are only collateral heirs. That, however, is not a material distinction, because if the interest of the widow descended to her heirs, it is unimportant whether they are collateral or lineal. Either will take as heirs if the widow, before allotment of dower, acquired the lands under the statute as an inheritable estate.

(3) It is next contended by learned counsel for appellant that the interest which the widow took under the statute was as heir of her husband, and that under our statute of descent it must go back to the blood of the original donor. This argument, is, we think, unsound for more than one reason. In the first place, it is a mistake to assume that the widow takes as heir, for the statute expressly declares that the widow "shall be endowed in fee simple of one-half of the real estate of which such husband died seized." Counsel rely mainly upon what they conceive to be the effect of certain decisions of the Supreme Court of Indiana. *Fletcher* v. *Holmes,* 32 Ind. 497, and other cases cited on the brief. In all of the cases cited by counsel, the court was construing another statute. The Indiana court in construing a statute similar

to ours expressly held that the widow did not take as heir. The proposition is fully discussed in two cases which have been repeatedly followed by the Indiana courts. *May* v. *Fletcher,* 40 Ind. 575; *Brannon* v. *May,* 42 Ind. 92. There are decisions of other courts construing similar statutes where it is held that the widow does not take as heir of her husband. *Gauch* v. *St. Louis, M. L. Ins. Co.,* 88 Ill. 251; *Crenshaw* v. *Moore,* 124 Tenn. 528, 137 S. W. 924; *Kendall* v. *Kendall,* 42 Ia. 464. The Supreme Court of Maine, in construing a similar statute (*Golder* v. *Golder,* 95 Me. 259), says: "The statute does not change the status of the widow with reference to her deceased husband's estate. It enlarges her interest by giving her an estate in fee instead of an estate for life. She still takes, not as heir, but as widow."

Another reason why the estate taken by the widow is not necessarily within the meaning of our statute is that that which is conferred under the statute by virtue of the marital relation comes to her as a new acquisition. The Supreme Court of Indiana, in the case of *Bookout* v. *Bookout,* 150 Ind. 63, said: "Marriage in the eye of the law is held to be a valuable consideration, and the wife is regarded as a purchaser for a valuable consideration of all the property which accrued to her by virtue of her marital rights." There is still another reason why the estate of the widow was not ancestral, within the meaning of our statutes of descent and distribution, so as to cast it back to the blood of the original donor. This court, in *Oliver* v. *Vance,* 34 Ark. 564, said: "The person last entitled to possession, or last invested with the vested remainder, remains the *propositus,* whose nearest heirs are to be traced. They must, however, be of the blood of the person from whom the benefit came, that is to say, the line of descent must be traced on that line, leaving off the side which bore no relation to the donor. In the case in judgment, we drop the mother altogether, since the land did not come through her, nor any of her blood. We take the father's line, because we find the lands came from a relative of the blood of the father.

But we retain the deceased Van R. as the *propositus,* and seek *his heirs on that side,* and not the heirs of the original donor. * * * Any construction of the law, which, on failure of descendants of a donee, would make the donor the *propositus,* would, in effect, enable one by gift or devise of land to a kinsman, to reserve a reversion to his heirs after an estate of inheritance given to another. This would contravene the policy of our laws." Again, in the case of *Johnson* v. *Phillips,* 85 Ark. 86, we said that the "person last entitled to possession, or last invested with the vested remainder, remains the *propositus,* whose nearest heirs are to be traced." Now, it would be impossible to follow our statutes of descent and distribution in this case if we treat the estate as an ancestral one within the meaning of the statute, for if we take the deceased widow as the *propositus,* we can find no heir of blood of the original donor. The widow herself not being of the blood of the original donor, none of her heirs could fall within that line. It necessarily follows that that statute has no application in this case. Our conclusion therefore is that the chancellor was correct in his holding that the Boyd heirs, that is to say the heirs of the widow of J. K. Bowers, inherited an undivided half of the lands which constituted a new acquisition of said J. K. Bowers.

The Travis heirs insist on their cross-appeal that the court awarded lands to appellant which were not in fact ancestral, for the reason that J. K. Bowers purchased an undivided interest from the appellant. The decree of the chancellor dealt only with the undivided interest of J. K. Bowers, which he inherited from his father, and the chancellor evidently held that the other undivided half was still owned by appellant. It is undisputed that Mrs. Barton inherited an undivided half of these lands from her father; and while there are some vague and uncertain statements in the record that she had sold her interest to her brother, J. K. Bowers, she disputes that fact, and the evidence is not sufficient to warrant a finding that she did convey. Of course, if she

had conveyed her interest to her brother, that would have constituted a new acquisition on his part. But the chancellor found that she had never made any such conveyance and therefore that she owned an undivided half in the lands, and that she inherited from her brother the other undivided half which was an ancestral estate in his hands.

Upon the whole, we think the decree of the chancellor was correct and the same is affirmed.

ROBERTS v. STATE, USE LOGAN COUNTY.

Opinion delivered January 18, 1915.

1. COUNTY FUNDS—DEPOSITORY.—Act No. 196, Acts 1909, providing for the selection of a county depository for public funds in Logan County, and providing for the liability of the sureties on the bond of said depository bank, is in force, and sureties on the bond of such bank are liable to the county for public funds deposited in the said bank.
2. COUNTY FUNDS—DEPOSITORY—LIABILITY OF STOCKHOLDERS OF DEPOSITORY BANK.—Act 113, Acts 1913, providing for the individual liability of stockholders of banks, does not repeal section 4, Act 196, Acts 1909, which makes all stockholders of a bank liable for all public funds that such bank shall fail to pay over on demand to the person entitled to receive the same.

Appeal from Logan Circuit Court, Southern District; *Jeptha H. Evans*, Judge; affirmed.

STATEMENT BY THE COURT.

This is a suit by the prosecuting attorney, in the name of the State, for the use of Logan County, to recover from the Logan County Bank, as principal, and the sureties on its bond and certain stockholders a judgment for $17,099.59, for funds alleged to have been deposited by the county treasurer with the bank as the depository of the public funds. The complaint alleged that the bank was selected as the depository of the public funds under the statute; that it executed and filed its bond, as required by law, in the sum of $35,000.00; that the treasurer of Logan County had from time to time deposited the county funds, had drawn checks thereon,

leaving a balance in the hands of the bank in the sum of $17,099.59, on May 25, 1914, which the bank had failed and refused to pay upon checks of the treasurer or otherwise, and that on May 25, 1914, the State Bank Commissioner took charge of the bank on account of its insolvent condition. The prayer was for judgment in the sum of $35,000, to be applied to the satisfaction of the amount alleged to be due, and the balance be held for the benefit of those entitled thereto.

John M. Davis, the State Bank Commissioner, was made a party, and he answered, admitting that the bank had been taken over by him and that the affairs of the bank were then in process of liquidation under the laws governing State banks.

J. L. Roberts, one of the defendants, answered, and among other things, denied that the deposit for which recovery was sought was according to law, and alleged that section 36 of the act of 1913 repeals the act making stockholders of a bank liable for public funds.

The court sustained a demurrer to the answer of Roberts and found that the bank was duly selected as the depository of all the public funds of Logan County, and that the bond was duly executed as the law requires; that the appellants were stockholders and liable for all the public funds due the county treasurer under section 4 of Act No. 196, approved May 1, 1909, and it rendered judgment against the appellants, as stockholders, and bondsmen, for the amount sued for, with interest, and ordered that all dividends from liquidation of the assets of the Logan County Bank paid by the State Bank Commissioner to the county treasurer upon the county deposit account be entered as a credit upon the judgment.

The appellants duly prosecute this appeal.

Carmichael, Brooks, Powers & Rector, for appellant.

1. The purpose of the deposit was for the purpose of getting *interest* and not for safe-keeping. Act 57, p. 176, 1913, Kirby's Dig., § 1990. The statute as to stockholders is not only penal but in derogation of the com-

mon law and must be strictly construed. 59 Ark. 356; 82 *Id.* 247. *Safe-keeping* means a special and not a general deposit. 7 Words & Phr., 6283-4. It is in the nature of bailment, and the money must be paid over on demand. 62 Ala. 340; 34 Am. Rep. 24; 97 Ark. 374; 31 L. R. A. 851.

2. Any material alteration of a stockholder's liability or obligation without his consent, discharges the stockholder from liability. 9 Wheat. (U. S.) 702; 61 Atl. 36; 65 Ark. 550; 93 *Id.* 472; 98 N. E. 886; 181 Mo. 300. *Sondgrass* v. *Schader,* 40 A. L. R. 430; Brandt on Guar. & Sur., p. 376; 103 Ark. 483; 35 *Id.* 468.

3. The special act repeals section 1990 of Kirby's Digest. While repeals by implication are not favored, if the latter act covers the entire subject-matter and deals with the whole subject it will be held to be a repeal of the former act, or if there is a repugnancy between the provisions and the latter covers the whole subject, plainly showing the latter was intended as a substitute, it repeals the former act. 92 Ark. 600; 100 *Id.* 504; 101 *Id.* 238; 80 *Id.* 411; 82 *Id.* 302; 105 *Id.* 77, and many others.

4. Section 36 of the act of 1913, repeals section 1990 of Kirby's Digest, 14 Wis. 700; 80 Am. Dec. 797; 97 Ark. 374; *Boaz* v. *Coates,* 41 Ark. L. R. 23; Suth. on Stat. Const., § 140.

Anthony Hall, for appellee.

The special act does not repeal section 1990, Kirby's Digest. The liability of stockholders is based on section 4 of Act 196, Acts 1909, p. 577, and remains in full force. 97 Ark. 374. There is no repugnancy between the two acts. 93 Ark. 621; 88 Ark. 234. The judgment is correct.

WOOD, J., (after stating the facts). I. Act 196, approved May 1, 1909, provides for a depository of the public funds of Logan County. Sections 1 and 3 of that act were amended by Act No. 57, approved February 15, 1913, providing for the creation of separate depositories in the northern and southern districts of Logan County, and by changing the time for receiving bids from the

July term of the county court, as provided in the act of 1909, to the January term of the court. The latter part of section 2 of Act No. 57, Acts of 1913, provides that the county court, "shall select from among said bids as the depositories of all the public funds of the county and districts, including road and school funds, that bidder one in each district, offering the highest rate of interest per annum, on said funds of each district. * * * Said interest shall be computed upon the daily balances to the credit of said county with said depositories and the same shall be payable to the county treasurer quarterly and shall be immediately placed to the credit of the common school fund and county general purpose fund of said county and district in equal amounts." Section 3 repeals all laws in conflict.

But Act No. 196 of the Acts of 1909, except sections 1 and 3, providing for a depository of public funds in Logan County, remains unchanged, and is still in force.

The first part of section 4 of the act of 1909 provides for the making of a bond by the depository for the use and benefit of Logan County. The latter part of section 4 is as follows:

"All stockholders of any such bank, banker or trust company shall be liable for all public funds that such bank, banker or trust company shall fail to pay over on demand to the person entitled to receive the same."

Section 6 provides that the bond "shall be conditioned for the due and proper performance of all duties and obligations devolving by law upon said depository and for the prompt payment upon presentation of all checks drawn upon said depository by the county treasurer of said county, so long as said funds shall be in said depository to the credit of said county and that all funds of said county shall be faithfully kept by said depository and accounted for according to law; and for any breach of said bond, the county or any other person injured may maintain an action in the name of the county to the use of said county or person thereby injured."

(1) The liability of appellants as sureties on the bond and as stockholders arises under the above provisions of Act 196, approved May 1, 1909. The circuit court was correct in holding that the appellants were liable under the provisions of that act. It is therefore unnecessary for us to consider whether Act 57, approved February 15, 1913, repealed section 1990 of Kirby's Digest, for the liability of appellants in this case is not based upon that section.

II. Section 4 of Special Act No. 196 of the Acts of 1909 makes all stockholders of any such bank, banker or trust company "liable for all public funds that such bank, banker or trust company shall fail to pay over on demand to the person entitled to receive the same." Section 36 of Act 113, being "An Act for the organization and control of banks," approved March 3, 1913, provides: "The stockholders of every bank doing business in this State shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such stock."

Does the above section 36 of the banking act repeal section 4 of Special Act No. 196 of the Acts of 1909?

(2) Act 113 of the Acts of 1913 is a general banking law. It does not expressly repeal the provisions of section 4 of Special Act 196 of the Acts of 1909. "A general statute will not be held to repeal a prior special statute where there is no express repeal and no invincible repugnancy between the two statutes." *State* v. *Southwestern Land & Timber Co.*, 93 Ark. 621, and cases cited. See, also, *Hampton* v. *Hickey*, 88 Ark. 324. In the latter case we held, that "a later statute which extends and enlarges a right before existing impliedly repeals the law by which the former was created or given."

There is no invincible repugnancy between the special depository act for Logan County and the general banking act. The general banking law was not intended to cover the subject-matter of the special depository act

for Logan County. There are no provisions in the banking law showing that it was intended as a substitute for this special act. Section 36 of the banking law did not enlarge and extend the liability of stockholders for public funds deposited under the special depository law. On the contrary, the liability of the stockholders under the special depository act is greater than under the general banking law, for the special act makes the stockholders liable for the public funds without regard to the amount of stock held by each stockholder; whereas the general banking law makes them liable ratably to the extent of the amount of their stock at its par value, plus the amount invested in such stock. Each of the stockholders, under the special depository law, is liable in every case for the entire amount of the public funds deposited, whereas, under the general banking law each stockholder is liable ratably and only to the extent of his stock at par value, and, in addition, to the amount invested therein.

In some cases, under the general banking law, an individual stockholder might not be liable for the entire amount of public funds on deposit with the bank named as special depository. But, under the special depository law, each individual stockholder would be individually liable for the whole amount of public funds on deposit.

In section 36 of the general banking law the Legislature did not have in mind the subject-matter of the liability of stockholders under special acts creating depositories of public funds. The liability of stockholders under the special act creating the depositories for Logan County was fixed as a liability against all the stockholders for the public funds, making each liable for the amount of such funds. In section 36 of the general banking law the Legislature were intending to declare and apportion the general liability of all banks ratably among the stockholders thereof. They did not have in mind the fixing of primary liabilities against the stockholders in banks that were made depositories of public funds.

It follows that the judgment of the circuit court is correct and it is therefore affirmed.

MORRIS v. LYONS.

Opinion delivered January 18, 1915.

RES ADJUDICATA—JUDGMENT OF CIRCUIT COURT—IDENTITY OF ISSUES.—In an action brought in the circuit court by the Attorney General, the issue was to test the validity of the organization of a school district. The circuit court gave judgment in favor of the district; no appeal was taken from that judgment. Thereafter appellants brought an action in the chancery court to restrain the officers of the district from taking part in the management of its affairs. *Held*, the judgment in the first case is *res adjudicata*, because the issues raised in both cases were identical, and the judgment in the former case is conclusive in the latter.

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

STATEMENT BY THE COURT.

B. C. Morris and others instituted this action in the chancery court against J. T. Lyon and others restraining the latter from in any manner interfering with the property or school affairs of School District No. 65 in White County, Arkansas. The facts, so far as are necessary for a determination of the issues raised by the appeal, briefly stated, are as follows:

In January, 1912, residents of School District No. 61 and School District No. 65, in White County, Arkansas, attempted to consolidate the two districts under the provisions of section 7669 of Kirby's Digest, and Act No. 321 of the Acts of 1909, amendatory thereof. On the 17th day of June, 1912, the county court of White County gave public notice under the statute that on the 3d day of February, 1912, an election would be held for the purpose of voting for the establishment of a special school district at McRea, Arkansas, composed of school districts No. 61 and No. 65. Certain residents of school district No. 65 appeared in the county court thereafter and remonstrated against the consolidation of school districts No. 61 and No. 65, and the formation of McRae Special School District. The county court heard the matter on the petition for the consolidation and the remonstrance

thereto, and denied the prayer of the petition. An appeal from the judgment of the county court was granted to the circuit court. The circuit court found that McRae Special School District, to be composed of the territory of school districts No. 61 and No. 65, was properly formed under the statute and rendered a judgment that the surplus funds in districts No. 61 and No. 65 should be turned over to McRae Special School District and directed the judge of the White county court to make an order in conformity with its judgment. No appeal was taken from the judgment of the circuit court.

Thereafter the Attorney General of the State of Arkansas, upon the relation of certain residents of the school district, instituted an action in the White circuit court against the parties who were elected directors of McRae Special School District, and in his complaint alleged all matters and things we have set out above.

Upon the hearing the circuit court held that the defendants were entitled to hold their offices as directors of McRae Special School District by reason of the former judgment of the White circuit court and dismissed the complaint of the Attorney General. No appeal was taken to the Supreme Court from this judgment.

In the present suit the chancellor found the issues in favor of the defendants and entered a decree dismissing the complaint of the plaintiffs. To reverse that decree plaintiffs have prosecuted this appeal.

S. Brundidge, Jr., for appellant.

1. The McRae special district was never legally organized. Kirby's Dig., § 7669, as amended by Act 321, Acts 1909; 106 Ark. 406.

2. The judgment of the court sustaining the formation of said district was not *res adjudicata*. 3 Ark. 491; 6 Words & Phrases, 5608.

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

1. The district was legally formed. 103 Ark. 298; 102 *Id.* 311. At the time 103 Ark. 298 was the law applicable to this case.

2. The judgment of the White circuit court was *res adjudicata.* 60 Ark. 124.

HART, J., (after stating the facts). In the case of *Bunch* v. *Chaffin,* 106 Ark. 306, the court held that the provision fixing the time within which an election shall be held under section 7669 of Kirby's Digest was mandatory and that the election to be valid must be held not less than seven nor more than fifteen days after the order designating a day therefor is made by the county judge.

In the case of *Bonner* v. *Snipes,* 103 Ark. 298, the court held that a special school district is established under the statutes referred to if a majority of the qualified electors within the territory named in the petition before the county judge shall have voted for the establishment of the district, and that the act does not require that the county court shall make and enter of record any order as to such special election or relative to the establishment of the special school district.

Under the authority of these decisions it is contended by counsel for the appellants that the residents of School District No. 65 did not have a right to file a remonstrance in the county court against the formation of the McRae Special School District and that for that reason the judgment of the county court and the subsequent judgment of the circuit court upon appeal were erroneous.

They further insist that inasmuch as the county judge on the 17th day of January, 1912, gave public notice that the special election should be held on February 3, 1912, there was no authority to hold the election, the time being more than fifteen days from the time the order was made, and that for these reasons no valid election was held.

It may be conceded, for the purpose of this decision, that the contention of counsel for appellants in both these respects is correct, and still the decree of the chancellor must be affirmed.

It will be noted that the Attorney General instituted an action in the circuit court against the parties who had been elected directors of McRae Special School Dis-

trict, in which all these facts were set up, and the circuit court rendered a judgment dismissing the complaint of the Attorney General and from this judgment no appeal was prosecuted.

In the case of *Beavers* v. *State,* 60 Ark. 124, the court held that an action by the Attorney General in the nature of *quo warranto* proceedings against the directors of a school district is a proper method to test the legality of the organization of the school district. The court said: "This action was brought by the Attorney General in the name of the State, in lieu of *quo warranto.* Its object is to test the legality of the organization of the town of Waldron in Scott County into a single school district. The directors of the district, whose existence is being questioned, were made defendants. No valid objection can be urged to the form of the action or the parties litigant." Several authorities are cited by the court in support of the position assumed by it.

So it will be seen that the legality of the organization of McRae Special School District was distinctly put in issue and directly determined by a court of competent jurisdiction in the suit instituted by the Attorney General against the parties claiming to be directors of McRae Special School District. The particular issue sought to be determined in the present suit is the validity of the organization of McRae Special School District. That precise question was involved in the suit instituted by the Attorney General and the judgment in that case is conclusive in the present suit on all matters raised and determined in that action. No appeal was prosecuted from the judgment in the suit instituted by the Attorney General against the directors of McRae Special School District and the judgment in that case is *res adjudicata,* because the issues raised in that case and those raised in the present case are precisely the same. See *National Surety Company* v. *Coates,* 83 Ark. 545; *Morgan* v. *Kendrick,* 91 Ark. 394; *Pulaski County* v. *Hill,* 97 Ark. 450;

Fourche River Lumber Company v. *Walker,* 96 Ark. 540; and *Fogel* v. *Butler,* 96 Ark. 87.

It follows that the decree must be affirmed.

HODGES v. COLLISON.

Opinion delivered January 18, 1915.

1. APPEALS—BILL OF EXCEPTIONS—AGREEMENT OF COUNSEL.—Section 1, of Act 218, General Acts 1911, provides that where counsel of record of the respective parties agree in writing upon the correctness of a bill of exceptions by endorsement thereon, the same shall become a part of the record to the same extent as if signed and approved by the circuit judge. *Held,* an endorsement of the following agreement on the bill of exceptions, was a sufficient compliance with the act: "We agree that this is a correct and true bill of exceptions of the case of W. A. H. plaintiff v. J. C. defendant, tried in the White Circuit Court this May 2, 1914," and signed by the attorneys of record of both plaintiff and defendant.
2. BILLS AND NOTES—ENDORSEMENT BEFORE DELIVERY.—One who endorses a promissory note before delivery to the payee will be held as a maker of the same.

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

John D. DeBois and *W. A. Barnett,* for appellant.

1. The statute of limitations began to run from the date of the last payment on the notes, by any one of the joint makers or obligors. 68 Ark. 399; 34 *Id.* 44; 20 *Id.* 171; 50 *Id.* 229; 88 *Id.* 108; 64 *Id.* 80. Payment of interest or part of principal by one of the joint obligors of a note does not lessen or release any one of makers of a note. Kirby's Dig., § 5080.

2. Where parties sign a note, no matter where the name appears, at the same time, the parties are joint makers if they signed to give the note credit. This constitutes an original undertaking and all who sign are liable at maturity without notice. 24 Ark. 511; Tiedeman on Com. Paper, § 417, p. 690; 34 Ark. 524; 77 *Id.* 53.

3. Collison was not an endorser, and was not entitled to notice. Tiedeman on Com. Paper, § 415, p. 688; 24 Ark. 511. These joint obligations are not like those in 69 Ark. 67, nor 54 Ark. 97.

4. Collison assumed and undertook with Price to pay the notes and is liable. 126 Wis. 538; 5 A. & E. Annotated Cases, 435.

5. If appellee wanted close his further obligation he should have demanded action under the statute. Kirby's Dig., § § 7018-1021.

6. The five-year statute has not run against appellant. 107 Ark. 462.

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

1. There is no authenticated bill of exceptions and the judgment should be affirmed. Kirby's Digest, § 6225; Castle's Ann. Statutes, § 6225; 109 Ark. 120; 102 *Id.* 441; 51 *Id.* 280; 99 *Id.* 97; 101 *Id.* 84; 105 *Id.* 676; 100 *Id.* 244. See, also, 86 Ark. 360 and 84 *Id.* 95; 95 *Id.* 63; 31 *Id.* 725.

2. The presumption is therefore that the evidence sustained the verdict and jury properly instructed.

DeBois & Barnett in reply.

1. The argeement signed by the attorneys is positive, clear and certain and in strict conformity with the Act 218, at page 192, of Acts 1911. 109 Ark. 120.

HART, J. W. A. Hodges instituted two separate actions against J. Collison to recover on two promissory notes executed by R. M. Price and J. Collison. The two suits were consolidated before the justice of the peace and judgment was rendered for the plaintiff for the amount due on the notes. The defendant appealed to the circuit court and the case was there tried anew. There the fifty dollar note was introduced in evidence and is as follows:

"$50.00. January 17, 1908.

"Sixty days after date I promise to pay to the order of W. A. Hodges, fifty dollars at Bald Knob, Arkansas, with 10% interest per annum. Value received.

"R. M. Price,
"J. Collison."

The following endorsements appear on the back of the note: "Credit by cash 1/21/09, $5.00; credit by cash 1/31/1910, $5.00; credit by cash, 1/1/1911, $5.00."

The one hundred dollar note was also introduced in evidence as is as follows:

"$100.00. August 24, 1908.

January 1, 1909, after date we promise to pay to the order of W. A. Hodges, one hundred dollars at Bald Knob, Ark., with 10% interest per annum. Value received.

"Rufus M. Price."

This note is endorsed on the back, "J. Collison," and the following credits appear: "Credit by cash, 1/30/09, $3.50; credit by cash, 1/31/10, $5.00; credit by cash, 1/1/11, $15.00."

The plaintiff Hodges testified that R. M. Price made the payments endorsed on the back of each note and stated that the name of J. Collison was signed to the fifty dollar note and was endorsed on the back of the one hundred dollar note at the time Price delivered the notes to him. At the conclusion of the evidence the court instructed the jury to return a verdict for the defendant and judgment was rendered on that verdict. The plaintiff has appealed.

Section 1 of "An Act to regulate the practice incident to appeals to the Supreme Court in certain cases," reads as follows: "In all cases, except indictments charging a felony, where the parties to an action agree in writing upon the correctness of a bill of exceptions by endorsement thereon, signed by one or more counsel of record of the respective parties, it shall be the duty of the clerk of the court in which the case is pending, to at once file such agreed bill of exceptions and the same shall become a part of the record as fully, completely and effectively as

though approved, signed and ordered filed by order of the court or judge trying the cause. See General Acts 1911, page 192.

Pursuant to this act counsel for the plaintiff and defendant executed the following agreement: "We agree that this is a correct and true bill of exceptions of the case of *W. A. Hodges,* plaintiff, v. *J. Collison,* defendant, tried in the White Circuit Court. This May 2, 1914. John D. DeBois, Attorney for Plaintiff. Rachels & Miller, Attorneys for Defendant."

This agreement was endorsed upon the bill of exceptions and the bill of exceptions filed within the time fixed by the court for filing the same. It is now contended by counsel for the defendant that the agreement was not in compliance with the section of the statute above quoted.

(1) A comparison of the agreement endorsed upon the bill of exceptions with the language of section 1 of the act above quoted will show that in all essential respects it was in compliance with the act. The act provides, in effect, that where counsel of record of the respective parties agree in writing upon the correctness of a bill of exceptions by endorsement thereon the same shall become a part of the record to the same extent as if signed and approved by the circuit judge. The agreement in question was endorsed upon the bill of exceptions and it is expressly agreed that it is a true and correct bill of exceptions.

(2) The testimony shows that Price and J. Collison signed the fifty dollar note as makers; and also that J. Collison endorsed the one hundred dollar note on the back thereof before it had been delivered to the plaintiff Hodges. He was, therefore, a maker of the note. See *Nathan* v. *Sloan,* 34 Ark. 524; *Lake* v. *Little Rock Trust Co.,* 77 Ark. 53; *Kissire* v. *Plunkett-Jarrell Grocer Co.,* 103 Ark. 473, and cases cited.

It follows that the judgment will be reversed; and inasmuch as the facts have been fully developed, judgment will be entered here for the amount of principal

and interest on the two notes. That is to say, on the $50 note there is now due, including principal and interest, the sum of $70.00; and on the $100 note the sum of $140.47. Judgment will, therefore, be entered here for the aggregate amount due on the two notes, amounting to $210.47.

MORRIS v. FRIEND.

Opinion delivered January 25, 1915.

1. PRINCIPAL AND AGENT—GENERAL AGENT—AUTHORITY TO EXECUTE NEGOTIABLE PAPER.—An agent having authority to manage his principal's business, has, by virtue of his employment, no implied authority to bind his principal by making, accepting or endorsing negotiable paper; such an authority must be expressly conferred or be necesarily implied from the peculiar circumstances of each particular case.
2. PRINCIPAL AND AGENT—GENERAL AGENT—AUTHORITY TO EXECUTE NEGOTIABLE PAPER.—Authority of an agent to execute negotiable paper, binding upon his principal, will not be presumed from his mere appointment as a general agent.
3. PRINCIPAL AND AGENT—NEGOTIABLE PAPER—HUSBAND AS AGENT—AUTHORITY—QUESTION FOR JURY.—Where a husband is acting as a general agent for his wife in conducting a business, the question of the authority of the husband to execute negotiable paper, so as to be binding upon the wife, should be submitted to the jury, and such authority will not be inferred from the marital relation.

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

STATEMENT BY THE COURT.

Appellee sued to recover the amount of three notes, of $500 each, payable to his order and executed by "Morris & Company, per L. A. Morris." After several amendments to the complaint, the cause was submitted to the jury under a complaint alleging that Morris & Company was a business owned by appellant which she permitted her husband to conduct for her. This suit was brought after appellee had filed the notes sued on with appellant as administratrix of the estate of her husband and after they had been allowed by her as a demand against his estate.

Appellee testified that he made the loan to L. A. Morris for Morris & Company, which he supposed was a firm composed of Morris and his wife. He supposed the money was to be used in the business of that concern, but does not undertake to say how it was, in fact, used, and the evidence does not show what use was made of the money.

The evidence was legally sufficient to support a finding that the business of Morris & Company was owned by appellant individually, although Mrs. Morris stated unequivocally that it belonged to her husband and that he had exclusive control of it, and that she knew nothing about the loan until after her husband's death.

The stock of goods belonging to Morris & Company invoiced $2,700, was appraised at $1,700, and was sold for $900, and there were unpaid debts amounting to $800, in addition to $2,000 due appellee. L. A. Morris, at his death, left an insurance policy for $3,500 payable to appellant, and after its collection she paid the one of the four notes to appellee's order, which was then due, with the money received from her policy.

At appellee's request the court charged the jury as follows:

"You are instructed that if you find from a preponderance of the evidence that the defendant, Maggie G. Morris, was the owner of the business conducted in the name of Morris & Company, your verdict will be for the plaintiff, for the amount sued for, together with interest thereon."

Appellant requested the court to charge the jury as follows:

"1. You are instructed that unless you find that the business conducted in the name of Morris & Company, was the business of Maggie G. Morris, your verdict should be for the defendant."

"2. Even if you should find from a preponderance of the evidence that the defendant was the sole owner of Morris & Company, you can not find for the plaintiff un-

less you find that L. A. Morris was authorized by the defendant to sign her name to the notes sued on herein."

The court gave the instruction numbered 1, but refused to give the instruction numbered 2, and there were only two instructions given. The jury returned a verdict in appellee's favor for the amount of the notes sued on. The action of the court in refusing to give this instruction numbered 2 is assigned as error for the reversal of the judgment rendered upon the verdict of the jury.

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

Unless appellant was the owner of the business of Morris & Company, she is not bound for this debt, and if she was the owner she would not be bound unless she authorized L. A. Morris, as her agent, to contract the debt and execute the notes sued on; and his agency will not be inferred from the marital relation. His authority must appear from clear and satisfactory proof. Art. 9, § 8, Const.; 56 Ark. 217; 25 Am. & Eng. Enc. of L. 371; 1 *Id.* 1025; 21 Cyc. 1418; 41 Ark. 177, 184; 31 Cyc. 1396; 35 Am. Rep. 458; 43 Am. Dec. 420, 422, and cases cited; 20 Mont. 379, 63 Am. St. Rep. 628, 630; 61 Ark. 631; 39 Mich. 644.

J. T. Coston, for appellee.

The court did right in refusing to give instruction 2, because, if L. A. Morris was authorized or apparently authorized, to sign the name of Morris & Company, appellant is bound by it. The instruction ignores the apparent authority of L. A. Morris, whereas the evidence shows that he was manager of the store of Morris & Company, and, if so, he at least had apparent authority to borrow money to carry on the business, and to sign the note in question. Mecham on Agency, § § 281, 283, 284, 279.

SMITH, J., (after stating the facts). (1-2) It is insisted, in effect, that if there was any error in refusing the instruction numbered 2, that error was cured by the verdict of the jury. That this is true, because appellant testified that her husband had complete and unlimited

control over the business of Morris & Company, and that she was, therefore, bound by his action in signing the notes. But however complete the control of L. A. Morris over the business of Morris & Company may have been, there still remains the question of his right to bind her beyond the extent of the business which she was permitting him to manage. His right to bind her by the execution of notes would not arise out of the marital relation, and could exist at all only by reason of authority expressly conferred, or necessarily implied, under an agency for her, and he would have no greater authority to bind her than any other agent having similar authority would have had. And the rule as to any agent is that "an agent having general authority to manage his principal's business, has, by virtue of his employment, no implied authority to bind his principal by making, accepting or endorsing negotiable paper. Such an authority must be expressly conferred or be necessarily implied from the peculiar circumstances of each particular case. It may undoubtedly be conferred and by implication, but it will not be presumed from the mere appointment as general agent." Mechem on Agency, § 398. See, also, 1 Am. & Eng. Enc. of Law, (2 ed), p. 1025; 31 Cyc. 1381, and cases there cited.

(3) In determining the extent of the authority of L. A. Morris, the jury would have the right to consider the relationship between him and appellant, in connection with all other circumstances in proof; but the jury would have no right to infer this authority because of the marital relation. *Hoffman* v. *McFadden,* 56 Ark. 217.

For the error in refusing to give instruction No. 2, the judgment will be reversed and the cause remanded for a new trial.

KENDALL v. CRENSHAW.

Opinion delivered January 25, 1915.

1. DOWER—RIGHT OF DIVORCED WIFE.—A divorced wife is not entitled to dower.

2. DIVORCE—LANDS OF HUSBAND—CONFLICT OF LAWS.—Where a divorce was granted to a wife by a court in another State, that court is without jurisdiction to award to the wife lands belonging to her husband in this State.

3. DOWER—JURISDICTION OF PROBATE COURT.—Probate courts of this State are vested with jurisdiction in matters of dower.

4. DOWER—RIGHT OF WIDOW—ADJUDICATION.—A widow, where there are no children, is vested with title in one-half of the lands of her husband as dower, under the statute, and no adjudication of a court is necessary.

5. DOWER—ALLOTMENT TO WIDOW.—Where dower has not been allotted to a widow by the probate court, although a petition was filed in said court, and no final judgment rendered thereby, an action is not barred in the chancery court for an allotment of dower.

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

Fink & Dinning, for appellant.

1. The decree of divorce did not destroy the dower right. Kirby's Dig., § 2694; 4 Barb. 192; 205 N. Y. 355; 98 N. E. 488; 30 A & E. Ann. Cas. 553. The right of dower is not dependent upon the woman being the wife at the time of the husband's decease. 197 Ill. 144; 166 S. W. 547. A divorce does not bar dower. 59 Ark. 441, is merely *dictum.* 71 Ark. 565. Statutes should be construed liberally in favor of the wife. 131 S. W. 977; 34 L. R. A. (N. S.) 1106; 19 Oh. St. 502; 2 Am. Rep. 415; 44 Ala. 437.

2. The order of the Phillips County Probate Court is a conclusive adjudication of the issues here. 80 Ark. 304; 92 *Id.* 611; 19 *Id.* 515; 11 *Id.* 519.

Bevens & Mundt, for appellee.

1. Divorce bars dower. Kirby's Dig., § 2694; 59 Ark. 441; 51 Tenn. (4 Heisk.) 419; 103 U. S. 118; 55 Mo. 181; 2 N. Y. 47; *W. U. Tel. Co.* v. *Compton,* 41 A. L. R. 197; 173 N. Y. 503; 66 N. E. 193; 93 Am. St. 631; 118 Ill. 260.

2. The probate court judgment was made without jurisdiction. Kirby's Dig., § § 2720-33; 55 Ark. 222; 15 *Id.* 382; 50 *Id.* 40; 166 S. W. 547; 39 Ark. L. R. 585;

74 *Id.* 81; 33 *Id.* 428. It is void. 47 Ark. 460; 33 *Id.* 490; 76 *Id.* 151; 92 *Id.* 231; 101 *Id.* 395; 81 *Id.* 462.

McCULLOCH, C. J. This case involves the right of the apellant, Lizzie Kendall, to dower in the estate of one Bailey Kendall, who died in Phillips County, Arkansas, without issue, in the year 1913, leaving an estate consisting of certain lands which are described in the complaint. Appellant was the wife of Bailey Kendall, but upon her complaint a divorce was granted by a court of competent jurisdiction in the State of Illinois in the year 1894. Appellee is the nearest collateral heir of said decedent, and he challenges the right of appellant to take dower in the estate on the ground that she was not the wife of said decedent at the time of his death and is therefore not the widow within the meaning of the laws of this State on the subject of dower.

The statute reads as follows: "If a husband die, leaving a widow and no children, such widow shall be endowed in fee simple of one-half of the real estate of which such husband died seized, where said estate is a new acquisition and not an ancestral estate; and one-half of the personal estate, absolutely and in her own right, as against collateral heirs, but, as against creditors, she shall be endowed with one-third of the real estate in fee simple if a new acquisition and not ancestral, and of one-third of the personal property absolutely. Provided, if the real estate of the husband be an ancestral estate she shall be endowed in a life estate of one-half of said estate as against collateral heirs, and one-third as against creditors." Kirby's Digest, § 2709.

(1) The statute just quoted was an amendment introduced into the laws of this State by the act of March 24, 1891; and it enlarged the widow's dower to a very considerable extent; but the prior statutes on the subject, which still remain in force, except insofar as amended or repealed by the Act of 1891, provided only for allotment of dower to the *widow* of a decedent. There is not now and has never been in existence any statute of this State which in express terms gave dower to one who was not the wife of a decedent at the time of his death.

Another section of the revised statutes provides that "in case of divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." Kirby's Digest, § 2694. The effect of the statute last quoted, as bearing upon the right of a divorced wife of a decedent to take dower, was quite fully discussed by Judge BATTLE in the case of *Wood* v. *Wood,* 59 Ark. 441. In that case the court decided that a divorced wife could not be the widow of a decedent within the meaning of our divorce laws so as to be entitled to dower. It is pointed out in that case that section 2694, of Kirby's Digest, was copied from the New York statute without borrowing other statutes from that State which gave it any effect. Decisions of the New York courts, which are quoted from and discussed, show the purpose of the Legislature in that State by this enactment to restore the law as it existed in England prior to the statute of Westm. 2 (13 Edw. I), c. 34, but our divorce laws needed no statute to thus restore the condition of the law because the change brought by the English statute had never been introduced here. The effect of the statute is a little more plainly indicated by Judge RIDDICK in his opinion in *Grober* v. *Clements,* 71 Ark. 565, where it is shown that the Legislature meant to declare the law to be different than that expressed in the English statute which barred the widow's dower if she deserted her husband and went away with another in adultery, and to provide, contrary to the terms of the English statute, that such misconduct should not bar her right of dower unless it was followed up by a divorce dissolving the bonds of matrimony. It turns out that the Legislature was mistaken in finding a necessity for this statute, for under other sections of the statutes the widow was entitled to dower unless divorced, but the mistake of the Legislature in that respect does not alter the effect of the statute. It can be treated only as a legislative declaration of the state of the law to be contrary to that announced in the English statute which made the misconduct of the wife, without a divorce, a bar to her right of dower. At any rate, we regard the opinion of this court in *Wood* v. *Wood, supra,* as de-

cisive of the question that a divorced wife is not entitled to dower, and the reasons given by Judge BATTLE in that opinion are convincing. Learned counsel for appellant insist that Judge RIDDICK's opinion in *Grober* v. *Clements, supra,* is to the contrary, but we do not find it to be so. Judge RIDDICK was not discussing the question of the right of a divorced wife to dower, for he had already announced the conclusion of the court that the widow of Grober had not been legally divorced and was not on that account to be denied her right of dower. His discussion had reached that point where he was treating the question of the mere misconduct of the widow as a bar of dower, and he compared our statute with the English statute referred to and held that it was merely a declaration on the part of the Legislature of the State of the law different from that existing under the English statute. In other words, he was merely holding that the misconduct of the wife did not bar her dower, and that under the statute referred to it required a divorce to bar the right of dower.

The statutes on the subject of divorce, provide that when a wife is granted a divorce she "shall be entitled to one-third of the husband's personal property, absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been reliquished by her in legal form," and that the judgment for divorce "shall designate the specific property, both real and personal, to which such wife is entitled." Kirby's Digest, § 2684.

Of this statute the court, in *Beene* v. *Beene,* 64 Ark.. 518, said: "The Legislature seems to have enacted that statute for the purpose of putting an end to all after-controversies as to dower rights, and to settle the matter when a divorce is granted dissolving the marital bonds."

(2) The Illinois court which granted the divorce did not, of course, have jurisdiction to award to appellant lands in this State; and as it does not appear from the record in this case when appellant's husband acquired the lands in controversy, whether during the coverture or

since it ended upon the granting of the divorce, the question does not arise whether or not appellant could, subsequent to the divorce have maintained a separate action in this State to have a part of her husband's lands here awarded to her.

(3-4-5) Another question presented is that the judgment of the probate court of Phillips County was a final adjudication of appellant's right of dower and that the question could not be further inquired into. There appears in the record a judgment of the probate court reciting that appellant had filed her petition in that court to have dower set aside and that the court "adjudged that an undivided one-half interest in and to the above named tracts, pieces and parcels of land be and the same is hereby vested in the said Elizabeth Kendall in fee simple, together with all rights and appurtenances thereunto belonging." Probate courts of this State are vested with jurisdiction in matters of dower. Kirby's Digest, § 2720; *Carter* v. *Younger,* 112 Ark. 483; 166 S. W. 547, and other cases cited. The statute provides that if dower be not assigned to the widow within a certain time, she may file in the probate court her petition for the allotment of dower and give the names of those having an interest in the property, and that summons shall be served upon the persons named as in other cases at law. The statute then provides for a contest of the right of the petitioner, and that upon final hearing if the widow be found to be entitled to dower the court shall appoint commissioners to allot the same. Nothing is brought into this record except the judgment and it does not appear that appellee or any interested parties were brought in. Passing that, however, it is observed further that the judgment of the court is not for the allotment of dower, but merely an adjudication that the appellant is entitled to dower. Now, the statute itself vests the title in the widow to one-half of the lands as dower and no adjudication of a court is necessary. The proceeding authorized by the statute to be had in the probate court is merely for the allotment of dower and the inquiry as to the right of the widow to dower is a

mere incident to the allotment. There was no allotment of dower by the probate court, and therefore there was no final judgment of that court which binds any of the issues involved in this case. It is contended that the case of *Carter* v. *Younger, supra,* is decisive of this question that the judgment of the probate court bars the present suit, but we do not think so, for the reason stated above, if for no other, that there was no judgment of allotment of dower rendered by the probate court. The court had no jurisdiction of a suit merely to determine the widow's right of dower, and any determination of that issue in a proceeding of that kind does not bar the present proceeding originating in the chancery court.

The decree of the court was therefore correct, and the same is affirmed.

HOLT *et al.* RECEIVERS *v.* LESLIE.

Opinion delivered January 25, 1915.

1. RAILROADS—ACTS OF EMPLOYEES OF RECEIVER.—Where a railroad company is in the hands of receivers, it will not be liable for damages resulting from negligent acts of employees of the receivers.
2. NEGLIGENCE—VICIOUS ANIMAL—LIABILITY.—Plaintiff, while visiting a railway and express office on business, was injured by being bitten by a dog in the custody of the agent for the express company and of the receivers of the railway company; *held,* if the receivers and express company knew that the dog was vicious and dangerous, and with such knowledge kept the dog in the depot building where the plaintiff received the injury of which he complained, the receivers and express company would be liable.
3. PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT—NEGLIGENCE.—The knowledge of the agent of the receiver of a railroad company and of an express company, that a dog received as express, and permitted by the agent to go about the depot building, was vicious and dangerous, will be held to be the knowledge of the principals.
4. ANIMALS—VICIOUS DOG—KNOWLEDGE.—Where plaintiff was injured by being bitten by a dog in the custody of defendant's agent, whether the dog was vicious and dangerous and whether the agent knew it, are issues for the jury, plaintiff having been bitten while in a railway and express depot building by a dog in the custody of the agent of the express company and the receiver of the railroad company.

5. ANIMALS—VICIOUS DOMESTIC ANIMAL—EXPRESS COMPANY—SCIENTER.—If one knowingly keeps a vicious or dangerous domestic animal, one accustomed to bite mankind, he is liable for injuries done by such animal without proof of negligence as to the manner in which the animal was kept and handled. The mere keeping of such an animal, knowing its vicious and dangerous qualities, is (except as to trespassers) at the risk of the owner, and renders him liable in damages to one injured by such animal. Without any proof of negligence, the owner of such an animal, having knowledge of its vicious and dangerous propensities, will be held liable in damages for injuries done by it.

6. ANIMALS—VICIOUS DOG—LIABILITY OF BAILEE—SCIENTER.—An express company, which is a bailee for hire, of a vicious and dangerous dog, is liable for an injury done by the dog to a person visiting its office on business, there being proof of *scienter* on the part of the agent of the express company.

7. ANIMALS—VICIOUS DOG—LIABILITY OF CUSTODIAN.—One who has custody of a vicious dog, whether as owner or bailee, knowing him to be vicious, must restrain him, and if he fails to do so he will be liable in damages to any person injured thereby.

8. ANIMALS—VICIOUS DOG—DUTY OF BAILEE.—An express company which is holding a dog for delivery to the consignee thereof, is under a duty to so keep the dog that it will not cause an injury to those who have business to transact with the express company.

9. RECEIVERS—RAILROAD COMPANY—DEPOT BUILDING—DUTY TO PUBLIC.—It is the duty of the receivers of a railroad company to see that their agents exercise ordinary care to see that its depot building is maintained in a safe condition for those of the public who might have business with them.

10. RECEIVERS—RAILROAD COMPANY—NEGLIGENCE OF EXPRESS COMPANY—LIABILITY.—The receivers of a railroad company will be liable to a visitor to its depot building for an injury received by the visitor where he was bitten by a dog in the custody of the express company, which transacted its business in the same building, the agents of the express company having knowledge that the dog was dangerous and vicious, it being the duty of the receivers to protect visitors while on the depot premises.

11. PRINCIPAL AND AGENT—EXPRESS COMPANY—VICIOUS DOG—ACTS OF AGENT.—Where the agent of an express company received a dog for delivery to the consignee thereof it is the agent's duty to keep the dog until delivered, and, having knowledge that the dog was vicious, to keep him restrained.

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

STATEMENT BY THE COURT.

On the 3d of August, 1913, the Missouri & North Arkansas Railroad Company was in the hands of receivers and being operated by them. R. M. Warner was in their employ as station agent at Leslie, Arkansas. He was also agent for appellant, Wells Fargo & Company Express. The office of the latter company was maintained in connection with that of the receivers, at the railroad depot.

Doctor Sheridan lived at Leslie, Arkansas. His son lived at Clarence, Missouri. The son shipped to his father, through Wells Fargo & Company Express, over the railroad, a large bull dog. The dog was received at the depot at Leslie on the 3d of August, 1913; was crated and had a chain on him. The crate was marked, "Be careful. Hands off." He was placed in the wareroom of the depot at Leslie, and on the afternoon of August 3, the consignee called for him. He did not take the dog out then, giving as his reason that he did not have the dog house ready for him. The express agent says that he did not take the dog because he did not have the money with which to pay the express charges. The dog had been crated three days before he got to Leslie. On the morning of the 5th of August, the owner still not having paid the charges and received the dog, he was uncrated. Mabrey, the check clerk at the depot, in the employ of R. M. Warner, stated that the consignee, Sheridan, showed him a letter from his son stating that he had shipped his father the dog; that he had bit a man, and he was shipping him to his father to keep awhile. Sheridan warned the witness to be careful with the dog. The witness told the agent, Warner, but he did not remember when he told him. Sheridan stated that he thought he told both Warner and his clerk, Mabrey, that his son said the dog was dangerous. He did not instruct them to take the dog from the crate. He did not refuse to immediately receive the dog because he was vicious, but was delaying in order to get a house for the dog so that he could put him in his barn. When he

went to the depot and told Mabrey, the clerk, about what was contained in the letter parties were around the crate poking at the dog. Sheridan told them that they had better let him alone.

The clerk, Mabrey, stated that the dog was "tolerably peaceable while he was in the crate and there was not anybody around him, but after they took him out and he was rested he seemed to be pretty bad. They kept him chained and he would lunge at anybody that came around. He had been in the crate a good long while and they took him out to stop his barking."

Warner, the agent, had seen the dog "lunge at lots of people." The dog was chained in the depot, being in the freight room some and in another room where they kept the ticket case and copying table some. He was kept in the freight room where people would go in to get their freight.

Agent Warner testified that he received the dog as the agent for the Wells Fargo & Company Express, and that he was in the custody of that company; that he had no authority from any one to take the dog out of the crate and he was not authorized to do so by any of his employers. He was taken out of the crate by witness' son or Mabrey, his clerk. He was not permitted to run at large around the depot, but was on the chain all the time. He stated that he did not see anything to indicate that the dog was vicious or dangerous; that he could handle him with ease and had no fear of him. He denied that Sheridan had shown him any letter from his son stating that the dog was a vicious or dangerous dog.

On the afternoon of August 5, the appellee, a man fifty-two years of age, went to the depot to get some sugar that had been shipped to him at Leslie. The agent's son had gone in the freight room after the dog and came out through the office with him. The dog was walking in front of the boy and the boy had hold of the chain. The appellee, Leslie, had gone into the depot to inquire about his sugar, and he states that as he stepped out of the depot door the dog grabbed him by the calf of his leg, biting him and inflicting a serious injury. He states

that the dog was in the hallway; that they came through out of the waiting room into the depot building, and that the dog bit him just as he went out at the door onto the platform.

The appellee sued the appellants' alleging the shipment of the dog; that the dog was vicious, and that the agents of the appellants were apprised of that fact; that they negligently uncrated the dog and permitted him to go free in the depot building, and negligently kept him at the depot, and that through such negligence the appellee received his injury, for which he asked damages in the sum of $5,070.

The receivers and the express company answered separately, admitting the shipment and denying the allegations of negligence. The appellant railroad company answered, alleging that its road was being operated by the receivers, and that it had no control over them, and otherwise adopting the answers of the other appellants.

The above are substantially the facts upon which the appellee recovered judgment against all of the appellants in the sum of $500, to reverse which is the object of this appeal.

W. B. Smith, J. Merrick Moore, H. M. Trieber and *Troy Pace,* for appellants.

1. The railroad company can not be held liable. 44 Ark. 322.

2. Nor can the receivers be liable. 99 Am. Dec. 438; 1 R. C. L. Animals 63.

3. Nor is the express company liable. 55 Atl. 237; 56 N. E. 879; 21 Oh. 302; 14 Atl. 461; 27 Pac. 17; 24 N. E. 216; 22 Am. St. 716; Burrows on Negl., § 150; Cooley on Torts, 412, note. The carrier is not the keeper or harborer of the dog in a legal sense. 17 L. R. A. (N. S.) 431, and 40 cases cited. A carrier is not liable except for negligence. 1 R. C. L. Animals, 71 Fed. Rep. 939; 16 L. R. A. (N. S.) 445; 99 Am. Dec. 438. See also, Am. Cas. 1912, c. 753.

S. *W. Woods,* for appellee.

1. If appellee is entitled to recover, damages should be awarded for loss of time, medical treatment, pain and suffering and dread of hydrophobia. 52 Vt. 251; 18 Tex. C. App. 690; 42 Atl. 723; 1 Cyc. 899.

2. Notice to the agent is notice to the principal. 29 Ark. 99; 21 *Id.* 22; 58 *Id.* 84; *Ib.* 446; 32 *Id.* 251; 1 Cyc. 898; 8 Oh. Dec. 92. A single vicious act of a dog may be such as to imply notice. 48 Am. Rep. 253; 57 Mo. 606; 1 Rul. Cas. Law. 1117.

3. When the express company accepted the dog the company became a common carrier and must use due diligence in its care. 7 A. & E. Enc. 554, 555; 93 U. S. 174; 62 Iowa 57; 99 Am. Dec. 438.

WOOD, J., (after stating the facts). (1) The appellant, Missouri & North Arkansas Railroad Company was in the hands of receivers, and the agents, through whose negligence appellee alleges his injury was received, were the agents of the other appellants and the appellant railroad company had no control over them. The appellant railroad company is, therefore, not liable. *Memphis & Little Rock Railway Co.* v. *Stringfellow,* 44 Ark. 322; *Ark. Cent. Ry. Co.* v. *State,* 72 Ark. 250.

The judgment against the appellant railroad company is reversed and the cause, as to it, is dismissed.

Agent Warner, who was in charge of the depot at Leslie, was the agent of the express company and the receivers, whom we will, for convenience, hereafter treat and designate as the appellants. They were maintaining the depot building in conjunction for the transaction of their business.

The court, among others, gave the following instruction:

"It was the duty of the defendants using said depot to use ordinary care to keep it in a safe condition for the benefit of those who had a legal right to go upon said depot premises, and I instruct you that one having business to transact with the defendants, or either of them, had a legal right to go to the said depot, and I instruct you that if from the preponderance of the testimony that

the said John Leslie had business to transact with said defendants, or either of them, that he had a legal right to go to said depot; and if you find from a preponderance of the testimony that the said John Leslie was injured while upon the premises of the said defendants, and that it resulted from the failure of the said defendants to use ordinary care to keep said depot in a safe condition, then you will find for the plaintiff."

(2) The court gave other instructions which, in effect, told the jury that if the appellants, the receivers and the express company, knew that the dog was vicious and dangerous, and, with such knowledge, kept the dog in the depot building whereby the appellee received the injury of which he complained then the appellants would be liable.

(3-4) These instructions considered together, as they must be, were not prejudicial to appellants. The court properly instructed the jury under the evidence, on the question as to whether or not the receivers had exercised ordinary care to keep the depot building in a safe condition for those who had business to transact with them. See *St. Louis & S. F. Rd. Co.* v. *Grider,* 110 Ark. 437. Warner was the agent of both appellants. In maintaining the depot and in carrying on their business, his knowledge, therefore, was the knowledge of the appellants. Whether or not the dog was a vicious and dangerous one, and whether or not the agent, Warner, knew that he was a vicious and dangerous dog were issues of fact for the jury to determine. There was evidence to warrant a finding that the dog was vicious and dangerous, and that appellant's agent knew of this fact. There was testimony also to warrant a finding to the effect that, knowing the vicious disposition of the dog, the appellant's agent was negligent in not keeping him restrained or in not removing him from the depot in such manner as to prevent injury to those who had legitimate business to transact with appellants and who were injured while about such business, and therefore that the receivers were negligent in not keeping the depot in a safe condition.

The appellants complain because the court refused to give the following prayer for instruction:

"You are instructed that the liability of an express company is not the same as that of an owner, because the company were bound by their contract to take and transport the dog and keep it a reasonable time to deliver over to the consignee, and are not presumed to be liable because they kept or harbored the dog, as an absolute owner would do."

This instruction was not applicable to the facts of the case and was calculated to confuse and mislead the jury. The general doctrine as to the owners of domestic animals is as follows:

(5) If one knowingly keeps a vicious or dangerous domestic animal, one accustomed to bite mankind, he is liable for injuries done by such animal, without proof of negligence as to the manner in which the animal was kept and handled. The mere keeping of such an animal, knowing its vicious and dangerous qualities, is at the risk of the owner (except as to trespassers) and renders him liable in damages to one injured by such animal. Without any proof of negligence, the owner of such an animal, having knowledge of its vicious and dangerous propensities, will be held liable in damages for injuries done by it. See 1 Ruling Case Law, "Animals," § § 33 and 59, and cases in note. 2 Cyc. 368 and note. Scienter in such cases is the basis of liability. *F. F. Harris* v. *Carstens Pk. Co.,* 86 Pac. 1125, 6 L. R. A. (N. S.) 1164, and note.

(6-7) The prayer for instruction ignored the evidence on the part of the appellee which tended to prove that the dog was vicious and dangerous and that the appellants knew of that fact. The express company was a bailee for hire of the dog, and proof of *scienter* on its part brings it within the general doctrine above stated. Having in its possession the animal and knowing its vicious propensities, as the jury were warranted in finding, the express company was as responsible for its safe keeping and was to the same extent liable for injuries inflicted by the dog as if it had been the owner thereof.

"One who has charge of a vicious dog, whether as owner or bailee, knowing him to be vicious, must restrain him and if he fails to do so will be liable in damages to any person injured thereby." *Marsel, by next friend,* v. *Bowman,* 62 Iowa 57. See also, *Frammell* v. *Little,* 16 Ind. 251.

The appellants contend that the court erred in refusing to grant prayers on their part submitting to the jury the question as to whether or not the uncrating of the dog and the manner of keeping and handling the same by agent Warner was within the scope of his employment and the line of his duty. But the court did not err in refusing to grant these prayers, as they were abstract, and, under the evidence, such prayers would have been confusing.

(8-9) There was no testimony to warrant the court in submitting to the jury the issue as to whether the agent, Warner, in the manner of keeping and handling the dog, was acting within the scope of his employment. The evidence shows that the consignment had not been delivered. The express company still had the dog in its keeping at the depot, and necessarily had to keep same so as not to cause injury to those who had business to transact with it. All these matters were proper too for the consideration of the jury on the issue as to whether or not the receivers were negligent in not maintaining the depot in a safe condition. There was no testimony to warrant the court in submitting to the jury the issue as to whether or not the agent, Warner, in his manner of handling the dog, was acting on his own responsibility and not as agent of the appellants. In his manner of handling the dog while the same was in the depot and undelivered to the consignee, the receivers were liable for failure upon his part to exercise ordinary care to see that the depot building was maintained in a safe condition for those of the public who might have business with them.

(10) The express company having knowledge of the vicious and dangerous propensities of the dog, would be liable, as bailee for hire, for the injuries inflicted under

the rule above stated, and the receivers would be liable because they owed appellee the duty to exercise ordinary care to maintain the depot in a safe condition, which would involve the duty of protection against the danger caused by the failure of the express company to restrain the dog. See *St. Louis, I. M. & S. Ry. Co.* v. *Shaw,* 94 Ark. 15.

(11) The appellants contend that the act of the son of the agent in removing the dog from the crate and of the agent himself in consenting for the dog to be taken from the depot was not within the line of the agent's duty, and that therefore appellants are not liable; and they cite *Baker* v. *Kinsey,* 38 Cal. 631, 99 Am. Dec. 438. In that case Baker sued Dyer and Kinsey to recover damages for personal injuries sustained from the bite of a vicious dog and recovered judgment against them. The testimony showed that Dyer was employed as keeper and collector of a toll bridge. Kinsey, his employer, was one of the proprietors of the bridge, and Dyer, without the knowledge or consent of Kinsey, procured a dog, while a pup, and kept him at the bridge as a companion because he had a fancy for dogs. The dog was vicious and accustomed to bite mankind. He was not securely kept and was suffered to go at large, without guard or muzzle. His disposition was known to Dyer, but Kinsey never heard of the dog. The Supreme Court held that it was not shown that the dog had been put there under Kinsey's direction, and the nature of Dyer's employment was not such as to authorize or require it to be put there, and therefore reversed the judgment as to Kinsey. The facts clearly differentiate that case from this. There it was not the duty of Dyer to have and keep the dog. Here, as the agent of the express company, Warner was required to have and keep the dog, and, having knowledge of his vicious and dangerous habits, to keep him restrained. As the agent of the receivers it was the duty of Warner to exercise ordinary care to see that the depot was kept in a safe condition. So as the agent of appellants Warner was acting strictly

within the line of his duty in the manner in which he kept and handled the dog.

The judgment is correct and it is therefore affirmed.

LOVELESS v. DAVIS.

Opinion delivered January 25, 1915.

1. CONTRACTS—EXCHANGE OF LANDS—MISREPRESENTATIONS—RESCISSION.—In order to vitiate a trade or exchange of lands, on the ground of fraudulent misrepresentations, the misrepresentations 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 to his injury.
2. CONTRACTS—MISREPRESENTATIONS—RESCISSION.—In an action to rescind a contract for the exchange of land, on the ground of fraudulent misrepresentations made by the defendant, if the means of information as to the matters represented are equally accessible to both parties, they will be presumed to have informed themselves, and if they have not done so they must suffer the consequences of their own neglect.
3. EVIDENCE—EXCHANGE OF LANDS—MISREPRESENTATIONS BY ONE PARTY—RESCISSION.—In an action to rescind a trade of real estate, testimony by a third party as to the statements made to him by defendant with reference to the character of the land, after the trade between plaintiff and defendant was closed, is admissible and competent as tending to discredit the testimony given by defendant on the trial of the case.
4. CONTRACTS—RESCISSION—EXCHANGE OF LAND—MISREPRESENTATIONS.—A trade of land between plaintiff and defendant will be rescinded where defendant, although he had never seen the land he was trading to plaintiff, and so informed the plaintiff, misrepresented the character of the land for cultivation, and its situation with reference to a well, a town and a railroad, and where the plaintiff relied on these statements in making the purchase, and although defendant offered to pay one-half of plaintiff's expenses if he would visit and inspect the land.

Appeal from Sebastian Chancery Court, Fort Smith District; *W. A. Falconer*, Chancellor; reversed.

STATEMENT BY THE COURT.

J. N. Loveless instituted this action in the chancery court against C. A. Davis and his wife to rescind a contract for the exchange of lands between them on account

of the alleged false representations made by the defendants to the plaintiff.

The record is very voluminous, the witnesses being examined and cross-examined at great length, and after a careful examination of the record we think the substance of the testimony is as follows:

On the 27th day of February, 1912, the plaintiff, J. N. Loveless, conveyed by warranty deed to the defendant, C. A. Davis, certain residence property in the city of Fort Smith, Arkansas, and in exchange therefor Davis conveyed to Loveless a section of land in Craine County, Texas. Loveless and Davis at the time were residents of the city of Fort Smith and had been for several months but did not become acquainted with each other until they began to negotiate for the exchange of these lands. Davis had moved there from Polytechnic, Texas, on account of the ill health of his wife. He owned a residence at that place and exchanged it to W. S. Essex for the section of land in Craine County, Texas. Neither of the parties had seen the land but traded upon the representations made to them by A. P. Nelms, a preacher, who had formerly lived in Craine County, near the land. At the time the exchange was made Essex owned four sections of land in a body, upon which there was a vendor's lien for $4,000, but there was an understanding that each section should be free from the lien upon the payment of $1,000. When Davis moved to Fort Smith he concluded to exchange his Texas property for residental property in Fort Smith and in order to affect that purpose went to certain real estate agents in Fort Smith. He finally became acquainted with R. S. Grigsby and C. A. Smith who undertook to sell or exchange the lands for him. He told them that he had never seen the land but that he had purchased it upon the representations of a preacher named A. P. Nelms, in whom he had great confidence. He told them there was a lien for $1,000 against the land; that a railroad ran through Craine County and that this land was close to the railroad, or, as a matter of fact, that the railroad cut off about three acres of the land; that there were

stock pens upon the railroad and on this land; that the nearest station to the land was the town of Metz, a flourishing town of 800 or 1,000 people; that there was a flowing well of water near the partition fence between this and an adjoining section; that the land was fenced with three strands of wire and cross-wired up to this partition well with posts made of new bois d'arc; that some of the land had been planted in onions and that he had been offered $12.50 an acre for it and had been advised not to take that sum because he could sell it for more by placing it on the market with other adjoining sections; and that the land was good, black, sandy land.

Grigsby testified to substantially the same state of facts, and both Grigsby and Smith stated that they had made these representations to Loveless at the instance of Davis, and that Davis subsequently made the same representations to Loveless; that he stated to them and to Loveless that he had never been on the land and made these representations as being told him by A. P. Nelms, who had been his agent when he exchanged his Texas property for the land, and that he had great confidence in him.

Before the trade was consummated Davis offered to pay one-half of the expenses of Loveless in going to Texas to examine the land. The land was about 800 miles from Fort Smith and the ticket and return would have cost something over $27.

The plaintiff Loveless testified that Davis told him there was a railroad running through the land cutting off about three acres of the northwest corner; that there was a six strand fence on the land; that there was a flowing well of water on the land near the southern line; that it was good agricultural land; that a part of it had been planted in onions; that it would rent for $3 an acre; that he had passed over the land on the railroad but did not stop off to examine it; that there were stock pens on the land and that the town of Metz was just across and beyond the stock pens and had from 800 to 1,500 inhabitants; that he had been offered $12.50 for the land and had refused to sell at that price; and that he relied

upon these representations made by Davis and for that reason did not accept his proposition to go down there to inspect the land.

After the exchange of the land had taken place Loveless went to Texas to examine the land. He testified that there was no flowing well of water on the land or near it; that there was a small well of water on the land adjoining but that it was several miles away; that the land was only enclosed by a cattle fence of three wires; that none of it had ever been put in cultivation and that it was entirely unfit for cultivation; and that it was only fit for grazing purposes.

Other witnesses who resided in Craine County testified that that county had only about two hundred inhabitants; that the land in question was only fit for grazing purposes and that its rental value for that purpose was only about ten cents per acre; that it was only worth about two dollars an acre; that it was unfit for cultivation; that there was no well on the land or near it; that the nearest water was a small well several miles away; that there were no stock pens on the land; that the town of Metz was eight or ten miles away and contained only about nineteen inhabitants and that most of these were Mexicans; that there were stock pens on the railroad at Metz, and also at another little station which was about the same distance from the land, or perhaps a little nearer; that in their opinion no water could be found on the land, or, as one of the witnesses expressed it, "you might as well climb as dig for water;" that the whole county is a dry, arid place, and wholly unfit for cultivation.

After the exchange of lands had been made between Davis and Loveless, Grigsby and Smith attempted to sell the land to one Harris, and Davis endeavored to assist them.

A Mr. Cannington, another real estate agent, represented Harris. He testified that Davis drew up a little plat of the land showing that there was a flowing well of water on the partition line between it and the adjoining section; that the town of Metz was located at the

corner of the section; that he represented that half of the land had been planted in onions; that he had been offered $12.50 an acre for it and refused it; that there was a switch on the land adjoining it and stock pens upon it; and that the land was fenced with a six wire fence and cross fences.

Davis testified that all the representations made by him as to the land were made from the information he had received from A. P. Nelms, a preacher, in whom he had great confidence; and that he expressly stated to Loveless, Grigsby and Smith that he had never been on the land and that the representations he made were those which had been made to him by Nelms.

He testified that the land was fenced on three sides with three strands of wire and joined a ranch on the west side which was fenced with wire; that the fence had heavy bois d'arc posts; that there was a well of water and some improvements on the adjoining section just over the line; and that the land was six or seven miles southwest of the little town of Metz.

He denied that he told them that there were stock pens and a railroad switch on the land or immediately adjoining thereto; and stated that he told them the stock pens and switch were at the town of Metz. He stated that Judge Essex, with whom he had exchanged his Texas property for the section, advised him not to take $12.50 per acre for the land and to hold it and let him sell it with his other land because thereby he could secure a higher price. He denied that he told him that any of the land had been cultivated.

A. P. Nelms testified that he had formerly lived in Craine County, Texas, and knew all about the land; that a large portion of the land was tillable and was very good soil consisting of sandy loam; that formerly it was thought that these lands were not productive, but that it was adapted to raising certain kinds of grain and fruit; that he told these facts to Davis and also told him about the fences and the well on the other section; that there was a vendor's lien of $4,000 on the four sections and that the holder of the lien had agreed to release the lien

as to the section in question upon the payment of $1,000.

Other testimony will be stated or referred to in the opinion. The chancellor found in favor of the defendant and the plaintiff has appealed.

P. E. Rowe and *Robert A. Rowe,* for appellant.

From the testimony, this case falls clearly within the rule authorizing a rescission where the fraudulent representations were made by one who either knew them to be false, or else, not knowing, asserted them to be true with intent to have the other party to act upon them to his injury. 101 Ark. 95. Fraud avoids a contract *ab initio.* 35 Ark. 483; 11 Ark. 58.

Where one in possession of land, professing to be familiar with its quality, by false representations induces another to contract in reference to it, he is liable for the deceit, whether he knew the representations to be false or not. 30 Ark. 535; 38 Ark. 334. See, also, 25 Ark. 41; 30 Ark. 362; 60 Ark. 387; 43 Ark. 454; 47 Ark. 148; 46 Ark. 125; 26 Ark. 604.

Winchester & Martin, for appellee.

In order to affect the validity of a contract, the misrepresentation must relate to some matter of inducement in which, from the relative position of the parties and their means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other; and if the means of information are alike accessible to both, so that by ordinary prudence and diligence each party might rely upon his own judgment, he will be presumed to have done so. Failing therein he will be held to abide by the result of his own inattention and carelessness. 19 Ark. 522; 101 Ark. 603.

HART, J., (after stating the facts). The law in this case is well stated in *English* v. *North,* 112 Ark. 489, 166 S. W. 577. In that case the court held:

1. "Misrepresentations which will justify the rescission of a contract for the sale of land must be of a decided and reliable character relating to some matter of inducement to the making of the contract calculated to

mislead the purchaser and induce him to buy on the faith and confidence thereof, and in the absence of means of information to be derived from his own observation and inspection, and must injure the party seeking to rescind."

4. "Where one who exchanged 125 acres of land for city property, not only misrepresented its value, but also represented that all except possibly ten acres was susceptible of cultivation in some form, when in fact not more than forty-five acres was tillable, though he had special information regarding the character of the land acquired by personal observation, and was told by the other party that he would take the land in reliance on such representations, and it appeared that the other party was injured by the exchange, a rescission would be decreed."

(1) So it may be taken as well settled in this State that in order to vitiate a trade on the ground of fraudulent misrepresentation, the misrepresentation 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 to his injury.

(2) It is also the law that 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 suffer the consequences of their own neglect.

The chancellor was of the opinion that a clear preponderance of the evidence showed that the defendant urged the plaintiff to visit the Texas land before the deeds had been exchanged and offered to pay half of the expenses of the trip. It was also the opinion of the chancellor that the plaintiff refused to go, but made an independent investigation of his own as to the value of the lands and as to their character.

We do not agree with the chancellor in this finding. It is true the defendant offered to pay half of the expenses of the plaintiff in order that he might go and look at the land himself before the trade was made. It is also true that the plaintiff did make inquiry of another

person who resided in Texas concerning the land, but this person did not live in the immediate vicinity of the land and only told the plaintiff that as a general proposition western lands were rising in value. The plaintiff stated that he did not accept the proposition of the defendant to go and examine the lands before he made the exchange for them because he relied upon the representations made to him by the defendant, and we are of the opinion that he had a right to rely upon these representations.

The defendant told him that he had never been on the lands and that the representations he made in regard to them were derived from Nelms, but Nelms was his agent when he exchanged his Texas land for them.

The preponderance of the evidence shows that the defendant represented to the plaintiff that the lands were of black sandy loam, and that part of them had been cultivated in onions; that the land was adapted to the cultivation of certain kinds of grain and fruits; also that there was a flowing well of water on the tract of land adjoining and that this well was situated near the partition line between this land and the adjoining section; that the lands were situated near Metz; that Metz was a thriving village of eight hundred people; and that there were stock pens and facilities for handling stock on the land.

The preponderance of the evidence shows that these representations were not true; that the town of Metz was situated at least eight miles away and that only nineteen people lived there, most of them Mexicans; that there were no stock pens or switches on the railroad nearer than the town of Metz; that there was no flowing well of water on the land, the nearest water being a small well on the section adjoining, several miles away from the partition fence; that one-half of the land was gyp, which was wholly unsuitable for raising any kind of crops, and that the other half was sand and crops of no kind could be raised on it.

The representations that the land could be rented for three dollars an acre was not true; it could only be

rented as pasture land and the rental value was only ten cents per acre.

Nelms, the preacher who represented the defendant when the exchange was made for the Texas land, testified that he told them there was a small well on the land adjoining but as we have already seen this well instead of being near the partition fence was several miles away and instead of being a flowing well was only a small well with a wind mill attached to it. Nelms also said that the land was a black sandy loam and was capable of raising good crops of different kinds of grain and fruit but the testimony of several other parties who resided in Craine County showed that there were only about two hundred people in the county; that the soil was entirely worthless for agricultural purposes and that no water could be procured on it by digging wells.

(3) Cannington, who tried to purchase the lands for Harris after the exchange in question was made, testified that Davis told him that the lands were situated right on the railroad; that Metz was a flourishing town of a thousand inhabitants; and that stock pens were situated on the railroad right next to the land. Though these statements of Cannington were made after the exchange had been made, the testimony was competent as tending to discredit the testimony given by Davis on the trial of the case.

(4) It will be remembered that Davis stated that he merely told Loveless what had been represented to him by his agent Nelms. Nelms testified as to what he had told Davis and under this testimony the plaintiff might well have believed that the land was susceptible to cultivation and was well worth the land which he exchanged for it.

These representations the plaintiff relied upon, and had a right to rely upon, and the preponderance of the evidence shows that the representations were not true. All of the witnesses who lived near the land testified that it was a dry, arid place, unfit for cultivation, with no water on it and none near it.

Under these circumstances we do not think it is a case for the application of the rule that where the means of information are alike accessible to both parties they must be presumed to have acted upon their own information and not to have relied upon the information given them by the other.

It follows that the judgment must be reversed and the cause remanded with directions to enter a decree in favor of the plaintiff in accordance with the prayer of his complaint.

TANNER v. STATE.

Opinion delivered January 25, 1915.

1. BIGAMY—EVIDENCE—MARRIAGE CERTIFICATE.—In a prosecution for bigamy the testimony of the minister who performed the second marriage that he was duly authorized to perform the same, and that he did so, is competent, although he did not sign the certificate of marriage.
2. BIGAMY—EVIDENCE—JUSTICE OF PEACE—COMMISSION—PROOF.—In a prosecution for bigamy the authority of the justice of the peace who performed the first marriage may be proved by his oral testimony, instead of by the production of the commission issued by the Governor.

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

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

1. The proof was sufficient to show that Crump was a justice of the peace, authorized to, and did, perform the marriage ceremony between appellant and Eula Hamilton.

2. The testimony of the witness Taylor alone is sufficient to establish the fact of the second marriage and to justify the introduction of the marriage license. 112 Ark. 47.

KIRBY, J. Appellant brings this appeal from a conviction of the crime of bigamy, under the following indictment (formal parts omitted):

"The grand jury, in the name and by the authority of the State of Arkansas, accuse Green Tanner of the crime of bigamy, committed as follows, towit:

"The said Green Tanner, in Montgomery County and State aforesaid, on the 23d day of December, A. D. 1906, did marry one Eula Hamilton, and her, the said Eula Hamilton, then and there have for a wife, and the said Green Tanner afterward, and while so married to the said Eula Hamilton, as aforesaid, towit: on the 12th day of August, 1911, in the County of Pike and State of Arkansas, feloniously and unlawfully did marry and take as his wife one Katie Watterson, and to her, the said Katie Watterson, was then and there married, his former wife being then alive, against the peace and dignity of the State of Arkansas."

It appears from the testimony that appellant was married to Katie Watterson on August 11, 1911, at the home of her father in Pike County, who testified that the ceremony was performed by F. B. Taylor, a minister, who went about the country preaching, but witness had not seen his credentials and did not know whether he was an ordained minister and authorized to solemnize marriages.

Rev. Mr. Taylor testified that he married Green Tanner and Katie Watterson at her father's house and identified the marriage license and certificate, which was objected to because the certificate was not signed. The court admitted it upon this testimony that it was the marriage license presented to him, that he solemnized the marriage by authority thereof and then filled out the certificate, which was in his handwriting. He testified further, that he was a regularly ordained minister of the gospel, and had been for thirty years, authorized to perform marriage ceremonies, that his credentials were of record in Texas, Oklahoma, and in Pike County, Arkansas.

The marriage license between appellant and Eula Hamilton in Montgomery County was introduced in evidence and J. T. Crump testified that he was a justice of the peace of Montgomery County in the year 1906, and

married Green Tanner to Eula Hamilton in that county on the 23d or 24th of December, that year. He identified appellant as the man he married to Eula Hamilton and stated that she was still living in Black Springs in Montgomery County.

Appellant moved to exclude this testimony because there was no certificate or commission in evidence, showing that said Crump was a justice of the peace. He testified himself that he was, and the father of Eula Hamilton also testified that appellant was married to her at his home in Montgomery County by Jim Crump, who was a justice of the peace and that they lived together as man and wife after the marriage. That he knew Crump was a justice of the peace because he ran for the office; witness voted for him, he was declared elected and he had had some lawsuits before him, after his election as justice of the peace. It was also stated that Eula Hamilton had married a Mr. Hendricks in March, 1912.

Appellant did not testify, nor has he favored us with a brief in this cause.

(1) The testimony of the minister who married appellant to his second wife, stating that he had performed the ceremony, was competent whether he had signed the certificate of marriage or not. He stated that he was a regularly ordained minister of the gospel and his credentials were recorded in Texas, Oklahoma and Pike County, this State; that he recognized the license upon which he had made out the certificate and the certificate as the one filled out by him. This with his statement that he had performed the ceremony was sufficient to show the marriage, which could be proved without the exhibition of the license and the certificate of the person performing the ceremony attached.

(2) Neither did the court err in permitting the justice of the peace who solemnized the first marriage to prove his official capacity by his statement of it instead of by the production of the commission issued by the Governor. It is not disputed that appellant married Katie Watterson, while his first wife from whom he was not shown to have been divorced was living, and

there is no testimony in the record indicating even that a divorce had ever been procured from this marriage, unless it be the statement that the first wife had married Mr. Hendricks in 1912.

Since for aught the testimony shows to the contrary, her said marriage may have been after divorce procured since the bigamous marriage of appellant to Katie Watterson, but if her marriage to Hendricks was invalid because no divorce had been granted from appellant, that fact would not relieve him from the penalty of the law in any event.

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

KANSAS CITY SOUTHERN RAILWAY COMPANY v. STATE.

Opinion delivered January 25, 1915.

1. RAILROADS—FULL CREW LAW—LENGTH OF LINE.—Act 116, Acts 1907, held to require a full crew of three brakemen on certain freight trains operated by railroads whose lines are over fifty miles in length, whether the fifty miles was wholly or only partially within this State.
2. RAILROADS—FULL CREW LAW—CONSTITUTIONALITY.—Act 116, Acts 1907, requiring certain railroads to carry full crews on certain trains; *held*, not to conflict with the Fourteenth Amendment and the commerce clause of the Constitution of the United States.

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

STATEMENT BY THE COURT.

Appellant brings this appeal from a judgment of conviction for violation of the "Full Crew Law" or "Three Brakeman Act" of Arkansas, Act No. 116, of the Acts of 1907, in Benton County, by operating a freight train, consisting of more than twenty-five loaded freight cars and a caboose, over its line of road in said county, with a crew of less than three brakemen.

It admitted operating a freight train over its line of railroad in Benton County, which it alleged was only

28.8 miles in length, with only two brakemen, and that its entire line of railroad is more than fifty miles in length, but denied that it had over fifty miles of railroad in Benton County, stating that its line in the said county, starting at Sulphur Springs enters the State of Oklahoma at a distance of 28.8 miles, the exact mileage between the Missouri line and the Oklahoma line being 28.83 miles and denying that the train was operated unlawfully or in violation of the act, alleging that same was not applicable to such train or the operation of its road in that county. It alleged further that the act was not applicable to its trains operated upon its road in said county and if held to be, challenged the act as in conflict with the commerce clause of the Constitution of the United States and as depriving it of its property without due process of law and denying it the equal protection of the law as guaranteed by the Fourteenth Amendment to said Constitution.

It further alleged said act was in conflict with the Interstate Commerce Act, approved June 26, 1906, and the amendments thereto.

From the agreed statement of facts upon which the case was tried, it appears that appellant is a corporation of Missouri, owning and operating a line of railroad from Kansas City through that State, Kansas, Arkansas, Texas and Louisiana to Port Arthur, a distance of over 700 miles. The road runs from Missouri through Benton County, Arkansas, 28.83 miles, into Oklahoma. On the date alleged, August 14, it was engaged in the transportation of freight over said portion of its line in Benton County, operating a train, consisting of twenty-six freight cars and a caboose, manned by a crew including only two brakemen. It operated a like freight train, consisting of twenty-seven cars and a caboose over its said line of road in Benton County on August 15, with a crew including only two brakemen, there being no strike among its employees at the time.

The line of road after leaving Benton County runs into Oklahoma and enters the State of Arkansas again near Fort Smith, where it extends into the State about

half a mile in the limits of said city. This is a part of a branch line running from Spiro, Oklahoma, on the main line, to Fort Smith. The main line enters the State of Arkansas again from Oklahoma near Howard, on its western boundary and extends through this State southward for about fifty-five miles, where it crosses Red River into the State of Texas and runs through that State for a distance of about twenty miles, the road therein being owned by the Texarkana & Fort Smith Ry. Co., and then enters the State of Arkansas again and extends through the southwest corner of Miller County a distance of 7.4 miles and then on into the State of Louisiana.

James B. McDonough, for appellant.

By its terms the law does not apply to a road less than fifty miles in length. Acts 1907, p. 295. As applied to roads more than fifty miles in length the act was upheld by this court, 86 Ark. 412, and by the United States Supreme Court, 219 U. S. 453, but the question raised here was not passed upon.

Section 1 of the act gives clearness and certainty of meaning to section 2, and necessarily refers to the length of line in Arkansas.

In the construction of a statute, the entire act must read as one; its meaning must be gathered from the whole, and such construction given to the several provisions as will render them consistent and give effect to each. 99 Ark. 149; 102 Ark. 213; 11 Ark. 44; 22 Ark. 369; 28 Ark. 200; 31 Ark. 119; 38 Ark. 205.

There is nothing in the act showing an intent to give extra-territorial effect to the statute, even if the Legislature had that power, and in the absence of language showing an intent to give it such effect, it will not be so construed. 95 Ark. 381; 66 Ark. 466; 82 Ark. 405; 101 N. E. (N. Y.) 894; 125 Pac. 812. No State has power to give its laws effect beyond its boundaries. 36 Cyc. 829, notes 21 and 23, and cases cited; 53 S. W. 809; 42 N. Y. 283; Sedgewick on Stat. Construction, 56, 57, and cases cited; 187 U. S. 617.

Statutes which impose burdens not known to the common law should be construed strictly in favor of those upon whom the burdens are imposed. 71 Ark. 556.

2. The full crew law, if applied to this line in Benton County, is void, because it is a burden upon interstate commerce. Art. 1, sec. 8, Const. U. S.; 210 U. S. 281; 95 U. S. 465; 201 U. S. 321; 202 U. S. 543.

3. If applied to appellant's lines in Benton, Sebastian and Sevier counties, the act is unreasonable and denies to appellant the equal protection of the laws, and deprives it of its property contrary to the Fourteenth Amendment. 118 U. S. 356; 165 U. S. 150; 174 U. S. 96; 183 U. S. 79; 184 U. S. 540; 232 U. S. 626; 230 U. S. 139; 229 U. S. 397; 230 U. S. 340; 42 L. R. A. (N. S.) 106.

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

1. The plain meaning and intent of the act was and is that all railroads authorized to do business in this State, whose roads are fifty miles or more in length and a part of which runs into or through this State, shall be subject to the provisions of the act. Acts 1907, p. 295, § 2; 86 Ark. 412; 219 U. S. 453; 165 U. S. 628.

2. It is not a burden on interstate commerce. 55 Law Ed., 290-296.

KIRBY, J., (after stating the facts). It is first contended for appellant that the act is not applicable to the operation of its road in Benton County, which is less than fifty miles in length within the State, therein. Section 1 of the act provides that no railroad company, etc., operating any line of railroad in the State, engaged in the transportation of freight, shall equip its freight trains, with a crew consisting of fewer men than an engineer, fireman, conductor and three brakemen, "regardless of any modern equipment of automatic coupler and air brakes, except as hereinafter provided." Section 2 provides the act shall not apply to any railroad company or officer of court, operating any line of railroad, whose line or lines are less than fifty miles in length, nor to any railroad in the State, regardless of length, where

the freight train operated shall consist of less than twenty-five cars, and "it being the purpose of this act to require all railroads in this State whose line or lines are over fifty miles in length engaged in hauling a freight train, consisting of twenty-five cars or more, to equip the same with a crew, consisting of not less than an engineer, a fireman, a conductor and three brakemen, etc.," and permitting the increase of the number of the crew.

Section 3 provides that the penalties of the act shall not apply during strikes of men in the service of the lines involved.

(1) The evident purpose of the act as therein declared, is to require all railroads over fifty miles in length, engaged in the operation of trains and the hauling of freight, to equip the freight trains of the designated length with the full crew including three brakemen and this relates to all railroads operating in the State, whose line or lines of road are more than fifty miles in length, whether they are fifty miles in length within the State or not.

If it had been the intention to require only such roads as operated a line fifty miles in length within the State words clearly manifesting that intention would have been used and not the expressions that were employed, which clearly manifest the intention to make this requirement of all railroads operating in the State, whose entire operative line is fifty miles or more in length. The law fixing the rate that may be charged for the carriage of passengers makes a like classification of railroads operating in the State of the length designated therein and it has not been questioned that the purpose and effect of such law was to fix the rate that might be charged for the carriage of passengers upon a road operated in the State, if the entire length of road was more than that designated in the statute, without regard to whether it was all in the State or not. It does not operate as an attempt to extend the authority of the State beyond its confines nor to give the law extra-territorial effect (*Leonard* v. *State,* 95 Ark. 381; *State* v. *Lancashire Ins. Co.,* 66 Ark.

466; *Anderson* v. *State,* 82 Ark. 405), but only as a classification of such lines as are required to comply with its provisions in order to protect the employees operating the trains and the public. This classification has been held reasonable and proper, both by this court and the Supreme Court of the United States. *Chicago, R. I. & P. Ry. Co.* v. *State,* 86 Ark. 412, s. c. 219 U. S 453.

In affirming the judgment of this court, declaring this act not a burden upon interstate commerce, nor in conflict with the commerce clause of the United States Constitution, the court said:

"It is too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the safety of all engaged in business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the State. Local statutes directed to such an end have their source in the power of the State, never surrendered, of caring for the public safety of all within its jurisdiction; * * * the statute here involved is not in any proper sense a regulation of interstate commerce, nor does it deny the equal protection of the law. Upon its face it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce, and for the protection of those engaged in such commerce." *Chicago, R. I. & P. Ry. Co.* v. *Arkansas, supra.*

(2) Thus has the contention of the appellant railroad company that said act is in conflict with the Fourteenth Amendment and the commerce clause of the Constitution of the United States been determined against it, both by our court and the Supreme Court of the United States.

Neither do we think there is any merit in appellant's contention that the conclusion herein announced is in conflict with *South Covington & Cincinnati Railway Co.* v. *City of Covington et al.,* 235 U. S. 537, which is an authority in its favor. There the court in

discussing the class of cases wherein the State may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by the commerce clause of the Constitution said: "The subject was given much consideration in the Minnesota Rate Cases, 230 U. S. 352, and the previous cases, dealing with this subject are therein collected and reviewed in the light of these cases and upon principle, the conclusion is reached that it is competent for the State to provide for local improvements to facilitate, or to support reasonable measures as to the health, safety and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce."

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

KANSAS CITY & MEMPHIS RAILWAY COMPANY v. HUFF.

Opinion delivered January 25, 1915.

1. RAILROADS—CONTRIBUTORY NEGLIGENCE—INJURY TO SERVANT OF RAILROAD COMPANY.—Under Kirby's Digest, § § 6652 to 6655, inclusive, where an employee on freight train service, on a railroad over thirty miles in length, works for more than sixteen hours and returns to work without eight hours rest, and is injured and sues to recover damages therefor, the defense of contributory negligence can not be set up.
2. RAILROADS—CONTRIBUTORY NEGLIGENCE—INJURY TO SERVANT OF RAILWAY COMPANY—MIXED TRAIN.—Kirby's Digest, § § 6652-6655, limiting the defense of contributory negligence in certain cases where an employee is injured by the operation of freight trains, applies to an injury received by an employee while in the operation of a mixed train which carried both freight and passengers.
3. RAILROADS—INJURY TO SERVANT—DEFENSES—CONTRIBUTORY NEGLIGENCE—DEGREE OF NEGLIGENCE.—In a suit instituted by an employee against a railway company for damages due to negligence, brought under section 1, Act 88, page 55, Public Acts 1911, the defense of contributory negligence is available unless the carrier is more negligent than the servant, or where the carrier is guilty of the violation of any law enacted for the safety of the employee, which violation contributed to the injury sued for.
4. RAILROADS—INJURY TO SERVANT—CAUSE—CONTRIBUTORY NEGLIGENCE.—In an action for damages for an injury to the servant of a rail-

way company, for the defense of contributory negligence to be unavailing under Act 88, Public Acts 1911, by reason of a violation of the provisions of Kirby's Digest, § § 6652 to 6655, relating to the hours of employment, it must be shown that the working of the servant overtime in some manner or degree contributed to the injury.

5. RAILROADS—INJURY TO SERVANT—WORKING SERVANT OVERTIME—DEFENSES.—A railroad, in an action for damages brought by an injured employee, will not be deprived of pleading plaintiff's contributory negligence, as provided in Act 88, Public Acts 1911, simply because the servant had been worked overtime.

6. RAILROADS—INJURY TO SERVANT—DEFENSES—NEGLIGENCE.—In an action by an employee of a railroad company for damages due to an injury caused by negligence, under Act 88, Public Acts 1911, his action could not be defeated by the plea of assumption of risk, nor the defense of contributory negligence, unless his negligence in performing his duties was greater than that of the other employee of defendant which caused his injury, and, further, if the fact that plaintiff had been worked overtime contributed to his injury, then the degree of his negligence was immaterial, and his right to recover could not be defeated by any proof of contributory negligence on his part.

7. RAILROADS—INJURY TO SERVANT—OBSTRUCTIONS.—Under Act 88, Public Acts 1911, in an action for damages for an injury to a servant thereof, due to negligence because of "any insufficiency of clearance of obstructions," a continuing duty rests on the railway company to remedy such obstructions, and the phrase *held* to mean anything that would impede the safe operation of a train or imperil the safety of any one engaged in its operation, and no knowledge of any failure to perform this duty imposes upon the servant any assumption of risk.

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

Dick Rice, for appellant.

1. This action did not arise out of any of the provisions of Act No. 88 of 1911, and the doctrine of comparative negligence was, therefore, erroneously injected into the case. The injury complained of does not come within section 1 of the act, because it did not result in whole or in part from the negligence of any of appellant's officers, agents or employees; and it does not come within section 2, because the injury was not due to any defect in any car or cars, track or roadbed. The doctrine of

contributory negligence and assumed risk should be applied. 90 Ark. 543; 12 So. 88; 79 Mass. 59.

Appellee assumed the risk. 129 S. W. 532; 56 Ark. 232, 19 S. W. 600; 139 S. W. 960.

2. Appellant is not deprived of the defense of assumed risk by sections 5622-5624, Kirby's Digest. Under our law local freight trains are passenger trains. Kirby's Dig., § 6705; 71 N. W. 23; 117 S. W. 1173.

Appellee, pro se.

Appellant would have been liable under the law as it stood prior to the passage of Act No. 88, for it is well settled that a servant does not assume any risk arising from the negligence of the master. 77 Ark. 367; *Id.* 459; 53 Ark. 117; 70 Ark. 295; 48 Ark. 333. Appellant was not entitled to interpose the defense of contributory negligence. Kirby's Dig., § § 6652, 6654. The train in question was not a passenger train. 30 Cyc. 801, note 26; Kirby's Dig., § 6594; 52 Ark. 517; 76 Ark. 520; 94 Ark. 74; 87 Ark. 109.

SMITH, J. Appellee recovered damages for an injury sustained by him, which he detailed as follows: He was employed as a brakeman, and his run extended from Rogers to Fayetteville, the entire length of appellant's road, a distance of 104 miles, and his train was a local freight train, which did the local switching at all stations. He had instructions from the conductor at the station of Highfill to set out two cars at Springtown, and upon the arrival of the train, at the last named station, he proceeded to execute the orders previously given him, and he further testified as follows: "I cut the cars where I should, took out the box car and spotted it, came back to get the flat car, and when getting ready to take out the flat car the conductor gave me the signal to couple in the air; I had left the switch unlocked to set out the flat car, after I took out the box car and spotted it, so when he gave me the signal I went over the flat car to get to the switch to lock it, and by that time the train was in speed five or six miles an hour, and I had to run to catch it; I stumbled and fell and the train ran over my foot; I

left the switch unlocked to go back and put this other car in, as he had instructed me to set out two cars; he instructed me to set out the box car first and spot it and to set out the flat car in the clear; when I got over the flat car to get to the switch to lock it, I couldn't go west on account of the cattle guard; the cattle guard was in bad condition; was just one step to the switch, so that throwed me to go east; I thought it was the safest to go on, so I went up there, and as I got in motion with the train I hit a rock, missed my hand hold, stumbled and fell and the train run over my foot." The rock over which appellee stumbled and fell was described as being about the size of a man's head, and had been lying on the track for some days. It was shown that by the rules of appellant any employee would be discharged who left a switch unlocked.

It is said that the concurrence of the presence of the rock on the track and the premature signaling of the train to start, in view of the conductor's change in the switching directions without advising appellee of that change, caused the injury.

A number of instructions were given at the trial at the request of both appellant and appellee, and it is conceded that the instructions are conflicting, in that the court submitted questions of assumed risk and contributory negligence, and by instruction numbered 5, given at the request of appellee, eliminated those questions from the consideration of the jury. It is urged, however, that the instruction given at the request of appellant was erroneous in submitting those questions to the jury, and that appellant can not complain because the jury failed to follow instructions which should not have been given. Instruction numbered 5 was as follows:

"The court instructs the jury that if you find, from a preponderance of the evidence, that the plaintiff sustained the injuries alleged in the complaint, by reason of the defendant's conductor negligently causing the train on which plaintiff was employed as brakeman to move away from the station at Springtown at a rapid rate of speed, while the plaintiff was on the opposite side

of said train for the purpose of locking the switch and in the performance of the duties required of him, then you should find for the plaintiff."

We will not set out the other instructions given and refused, nor the various exceptions to the action of the court in giving and refusing instructions, as our discussion of this fifth instruction indicates our view of the law of this case.

(1) Appellant's railroad is more than thirty miles in length, and appellee, after having worked for more than sixteen hours, returned to his employment without having had eight hours' rest. By sections 6652 to 6655, of Kirby's Digest, it is provided that where under the above circumstances, a servant is injured, and brings an action to recover damages resulting from any accident which occurs while the servant is so employed, the defense of contributory negligence shall not be interposed. And, in addition to the deprivation of this defense, the railroad becomes subject to a penalty to be recovered in a civil action in the name of the State.

(2) The above sections do not apply to passenger trains, and it is said that they are not applicable here because the train on which apellee was employed carried passengers. This, however, is not the test. This was a local freight train carrying a caboose, and such trains are required to carry passengers, but they are, nevertheless, freight trains. The Legislature, in exempting passenger trains, evidently had in mind that the trains on which this protection was needed were freight trains, which might be broken up in transit and which would require switching.

An act numbered 88 was passed by the General Assembly and approved March 8, 1911. See page 55, of the Public Acts of 1911. This act was entitled, "An Act regulating liability of employers for injuries to employees," and by its provisions undertook to confer a cause of action upon any employee injured as the result of the existence, or concurrence, of any of those things there made the basis of a cause of action. Section 3 of this act is as follows:

"In all rights of action hereafter arising within or by virtue of this act or any provision of the same for personal injury to an employee, or where such an injury has resulted in his death, the fact that an employee may have been guilty of contributory negligence shall not bar a recovery; *provided,* that the negligence of such employee was of a lesser degree than the negligence of such common carrier, its officers, agents or employees; *provided, further,* that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier, its officials, agents or employees, of any law enacted for the safety of employees or persons contributed to the injury or death of such employee, and such employee shall not be held to have assumed the risk of his employment in any action arising out of any of the provisions of this act."

Section 1 of the act recites the "rights of action" referred to in section 3, but working an employee over time is not there named as one of these "rights of action." Where there is a right of action under section 1, that action can not be defeated by the defense of assumption of risk and is not, necessarily, defeated because the servant may have been guilty of contributory negligence.

An injured employee might have a cause of action which was not created by section 1 of the above act, and his right to recover damages could not be defeated by the defense of contributory negligence where the employee had been worked overtime. In such a case the jury would not inquire whether the master's negligence was greater than that of the servant, nor, indeed, would any inquiry be made about the servant's negligence, for that would be immaterial. The defense of assumption of risk would remain, but not that of contributory negligence.

(2) But if a right of action grew out of this Act 88, the defense of assumed risk is denied the master, and the defense of contributory negligence is not available unless the negligence of the servant is greater than that of the master. But the right to plead contributory negligence in such action is further limited by the proviso

"that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier, its officials, agents or employees, of any law enacted for the safety of employees or persons *contributed* to the injury or death of such employee." This last proviso, limiting the right to plead contributory negligence, does not read that that defense may not be interposed where the injury occurs *while* any law enacted for the safety of the employee is being violated, but its language is that such defense may not be interposed if the violation of such law contributed to the injury or death of such employee. We conclude, therefore, that in any suit dependent upon section 1, of Act No. 88, the defense of contributory negligence is available unless the carrier is more negligent than the servant, or where the carrier is guilty of the violation of any law enacted for the safety of the employee, which violation contributed to the injury sued for.

(4-5) If one would avail himself of the benefits of this Act No. 88, he must come within its terms, and we can not read into this act the provisions of sections 6652 to 6655, of Kirby's Digest, for the purpose of depriving the carrier, against which suit is brought under the provisions of this Act No. 88, of the defense of contributory negligence, unless it be shown that working the servant overtime in some manner or degree contributed to his injury. In other words, the question of fact should be passed upon by the jury whether working the servant overtime in any manner contributed to his injury, and if the jury should find that it did, then the defense of contributory negligence is not available. But under the facts of this case the court should not have assumed, as a matter of law, that the defense of contributory negligence was not available to the appellant simply because the servant had in fact worked overtime.

Most of the legislation on this subject is modeled after the Federal Employer's Liability Act of April 22, 1908, and among the States which have enacted legislation patterned after that act is the State of Michigan,

and, while our act is not a copy of the Michigan act, it is so similar to the one of that State as to suggest that it served as a model for our statute. Still, changes of a nature so material were made that we can not apply the rule that, in adopting this statute from Michigan, we intended also to adopt the construction given the statute by the courts of that State.

Section 1, of Act No. 88, reads as follows:

"That every common carrier by railroad in this State, shall be liable for all damages to any person suffering injury while he is employed by such carrier, or, in case of the death of such employee, to his or her personal or legal representative, for the benefit of the surviving widow or husband and children of such employee; if none, then to such employee's parents; if none, then to the next of kin of such employee, for such injury or death resulting in whole or in part for the negligence of any of the officers, agents, or employees of such carrier, or by reason of any insufficiency of clearance of obstruction, of strength of roadbed and tracks or structures, or machinery and equipment, of lights and signals in switching and terminal yards, or rules and regulations and of number of employees to perform the particular duties with safety to themselves and their co-employees, or of any other insufficiency; or by reason of any defect, which defect is due to its negligence in its cars, engines, motors, appliances, machinery, track roadbed, boats, works, wharves or other equipment."

This legislation was first enacted in jurisdictions where the common-law rule in reference to fellow-servants was in force, and in the case of *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492, the court construed the phrase, "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier." This quotation appears in the Federal Employers' Liability Act, and it will be observed that our act copies that phrase. Interpreting the section of the Federal statute in which the above phrase appears the Supreme Court of the United States in the above cited case said:

"This clause has two branches; the one covering the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; * * *"

There was the same necessity in some other jurisdictions for language of this character to abolish the common-law rule in regard to fellow-servants. It is true there was no necessity in this State, as the common-law rule on this subject had been changed by previous legislation. While there was no necessity under the law of this State for this phrase to change the common-law rule in regard to fellow servants, yet the language above quoted creates a right of action under this Act No. 88, where the servant's injury was caused by the negligence of a fellow servant.

(6) Having indicated our construction of this Act No. 88, there remains only the duty of applying that interpretation to the issues of this case. We think the proof is sufficient to require the submission to the jury of the question whether, under the circumstances, the conductor was negligent in signaling the train to start in the manner in which he did, after having told appellee that two cars were to be spotted, and that without advising him of the change in the switching directions. No defect in the cattle guard was shown. If this conduct of the conductor prevented appellee, while himself in the exercise of due care, from performing his duties with safety to himself, then the conductor's act was a negligent one, provided it was the proximate cause of the injury. The jury should be told that, if these issues were found for appellee, his right of action could not be defeated by the defense of assumption of risk, nor by the defense of contributory negligence, unless the negligence of appellee in performing his duties, in the manner in which he did, was greater than that of the conductor, and subject to the further qualification that, if they should find that the fact that appellee had worked overtime contributed to his injury, then the degree of his negligence

was immaterial and his right to recover could not be defeated by any proof of contributory negligence on his part.

We think the presence of the rock is a fact to be considered by the jury in determining the question of appellant's negligence and to be given such weight, if any, as it should have in the determination of that question. But we do not agree with appellee's contention that the mere presence of the rock itself constituted a right of action under section 1 of Act 88. Appellee's view is that the presence of the rock constituted an "insufficiency of clearance of obstructions." The phrase quoted evidently relates to obstructions of a permanent character. This view is sustained by the opinion of the Supreme Court of Georgia, construing a similar statute in that State, in the case of *Hubbard* v. *Central of Georgia Railway,* 63 S. E. 19, 19 L. R. A. (N. S.) 738.

(7) Prior to this legislation the law was that the carrier's failure to exercise care to make the servant's place safe did not sustain the right of recovery, where the servant was aware of this failure and pursued his employment after acquiring this knowledge without any promise of rectification or repair. Under this act a continuing duty rests upon the carrier to remedy "any insufficiency of clearance of obstructions," and no knowledge of any failure to perform this duty imposes upon the servant any assumption of risk, and we think the phrase refers to anything that would impede the safe operation of a train, or imperil the safety of one engaged in its operation.

The fifth instruction set out above does not conform to the views here expressed, and the judgment of the court below is, therefore, reversed and the cause will be remanded for a new trial.

McCULLOCH, C. J., (dissenting). I think the court is wrong in holding that, in a suit based on the Employers' Liability Act of this State (approved March 8, 1911), where the injury to the servant occurred during a period of time he was being overworked in violation of the provisions of Kirby's Digest,

§ 6654, it is necessary, in order to eliminate the defense of contributory negligence, to show that the fact of the servant being worked overtime contributed to the injury. The court has not, I think, correctly construed the last proviso of section 3 of the Employers' Liability Act. That provision obviously refers to a violation by the employer of some affirmative duty imposed by statute for the safety of employees, and it entirely abolishes the doctrine of contributory negligence in cases where the injury is caused by a violation by the carrier of such affirmative statutory duty. It has no reference to the statute which forbids the working overtime of railroad employees, for that statute itself declares that the defense of contributory negligince shall not be interposed in an action brought to recover damages resulting from an injury which occurs to an employee while detained in service more than the prescribed number of hours.

The act of 1911 was passed in the light of existing statutes and repealed them only to the extent of repugnancy. There is no repugnancy whatever between the two statutes and they may be read together in perfect harmony. It is a mistake, in my judgment, to undertake to subordinate the provisions of the statute concerning working employees overtime, to the new statute, and it defeats the wholesome effect of both, for the purpose of the lawmakers in the first statute was, in cases where a railroad employee is injured while being worked overtime, to shut off all inquiry as to contributory negligence on his part, and there is no indication of an intention on the part of the Legislature in passing the act of 1911, to change that rule in cases brought under that act. The view that the court now takes completely nullifies the old statute about working employees overtime, so far as concerns any application of it to a suit under the Employers' Liability Act, for it is impossible to prove that working overtime caused the injury. That is the reason why the Legislature passed the first statute, because they recognized the fact that an employee who had worked overtime was not in a condition to do so, and if he was in-

jured there should be no inquiry as to the fact of his being guilty of negligence.

My conclusion, therefore, is that there was no prejudicial error in giving instruction No. 5, for it is undisputed that appellant was, when he was injured, being worked overtime contrary to the provisions of section 6654, and the question of contributory negligence was thus entirely eliminated from the case.

BLACK v. SPECIAL SCHOOL DISTRICT No. 2.

Opinion delivered January 25, 1915.

1. LEGISLATIVE ACTS—HOW OPERATIVE.—The presumption is that all legislation is intended to act prospectively and not retrospectively.
2. BANKS—DEPOSIT OF PUBLIC FUNDS—LIABILITY OF DIRECTORS.—Act No. 113, Acts 1913, page 462, does not change the liability of shareholders in a banking corporation, as fixed by Kirby's Digest, § § 1990-1993.
3. BANKS—PUBLIC FUNDS—LIABILITY OF SHAREHOLDERS.—Only the collectors and treasurers named in Kirby's Digest, § 1990, who have deposited public funds with a banking corporation, can have the benefit of the section, and the stockholders of a bank are only liable for such deposits as are made in accordance with this section.
4. BANKS—DEPOSIT OF PUBLIC FUNDS—FUNDS OF SCHOOL DISTRICT—LIABILITY OF STOCKHOLDERS.—Where a deposit of school funds is made by the officers of the school district, it is necessarily made for the benefit of the county treasurer, as the legal custodian of all such funds.
5. SCHOOL DISTRICTS—CUSTODIAN OF FUNDS.—The directors of school districts, whether common or special, are not the custodians of the funds of their respective districts.
6. SCHOOL DISTRICTS—FUNDS—TREASURER—SALE OF BONDS.—The county treasurer is the custodian of funds derived from the sale of bonds of a school district, and of all the funds belonging to the various districts of the county, whether common school or special.
7. SCHOOL DISTRICTS—FUNDS—LIABILITY OF STOCKHOLDERS OF BANK—PARTIES.—Where funds of a school district are deposited in an incorporated bank, under Kirby's Digest, § 1990, they are so deposited for the county treasurer who is the custodian thereof, and the stockholders of said bank are liable for the same when the bank fails to pay over said deposit on demand; and in an action against the stockholders to collect the amount of the deposit, while the county treasurer is a proper party to the action, it is not fatal to the action if he is not joined.

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

E. F. Friedell, E. B. Buchanan and *Carmichael, Brooks, Powers & Rector,* for appellant.

1. Neither a special school district, nor its board of directors is authorized by the statute to sue. Kirby's Dig., § 1990. Being a penal statute and in derogation of the common law, it must be strictly construed. 59 Ark. 356; 65 Ark. 532; 82 Ark. 251.

As between the special school district and the trust company, the relation of lender and borrower existed. Appellee stands in the same relation to the trust company as any other individual and is entitled to no greater or different protection. 98 Ark. 294; 69 Ark. 43.

2. The appellee had no vested right in a remedy given by the statute which could not be taken away from it by the Legislature. 43 Ark. 420; 48 Ark. 187; *Id.* 519; 83 Ark. 344; 56 Ark. 152; 93 U. S. 108; 10 Wis. 481; 36 Wis. 344; 109 U. S. 285; 113 U. S. 646; 31 Ind. 219; 2 Peters 386, 413; 9 Bush (Ky.) 351; 101 U. S. 433; Cooley, Const. Lim. (7 ed.) 544; 2 Sutherland, Stat. Const., (2 ed.) 285; Endlich, Int. Stat., par. 479.

3. Act 113 of the Acts of 1913, was intended to cover the entire liability of stockholders, and was passed after the decision of *Warren* v. *Nix,* 97 Ark. 374, and it must have been intended to repeal section 1990, of Kirby's Digest. 92 Ark. 600; 100 Ark. 504; 101 Ark. 238; 88 Ark. 234; 80 Ark. 411; 82 Ark. 302; 105 Ark. 77; 72 Ark. 8; 76 Ark. 443; *Id.* 32; 70 Ark. 25; Sutherland, Stat. Const., § 140.

A. S. Gibson, Louis Josephs, John N. Cook, Pratt P. Bacon, Webber & Webber and *W. H. Arnold,* for appellant stockholders.

No provision is made in the statute for a suit against the stockholders other than in favor of collectors of taxes, county treasurers and treasurers of cities and towns, and the courts can not amend it by extending its provisions to apply to school districts or any other class of deposi-

tors. 46 Ark. 163; 75 Ark. 542; 71 Ark. 561; 82 Ark. 247; 74 Ark. 306.

Gustavus G. Pope, for appellee.

1. This being a deposit of public funds, the stockholders are primarily liable. Kirby's Dig., § § 1990-1993; 139 Fed. 114; 97 Ark. 385. If they are primarily liable, it can make no difference, so far as they are concerned, whether the funds belonging to the special school district were deposited in the name of the county treasurer or in the name of the district. 84 Ark. 520.

The deposit in the name of the district carried with it notice to the stockholders that it was a public fund, as much so as if it had been deposited in the name of the county treasurer. The statute, section 1993, Kirby's Dig., defines public funds, and its definition is broad enough to include the proceeds of the sale of bonds, or any other funds belonging to the district; and this definition applies to the amendment of 1903. 91 Ark. 243; 89 Ark. 598; 73 Ark. 600; 55 Ark. 389.

2. The court will not confine itself to a mere literal construction of the statute, but will look to the intention expressed in it. 109 Ark. 556; 102 Ark. 373.

3. The fund in this case was unquestionably a deposit, credited on the pass book as such, and payable on demand. 98 Ark. 385.

4. The banking act, Acts 1913, could not affect the liability of the stockholders, because the trust company never complied with that act, and because it went into the hands of a receiver before the act went into effect. 110 Ark. 161.

It does not repeal the public fund act by implication or otherwise. 92 Ark. 600.

SMITH, J. Special School District No. 2, of Miller County, Arkansas, by its directors, sued the stockholders of the Texarkana Trust Company, to recover the sum of $3,217.66, which had been deposited with the trust company prior to October 1, 1913, by the directors of the school district, the character of the funds being known at the time the deposit was received. The trust com-

pany was placed in the hands of a receiver on November 12, 1913, and its affairs are now being administered under the insolvency laws of this State. This deposit was derived principally from the sale of bonds, although the amount was credited by interest allowed, and by the proceeds of the sale of a certain lot, and by some insurance collected. It is sought to charge the directors of the trust company with liability for this deposit under the provisions of sections 1990-1993, of Kirby's Digest, and this appeal involves the applicability of those sections to the facts of this case, the trial court having directed a verdict in favor of the school district.

It is said, too, that Act No. 113, of the General Assembly approved March 3, 1913, page 462, supersedes the above numbered sections of the Digest, as it undertakes to cover the entire subject of the liability of shareholders in a banking corporation. It is urged that section 36 of this banking act of 1913 accomplishes this result. That section reads, as follows:

"Section 36. The stockholders of every bank doing business in this State shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock; *provided,* that persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to liability as stockholders, but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust fund would be, if living, and competent to act and hold the estate in his own name."

(1-2) It is unnecessary to decide here the liability of shareholders in banking corporations where that liability accrues after the banking act of 1913 became effective. The facts here are that this banking act of 1913 was not in force at the time the liability of appellants became fixed. The deposit in this case was made and the trust company had failed and been placed in the

hands of a receiver before this banking act was in force. The presumption is that all legislation is intended to act prospectively, and not retrospectively. Sections 1990-1993, of Kirby's Digest, were intended for the protection of the custodians of the public funds therein named, and we find nothing in the banking act to indicate any purpose to change the liability of shareholders of banking institutions in which public funds had been deposited where that liability had become fixed by the failure to pay over as required by those sections. And we need not, therefore, consider the power of the Legislature to change this liability, had such purpose been manifested by the banking act.

By an act numbered 137 of the General Assembly of 1891, found at page 230, of the acts of that year, it was enacted that "It shall be unlawful for any officer of this State, or of any county, township, city or incorporated town in this State, or any deputy clerk or other person employed by any such officer, having the custody or possession of any public funds, by virtue of his office or employment, to use any of such funds in any manner whatsoever for his own purpose or benefit, or to loan any of such funds to any person or corporation whomsoever or whatsoever, or to permit any person or corporation whomsoever or whatsoever, to use any of such funds, or to pay or deliver any such funds to any person or corporation, knowing that he is not entitled to receive it, or for any such officer to wilfully fail or omit to pay over any such funds to his successor in office at the expiration of his term of office."

The Legislature of 1903 amended this act by the addition of the following proviso:

"But collectors of taxes, county treasurers and treasurers of cities and incorporated towns may deposit the public funds in their custody in incorporated banks for safekeeping; and the said officers and the sureties on their official bonds, the bank and the stockholders of the bank shall be liable for all funds that such bank on demand shall fail to pay to the person entitled to receive the same."

Section 1993 of Kirby's Digest, is a portion of the above-mentioned act of 1891, and it provides:

"For the purpose of this act 'public funds' shall be construed to mean all lawful money of the United States, and all State, county, city, town, or school warrants or bonds, or other paper having a money value, belonging to the State, or to any county, city, incorporated town or school district therein."

It is thus seen that by the act of 1891, it was made unlawful for the custodian of public funds to make a general deposit of such funds with any bank or trust company; but by the act of 1903, (Kirby's Digest, § 1990), collectors of taxes, county treasurers and treasurers of cities and incorporated towns were permitted to deposit funds in their custody in incorporated banks for safekeeping. And, when so deposited, the stockholders of such bank were made liable for the deposit, upon the failure of the bank to pay the deposit on demand to the person entitled to receive it.

It is said that this act should be strictly construed and that, when so construed, it can have no application to this deposit, for the reason that it was made by school directors, and not by a collector of taxes, nor by the treasurer of any county, city or town, and that this act inures only to the benefit of collectors and treasurers, and that no other persons depositing public funds can claim the benefits of its provisions.

(3-4) The majority of the court are of the opinion that only collectors and the treasurers named can have the benefit of this act, and the stockholders of the bank are, therefore, only liable for such deposits. The majority of the court are further of the opinion that, although this deposit was made by the officers of the school district, it was necessarily for the benefit of the county treasurer, as the legal custodian of all such funds.

(5) The directors of school districts, whether common school or special, are not the custodians of the funds of their respective districts. No provision is contained in the law for the election of any member of a school board as treasurer of such board. It is contrary to the

spirit and genius of our laws that any one should handle public funds except bonded officers, whose bonds are conditioned to faithfully account for all moneys coming into their hands by virtue of their offices.

Section 46 of article 7 of the Constitution of this State names the officers to be elected by the qualified electors of each county, and, among others, "one treasurer, who shall be ex-officio treasurer of the common school fund of the county."

All special free school districts are authorized by sections 7696 to 7699 of Kirby's Digest to borrow money for certain designated purposes, and to mortgage the property of the district as security therefor and to evidence the indebtedness by certificates of indebtedness issued by the board of directors of the school district. Section 7697 provides that such evidences of indebtedness, whether warrants or promissory notes, shall be as valid as if there were money in the county treasury to pay them at the time they were drawn, and provides that such evidences of indebtedness need not be registered with the county treasurer till the time for payment, but shall be drawn upon the building fund and paid out of that fund in the order of their date, as that fund is collected by successive levies of taxes.

(6) It is true it is not expressly provided that the treasurer shall be the custodian of the proceeds of money derived from the sale of bonds, but the context of the sections above quoted from makes it plain that the Legislature so intended, and that the Legislature assumed that the treasurer would necessarily be the custodian of such funds, without express provision to that effect.

The section of the Constitution quoted mentions only "common school fund," but no provision is made for any other officer to be the custodian of public funds, after the same have been collected.

Various sections of the Digest, which we need not set out, defining the duties of the treasurer and providing for his settlements, together with various sections of the statutes relating to the conduct of the public schools of the State, and the disbursement of their funds, make it

evident that the Legislature contemplated the county treasurer should be the custodian of all the funds belonging to the various districts of the county, whether common school or special.

The case of *Helena Special School District* v. *Kitchens,* 108 Ark. 137, does not conflict with this view. It was decided in that case that the county treasurer was not entitled to commissions upon the proceeds of a sale of bonds issued by the Helena Special School District, but it was not there decided that the treasurer was not the proper custodian of the money. It does appear, from the statement of facts in that case, that the funds derived from the sale of the bonds were never placed in the treasurer's hands; but the right to the custody of those funds was not involved in that litigation. Indeed, it appears, from the statement of facts, that the fund had been entirely disbursed by the officers of the district in the construction of the buildings, for the payment of which the bonds had been issued. The decision in that case was uninfluenced by the fact that the treasurer had never had the custody of the money.

In the case of *Honey* v. *Greene County,* 102 Ark. 106, we held, in a case where the county treasurer had had the custody of certain drainage funds under the general drainage law of the State entitles him to such custody, that no commission could be charged because none had been provided for. And in the more recent case of *Haley* v. *Thompson,* 116 Ark. 354, we held that a collector was not entitled to commissions on certain drainage funds, although he had been required by the law to make this collection, for the reason that no provision had been made for the payment of his commission. So, an officer may be entitled to the custody of public funds and may be required under his bond to account for them, and yet be entitled to no commission for handling them.

(7) The treasurer of Miller County is not a party to this litigation; yet he is the beneficiary of it, because he is entitled to the custody of the deposit, for, although it was not made in his name, it should have been. This bank is no longer a going concern, but is now in the hands

of a receiver, and there has been a consequent failure to pay this deposit to the person entitled to receive it, and that person is a county treasurer, who has the right, under section 1990 of Kirby's Digest, to deposit public funds in the custody of an incorporated bank, the stockholders of which are thereby made liable to him individually for the full amount thereof.

The judgment of the court below will not be reversed because the treasurer of the county is not a party to this litigation.

In the case of *Clarke* v. *School District No.* 16, 84 Ark. 516, which was a suit by a school district against one of the directors thereof for money which had erroneously been paid to said director, in which suit, however, the county treasurer had been made a party, the court said:

"The school district, having been reimbursed by Bussell (the county treasurer), was not a necessary party. It was not, however, an improper party, for the funds belonged to it; and, as it had been paid, it could sue for Bussell's benefit. * * * In reality, the school district here was only a party for the benefit of Bussell, it having already been paid."

So here the recovery is for the benefit of the county treasurer as the legal custodian of the funds and the judgment of the court below is, therefore, affirmed.

McCULLOCH, C. J., (dissenting): The statute now under consideration, in the form in which it was originally enacted by the General Assembly of 1891, was purely criminal in its nature, and made it an offense for any officer of the State, or any county, township, city or town, or deputy clerk or other person employed by such officer, to use or loan public funds or to permit any other person or corporation to use the same. The other section of the same statute, quoted in the opinion of the majority, merely defined the term "public funds" as used in the first section, prohibiting public officers from using, lending or depositing, but did not enlarge the class of persons to which the statute was applicable. The statute applied only to officers of the State or of a county, town-

ship, city or town, and did not include officers of a school district. Being a criminal statute, nothing could be taken by intendment, and it reached to only such cases as those which fell squarely within the terms of the statute. It can not be successfully contended that an officer would have been subject to the penalty of the statute if any other person had deposited money in his name, or if moneys to which he was entitled, as such public officer, were deposited by some other person. In other words, prior to the amendment made by the Legislature in 1903, the county treasurer would not have been criminally liable for funds wrongfully deposited in the bank by the officer of the school district. I think that is the test in the present case, for if the funds were not deposited in such manner as would have made the treasurer criminally liable prior to the amendment, the stockholders of the bank are not civilly liable under the statute as amended. The amendment of 1903 merely relaxed the penalty of the statute so as to permit "collectors of taxes, county treasurers and treasurers of cities and towns," to deposit public funds for safe keeping, on condition that the sureties on their official bonds, and banks in which such deposits are made, and the stockholders, shall be liable for such funds. There is in this amendment no enlargement of the class of persons to which the statute is applicable, but a mere relaxation of the terms of the statute so as to permit some of the officers named to deposit public funds under the specified conditions.

It seems to me that the court is stretching the language of the statute beyond its real meaning, according to ordinary rules of interpretation, in saying that the stockholders are liable in this case for funds deposited by the school district. The fact that the funds themselves fall within the class designated by the statute as "public funds" does not necessarily make the stockholders of the bank responsible, for the reason that the statute only creates a liability for funds deposited by the officers specified therein. It will be observed that the same clause which makes the bank and its stockholders liable also declares that the sureties on the official bond shall be

liable. Now, can it be contended for a moment that the sureties on the official bond of a treasurer are liable for funds which never came into the hands of that officer, but were deposited in the bank by the officers of a school district? Yet the same provision of the statute which makes the stockholders of the bank liable also makes the sureties on the official bond liable, and there is no ground for separating the liability. The interpretation which the court now places on this statute leaves stockholders of the bank without any means of protecting themselves against this liability. They may have instructed the cashier not to receive any deposits from collectors or treasurers, thinking that they were thereby escaping liability, and yet without their consent the cashier imposed a liability upon them by accepting funds on deposit from a school district.

It is my opinion, therefore, that the court erred in holding that the stockholders were individually responsible for this fund.

THE FECHHEIMER-KIEFER COMPANY v. KEMPNER.

Opinion delivered January 25, 1915.

1. TRIAL—REMARKS OF TRIAL JUDGE—VERACITY OF WITNESS—OPINION.—Under the Constitution it is prejudicial error for a trial judge to express his opinion as to the credibility or varacity of a witness during a jury trial.
2. TRIAL—OPINION OF TRIAL JUDGE—FACTS.—Any expression or intimation of an opinion by a trial judge during a jury trial as to questions of fact or the credibility of witnesses, necessary for the jury to decide in order to render a verdict, tends to deprive one or more of the parties to the litigation of the benefits of the Constitution, and constitutes prejudicial error.
3. EVIDENCE—SELF-SERVING DECLARATIONS.—In an action on a promissory note by appellant against appellee, by way of defense appellee testified to facts tending to show that the note did not evidence any debt; *held*, statements of a witness tending to confirm appellee's self-serving declarations are inadmissible.

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

STATEMENT BY THE COURT.

Appellant brought suit on a promissory note executed by appellee, dated at Cincinnati, December 28, 1908, for $9,053.00, payable to its order, at its office one day after date. Certain credits were endorsed on the note and there was a prayer for judgment for $7,350.98, the balance due thereon.

Appellee answered and admitted the execution of the note, but denied that the note evidenced any debt due by him, and stated that the circumstances of its execution were as follows: One Al Cohn, a merchant in Little Rock, had been a customer of appellant for a number of years, and the balance due by him grew from year to year until on the date of the note it had reached the sum named in the note. That Cohn desired credit from other houses, whose officers knew he had extensive dealings with appellant, and, in order to make it appear that he was not indebted to appellant and to thereby secure additional credit, it was agreed that appellant should assign its account against Cohn to appellee, who had for many years been employed by it as a traveling salesman, and this result was accomplished by the execution of the note sued on and the execution of an assignment of Cohn's account to appellee, but that it was expressly agreed that appellee should not be liable for the payment of the note, but should only pay whatever sum he might collect from Cohn. It was further alleged that Cohn shortly afterward became a bankrupt, and that appellee probated the account against his estate and collected and remitted dividends, in the doing of which he acted for appellant, and not for himself. Appellee offered proof legally sufficient to support these allegations.

Appellant denied there was any understanding whereby appellee was relieved from liability for the payment of the note, and offered evidence tending to show that appellee had personally loaned Cohn large sums of money and had guaranteed the 1907 account, and was very desirous of having Cohn continue in business, and in having additional credit extended to him by other business houses. It denied that it probated any claim in

bankruptcy against Cohn, or that it authorized appellee to do so, and this question of fact appears to have been largely controlling in the verdict of the jury. Appellee admits that, in probating the account in his own name, he filed an affidavit which contained among others, the following recitals: "(Kempner) makes oath and says that Al Cohn, the person against whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of $17,971.87, of which amount $9,053.00 was on account that said Al Cohn owed Fechheimer-Keifer Company for goods and merchandise bought by him from said firm, which account was purchased by this deponent and now belongs to him, and that no part of said debt has been paid except as herein stated. * * *"

When this affidavit was offered in evidence, the court remarked: "(*Court*): The court instructs the jury right now that that affidavit that was attached to that claim in the Federal Court, proving up that claim, there is nothing wrong in that; he had a right to swear that he owned that; there was no false oath at all in that."

Exceptions were duly saved to this statement of the court.

In corroboration of appellee's version of the transaction between the parties culminating in the execution of the note, Cohn was permitted to testify about a conversation had in Little Rock between himself and appellee to the following effect: That appellee came to him and was given a statement by Cohn showing his (Cohn's) financial condition, and they agreed on the representations to be made appellant to induce the extension of further credit, and that appellee did go to Cincinnati and on his return brought back the papers which in effect gave the required extension, these being the note and a statement of the account and its assignment.

We do not set the evidence out in further detail, as we have stated the respective theories of the parties, and the evidence conflicted so sharply that it can not be reconciled.

There appears to have been no error in instructing the jury, and a verdict was returned in appellee's favor, and this appeal has been duly prosecuted from the judgment rendered thereon.

Marshall & Coffman, for appellant.

The court's instruction to the jury with reference to the affidavit attached to the claim in the Federal Court was plainly an instruction on the weight of the evidence, and reversible error. 51 Ark. 155; 38 Cyc. 1316-1321.

Sam Frauenthal and *L. B. Harrod,* for appellee.

The court's remarks were not an instruction on the weight of the evidence. It amounted to a simple declaration that, as a matter of law, the legal title to the account, as is shown by the evidence, having been transferred to appellee, he was not an improper party to make the affidavit to the claim in the bankruptcy court. It was not erroneous. 38 Cyc. 1651; 102 Ark. 302; 90 Ark. 78; 86 Ark. 548; 85 Ark. 293; 84 Ark. 81.

SMITH, J., (after stating the facts). We think the remark of the court in regard to the purpose and effect of appellee's affidavit constitutes prejudicial error which calls for the reversal of the case. The statement of the court may have been true and appellee's action in making this affidavit may have been authorized by appellant; but that is the very issue the jury was trying, the decision of which would necessarily be controlling in the rendition of their verdict. Appellant was strongly urging that appellee, in making this affidavit, was acting for himself, and not for it, and offered much evidence in support of this position, and the jury should have been permitted to pass upon that contention uninfluenced by any action of the trial court. Appellee had been permitted to explain this affidavit in detail, and had been sharply cross-examined in regard to it, and an attempt had been made by appellant's counsel to show by cross-examination that appellee's version of the transaction was not true, and the remark of the court, upon the formal introduction of the affidavit in evidence, tended, in a measure at least, to sustain appellee in his contention.

(1-2) The rule which should be observed by trial judges in cases arising before them, where there is a question of the veracity of witnesses, is stated by this court in the opinion in the case of *Sharp* v. *State,* 51 Ark. 155, where it was said:

"In all trials the judge should preside with impartiality. In jury trials especially, he ought to be cautious and circumspect in his language and conduct before the jury. He should not express or intimate an opinion as to the credibility of a witness or as to controverted facts. For the jury are the sole judges of fact and the credibility of witnesses; and the Constitution expressly prohibits the judge from charging them as to the facts. The manifest object of this prohibition was to give to the parties to the trial the full benefit of the judgment of the jury, as to facts, unbiased and unaffected by the opinion of judges. Any expression or intimation of an opinion by the judge as to questions of fact or the credibility of witnesses necessary for them to decide in order for them to render a verdict would tend to deprive one or more of the parties of the benefits guaranteed by the Constitution, and would be a palpable violation of the organic law of the State."

(3) We think, too, the court should not have permitted Cohn to detail the conversation which he had with appellee in regard to the representations which appellee was to thereafter make to appellant to secure the desired extension of time for the payment of the account. It is said this evidence is not erroneous and prejudicial, because it is admitted that appellee was appellant's agent, and that appellant is, therefore, bound by these statements. But this is not a suit between appellant and Cohn, and Cohn's evidence serves to bolster up the self-serving statements of Kempner in this suit against Kempner. The rule which excludes proof of self-serving acts and declarations renders this evidence incompetent. *Hamburg Bank* v. *George,* 92 Ark. 472.

For the errors indicated, the judgment of the court below will be reversed and the cause remanded for a new trial.

HART and KIRBY, JJ., dissent.

DYER v. DYER.

Opinion delivered February 1, 1915.

1. STATUTE OF FRAUDS—DEED TO LANDS—PAROL AGREEMENT.—Where appellant holds possession of lands belonging to deceased under a parol promise by deceased to deed appellant a portion thereof after the expiration of a certain time, and where appellant made valuable improvements on the land to be deeded to him, the case would not fall within the statute of frauds.
2. STATUTE OF FRAUDS—PAROL AGREEMENT TO CONVEY LANDS—VALUE OF IMPROVEMENTS.—Where appellant was in possession of lands belonging to deceased, and made improvements thereon of small value in comparison with the rental value of the land, the case will not be taken out the statute of frauds and a parol agreement by deceased to convey to appellant, will not be enforced.
3. APPEAL AND ERROR—FINDING OF CHANCELLOR.—Chancery cases are tried in the Supreme Court *de novo*, but the rule of practice is that the findings of the chancellor are of such persusive force, that, upon evenly balanced testimony, a decree will not be reversed.

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

Crawford & Hooker, for appellant.

1. Where one occupies land under a parol contract with the owner, and makes valuable improvements, the case does not fall within the statute of frauds. The statute of frauds can not in courts of equity be made a means of fraud. The doctrine of part performance is well established in this State. 1 Story, Eq. Jur., § 759; 1 Ark. 391; 21 *Id.* 110; 19 *Id.* 23; 48 *Id.* 535; 30 *Id.* 249; 42 *Id.* 246; 68 *Id.* 150; 76 *Id.* 363; 76 U. S. (19 L. Ed.) 560; 83 Ark. 340; 91 *Id.* 280; *Ib.* 468; 97 *Id.* 366; 105 *Id.* 494; 55 *Id.* 583; 22 N. E. 537; 76 Ark. 363; 98 *Id.* 459; 102 *Id.* 658, etc.

2. The case is on trial here *de novo* and the finding of the chancellor is against the evidence. Appellant has

fully executed his contract, and has had possession the full period of limitation. 1 Story, Eq. Jur., § 759; 21 Ark. 110; 76 U. S. 254 (19 L. Ed.) 554, and cases *supra.*

Danaher & Danaher, for appellees.

1. The defendant has failed to make out a case and the statute of frauds applies. The burden was on him. 23 Ark 421; 39 *Id.* 424; 78 *Id.* 158; 20 Cyc. 222.

2. Possession of land can not avail to take a contract out of the statute of frauds unless the possession was delivered in pursuance of the contract. 76 Ark. 363; 75 *Id.* 526.

3. The improvements made did not cover the use or rents. They were not valuable. Pom. on Spec. Perf. of Cont., 131; 82 Ark. 42.

McCULLOCH, C. J. This case involves a controversy over the title to a tract of 120 acres of land in Lincoln County, Arkansas. Appellees, Ella Josephine and Edwin R. Dyer, are the widow and only child, respectively, of E. R. Dyer, deceased, who it is claimed, was the owner of the land. Their contention is that appellant, J. W. Dyer, entered into possession of said land as a tenant of said E. R. Dyer, and since the death of the latter appellant has refused to surrender possession after termination of his tenancy. Appellant contends, on the contrary, that he entered into possession of the land in controversy under parol agreement with E. R. Dyer that the latter would convey the same to him in consideration of his occupancy of certain other lands for said E. R. Dyer. He asked the court, in his cross-complaint, to decree specific performance of said contract on the ground that he performed his part of it by occupying the land in controversy, as well as the other lands owned by E. R. Dyer, and that he made valuable improvements on the tract in controversy pursuant to said contract. The case was heard upon the pleadings and depositions of witnesses, and the chancellor found against appellant upon the facts alleged in his cross-complaint and rendered a decree accordingly.

The evidence shows that E. R. Dyer was the owner of 320 acres of land in Lincoln County, including the 120 acres in controversy, but that there was an apparent defect in the title which he, the said E. R. Dyer, considered it necessary to cure by actual occupancy of the land for the statutory period necessary to confer title by limitation. There was a small amount of cleared land on this particular tract and improvements of inconsequential value. Appellant was a brother of E. R. Dyer and he introduced proof to the effect that E. R. Dyer proposed to him that if he would occupy the whole 320 acres as his (E. R. Dyer's) tenant, and hold possession during the period of statutory limitation, the said E. R. Dyer would make him a deed conveying this 120 acres. He testified that pursuant to that agreement he took possession of all the lands and held possession up to the time of the death of E. R. Dyer, and made valuable improvements. The testimony adduced by appellees tends to contradict that of appellant and to show that appellant occupied the lands solely as the tenant of E. R. Dyer. The conflict in the testimony is so sharp that we think that it can not be said that the finding of the chancellor on the facts is against the preponderance of the testimony.

(1-2) Learned counsel for appellant are correct in their contention as to the law of the case, that if appellant occupied the land under a parol contract such as he claims to have made with E. R. Dyer, the owner, and that he made valuable improvements, the case would not fall within the statute of frauds. However, the facts as found by the chancellor, are that there was no agreement for conveyance of the property as contended by appellant, and also that the improvements made by him are so slight in value, as compared with the rental value of the land during the time he occupied it, that the case is not taken out of the operation of the statute of frauds. There is much proof introduced by appellant of persuasive force tending to show that he is right in his contention that his brother, E. R. Dyer, agreed to convey the land to him; but upon the whole, the testimony is not

altogether satisfactory, and is not clear enough to justify us in overturning the finding of the chancellor. This is true, also, as to the value of the improvements made; for if the improvements were of little consequence, compared with the amount of rents he received on the place, that would not take the case out of the operation of the statute. *Young* v. *Crawford,* 82 Ark. 33.

(3) Chancery cases are tried here *de novo,* but the established rule of practice is that the findings of the chancellor are of such persuasive force upon evenly balanced testimony that a decree will not be reversed; and it not appearing to us in this case that the decree is against the preponderance of the evidence, it follows that the same must be affirmed, and it is so ordered.

GERMAN NATIONAL BANK *v.* MOORE.

Opinion delivered February 1, 1915.

1. LOST INSTRUMENTS—LIABILITIES OF THE PARTIES.—The loss or destruction of a written instrument in no way affects the liabilities of the parties to it or changes the nature of the demand.
2. LOST INSTRUMENTS—ACTION ON—EQUITY JURISDICTION.—Courts of equity have jurisdiction of suits brought to recover the amounts due on lost instruments.
3. LOST INSTRUMENTS—ACTION ON—INDEMNITY—DISCRETION OF COURT.—Plaintiff held a certificate of deposit in defendant bank and having lost the same brought an action in equity, upon the maturity of the certificate, to recover the amount. *Held,* the question of whether the plaintiff should have judgment without furnishing the defendant a reasonable indemnity, is addressed to the sound discretion of the court, to be determined by the facts in each particular case.
4. LOST INSTRUMENTS—ACTION ON—INDEMNITY—GOOD FAITH—DISCRETION OF COURT.—In an action by the holder of a certificate of deposit, given by a bank, to collect the same, where the plaintiff had lost the certificate, *held,* where there was no evidence that plaintiff was acting in bad faith, the ruling of the chancellor giving plaintiff judgment, without requiring that he give defendant bank any indemnity, will not be disturbed.

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

STATEMENT BY THE COURT.

R. H. Moore instituted this action in the chancery court against the German National Bank to recover from it the amount of a certificate of deposit, a true copy of which is as follows:

"German National Bank,
Capital $750,000.
"No. 538.
"$4,000.

"Little Rock, Ark., January 14, 1913.

"R. H. Moore has deposited with us four thousand ($4,000) dollars, payable to the order of self twelve months after date with interest to maturity only at the rate of 4 per cent per annum upon the return of this certificate properly endorsed.

"Not subject to check."

The facts are practically undisputed. The plaintiff, Moore, was engaged in the cotton business in the city of Little Rock and was a customer of the German National Bank. About the end of the cotton season he deposited in the bank $4,000 and received a certificate of deposit, a copy of which is above set out. That certificate was then placed in the vaults of the bank for safe keeping.

In November, 1913, the plaintiff was advised to go south for his health and he took the certificate of deposit from the vaults of the bank and put it in his pocket with other papers which he carried with him on his journey. He left Little Rock with his nephew and traveled with him to the city of Texarkana. There he separated from his nephew and bought a ticket to Alexandria, Louisiana, via Shreveport. When he arrived at Shreveport he was told that it would be better to go to San Antonio, Texas, than to Alexandria, because of the higher altitude at the former place. He went to the ticket office of the railroad company and asked for a rebate on his ticket. He was told that it could not be procured there, and then bought a ticket to San Antonio, Texas. The ticket upon which he desired a rebate was in an envelope with the certifi-

cate of deposit. During the course of his conversation with the ticket agent he took out the envelope and exhibited the ticket to the agent and then left, leaving the envelope on the desk or ledge of the ticket office. He did not discover the loss until he had boarded the train and was on the way to San Antonio, Texas. En route he wired the German National Bank the circumstances of his loss and when he arrived at San Antonio wrote them fully the particulars of it. He then procured money with which to return to Shreveport and went back there and made a diligent search for the certificate of deposit but was unable to locate it.

After the certificate of deposit became due he went to the bank and demanded payment. The bank refused to pay him unless he would furnish an indemnity in double the amount of the deposit. Moore endeavored to furnish the indemnity to the bank but was unable to do so. The bank still declined to pay him the amount of the deposit and he instituted this action on the 14th day of October, 1914.

Other facts will be referred to in the opinion. The chancellor found in favor of the plaintiff and entered a decree to that effect on the 21st day of October, 1914. The defendant has appealed.

Moore, Smith & Moore, for appellants.

1. This is a case of first impression in this State. Indemnity should be required, at least where the note is not clearly shown to have been destroyed, or barred by limitation, and the fact that it was unindorsed constitutes no exception to the rule. 2 Pom., Eq. Jur., § § 831, 832; 16 Pick. 315; 104 Fed. 187; 45 Oh. 39; 15 *Id.* 39; 3 Bing. 273; 1 J. B. Moore 510; 7 B. & C. 90; 1 Exch. 167; 2 Daw., Neg., Inst., § 1484; Story on Eq. Jur., § 86; Story on Prom. Notes, § 106; 104 Fed. 187; 78 S. E. 671.

2. The remedy upon a lost negotiable instrument can be sought only in equity. Daniels on Neg. Inst., § 1475, and cases *supra;* 78 S. E. 671.

Miles & Wade, for appellee.

1. In this country the authorities preponderate that no indemnity is required. The chancery court was the proper forum. 2 Pom. on Eq. Jur., § § 831-2; 20 Vt. 407; 2 Daw., Neg. Inst. (5 ed.), § 1475; *Ib.* (6 ed.), § § 1481-4; 57 Ark. 49; 101 *Id.* 4; 25 Cyc. 1615, 1616; 2 Greenl., Ev., § 156; Story, Prom. Notes, § 451; 1 R. I. 401; 49 Iowa 37; 15 Oh. 242; 16 Col. 134; 138 S. W. 314; 125 N. Y. Supp. 402; 140 N. C. 640; 4 Cal. 37; 109 Pac. 499; 25 Cyc. 205; 3 Wend. 344; 12 Vt. 433; 3 Stew. (Ala.) 31. The question of indemnity is one addressed to the sound discretion of the court. Cases *supra.*

HART, J., (after stating the facts). (1) Equity was the proper forum in which to institute this action. The loss or destruction of a written instrument in no way affects the liabilities of the parties to it or changes the nature of the demand. 25 Cyc. 1608.

In an extensive case note to 48 L. R. A. (N. S.) 648, the jurisdiction of courts of law and equity in actions on lost instruments is discussed. In some of the States courts of law have enlarged their jurisdiction by their own acts and in other States such jurisdiction has been conferred by statute.

Article 7, section 15, of the Constitution of 1874, provides that until the General Assembly shall deem it expedient to establish courts of chancery, the circuit courts shall have jurisdiction in matters of equity. By this is meant such jurisdiction as a court of chancery properly exercised at the time of the adoption of the Constitution. The jurisdiction of courts of equity under our Constitution is fixed and permanent and its jurisdiction can not be enlarged or diminished. *Gladish* v. *Lovewell,* 95 Ark. 618; *Hester* v. *Bourland,* 80 Ark. 145; *Walls* v. *Brundidge,* 109 Ark. 250.

(2) It has long been settled that courts of equity have jurisdiction of suits brought to recover the amount due on lost instruments. Pomeroy's Equity Jurisprudence (3 ed.), vol. 2, § § 831-2.

Inasmuch as courts of equity originally had jurisdiction in actions on lost instruments, even if courts of law were given jurisdiction in such cases by statute or otherwise, such action would not deprive courts of equity of the jurisdiction which they originally had.

Our courts and the courts of many other States have held that a negotiable instrument payable to the order of a particular person but not endorsed can not be made the issue of an action against the maker except in the right of the payee. Case note to 48 L. R. A. (N. S.) at page 655, and in *Lewis Mercantile Co.* v. *Harris,* 101 Ark. 4, this court held that the drawee of a draft payable to order who pays upon a forged or unauthorized endorsement does so at his peril.

It is, therefore, insisted by counsel for plaintiff that the instrument sued on, being payable to the order of the plaintiff, and not having been endorsed by him at the time it was lost, only the plaintiff could sue on it and, such being the case, no indemnity is needed. Hence they contend that in all cases where the lost instrument, though negotiable, is payable to the order of the payee and unendorsed it does not come within the rule requiring indemnity to be furnished.

On the other hand, it is contended by counsel for the defendant that the maker upon payment of the instrument has a right to its possession as a voucher of its payment and that this right should not be taken from him without an equivalent.

Again, they contend that it may be subsequently ascertained that the instrument had been endorsed by the plaintiff and that it had passed into the hands of an innocent purchaser before maturity and that it would thus be forced to pay the instrument again because the holder thereof, not being a party to the action, would not be concluded by the judgment.

(3) The decisions bearing upon both sides of the question have been ably discussed by counsel in their respective briefs and many of them are reviewed in the case note above referred to. No useful purpose could

be served by again citing them in this opinion. The case is one of first impression in this State and, after a careful consideration of the question we have concluded not to adopt either rule in its severity. We are of the opinion that the rule which will be most conducive to justice in all cases and which will be in accord with the principles of equity, is that in cases of this kind the question of whether the plaintiff should have judgment without furnishing the defendant a reasonable indemnity is addressed to the sound discretion of the court, to be determined by the facts of each particular case.

(4) This brings us to the question of whether the chancellor abused his discretion by rendering judgment for the plaintiff on the lost instrument without requiring him to furnish bond of indemnity. In the case before us the plaintiff had been a customer of the bank for the cotton season before he deposited the $4,000 with the bank. The deposit was made on the 14th day of January, 1913, and was payable to the plaintiff's order twelve months after date with interest to maturity at the rate of 4 per cent per annum. The plaintiff put his deposit certificate in the safety vaults of the defendant and took it out and placed it in an envelope with other valuable papers at the time he started south for his health. According to the statement of facts, which need not be repeated here, he lost it in a perfectly natural manner and there is no testimony whatever tending to show that he intended to practice any fraud upon the defendant. He immediately notified the defendant of his loss and of the way in which it occurred. He went back to the place where he lost it and made a diligent effort to locate it. After the instrument became due he went to the defendant and made demand for the payment of it in the usual course of business. The defendant refused to pay him until it had been furnished indemnity. The plaintiff endeavored to comply with this demand but was unable to do so. He then did not institute this action until the 14th day of October, 1914, which was ten months after the amount represented by the certificate of deposit be-

came due. These facts are undisputed. There is not a particle of testimony in the record tending to show that the plaintiff endeavored to practice any fraud upon the defendant and there is nothing tending to impeach his integrity and good faith in the whole transaction. He was not a stranger at the bank at the time he made the deposit with it, but had been a customer of the bank. So far as the record discloses, his character was above reproach and under these circumstances we do not think the chancellor abused his discretion in rendering judgment for the plaintiff without requiring him to furnish indemnity to the defendant.

It follows that the decree will be affirmed.

SORRELS *v.* WARNOCK.

Opinion delivered February 1, 1915.

1. TITLE—CERTIFICATE FROM STATE—DUTY OF STATE.—Where J. purchased lands from the State and the State issued a certificate showing that fact, J. acquired the equitable title to the lands, and the State held the legal title as trustee, charged with the duty to issue to the purchaser a patent at the proper time, it can not lawfully sell the land to another.
2. VENDOR AND PURCHASER—CERTIFICATE FROM STATE—RIGHTS OF PURCHASER.—The purchaser of land, and his successors, under a certificate from the State, may protect his right to the land by an action of ejectment, or may sell and convey the same.
3. TIMBER—RIGHTS OF HOLDER OF EQUITABLE TITLE.—The owner of the equitable title to land, held under a certificate of purchase from the State, has the right to the timber growing thereon and can not be compelled to pay damages for removing same to the owner of the mere legal title, and the equitable owner may in a suit at law set up such facts as a defense to an action against him for damages for removing the timber.

Appeal from Columbia Circuit Court; *W. E. Patterson,* Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought suit against appellant for treble damages for cutting timber from the southwest quarter

of the northeast quarter of section 28, township 16 south, range 22 west, in Columbia County, claiming to be the owner thereof and alleging that the land was wild and unimproved, and that the timber was cut and removed wilfully and without right.

Appellants denied that appellee was the owner of the land and that they had cut any timber therefrom wilfully and without right, and that they had cut timber of the value alleged. The jury returned a verdict for the plaintiff in the sum of $227.50, and the court thereupon rendered judgment against one of the defendants only, Mrs. Alice Sorrells, from which she appealed.

It appears from the testimony that the land was patented to the State as swamp land, September 28, 1850, that the State thereafter, on September 16, 1873, conveyed it, with other lands, by a deed of the Governor to W. C. Sheldon, as trustee for Jno. D. Alexander, Alexander McDonald, B. D. Williams and himself. This deed recites that the Land Commissioner granted his certificate dated June 6, 1872, in favor of B. D. Williams for lands described, including the tract herein; that Williams on the 12th day of December, 1873, assigned said certificate to said Sheldon as trustee. This deed also recites that the Commissioner of State Lands certified on the 16th day of December, 1873, the lands had been confirmed to the State. B. D. Williams and Alexander McDonald granted the lands by a quitclaim deed to C. B. Myers, acknowledged in April, 1900. C. B. Myers conveyed the land by a quitclaim deed to Geo. R. Sheldon and William C. Sheldon, deceased, by a deed on the 24th of July, 1900. Copy of the probated will of Wm. C. Sheldon was also introduced in evidence. It was dated the 10th day of March, 1889, and probated the 10th day of March, 1896, in Delaware County, New York, as a will valid to pass real and personal property.

George Randall Sheldon and Wm. C. Sheldon, Jr., were appointed executors of the will and given power to lease, sell, convey or mortgage any and all real estate of the testator, none of which was described. The executors

transferred this land by a quitclaim deed to C. W. McKay, A. A. Reed and Edwin T. Hicks, on June 30, 1905, who conveyed one-fourth undivided interest to Mr. Warnock by deed July 25, 1905, and the said Hicks and C. W. McKay on January 1, 1906, conveyed a half interest to said Warnock and A. A. Reed an undivided one-fourth interest on October 22, 1906, the last two deeds not being recorded.

The defendant introduced an exemplified copy of the records of the State Land Office, showing these lands were sold by the State by a certificate issued therefor to Thos. J. Jarnigan in 1862, who conveyed them to W. F. Dodson by deed of December 3, 1864. They were afterward conveyed by a deed from Bernard W. Duffer and wife to Nathan Franks, on December 19, 1883, who conveyed them to R. L. Emerson, appellant's father by a deed of April 6, 1888, recorded April 17, of that year.

The testimony tends also to show that the appellant, acting for himself and sisters, the heirs of R. L. Emerson, deceased, sold the timber on this tract of land, which was removed by the purchasers.

A witness testified that the tax records of Columbia County show that the taxes had been paid on the lands by W. C. Sheldon, from 1884 to 1904. W. C. Sheldon, the grantee in the deed from the State, died on the 28th day of January, 1896, as shown by the probate of his will. Appellant exhibited tax receipts, showing the payment of the taxes by her father and herself for the six of seven years, including 1912, but not in succession.

The court instructed the jury over appellant's objection that if they found from the testimony that the timber was sold by appellants on the land described, and cut and removed therefrom, under the contract of sale, it should find for the plaintiff, and refused to instruct the jury at appellant's request that they must find from a preponderance of the evidence that appellee was the owner of the tract of land described before they could find a verdict for him.

Stevens & Stevens, for appellant.

1. The deed to appellee was not signed in accordance with the statute. Gantt's Dig., § 3967; 13 Cyc. 557; 10 Enc. Ev. 897-8.

2. There is no description of any land in the deed. When State land is sold and certificate of purchase issued, a subsequent purchaser gets no title. 24 Ark. 431; 36 *Id.* 334; 85 *Id.* 584; 44 *Id.* 452.

3. The deed imposed no duty on Sheldon. He merely held the legal title and was a simple, passive, dry and naked trustee. 39 Cyc. 30; 1 Tiffany, Real Prop., § 95; 84 S. W. 737; 50 *Id.* 439. The legal title immediately under the statute of uses, vested in the beneficiaries. 25 L. R. A. (N. S.) 424; 81 S. W. 162; 66 L. R. A. 408; 76 Am. Dec. 624; 46 S. W. 362; 101 U. S. 782; 25 C. C. A. 97.

4. The deed to Myers was not acknowledged. Kirby's Dig., § 756. No authority to convey for McDonald was shown. 22 Ark. 136; 20 *Id.* 508; Kirby's Dig., § 753; 38 Ark. 181; 45 *Id.* 309; 41 *Id.* 363; 13 Cyc. 657, 611. The alleged will was not introduced in evidence. 45 Ark. 309.

5. The will of Sheldon was improperly admitted. There is no authentication of the record. Kirby's Dig., page 187; *Ib.*, § 8033; Warvell on Abst., § 416; 29 Ark. 418.

Gaughan & Sifford and *C. W. McKay,* for appellee.

1. There is no issue here as to appellee's title; it is not denied. No objection was made to the introduction of the deed from Governor Baxter. He signed it and that is sufficient to convey the legal title. 13 Cyc. 557. No words of inheritance are necessary. 39 Cyc. 210, 219; 61 S. E. 410.

2. Under our laws every interest and right, legal and equitable, are inheritable, and descendable. 15 Ark. 555; Kirby's Digest, § § 2654-5, 8049.

3. Unimproved and unenclosed lands are held to be in *possession* of the person who pays taxes, etc. Kirby's Dig., § 5057. The deeds to Sheldon gave *color of title.* This is sufficient. 96 Ark. 6; 74 *Id.* 304; 80 *Id.* 75.

KIRBY, J., (after stating the facts). Appellee's right to maintain the action was based upon his ownership of the land, which was denied by the answer, and the court erred in not giving said instruction requested by appellant and in giving said instruction requested by appellee. Appellee deraigned his title through a grant from the State, of date December 16, 1873, and appellant showed the lands had been purchased from the State by Thos. J. Jarnigan, and a certificate issued therefor in 1862. That Jarnigan conveyed the lands to others and that they had been finally conveyed to her father, from whom she and the other defendants inherited. A complete chain of title was not shown.

(1) Appellee's right to recover, however, rested upon the strength of his own title, since he had no possession of the lands from which the timber was taken. *Price* v. *Greer,* 76 Ark. 426. The land was purchased from the State by Jarnigan in 1862, and certificate issued therefor showing such fact. Jarnigan thereby acquired the equitable title to the lands and thereafter the State was but a naked trustee of the legal title, charged with the simple duty to issue him a patent at the proper time, and could not lawfully sell it to another. *Hibben* v. *Malone,* 85 Ark. 587; *Coleman* v. *Hill,* 44 Ark. 452.

(2) The purchaser under the certificate from the State, and his successors could protect his right to the land by an action of ejectment or sell and convey the same. *Alexander* v. *McCauley,* 22 Ark. 553; *Coleman* v. *Hill,* 44 Ark. 452; *Smithee* v. *Mosely,* 31 Ark. 426; *Brummett* v. *Pearle,* 36 Ark. 472; *Chowning* v. *Stanfield,* 49 Ark. 87; Kirby's Digest, § 2741.

(3) The owner of the equitable title to the land had the right to the timber growing thereon and could not be compelled to pay damages for removing same, to the owner merely of the naked legal title, and had the right in a suit at law to set up the fact as a defense to such action. There is some testimony tending to show that appellee's grantors had paid the taxes upon the lands which were wild and unimproved for more than seven

years, under color of title, three of the payments being after the approval of the statute of 1899. Kirby's Digest, § 5057. No title was acquired thereby, however, although a witness stated that an examination of the tax books disclosed that W. C. Sheldon paid the taxes from 1884 until 1904. Wm. C. Sheldon, the grantee trustee in the deed from the State, died in 1896, and the taxes could not, of course, have been paid by him thereafter, and if they were paid by W. C. Sheldon, Jr., a devisee in the will and one of the executors thereof, who made the deed conveying the lands to the grantors of Warnock, he had no color of title thereto at the time of paying the taxes after the death of said W. C. Sheldon, for the will contains no description of any lands and did not constitute color of title. The court erred, therefore, in instructing the jury that they should render a verdict for appellee, if they found from a preponderance of the testimony that appellants removed the timber from the land without requiring it to first find that the land belonged to him.

For the error in refusing said instruction the judgment is reversed and the cause remanded for a new trial.

COOPER v. MCCOY.

Opinion delivered February 1, 1915.

1. RES ADJUDICATA—FORMER JUDGMENT, BINDING WHEN.—A former judgment, in order to be a bar, must have been a decision on the merits of the cause, must have been rendered in a proceeding between the same parties or their privies, and the point of controversy must have been the same.

2. PLEADING—SUFFICIENCY OF COMPLAINT—DEMURRER—RES ADJUDICATA.—A complaint failed to state a cause of action, and a demurrer thereto was sustained. *Held*, the sustaining of the demurrer and dismissing of the complaint, was not an adjudication of the merits of the controversy between the parties, nor was it such a judgment as would prevent the maintaining of another action by the plaintiff against the defendant.

3. LEGITIMACY—CHILDREN OF VOID MARRIAGE.—The children of a marriage, void in law because the father, at the time of its solmniza-

tion, had another wife living, will be held legitimate, and entitled to inherit from the father, under Kirby's Digest, § 2640.

4. DOWER—VOID MARRIAGE.—Where deceased contracted a bigamous marriage, the second wife can not share in the estate of deceasd as widow.

Appeal from Greene Chancery Court; *C. D. Frierson,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Maude McCoy brought suit for partition of the estate of Jacob H. Cooper, her father, against his other children, naming them, and alleged that she was the sole surviving child of his marriage to Caroline Cooper and owned a one-seventh undivided interest in the lands described; that four of the children were minors and had a claim of homestead in the lands, which should include only forty acres, which was alleged to be of the value of $2,500; that the homestead should be defined and set aside to the minors, that the remaining part of the lands were subject to partition between all the said heirs, and as to Ella J. Cooper, alleged:

"Said Ella J. Cooper claims some interest in the above described real estate by way of dower and homestead, but plaintiff avers that such claim is not well founded, and that said defendant has no interest whatsoever in said above described real estate."

The prayer of the complaint as to her was that said Ella J. Cooper be required to set up by answer in this case any alleged rights or claims which she may have in said lands, and that the same may be adjudged by this court to be null and void.

The general prayer was for the setting apart of the homestead to the minors of the forty acres of land containing the dwelling, etc., and that the remainder, be partitioned among all the heirs. The administrator was not made a party.

Appellant demurred to the complaint which the court, upon hearing, treated as a motion to make more definite and appellee, declining to amend, sustained the demurrer and plaintiff refusing to plead further, dismissed the complaint as to said Ella J. Cooper, to which

action the plaintiff excepted and prayed an appeal to the Supreme Court. The appeal was not perfected, however, and in April, 1912, the said Maude McCoy, plaintiff in the first suit, brought another suit against the same parties and C. C. Cooper as administrator of the estate of Jacob H. Cooper, the deceased, alleging that he had in his hands moneys and chattels of greater value than $3,500, and that all the claims against the estate had been paid, that said amount should be disbursed, but was held by the administrator, on account of a pretended claim of Ella J. Cooper of a dower interest therein, that plaintiff was entitled to one-seventh interest in the money; that Ella J. Cooper had no claim against said estate because she was never the lawful wife of Jacob H. Cooper and hence not his widow; that she never had at any time any right, claim or interest whatever in said money or chattel property and "that said Ella J. Cooper has not now and has never had any right, title or interest in or concerning any of the real estate therein above described, either as the lawful wife of Jacob H. Cooper, deceased, or otherwise," etc.

The relief sought as to partition of the lands of the estate of Jacob H. Cooper between the heirs was the same in the second as in the first complaint. The complaint prays the appointment of commissioners to set apart to plaintiff one-seventh of the lands described, excepting the eighty acres designated as the homestead of the minors; that the commissioners be directed to set apart to the minor children named, the designated eighty acres and improvements and no more. That the court declare plaintiff and the six other children of Jacob H. Cooper, deceased, named therein, the sole and only owners and distributees of the money and personal property of his estate now in the hands of the administrator; that he be directed to pay over same, after making final settlement, one-seventh part to plaintiff; that Ella J. Cooper be required to set up by answer her pretended claims to either the personal or real property of the estate and that such pretended claims be adjudged void and for general relief.

Appellant plead the judgment of dismissal of the first complaint as *res adjudicata* in bar of the second action. This plea alleged the filing of the suit, the demurrer, the decree, treating the demurrer as a motion to make more specific and permitting plaintiff to amend the complaint, plaintiff's refusal to do so, the sustaining of the demurrer and the dismissal of the complaint. That an appeal was prayed and granted but never perfected; that more than a year had elapsed since the decree dismissing the complaint which became a final judgment; that all matters alleged in the last complaint against appellant were properly subject to hearing and determination in the first and embraced within the meaning and terms thereof.

This plea was overruled and appellant answered denying the right of appellee to the interest claimed in the property and estate of Jacob H. Cooper and the other allegations of the complaint.

The chancellor found that plaintiff, Maude McCoy was the sole surviving heir of Jacob H. Cooper's marriage to her mother, Caroline Cooper, that he left his family and afterward, during the life of his said wife, and without any divorce procured, married appellant, Ella J. Cooper, who had no knowledge or information that he was a married man until fifteen years or more thereafter, and that the other defendants, children of this last marriage, were also heirs and entitled to inherit his estate each in equal share with plaintiff, and that Ella J. Cooper was never the lawful wife nor widow of Jacob H. Cooper, deceased, and decreed accordingly and that Ella J. Cooper take nothing by this suit and dismissed her answer and cross-complaint for want of equity, from which judgment she prosecutes this appeal.

M. P. Huddleston, Robert E. Fuhr and *R. P. Taylor,* for appellant.

1. The plea of *res adjudicata* should have been sustained. No appeal was taken from the first decree, which was a final judgment. 83 Ark. 371; 99 *Id.* 496; 102 *Id.*

380; *Radford* v. *Samstag,* 113 Ark. 185; 99 Ark. 433; 1 Freeman on Judgments, § 16; 11 Enc. Pl. & Pr. 926; 23 Cyc. 670; 14 Ark. 159; 63 *Id.* 254; Kirby's Digest, § § 6169-6228; 1 Freeman on Judg., § 267.

2. Where it appears that parties to a prior marriage were living at the time of a subsequent marriage by one of the parties to a third person, it will be presumed that the disability of the prior marriage has been removed by a divorce before the time of the second marriage. 222 Mo. 74; 17 A. & E. Ann. Cas., 673, 683; 43 Pac. 756; 64 *Id.* 195; 35 N. E. 525; 41 *Id.* 600; 77 S. W. 122, etc. The burden is on him who attacks the validity of the subsequent marriage to show its invalidity. 128 Ga. 339; 57 S. E. 709; 21 Ore. 387; 28 Pac. 388; 98 Fed. 63; 57 Ark. 278.

Geo. A. Burr and *R. E. L. Johnson,* for appellee.

1. This record does not present a case for the application of *res adjudicata.* 8 S. W. 441; 4 Wall. 232; 109 U. S. 125, 426; 1 A. K. Marsh. 321; 99 Ark. 433. The judgment on the demurrer was wrong. 47 Ark. 222; 1 S. W. 99.

2. The causes of action were not the same, nor the same parties, nor privies, nor the same issues, hence the doctrine does not apply. 23 Cyc. 1155-1156-7; 76 Ark. 391.

3. The decree in the first case was based solely on a defective pleading. 23 Cyc. 1152. It was not a bar. 95 Pa. St. 521; 63 Tex. 698; 9 Enc. Pl. & Pr. 621; 48 Tex. 62.

4. The second marriage was void. 82 Ark. 76; 169 S. W. 817.

KIRBY, J., (after stating the facts). (1) It is strongly urged that the court erred in denying appellant's plea of *res adjudicata.* It is well settled that a former judgment in order to be a bar must have been a decision of the merits of the cause. In *Smith* v. *McNeal,* 109 U. S. 426, the court, quoting from *Hughes* v. *U. S.,* 4 Wall. 232, said: "In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding be-

tween the same parties or their privies, and the point of controversy must be the same, in both cases and must be determined on its merits. If the first suit was dismissed for defect in pleadings or parties, or a misconception of the form of the proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

It is contended by appellant that the first complaint to which the demurrer was sustained was only defective and stated a cause of action and that judgment having been rendered against appellant on failure to plead further and no appeal taken therefrom, the same was binding as an adjudication of all the rights that might have been determined therein.

If the inference may reasonably be drawn from the allegations of the pleadings by a fair intendment that facts sufficient exist to constitute a cause of action or defense, the defect must be corrected by a motion to make more definite and certain and not by demurrer. *Johnson* v. *Mantooth,* 108 Ark. 36.

In *Arkansas Life Insurance Co.* v. *American National Ins. Co.,* 110 Ark. 139, the court said: "In testing the sufficiency of a pleading by general demurrer, every reasonable intendment should be indulged to support it. If the facts stated, together with every reasonable inference therefrom constitute a cause of action, then the demurrer should be overruled." It was there held that the complaint did not state a cause of action and could not be amended by a motion to make more specific; that it was not a statement of a cause of action defectively, but a failure to state one at all.

The court quoted with approval in *Luttrell* v. *Reynolds,* 63 Ark. 258, from Freeman on Judgments: "If any court errs in sustaining a demurrer and enter judgment for defendant thereon, when the complaint is sufficient, the judgment is nevertheless on the merits. It is final and conclusive until reversed on appeal."

In *Melton* v. *St. Louis, I. M. & S. Ry. Co.*, 99 Ark. 436, this court held that the question of the sufficiency of a cause of action raised by a general demurrer became an issue of law, and the determination thereof by sustaining the demurrer, was an adjudication and decision by the court by which the merits of the case were determined and plaintiff having elected to stand upon his pleadings and declined to amend his complaint, the adjudication sustaining the general demurrer became a final determination of the issue of law deciding the merits of the case and was a final judgment which could be set aside only upon appeal."

There were no facts sufficiently alleged in the first complaint relative to the claim of Ella J. Cooper against the estate of the father of the plaintiff as would constitute a cause of action or warrant an adjudication of its validity. It was not stated that she had ever been married to or claimed to be the widow of Jacob H. Cooper, deceased, nor that she was illegally married to him and claimed to be his lawful widow and on that account, entitled to dower and homestead in his estate, but only that she claimed some interest by way of dower and homestead, which claim was not well founded and an averment that she had no interest whatever in said estate; the prayer asking that she be required to set up by answer any claim or right that she may have in the lands and that the same be adjudged void by the court.

(2) The complaint did not state facts sufficient, together with every reasonable inference deducible therefrom, to show that the said Ella J. Cooper was ever married to or claimed to be the wife of Jacob H. Cooper, deceased, and a dower and homestead interest in his lands on that account, and since it stated no cause of action, there was no adjudication of the merits of the controversy by sustaining the demurrer and dismissing the complaint, nor any judgment preventing the maintaining of this suit against her.

(3-4) The children of appellant's marriage to Jacob H. Cooper, duly solemnized under the forms of law but void because of his having a former wife living from

whom he had not been divorced at the time thereof, are protected by law, deemed legitimate and entitled to inherit his estate. Kirby's Digest, § 2640; *Evatt* v. *Miller,* 114 Ark. 84, 169 S. W. 817. But not so the mother who bore them, and the stress and struggle of life with their father helping to accumulate the estate left at his death, who is not allowed the portion thereof belonging to the widow under the law. Her marriage was illegal, and that fixed her status. Not having been the legal wife of the deceased, she is not entitled to a division of the property which she herself helped to accumulate, notwithstanding it was through no fault of hers that she married the husband of another. Such is the law.

The findings of the chancellor are supported by the testimony and no error was committed in the rendition of the decree, which is affirmed.

GAINES v. GAINES.

Opinion delivered February 1, 1915.

GUARDIAN AND WARD—LEASE OF LAND—CONFIRMATION.—It is necessary, in order that a lease of a ward's land, made by a guardian in pursuance of an order of the probate court, shall be valid, that the lease be confirmed by the court, and where there has been no confirmation, the lease may be cancelled.

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

STATEMENT BY THE COURT.

Appellees brought this suit to cancel a lease executed by their mother, Lydia A. Gaines, life tenant of the property, and by their father, Abner L. Gaines, as guardian for the then minor children of the marriage.

Appellant and appellees are the owners of a three-story brick building between Central Avenue and Valley streets in the city of Hot Springs, which is centrally located and substantially constructed. The ground floor is used for a bank and other business purposes and the rooms on the second and third floors for offices. The appellant owns the north half of the building and the south

half belongs to appellees. There is only one entrance to the rooms on the second and third floors, which is a stairway from the outside of the building on Central Avenue. This stairway and the lavatories on the second and third floors are in that part of the building belonging to appellees and before the execution of the lease sought to be cancelled, appellant had been paying from $25 to $35 a month for the privilege of the use of the stairway and the lavatories by his tenants in common with appellees.

Appellant and his brother, Abner L. Gaines, the father of appellees, inherited the lands from their parents, and appellant on the 28th day of February, 1891, conveyed the lands to Lydia A. Gaines, during her natural life, or so long as she remained wife of her then husband, Abner L. Gaines, and upon her death or separation from Abner L. Gaines, or marriage after his death, the remainder to Mary Lydia Gaines, Alice Augusta Gaines and all other children that may be born to said Abner L. and Lydia Gaines, the fee simple title in said property to vest and rest in them share and share alike. Habendum, "To have and to hold the same unto the said Lydia A. Gaines and her children as aforesaid and those that may hereafter be born during the marriage of said Abner L. Gaines and the said Lydia A. Gaines, and unto their heirs and assigns forever, with all appurtenances thereunto belonging."

On the 31st of March, 1898, the two children mentioned in the deed being alive and two others also having been born, Abner L. Gaines was appointed guardian of the four children and required to give bond in the sum of $600. On April 5, following, he filed a petition as guardian, asking that he be authorized and empowered to join with the life tenant in the execution of a lease to Albert B. Gaines for the use of said stairway and lavatories in said building for a period of ninety-nine years, for a consideration of $1,000, and praying that the court designate what part of the consideration should be paid to his wards. The court determined that $300 would compensate for the minors interest and made an order

upon the payment of that sum to the guardian for their use, authorizing him to join with the life-tenant in the execution of the lease, for a period covering the life of the building, but not to exceed fifty years, the lease being made assignable. This order was made on the day after the petition was filed, and the lease executed on the next day thereafter and there was no order of court confirming the execution of the lease.

The petition stated the age of the life-tenant and her expectancy of life at thirty-four years.

The complaint alleged that the lease was void or voidable as to appellees, they being minors at the time, it being executed by their guardian without authority and because it was not made pursuant to the statute, and the estate being a contingent remainder was not subject to disposition. It alleged the death of their mother and their eldest sister, Marie Lydia, without heirs, that they became the owners thereby and entitled to the exclusive occupancy and possession. That the reasonable value of the easement was $360 a year, and prayed a cancellation of the lease and for an accounting and an injunction against appellant from further using the stairway, etc.

Appellant answered, claiming the right to the use of the premises under the lease which he alleged was properly made by Abner L. Gaines, guardian of appellee minors and being duly authorized by the probate court to execute it, and that he had paid the consideration fixed by the court in its order and was entitled to the use of the stairway and lavatories under the lease, a copy of which was exhibited with the answer.

The lease was executed by the mother of appellees, the life-tenant, and their father as guardian, and recites a consideration of $1,000, which was acknowledged received.

The answer did not deny the alleged rental value of the easement and the proof upon that point tended to show it was of the value of $30 per month. The chancellor decreed the cancellation of the lease and rendered a judgment for three years' rent, and from the decree appellant brings this appeal.

Martin, Wootton & Martin, for appellants.

1. The interest of appellees was a vested remainder and the probate court had jurisdiction to authorize the execution of the lease. 49 Ark. 425; 67 *Id.* 517; 72 *Id.* 336; 75 *Id.* 19; 95 *Id.* 23; 15 A. & E. Enc. Law (2 ed.), 320; 95 Ark. 22; 2 Washb., Real Pr. (6 ed.), § 1545; 24 A. & E. Enc. L. (2 ed.), 382-390; 84 Am. St. 233.

2. The order of the probate court was a sufficient confirmation of the lease. Kirby's Dig., § § 3801-2-3, 3798; Rogers on Dom. Rel., § 920.

James E. Hogue, for appellees.

1. The lease was void. Kirby's Dig., § § 3794 to 3803. It was not made for the education of the minors, nor for maintenance, nor investment. 89 Ark. 284; 74 *Id.* 81.

2. The order was never confirmed; this is fatal. 47 Ark. 413; 69 *Id.* 539; 76 *Id.* 146; 61 *Id.* 80.

3. As to contingent remainders, bodily heirs and children, etc., see 2 Words & Phr. 1503 and 8 *Id.* 7305; 67 Ark. 517; 75 *Id.* 19; 95 *Id.* 18.

4. This lease was a *sale* and confirmation was absolutely necessary. 52 Ark. 341; 106 *Id.* 563.

KIRBY, J., (after stating the facts). Appellant contends that appellees' interest in the property under the deed of conveyance was a vested remainder, and that the probate court had jurisdiction to authorize the execution of the lease disposing thereof, which it claims was executed in conformity to law and is a valid instrument.

There is much discussion in the briefs as to whether the estate of the minors under the conveyance to their mother and themselves consisted of a vested or contingent remainder, but under our view of the law, we do not find it necessary to determine this question. The mother of appellees remained the wife of their father until her death and had a life-estate in the property conveyed. The remainder belonged to the children living, born and to be born of the marriage, upon the termination of the life-estate and the probate court attempted to dispose thereof

by authorizing their guardian to join the life-tenant in the lease to appellant.

The probate court has power to authorize the leasing and the sale of lands belonging to minors as conferred by the statute. Section 3789, Kirby's Digest, authorizes the annual renting of the minors' improved lands, designating the procedure to be followed by the guardian and giving the probate court power to order that such renting may be done publicly or privately, subject to the court's or judge's approval.

Section 3791 authorizes the guardian to let out the ward's wild or unimproved lands, under the direction of the court, on improvement leases, not to extend more than two years beyond the majority of the ward.

Section 3794 authorizes the leasing or sale of the minor's lands when necessary for their proper education, and section 3801 authorizes the real estate of the minor, "to be sold or leased and the proceeds put on interest or invested in productive stocks or other real estate" when it appears that it would be for the benefit of the ward, upon an order from the probate court, directing it. Sections 3802 and 3803 of Kirby's Digest are section 34 of the Act of April 22, 1873, and provide the procedure for making such sale or lease of the land for investment for the ward's benefit.

Neither the petition for, nor the order of the court authorizing the guardian to make the lease for the minors, shows that it was to be made for the education of the minors, according to their means or the investment of the proceeds for their benefit in securities or other real estate. Under said section 3803, the court is authorized, upon the petition praying therefor, after a full examination of creditable and disinterested witnesses, when it appears that it would be for the benefit of the ward, that his real estate should be sold or leased to "make an appropriate order for such sale or lease under such regulations and conditions, subject to the provisions of this chapter in relation to the sale of real estate of

minors, as the court shall consider suited to the case," etc.

The law regulating the sale of real estate of minors requires that such sales be reported to and approved by the court in order to their validity. (Section 3798, Kirby's Digest) and this court has invariably held such sales, if not confirmed by the court, void. *Guynn* v. *McCauley,* 32 Ark. 97; *Apel* v. *Kelsey,* 52 Ark. 341; *Lumpkins* v. *Johnson,* 61 Ark. 80; *Morrow* v. *James,* 69 Ark. 539; *Harper* v. *Smith,* 89 Ark. 284; *Collins* v. *Paepcke-Leicht Lbr. Co.,* 74 Ark. 81.

Conceding that the lease was attempted to be made for the benefit of the minors, for an investment, the court was authorized to make the order under such regulations and conditions as it should consider suited to the case, subject to the provisions of the law in relation to the sale of the real estate of the minors, which require such sales to be confirmed.

There is no claim that there was any report to the probate court of the lease having been made, nor approval thereof by it, but only that the court made the order directing such lease and prescribing the terms and that the lease was in fact executed in accordance with the order authorizing it, which it is contended was in effect a confirmation, if confirmation be required of a lease of minor's real estate.

We do not agree with this contention. When the sale of the minor's real estate is ordered upon the terms prescribed by the order directing it, it could as well be argued that if the sale was effected and the conveyance made in accordance with the prescribed terms, that it was a sufficient compliance with the law requiring confirmation. The lease executed amounted to a sale of the interest of the minors in this valuable real estate, since by its terms it disposed of the property for a longer time than the average span of life, and for a consideration smaller than the annual rental value thereof. There was not a substantial compliance with the law in the making of the lease, or the sale of the minor's interest, and same

was void, and the court did not err in cancelling it. *Mobbs* v. *Millard,* 106 Ark. 563.

The answer did not deny that the rental value of the right to the use in common of the stairway and lavatories in the building belonging to the minors was not of the value of $30 per month as alleged in the complaint, and the proof introduced was sufficient to sustain the finding upon that point in any event.

There being no prejudicial error in the record, the judgment is affirmed.

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

Opinion delivered February 1, 1915.

1. RAILROADS—DUTY TO MAINTAIN LOOKOUT—DRUNKEN TRESPASSER.—A railroad company is required to maintain a lookout for persons on its track, and it will be liable for an injury to a drunken trespasser if its servants could have discovered his peril by the keeping of a proper lookout, in time to have avoided injuring him.
2. APPEAL AND ERROR—INSTRUCTIONS—READING STATUTE TO JURY.—In an action for damages caused by the negligence of the servants of a railroad company, while it is better practice for the trial court in instructing the jury, to interpret a statute, about the interpretation of which there is or may be a difference of opinion, it is not error for the trial court, to read to the jury the statute requiring the railroad company in the operation of trains to maintain a constant lookout.
3. TRIAL—IMPROPER ARGUMENT—REMOVAL OF PREJUDICE.—Appellee's counsel in the argument of the case, made remarks prejudicial to the appellant's case. The trial court overruled appellant's objection thereto, but at the conclusion of the argument, instructed the jury to disregard the parts of the argument objected to. *Held,* the ruling of the court removed any prejudice resulting from the improper argument.

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

STATEMENT BY THE COURT.

One of appellant's locomotives ran over appellee on the night of the 3d of September, 1911, and so crushed his arm that an amputation at the shoulder was necces-

sary. Appellee alleged and proved that he suffered great pain and anguish, as well as loss of earning capacity, and, in the trial, from which this appeal is prosecuted, recovered a judgment for the sum of $3,000.00.

It is not contended that the judgment is excessive, nor is it claimed that any error was committed by the court in charging the jury, except that the court erred in giving an instruction numbered 4 at the request of appellee, for reasons which will hereafter be discussed.

Appellant insists the jury did not follow the instructions of the court, as it says the instructions, under the proof, practically directed a verdict in its favor, and it is now urged that the case should not have been submitted to the jury at all. The jury might well have found that appellee's injury did not occur in the manner stated by him, but his right to recover does not rest solely upon his own evidence. This injury occurred about 3 o'clock in the morning, after appellee had spent the preceding part of the night in drunken revelry, and he undertook to show that he was struck by the locomotive as he was walking across the tracks at a public crossing. It is now practically conceded by appellee's counsel, however, that his injury did not occur in that manner, but that he was lying in a drunken stupor, with his arm across one of the rails, when the locomotive struck him. The injury occurred just as the locomotive was rounding a very sharp curve, and one of the principal questions of fact in the case was, whether or not the operatives of the train could have seen appellee by keeping a constant lookout in time to have thereafter avoided the injury by the exercise of ordinary care. Three members of the switching crew were riding in front of the engine, and the evidence on the part of the appellant is that these men were keeping a lookout as well as the engineer, but that the curve in the track was too sharp for appellee's presence upon the track to be discovered by them in time to avoid striking him. There was evidence, however, from which the jury might have found that appellee's presence on the track would have been apparent, to one

keeping a lookout, for a distance of from 150 to 200 feet, and that the train could have been stopped in a distance of about sixteen feet and was, in fact, stopped in a distance estimated at from fifty to sixty feet.

Instruction numbered 4, given at appellee's request, was as follows:

"You are instructed that if defendant's servants discovered plaintiff's peril in time to have avoided injuring him by the exercise of ordinary care, or if they could have discovered it in time by keeping a constant lookout, then it is immaterial whether the plaintiff was asleep, drunk or sober, and immaterial that he was a trespasser."

It is insisted that this instruction should not have been given, because, according to appellee's contention, he was not lying drunk near the rail.

In connection with the other instructions in the case the court read to the jury the lookout statute, approved May 26, 1911; but only a general objection was made to this action of the court.

Mr. Winn, one of the attorneys for appellee, in his opening argument to the jury, used the following language:

"Gentlemen of the Jury: This defendant railroad corporation has taken all of the land they wanted in this State. They can go and take your homes from you. They do take your homes; they run over the widows and orphans of this State. They are absolutely without souls."

To the use of this language appellant at the time objected and its objection was overruled, and exceptions saved. At the conclusion of the argument, in which this language was used, however, the court stated to the jury that the argument was an improper one and should be disregarded by them.

Other questions are raised in the brief, but we think it unnecessary to discuss them.

Thomas B. Pryor, for appellant.

1. It was error to refuse a peremptory instruction for defendant. Plaintiff was a trespasser; the lookout

law was strictly complied with and as soon as plaintiff's presence was discovered everything possible was done to avert the injury. 40 Ark. Law Rep. 358; 107 Ark. 431; 108 *Id.* 396; 110 *Id.* 444; 162 S. W. 51; 166 *Id.* 568. A jury has no right to arbitrarily disregard the testimony of witnesses. 67 Ark. 516; 89 *Id.* 121; 66 *Id.* 441; 89 *Id.* 578; 78 *Id.* 237.

2. The remarks of attorney for plaintiff were improper and prejudicial. The error was not cured by the court. 70 Ark. 305; *Ib.* 179; 61 *Id.* 130; 63 *Id.* 174; 30 N. W. 630; 14 S. W. 566.

3. It was error to read to the jury Act No. 284, approved May 26, 1911, the "Lookout" statute. 63 Ark. 477; 107 *Id.* 431; Const. Ark., art. 7, § 23; Kirby's Dig., § 6196; 71 Ark. 43.

4. Instruction 4 was improper. It was unwarranted under the pleadings. 75 Ark. 468; 59 *Id.* 169.

Oscar Winn and *Mehaffy, Reid & Mehaffy,* for appellee.

1. If the lookout statute had been complied with the engine could have been stopped in time to avoid the injury. The question of drunk, asleep, negligence, or trespass, cuts no figure in this case, if the employees violated the statute. The verdict is not based upon conjecture or speculation, but upon competent testimony. 168 S. W. 135.

2. The statements in argument of Oscar Winn were not prejudicial. The jury were properly admonished. When carefully examined, they do not fall within the rule. 70 Ark. 305; 63 *Id.* 174; 61 *Id.* 130; 65 *Id.* 620; 70 *Id.* 179; 71 *Id.* 434.

3. No prejudice resulted from the reading of the statute. 63 Ark. 484.

4. There is no error in the court's charge. The verdict is supported by the evidence and is not excessive. The instructions are capable of but one construction. 63 Ark. 474-484.

SMITH, J., (after stating the facts. (1) It is true that instruction No. 4, given at appellee's request, did

not comport with what he said the facts were, but the instruction correctly declared the law, and if the jury found the facts to be as they were there hypothetically stated, then appellee was entitled to a verdict. We think the court properly gave this instruction under the circumstances. The fact that appellee was drunk constituted no defense, if his presence was discovered in time to have avoided injuring him, or if, by keeping a constant lookout, his presence could have been so discovered.

The court gave numerous instructions declaring the law in conformity with the opinion of this court in the case of *Russell* v. *St. Louis S. W. Ry. Co.,* 113 Ark. 353, 168 S. W. 135.

(2) We think no error was committed in reading the lookout statute to the jury, although the better practice is for the court to interpret any statute, about the interpretation of which there is or may be a difference of opinion. But the facts in this case are unlike those in the case of *Kansas City, F. S. & M. Ry. Co.* v. *Becker,* 63 Ark. 477., which last mentioned case was reversed because of the action of the court in reading the fellow-servant statute, then in force, to the jury, that statute being what are now sections 6658 to 6660 of Kirby's Digest. In the *Becker* case there was a sharp conflict over the construction of this statute, and in the opinion it was there said:

"The circuit court erred in giving the statutes, without explanation, as an instruction to the jury. They were susceptible of more than one interpretation, as shown by the contention of counsel in this case, and parts of them were not applicable to the facts before the jury. It was the duty of the court, and not of the jury, to interpret the statutes. The instructions of the court should be susceptible of only one construction."

The point there in controversy was whether an engineer and fireman were fellow-servants, and the court held that the reading of the statute was improper in the elucidation of that question, as it was capable of more than one construction. But no such question arises in

this case, for, while the lookout statute is susceptible of more than one construction, only one construction was given it at the trial.

(3) The majority of the court are of the opinion that, while the argument of appellee's counsel was improper, under the circumstances, it did not constitute prejudicial error calling for the reversal of the case. It has been said in numerous decisions of this court that a certain discretion abides with the trial judge in rebuking improper arguments, and that a judgment will not be reversed because an improper argument was made, if it appears that no prejudice resulted therefrom. It is true the court overruled the objection made to this argument, but it must have appeared to the jury that, upon further reflection, the court had concluded that an erroneous ruling had been made upon this subject, and the court's former ruling was reversed and the jury told that the argument was, in fact, an improper one, and should not be regarded by them. The court did finally rule with sufficient firmness on this question, but it is insisted that this ruling should have been made immediately, upon objection being offered, and, further, that the argument itself was of such an incendiary character that no reproof of counsel could cure the harm resulting from its having been made.

A number of our cases, on the subject of improper arguments are reviewed in appellant's brief and among those chiefly relied upon are the cases of *Union Compress Co.* v. *Wolf,* 63 Ark. 174, and *German-American Insurance Co.* v. *Harper,* 70 Ark. 305. In the first of these cases the attorney for appellee referred to the fact that appellant had taken a change of venue and offered to read the affidavit in support of the petition therefor, after he had been told by the court that this was exceedingly improper. The argument was held prejudicial because, as the court there said, "where counsel persevere in saying things that are not pertinent to the issue and are prejudicial to the other party, the court in civil cases should see that they do not reap any benefits from such statements, even to the

extent of setting aside a verdict in favor of the client of the attorney thus offending, if the court should deem that the prejudice can not otherwise be overcome."

In the insurance company case, *supra,* the judgment was reversed because appellee's attorney made a statement of fact, not supported by any evidence, concerning the integrity and veracity of a material witness for appellant. The court held that under the circumstances the statement of counsel left an unfavorable impression on the jury, as to the veracity of the witness, which no admonition from the court could eradicate.

For similar reasons other cases have been reversed, for improper arguments, but in each of them it appears that the court either gave no directions to the jury to disregard the argument, or the argument itself was so prejudicial that no direction to the jury could have secured a fair trial, or that the direction which was given did not accomplish that purpose. Here the argument was not in defiance of the court, nor did it question the veracity of any witness, and while it was highly improper and the trial court should have so held immediately, even though no objection had been made, yet it appears that the court did make a proper ruling upon the conclusion of the speech in which the language quoted was used. The record does not show whether this speech was concluded soon after this statement was made or not, but it does show that at its conclusion the court reversed its action, in overruling the objection, and made the ruling which should have been made earlier.

The presumption is that the jury followed the directions of the court and the moderate verdict returned gives no indication to the contrary. The judgment is affirmed.

C. L. KRAFT COMPANY v. GRUBBS.

Opinion delivered February 1, 1915.

CORPORATIONS—AUTHORITY OF OFFICER TO EXECUTE NEGOTIABLE PAPER.—In an action on the promissory note of a corporation, executed by its

president, where there was evidence that he applied the proceeds of the note to his own use, and that he had no authority to execute the company's note for his own use, it will be *held* to be prejudicial error to charge the jury that the corporation would be liable if the president executed notes without authority, if the directors knowingly acquiesced in his acts; the instruction, under the facts, being too broad.

Appeal from Pulaski Circuit Court, Third Division; *G. W. Hendricks,* Judge; reversed.

STATEMENT BY THE COURT.

The appellee instituted this suit against the appellant on a promissory note in the sum of two thousand dollars ($2,000).

The appellant denied that it was indebted to the appellee; denied that the note sued on was executed by it. It alleged that the note was drawn by one McCain, without authority, and negotiated and the proceeds used by him without the knowledge of appellant.

The facts are substantially as follows:

The Kraft company was a corporation engaged in the livery business in Little Rock, Arkansas. Ed Woodruff and C. M. McCain purchased the stock of the corporation, and transferred one share of the stock for the purpose of completing the new organization to Roy Campbell, and he held the same merely as trustee. The new corporation went under the same name as the old, that of C. L. Kraft Company. The purchase price was $8,000. Woodruff paid $4,000 of the purchase money in cash. Notes were executed to C. L. Kraft Company, and certificates of stock were pledged by the corporation to the Citizens Bank for money with which to pay the balance. This money, the balance of the purchase money, $4,000, was to be paid in monthly installments of $300 out of the profits of the business, after which the corporation was to pay Woodruff a similar sum each month until the $4,000 he had advanced was returned to him, the same being in effect a loan by him to the corporation.

By a contract between Woodruff and McCain, it was understood that after the $8,000 purchase money was

fully paid in the manner indicated that they were to be equal partners in the business. McCain was the president and treasurer of the corporation, and its active business manager. The directors were Woodruff, McCain and Roy Campbell.

Thus far the facts are undisputed.

McCain testified on behalf of the appellee: "I had absolute control; as president my powers were 'to buy and sell, borrow and sign notes.' The directors knew that the company had no capital to work on, and I had absolute control to execute notes for anything I needed."

Witness here exhibited one of a series of fourteen notes, executed by the Kraft company and signed by the witness. The note was for $93.75, bearing interest at the rate of 10 per cent per annum until paid. Continuing, witness says:

"I, as president of the company, borrowed $2,000 from Mrs. E. G. McCain, my wife, and signed the company's name to the note, with me as president, with the knowledge of Mr. Woodruff."

The note is exhibited, being a promissory note to Mrs. E. G. McCain for $2,000, specifying: "This note is secured by 238 shares of the C. L. Kraft Company's stock and lien on lease on building, with interest at 8 per cent until paid. Signed, C. L. Kraft Company, by C. M. McCain, President."

The witness continued as follows:

"The borrowing of this money was discussed between me and Mr. Woodruff as many as a dozen times. The object of borrowing the money was to pay the debts of the company. I paid Woodruff $1,000 and used $1,000 to pay bills of the company. All of the money was used to pay bills of the company. One thousand dollars was used to pay Mr. Woodruff. It was a company debt, because the company borrowed the money. The company got the benefit of all the proceeds."

The appellee testified that he bought the note from his sister a few days after the date of the note. He paid

face value for it. The note was not due. He sent his sister $2,000 of his own money.

There was testimony on behalf of the appellee tending to show that Woodruff knew that McCain was borrowing the money from his wife. Grubbs testified concerning this that "he wanted the company to borrow and McCain to turn it over to him." "I understood that Woodruff was to get the money. * * * I had some talk with Woodruff. I don't remember exactly what I said to him, but anyway they all gave me this impression, if he (McCain) could get this $2,000, that would enable him to pay off the pressing debts and satisfy Mr. Woodruff."

Woodruff testified on behalf of appellant that he was one of the directors of the Kraft company at the time of the execution of the note; that he did not authorize its execution, and did not know anything about it; that he didn't know anything about any of the notes that McCain executed, never authorized him to execute any notes for the company. He kept the minute books containing the articles of association under which the company was operating at the time. These showed the following as to the duties of the treasurer:

By-Law 7. "It shall be the duty of the treasurer to collect and disburse the funds of the corporation, to draw checks, to endorse or collect all drafts, warrants or checks."

By-law 10 reads as follows:

"Whenever it becomes necessary to borrow money for the use of the corporation, such transaction must be done by the authority and consent of the majority of the board of directors."

The witness, continuing his testimony, stated that "the majority of the directors never did give their consent to the borrowing of this money."

The witness's testimony shows that McCain gave him a check of $1,000, that "was to purchase for McCain, personally, stock of the witness. He gave witness his personal check. He denies having any conversation with Grubbs as to buying the business; states that McCain had

no money when they bought out the corporation; that he had authority to run the business as manager, and, of course, had to buy stuff to run it with. He did not need any money for thirty days, "the business being a remarkably good, profitable business." He denied, in short, that the money that McCain borrowed was used in the business, and for the benefit of the company.

The court, at the instance of the appellee, gave, among others, the following instruction:

1. If you find from the evidence that C. M. McCain, the president and manager of C. L. Kraft Company, had been in the habit of executing notes in the name of the company without express authority from the board of directors, and that the board had knowledge of such custom, then you will find that the company is bound by the note sued on herein the same as if express power to execute it had been conferred, and your verdict will be for the plaintiff.

There was a verdict and judgment in favor of appellee and this appeal has been duly prosecuted.

The above facts are sufficient for the purpose of the opinion.

Baldy Vinson and *Mehaffy, Reid & Mehaffy,* for appellant.

1. The officers of a corporation, without express authority of the board of directors, have no authority to bind the corporation. 29 So. 688. A note executed in the name of a corporation by an officer having no authority to execute same is void. 90 Fed. 703. McCain borrowed the money for his individual use and not for the company. Instructions 1 and 4 were erroneous and prejudicial. 20 S. W. 535; 105 N. E. 210; 96 N. W. 576; 14 L. R. A. 356; 86 Fed. 742; 56 N. Y. S. 740; 35 Pac. 376; 28 Atl. 1072; 69 Fed. 131; 49 S. W. 544; 55 *Id.* 944; 67 Ark. 542. The note was *ultra vires* and void. 67 Ark. 542; Kirby's Dig., § 839.

Marshall & Coffman and *Covington & Grant,* for appellee.

1. Third persons and strangers dealing with the president of a corporation, where he has the management and control of the business, are protected. Holding him out to the public as possessing power to bind the corporation, or a custom to that extent, binds the company. 2 Thomp., Corp. (2 ed.), 515; 105 Ark. 641; 103 *Id.* 283; *Int. Life Ins. Co.* v. *Vaughan,* 41 A. L. R. 26; 81 Ark. 111.

2. The company is estopped. 86 Ark. 288; 74 *Id.* 190. Accepting the money was a ratification. 86 Ark. 190.

3. The verdict is conclusive, and there is no error in the instructions. 73 Ark. 337; 75 *Id.* 111; 67 *Id.* 531; *Quinn* v. *State,* 114 Ark. 201. The president was authorized to contract debts and execute notes. 105 Ark. 641; *Int. L. Ins. Co.* v. *Vaughan, supra.* Instructions must be considered as an entirety. 100 Ark. 107; 64 *Id.* 251. Justice has been done.

WOOD, J., (after stating the facts). The testimony on behalf of the appellee would have warranted the court in submitting to the jury the issue as to whether or not C. M. McCain, as president and active manager of the appellant, had been in the habit of executing notes in the name of the company in order to carry on the company's business, and for the benefit of the company, without express authority from the board of directors, and also as to whether or not the board of directors had knowledge of such habit or custom on the part of its president, McCain. In other words, it was an issue for the jury as to whether or not the board of directors, without expressly authorizing him to do so, had permitted McCain to execute notes on behalf of the company to such an extent as to establish a custom by which the corporation was bound. The proof tended to show that McCain, as president and business manager of the corporation, frequently executed notes on behalf of the company in transacting business for the company, and that this was done so often as to warrant a finding that the board of directors permitted,

or at least consented or acquiesced in the exercise of such custom. But there is no evidence that tended to prove a custom on the part of McCain to execute notes in the name of the C. L. Kraft Company for his own benefit. The custom that the testimony tended to prove was a custom of the president, McCain, to execute notes in the company's name in the transaction of the business of the company, the company receiving the benefit of the proceeds of such notes.

The instruction No. 1 was therefore inherently erroneous, for there was a sharp conflict in the evidence as to whether or not the proceeds of the note in controversy were used for the benefit of appellant, or for McCain's individual benefit.

The appellant contends, and testimony in its behalf tends to show, that McCain executed the note in suit in the name of the company for his own private benefit, and that the entire proceeds of the note were used by him for his individual benefit and not for the benefit of the corporation. But, under the above instruction, the jury were authorized to find the appellant liable on the note in suit, even though the proceeds of the note were used for the exclusive individual benefit of McCain. In other words, under the instruction, although the jury might have found that the appellant received no benefit whatever from the note in suit, it was nevertheless liable, if McCain was in the habit of or had established the custom of executing notes in the name and on behalf of the company in the transaction of the company's business, and the proceeds of which the company received.

This instruction was well calculated to confuse and mislead the jury and was highly prejudicial to appellant. The acts of a president of a corporation in the management of the business of the corporation, when within the scope of his authority, are the acts of the corporation itself. And, if the corporation has customarily permitted him to exercise acts within the scope of his employment as general manager of the corporation, it will be liable for

such acts. *Wales-Riggs Plantations* v. *Caston,* 105 Ark. 641.

But here, as before stated, there was no authority by custom or otherwise for McCain to execute notes in the name of the company to be used for his own individual benefit.

The execution of notes, therefore, to be used for his individual benefit, and not for the benefit of the corporation, was beyond the scope of any authority, express, implied or apparent, with which the company had clothed him.

The court erred, therefore, in granting appellee's prayer for instruction No. 1, and also instruction No. 4, which was, in part, based upon it. Otherwise, we find no reversible errors in the rulings of the court.

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

LANGFORD v. NATIONAL LIFE & ACCIDENT INSURANCE COMPANY.

Opinion delivered February 1, 1915.

1. INSURANCE—RIGHT OF INSURED TO NAME BENEFICIARY—LIFE INSURANCE—PAYMENT OF PREMIUM BY BENEFICIARY.—A person may take out insurance on his own life, and name any one that he pleases as beneficiary, and where there is no understanding between the insured and the beneficiary, at the time the policy is taken out, the policy will be held valid, although the beneficiary had no insurable interest in the life of the insured, and the policy will not be rendered void, if, thereafter, the beneficiary paid the premiums on the policy up to the time of the insured's death.
2. INSURANCE—LIFE INSURANCE—PREMIUMS—PAYMENT BY BENEFICIARY.—Where the beneficiary, named in a policy of life insurance, is without fraud in procuring the issuance of the same, and the contract being valid, no ground of public policy would prevent the beneficiary from keeping the contract alive for his own benefit.
3. INSURANCE—LIFE INSURANCE—WAGERING CONTRACT.—An agreement between the assured and the beneficiary, having no insurable interest, in a policy of life insurance, to the effect that the latter shall pay the premiums, and that the policy shall be taken out in his name, or, if taken payable to the estate of the assured,

that it shall be assigned to the person having no insurable interest, will render a policy taken out in pursuance of such agreement void as a wagering contract.

4. INSURANCE—LIFE INSURANCE—ASSIGNMENT—INTEREST OF BENEFICIARY.—A person may procure insurance on his own life and assign it to one who has no insurable interest in the life of the insured, if it is not done as a cover for a wager policy.

5. LIFE INSURANCE—VALID POLICY—PREMIUMS—PAYMENT BY BENEFICIARY.—Where a policy of life insurance is valid at its inception, the contract is not afterward rendered invalid because the beneficiary, after the insured ceased to pay the premiums, continued to pay the same until the assured's death.

6. LIFE INSURANCE—WAGER POLICY—GOOD FAITH—PREMIUMS—PAYMENT BY BENEFICIARY.—Where the insurance is taken in good faith and is not intended as an evasion of the rule against wager policies, in the absence of some provision in the policy or statute to the contrary, the policy is not thereafter invalidated because the beneficiary named therein keeps the policy in force by payment of the premiums.

7. INSURANCE—MISREPRESENTATIONS BY INSURED—QUESTION FOR JURY.—Whether insured in a policy of life insurance practiced any fraud in the procurement thereof, by way of false representations in his application, is a question for the jury.

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

STATEMENT BY THE COURT.

The appellant sued the appellee on a policy of life insurance. It was alleged that appellee was liable under a contract with the Arkansas Life Insurance Company, on a policy issued by the latter on the life of one Grant Stewart on April 28, 1913. Stewart died March 14, 1914. The appellant was the beneficiary in the policy. Stewart paid the premium on the policy for some time; then the policy came into the possession of the appellant and she paid the premiums continuously from November 17, 1913, until Stewart's death. After the death of Stewart appellant made proper proof of death and demanded payment, which was refused.

The application for the policy contains this provision: "I declare and warrant the answers to the above questions to be true and complete. I agree that said answers, with this declaration, shall form the basis for a

contract for benefits between me and the Arkansas Life Insurance Company, of Little Rock, Arkansas, and that the policy which may be granted by this company in pursuance of this application shall be accepted subject to the conditions and agreements contained in said policy. I further agree that no obligation shall exist by said company on account of said application or any policy thereon unless the answers to the above questions and the answers made to the medical examiner are found to be complete and true."

Among the questions, Stewart was asked what was his relation to the beneficiary, and answered that she was his aunt.

There was no express provision in the application or the policy making the answers in the application warranties and making the application a part of the contract of insurance. There is a provision in the policy specifying the conditions upon which the same shall be void; but there is no provision declaring that the policy shall be void if the insured answered falsely the question as to his relationship to the beneficiary. There was a condition to the effect that the policy should be void if the insured, before the date of the policy, had been attended by a physician for any serious disease or complaint, or had, before said date, any pulmonary disease. The policy also contained this provision: "This policy is issued upon an application and contains the entire contract between the parties hereto. All statements made in the application shall, in the absence of fraud, be deemed representations and not warranties."

The appellant set up the policy, alleged the death of the assured, that all the provisions of the policy had been complied with, and that she was entitled to recover thereon.

The appellee denied that the appellant was related to Grant Stewart, and denied that she had any insurable interest, and denied that Stewart was an insurable character under the terms of the policy, and alleged that he

had broken certain conditions of the application and policy which appellee alleged were warranties.

The appellant testified that her mother was a Stewart; that it was said that she and the assured were related by blood. Stewart called her Aunt Alice. He was a friend of her family and visited her house frequently. She had known him a long time, and he had lived with them. She didn't pay the first premiums on the policy, did not make the application for the policy, and did not know who did. Grant Stewart never talked to her about the policy. She knew nothing about the condition of his health in April, 1913, at the time the policy was issued. About that time he appeared to be all right; never complained about being sick. He was working at the mill. An agent of the company first showed her the policy. He had it in his possession before Stewart died. He showed her the policy and represented to her that he was collecting for the insurance company, and from that time on she paid the premiums.

There was testimony on behalf of the appellee tending to show that the insured, at the time the policy was issued, was afflicted with tuberculosis.

Among other prayers, the appellant asked the court to instruct the jury as follows:

"1. If you find from the evidence that the deceased was an insurable character at the time the policy was written and it was written in good faith and without any element of fraud, on his own application, and that he paid the premiums to begin with, and that after he went away or was disabled to pay the premiums, the defendant carried the policy to the plaintiff herein, and requested her to pay the premiums and she did so in good faith in order to keep the policy in force, and if you further believe that all other provisions of the policy were complied with, you will find for the plaintiff."

"4. The jury is instructed that, although you may find that the plaintiff who is named the beneficiary in said insurance policy may not be related by blood to the deceased, this fact will not render the policy invalid if you

find that he had his life insured in said company in good faith and was an insurable character under the terms of said policy at the time the insurance was written and that he paid the premiums on said policy continuously from the date of issue as long as he was able to do so, and provided you find that all conditions of the policy were complied with."

The court refused these and other instructions requested by the appellant, and instructed the jury that, "the plaintiff is not entitled to recover, taking all she has said as true, and direct you, therefore, to return a verdict for the defendant." From a judgment in favor of the appellee this appeal has been duly prosecuted.

H. B. McKenzie, for appellant.

1. The policy was valid in its inception. If so, only fraud or collusion could invalidate it, and that was a question for the jury. A person may take out insurance on his own life and designate the beneficiary. 127 S. W. 490; 127 Ky. 348; 57 Vt. 496; 135 Am. Rep. 135; 152 Mich. 266; 15 A. & E. Ann. Cas. 232, and note; 101 Mich. 250; 65 Am. St. 693; 77 Ark. 63; 98 Ark. 343; 27 N. Y. 282; May on Ins., § § 115, 116.

The case of *McRae* v. *Warmack,* 98 Ark. 52, was a case of mere wager, and does not apply; nor does 104 U. S. 775. The instructions asked should have been given.

Horace E. Rouse, for appellee.

1. The policy was a wagering contract and void. 77 Ark. 63; 152 Mich. 226, 15 A. & E. Ann. Cas. 232; 98 Ark. 343. The beneficiary had no insurable interest, and Stewart *warranted* she was his aunt. This also avoided the policy. 25 Cyc. 705; 98 Ark. 57.

2. A breach of warranty renders the policy void. 53 Ore. 102; 17 A. & E. Cas. 1202; 121 Fed. 664; 46 Atl. 426; 45 *Id.* 774; 72 Ark. 662; 56 N. E. 909; 95 N. Y. Supp. 587; 88 Pac. 401; 64 N. Y. Supp. 183.

3. Where the testimony is uncontradicted, the court should direct a verdict. 89 Ark. 29; 102 *Id.* 170; 104 *Id.* 268.

WOOD, J., (after stating the facts). The appellee contends that the judgment was correct for two reasons: First, because the policy was a wagering contract and void; second, because the uncontradicted evidence showed that Stewart, the insured, violated the conditions of the contract.

I. Conceding that appellant had no insurable interest in the life of Stewart, it does not follow that the policy was void as a wagering contract. In *McRae* v. *Warmack,* 98 Ark. 52, one Boswell had policies of insurance issued on his life under an agreement with one Warmack that Boswell should apply for insurance and that when the policies were issued he should immediately assign the same to Warmack, Warmack agreeing to pay the first and second premiums. The reason for the agreement was that Boswell was unable to pay the premium for insurance on his life, and in order to have Warmack pay the premiums, Boswell agreed to assign both policies to him when the same were issued, upon the understanding that Warmack should receive the proceeds of one of the policies at the death of Boswell.

In the above case we held that the assignment was invalid because the policies of insurance issued upon such an agreement were void, being wagering contracts. In that case it appeared that Warmack was the uncle of Boswell, but was in no way dependent upon the latter, and Warmack had no insurable interest in the life of Boswell.

The appellee relies upon the above case to sustain its contention that the policy in suit is a wagering contract. But the facts of the Warmack case clearly distinguish it from the instant case. In the Warmack case the policies of insurance and the assignment of those policies were void because before any policies were issued it was agreed between Boswell and Warmack that when the policies were issued they should be assigned to Warmack and that he should pay the premiums in consideration of the assignment to him of the policies. This assignment and the policies applied for and issued in pursuance of the agreement were invalid from their inception for the

reason that Warmack had no insurable interest in the life of Boswell, and the execution of the contract between them was tantamount to Warmack having the policies of insurance issued upon the life of one in whom he had no insurable interest, which rendered such policies of insurance void as wagering contracts. But here Stewart, the insured, had the policy issued on his own life payable to the appellant, but without any knowledge upon her part, at the time the same was issued that she was made the beneficiary in the policy, and there was no contract or agreement between the appellant and Stewart, that he should have his life insured for her benefit and that she should pay the premiums on the policy when it was first issued or thereafter.

So, under the facts of the present case, the questions are whether or not the policy was void in its inception as a wagering contract, and, if not, was it rendered invalid by reason of the fact that the appellant, as beneficiary, afterward paid the premiums on the same and continued to pay them until the death of the assured.

On the question of whether or not Stewart could insure his own life for the benefit of the appellant, naming her as the beneficiary in the policy, we quote from Mr. Cooley, as follows: "That one has an insurable interest in his own life is an elementary principle as to the existence of which the cases are unanimous. It follows, therefore, that one may take out a policy of insurance on his own life and make it payable to whom he will. It is not necessary that the person for whose benefit it is taken should have an insurable interest." And he cites *Rawls* v. *American Mut. Life Ins. Co.*, 27 N. Y. 284, 84 Am. Dec. 280, where it is held that when the insurance is taken out by the person insured the question of insurable interest does not arise. Cooley's Briefs on Law of Insurance, volume 1, pages 252-4, and numerous cases cited in note.

"If the person whose life is insured pays the premiums there can be no doubt" of the validity of the policy, "even if the beneficiary has no interest, since the

interest of the insured supports the policy." 1 May on Insurance, § 112, pp. 201-2, and cases cited in note.

The Supreme Court of Kentucky, in *Hess' Admr.* v. *Segenfelter,* 127 Ky. 348-351, says: "All the courts of last resort, with possibly one exception, and the text writers on insurance generally are agreed that a person may take out insurance upon his own life and designate whom he pleases as the beneficiary. This doctrine is based upon the sound and sensible theory that it is not reasonable to suppose that a person will insure his own life, for the purpose of speculation or be tempted to take his own life, in order to secure the payment of money to another, or designate as the beneficiary a person interested in the destruction and not in the continuance of his own life;" citing numerous authorities.

Our own court recognizes this doctrine in *McRae* v. *Warmack, supra,* where it is said: "The policies, it is true, were issued in the name of and to the assured, who had an insurable interest in his own life." See *Matlock* v. *Bledsoe,* 77 Ark. 60-64. See note to *Currier* v. *Continental Life Ins. Co.,* 52 Am. Rep. 134-141, where many cases are cited.

(1) Now, as the policy in suit was not taken out at the instigation of the appellant, and there was no understanding between her and Sewart, the assured, at the time it was issued, that it should be taken out for her benefit and that she should pay the premiums, the contract was valid in its inception. Under the policy of insurance the company was to pay "to the person designated therein" the amount of the policy in consideration of the premiums. There is no provision in the policy to the effect that if the premiums are paid by the beneficiary named in the policy that the same shall be void. The policy being valid in its inception was valid at the death of the assured, it being conceded that the premiums at that time had all been paid. The policy being valid in its inception, was not rendered void because the beneficiary thereafter paid the premiums. The insured having the right to enter into this contract with the insurance com-

pany, in the first place, for the benefit of the appellant, certainly the policy would not be rendered invalid because she complied with the provisions which required that the premiums should be paid in order to keep the contract in force.

(2) The beneficiary being without fraud in procuring the issuance of the policy, and the contract being valid, no ground of public policy would prevent her keeping the contract alive for her own benefit. The principle announced in *Matlock* v. *Bledsoe, supra,* is applicable to this phase of the contract. There Judge RIDDICK, speaking for the court, said: "Every person has an insurable interest in his own life, and, as Henry had the right to take out a policy on his own life, payable to his administrator or assigns, it is not disputed that this policy was valid. The policy being valid and belonging to Henry, he had, on the approach of death, the same right to give and transfer this property to any one in whose welfare he felt an interest as he had to dispose of any other property that he owned." *Page* v. *Metropolitan Life Ins. Co.,* 98 Ark. 340.

In the recent case of *Prudential Ins. Co.* v. *Williams,* 113 Ark. 373, 168 S. W. 1114, we said:

"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."

The above language was used with reference to *McRae* v. *Warmack,* where Judge FRAUENTHAL, speaking for the court, said:

"It is therefore well settled that the issue of a policy to one who has no insurable interest in the life of the insured, but who pays the premiums for the chance of collecting the policy, is invalid, because it is a wagering contract and against a sound public policy."

(3) The above and other language used in *McRae* v. *Warmack* was based upon the facts of that case. This

court, by the broad language used in *Prudential Ins. Co.* v. *Williams, supra,* did not mean to hold that all policies of insurance issued in the name of one as beneficiary, who had no insurable interest in the life of the person insured were void as wagering contracts regardless of whether the policies were so issued in pursuance of an agreement between the insured and beneficiary, that the latter should pay the premiums and receive the proceeds of the insurance. An agreement between the insured and the beneficiary, having no insurable interest, to the effect that the latter shall pay the premiums, and that the policy shall be taken out in his name, or, if taken, payable to the estate of the assured, that it shall be assigned to the person having no insurable interest, renders policies taken out in pursuance of such agreements void as wagering contracts. This is held in and shown by the numerous authorities cited in *McRae* v. *Warmack, supra.* But this court has not held (and in none of the above cases did the facts call for such holding) that policies are void where one insures his own life for the benefit of a third party, who has no insurable interest in the life of the assured, and has such party named as the beneficiary in the policy, there being no understanding between the assured and the third party that this should be done, and that the latter should pay the premiums and get the benefits. Such a doctrine, as we have shown, would be contrary to reason and the great weight of authority.

(4) We have held in recent decisions that a "person may procure insurance on his own life and assign it to one who has no insurable interest in the life of the insured if this is not done as a cover for a wager policy." *Prudential Ins. Co.* v. *Williams, supra; Page* v. *Metropolitan Life Ins. Co.,* 98 Ark. 340; and see *Matlock* v. *Bledsoe,* 77 Ark. 60.

(5) Since the contract was valid in its inception, it follows logically, if not necessarily, from the above decisions, that the contract was not afterward rendered invalid, because the beneficiary, after the insured ceased to

pay the premiums, continued to pay the same until the assured's death.

(6) Under the above decisions, if the insured, under the facts of this case, had immediately assigned the policy to the appellant, the assignment would have been valid, and would have transferred to her the beneficial interest in the policy. If the insured had the right to assign appellant the policy after it was issued, then he had the same right to give her the policy in the first instance by naming her as the beneficiary therein. "There is no more danger of evil resulting from allowing one to name a stranger as beneficiary in a policy than from allowing one to devise property to a stranger." *Lamont* v. *Grand Lodge Iowa Legion of Honor,* 31 Fed. 177. Where the insurance is taken in good faith and is not intended as an evasion of the rule against wager policies, in the absence of some provision in the policy or statute to the contrary, the policy is not thereafter invalidated because the beneficiary named therein keeps the policy in force by payment of the premiums. See 1 Cooley's Briefs, 258, and cases.

While there is great conflict among the authorities, the weight of authority in this country seems to be in favor of the rule "that if a policy of life insurance is issued to a person having an insurable interest, an assignment thereof to one having no such interest is nevertheless valid." *Mutual Life Ins. Co.* v. *Allen,* 138 Mass. 24, 52 Am. Rep. 245; Cooley's Briefs on the Law of Ins., vol. 1, pp. 262-264.

While there is no assignment of the policy under consideration, the appellant's position as the beneficiary is certainly as favorable as it would have been had the assured taken out the policy in his own name for the benefit of his estate and then afterward assigned the same to the appellant. In the absence of wagering contract, or fraud, as we have seen, the assured could have done this.

II. (7) Under the express provisions of the policy, all statements made in the application were, in the absence of fraud, to be deemed as representations and not

warranties. As to whether or not the assured perpetrated a fraud, upon the insurance company in his statements in the application was a question for the jury under the evidence.

It follows that the court erred in directing a verdict in appellee's favor, and in refusing to grant appellant's prayers for instructions set out. The judgment is therefore reversed and the cause remanded for a new trial.

WEST v. COTTON BELT LEVEE DISTRICT NO. 1.

Opinion delivered February 1, 1915.

1. LEVEE DISTRICTS—MEEETING OF LAND OWNERS—PLACE.—Under Kirby's Digest, § 4941, which provides that the board of directors of a levee district, where it is proposed that work be done, shall call a meeting of the land owners of the district at some place convenient to some part of the work, a meeting called for a place inside the district, but convenient to a part of the work, is valid.
2. IMPROVEMENT DISTRICTS—CONSTRUCTION OF STATUTES.—In the construction of statutes governing improvement districts the grant of powers by the statute includes the incedental powers reasonably proper and necessary for carrying into execution the powers specifically granted.
3. STATUTES—CONSTRUCTION.—The purpose of the Legislature in framing a statute must be gathered from the statute as a whole, and if to effectuate the purpose intended a liberal interpretation must be reached, it is the duty of the courts to so construe the statute; and, if a literal interpretation would defeat the statute in whole or in part, such interpretation can not be given.
4. LEVEE DISTRICTS—CONTINUING POWER OF LEVEE BOARD.—Under the provisions of chapter 100 of Kirby's Digest, where a levee district is created thereunder, the authority given to construct the levees and to protect the district from overflow is a continuing authority.
5. LEVEE DISTRICTS—CONTINUING POWER OF BOARD.—The board of directors of a levee district, organized under the provisions of chapter 100 Kirby's Digest, has a continuing power to act after the completion of the improvement, and, at their discretion, to perform the work necessary to be done on the levee system for the purpose of protecting the property of their district from loss and destruction by overflow.

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

STATEMENT BY THE COURT.

M. E. West instituted this action in the chancery court against Cotton Belt Levee District No. 1 and the board of directors and treasurer of said district for the purpose of enjoining and restraining them from proceeding to enforce the collection of an assessment against a certain tract of land belonging to the plaintiff which, he alleged, was unlawfully assessed against his land. The plaintiff set up a state of facts substantially as follows:

The Cotton Belt Levee District No. 1 of Phillips County, Arkansas, was organized by the county court of Phillips County in year 1887, under the provisions of chapter 100 of Kirby's Digest and embraces 136,694 acres of land in that county. Since that time the organization of the district has been kept up and the board of directors has been engaged in building levees for the protection of lands within the district and has continuously elected the officers provided for in the statute. W. F. Craggs, H. D. Moore and Greenfield Quarles were the directors for the district at the time the proceedings now complained of were had. The plaintiff is the owner of certain lands within the district.

At a regular meeting of the board of directors held on July 1, 1914, a resolution was adopted providing that it was necessary that certain work be done to protect the lands of the district from overflow. The board found it necessary to enlarge the levee in certain places, to build a forty-foot banquette along the side of the levee and to provide additional right-of-way therefor. The resolution provided that the board of directors should cause an accurate survey of all the work they deemed necessary to be made and the engineer of the district was ordered to make the survey.

At a subsequent meeting the board of directors received the written report of its engineer showing the amount, character and kind of work to be done and the exact location thereof, together with an accurate survey

of all the work deemed necessary by the board to protect the district from overflow.

In accordance with the terms of the statute, the board of directors gave notice to the land owners of the district, that a meeting of the land owners would be held at the office of the Board of Trade, in the city of Helena, in Phillips County, on the 29th day of July, 1914, at 2:30 o'clock P. M., for the purpose of considering the improvements and the expediency of doing the work before referred to. At that meeting proof was made to the land owners present to show that the notice had been posted as required by the statute, and the reports and estimates of the engineer, with maps, surveys, plans, calculations and specifications, together with the assessment of the assessors, were laid before the land owners present. All of the land owners present, either in person or by proxy, voted that the work be done. It was estimated that the probable cost of the work would be $81,000, and the assessed value of the land in the district amounted to $1,125,169. It was provided that there should be assessed and levied a tax of 72 per cent upon the betterments estimated to accrue to the land, railroads, tramroads, rights-of-way and roadbeds in said district by reason of the work, and that the tax should be paid in twenty-four annual installments of 3 per cent each.

Pursuant to the vote of the land owners at the meeting aforesaid, the board of directors also passed a resolution providing that there should be levied on the value of the lands in said district for repairs and incidental and contingent expenses of the district an annual tax of five mills on the dollar of the value of such lands as assessed for State and county purposes.

The defendants interposed a general demurrer to the complaint. The chancellor sustained the demurrer and the plaintiff declined to plead further and has expressly elected to stand upon his complaint. Thereupon the chancellor dismissed his complaint for want of equity and a decree was entered to that effect. The plaintiff has appealed.

Fink & Dinning, for appellant.

1. The meeting of land owners and the proceedings of the board were had at a place outside the district, and hence void. Kirby's Dig., § 4941; 103 Ark. 127; 10 Cyc. 320.

2. The board had no authority to levy a tax in excess of five mills. Kirby's Dig., ch. 100, § 4938; *Ib.,* § 4961.

3. Levee districts have no powers beyond those *expressly* conferred. Nothing is taken by intendment. 103 Ark. 127.

Moore, Vineyard & Satterfield, for appellees.

1. The statute only requires that the meeting shall be held at "some place convenient to * * * the work." Kirby's Dig., § 4941. As to what powers are conferred on the board, see section 4953 of Kirby's Digest. A board of directors is invested with no powers except those expressly granted, or such as are *necessarily implied* in order to carry out the purposes and objects for which the district was formed. 106 Ark. 39-48. In the absence of fraud it will be presumed that all necessary formalities in the proceedings were complied with. 4 Ark. 258.

2. The board had authority to levy the tax. The levee has never been completed. Kirby's Dig., § § 4927-4938-4961; 53 Atl. 728; 32 S. E. 349; 49 Atl. 518; 14 N. E. 600; 54 Ark. 224.

HART, J., (after stating the facts). Section 4941 of Kirby's Digest provides that the board of directors shall call a meeting of the land owners of said district at some place convenient to some part of the work. The meeting of the land owners in this case was called and held in the Board of Trade building at Helena, in Phillips County, a place outside the boundaries of the district. It is contended by counsel for the plaintiff that this rendered the whole proceeding void.

(1) The plaintiff did not charge the board of directors with any design to perpetrate a fraud in selecting

the city of Helena as the meeting place of the land owners. The only contention of counsel in this respect is that the city of Helena is not within the boundaries of the levee district, and that the section of the statute above referred to contemplates that the meeting of the land owners shall be held within the boundaries of the district. The statute does not so provide. It provides that the meeting shall be held at some place convenient to some part of the work. It appears from the language of the complaint that the city of Helena was situated near some part of the work which was contemplated to be done. Doubtless the city of Helena was designated by the board of directors because that was the most convenient place for the land owners to assemble.

It is conceded by counsel for the plaintiff that under section 4961 of Kirby's Digest the board of directors had authority to levy and collect off the land reported as benefited by the assessors of the levee district, a tax not to exceed five mills on the dollar of the value of such lands as assessed for State and county purposes for the purpose of keeping the levees in the district in repair and to meet incidental and contingent expenses. But it is contended by them that the board of directors had no power to levy the 72 per cent tax for the purpose of enlarging the levee, and providing banquettes along the same.

As we have already seen, the levee district in question was organized pursuant to the provisions of chapter 100 of Kirby's Digest. The lands in the district were all situated in Phillips County. Section 4927 of the Digest provides that the county courts of the several counties in this State containing lands subject to overflow may divide the territory of their respective counties subject to overflow into one or more districts having reference to the locality of the land and the character of the river front, including in each of said districts as nearly as possible all lands subject to overflow from the same crevasses or direction and which can be protected by the same system of levees.

Section 4929 provides a method by which the districts may be formed or altered.

Section 4938 pertains to the duties of the levee directors and reads as follows: "It shall be the duty of said board of directors to determine what work is necessary to be done, or levees to be constructed to protect their said district from overflow. They shall cause accurate surveys of all work deemed necessary by them, and accurate estimates and calculations, to be made by some suitable and competent engineer or other person, who shall make a written report thereof, showing the amount, character, and kind of work, the exact location thereof and the probable cost thereof, and return the same with all plans and specifications to the board of directors."

(2-3) It is a fundamental rule of construction that in statutes of this kind the grant of powers includes the incidental powers reasonably proper and necessary for carrying into execution the powers specifically granted. The purpose of the Legislature in framing the statute must be gathered from the statute as a whole, and if to effectuate the purpose intended a liberal interpretation must be reached, it is the duty of the courts to so construe it; if, on the other hand, a literal interpretation would defeat the statute in whole or in part, such interpretation can not be given.

(4) In the case of an improvement district organized to pave a street or to build a road when the improvement has been accomplished the power of the improvement commissioners is exhausted and the improvement constructed by them is turned over to the city or county authorities. There is in such case no provision in the statute for a continuation of the board of improvement commissioners and their authority ceases when the improvement is accomplished. Under the provision of the statute in question, however, we think the authority given to construct the levees to protect the district from overflow is to be regarded as a continuing power.

Section 4938 of the Digest provides that it shall be the duty of the board of directors to determine what work is

necessary to be done or levees to be constructed to protect the district from overflow. The act under which levee districts are organized provides for a continuation in office of the board of directors and other officers provided in the act. The purpose of the organization of the levee district in question was to protect lands in the district from overflows of the Mississippi River. The very nature of the ever shifting yet ever present danger of overflow from that river, against which the levee was intended as a guard, makes it imperative that the board should have the broadest latitude in dealing with the situation which confronted it. If the board did not have the power to perform the work in question, then the whole purpose intended to be effected by the statute would be defeated. The object of the statute was to protect the lands within the district from inundation and devastation by floods and overflows which annually occur in the Mississippi River. It is well known that the rivers of this State and those upon its borders are constantly shifting their channels and that their banks are constantly caving. For this reason, the construction of the levee is never completed and work is constantly necessary to be done on it for the purpose of accomplishing the results intended by the organization of the levee district. If the power were exhausted by a single exercise the very purpose of the statute would be defeated. The work in its nature is continuing, and in view of the broadness of the terms of the statute, we are of the opinion that the powers granted by the statute have not been exhausted because the levee board had already established a levee.

(5) We are of the opinion that the terms of the statute are broad enough to confer upon the board of directors the power at their discretion to perform the work necessary to be done on the levee system for the purpose of protecting the property of their district from loss and destruction by overflow.

There is no allegation in the complaint that the board proceeded arbitrarily or fraudulently.

It follows that the decree must be affirmed.

KIRBY, J., dissents.

THE J. K. SIPHON VENTILATOR COMPANY v. HUTTON.

Opinion delivered February 8, 1915.

1. CORPORATIONS—TRANSFER OF STOCK—LOAN OF MONEY—INTENTION OF THE PARTIES.—One R., a large stockholder in a corporation, turned into the treasury two hundred shares of stock which were then transferred to appellee, who paid $5,000 therefor. *Held*, under the evidence, the transaction was a loan by appellee to the corporation of the sum named, and that the stock was given to him as security.
2. CORPORATIONS—ACTS OF DIRECTORS—BINDING EFFECT ON STOCKHOLDERS.—Acquiescence by a stockholder in the action taken by the directors of a corporation separately, and when such action was carried out by the corporation, is sufficient to render the acts valid.
3. CORPORATIONS—ACTION OF BOARD OF DIRECTORS—RECEIVING MONEY—ESTOPPEL.—A corporation will be bound by a contract made by its board of directors, even though the meeting at which the contract was authorized was not legally called, where the corporation is the beneficiary of the proceeds of the contract authorized at that meeting and received the funds and appropriated them to its own use. The corporation is, therefore, estopped from setting up the invalidity of the contract.
4. CORPORATIONS—ACTS OF OFFICER—ACCEPTING BENEFITS—ESTOPPEL.—If an officer of a corporation or other person assuming to have power to bind the corporation by a given contract, enters into the contract for the corporation, and the corporation receives the fruits of the contract and retains them, after acquiring knowledge of the circumstances attending the making of the contract, it will thereby become estopped from afterward rescinding or undoing the contract.
5. CORPORATIONS—DEBTS—FORM OF OBLIGATION.—In the absence of express limitations a corporation has the implied power to borrow money to carry out the purposes of its organization and to execute evidences of its indebtedness and to give security therefor; it may bind itself by any form of obligation not forbidden by its charter.
6. CORPORATIONS—LIABILITY FOR MONEY BORROWED—INTEREST.—Where a transfer of stock in a corporation, in consideration of a sum of money received, was held to constitute a loan to the corporation and not a sale of the stock, an agreement with the lender, guaranteeing him a ten per cent dividend, will be treated as an agreement to pay ten per cent interest on the loan.
7. EVIDENCE—AMOUNT OF JUDGMENT—NOTE.—Where defendant owed plaintiff a sum of money and gave plaintiff a note for the amount, in an action by plaintiff to recover the same, the note will be

treated as an admission by the defendant of the amount due plaintiff, up to the date of its execution.

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

STATEMENT BY THE COURT.

On the 25th of February, 1914, a contract was signed by the appellant and the appellee, which, omitting formal and unnecessary matters, provided as follows: "That for and in consideration of the purchase for cash by the party of the second part of two hundred (200) shares of the capital stock of party of the first part, amounting to five thousand dollars ($5,000), party of the first part hereby agrees with, and guarantees to, party of the second part the following:

1. Party of the second part will receive yearly upon said stock a dividend of not less than 10 per cent.

2. Party of the second part shall be elected a director and secretary of party of the first part.

3. Party of the second part shall receive a salary amounting to one-fourth of that paid to any other officer or employee of party of the first part.

4. All of the stock of party of the first part shall at all times be of the same class, and each share be entitled to the same dividend.

5. The total amount of indebtedness against party of the first part does not at any time exceed the sum of two thousand dollars ($2,000).

6. The affairs of party of the first part shall at all times be conducted in a business-like manner, and that no extravagant debts shall be created by party of the first part.

7. Party of the second part shall have the right to object to the sale, transfer or pledge of any of the stock of any stockholder of party of the first part to any other person, firm or corporation.

8. Party of the second part shall have the right at any time to withdraw the amount invested by him, if he sees fit to do so, upon tendering back the certificates of stock held by him, and shall be paid in cash at face value

of said stock, upon reasonable notice." Signed by the appellant, through J. K. Robinson, as president, and by the appellee.

Endorsed on the above contract was the following: "We, the undersigned, who constitute the stockholders of the above named company, having read the above and foregoing contract, hereby consent to the making thereof by said company. (Signed) "J. K. Robinson, Nick Peay."

Robinson and Peay also signed the following as a guarantee: "In consideration of the sum of one dollar and other valuable considerations paid us by W. G. Hutton, receipt of which is hereby acknowledged, do hereby, for ourselves, our heirs and administrators, bind ourselves, singly and jointly, as sureties for the faithful performance of the above and foregoing guaranty."

On the 5th of June, 1914, the appellee instituted this suit against appellant, alleging that appellant was a corporation organized and doing business under and by virtue of the laws of the State of Arkansas; that appellant was indebted to him in the sum of $5,000, with interest from February 25, 1914, for borrowed money, and also in the sum of $81.25 for salary. He alleged that the appellant was insolvent, and prayed that a receiver be appointed to take charge of the assets and to pay all the claims owing by the appellant, and for all proper relief to which he in equity and good conscience might be entitled.

Appellant, in its answer, denied that it was indebted to the appellee for borrowed money in any sum; admitted that it was due the appellee the sum of $81.25 for salary. It denied that it was insolvent and set up "that on or about the 25th day of February, 1914, the appellee purchased from said J. K. Robinson $5,000 worth of his individual stock; that the stock had been issued in large denominations; that at appellee's request J. K. Robinson returned to the treasury his stock, and stock in the sum of $5,000 was issued to the appellee, who accepted the same, and had continued in the possession thereof; that

on the same day the appellee was elected by the board of directors a director of the company; that Robinson and Peay entered into an agreement with the appellee whereby they agreed to repurchase the stock purchased by appellee and undertook to have the appellant agree to repurchase the stock by signing the agreement set out above; that the appellant did not authorize the agreement, and that the same was void, the appellant having no authority to repurchase its stock.

The appellant filed a demurrer to the jurisdiction, but afterward waived all questions of jurisdiction, and by consent of all parties the testimony was taken before the chancellor *ore tenus* and was reduced to writing and made a part of the record.

It was shown at the hearing that appellant is a manufacturing corporation, organized under the laws of Arkansas on the 23d day of December, 1913, with a capital stock of $100,000, divided into 4,000 shares, of which J. K. Robinson owned 2,399 shares, Guy Robinson, his son, one share, and Nick Peay 1,600 shares. The business of the corporation was the manufacture and sale of a patent ventilator. The patent right, which belonged to J. K. Robinson, was valued at $75,000, and machinery belonging to Nick Peay was put in as part of the capital stock and valued at $25,000, making the paid-up capital stock of $100,000, divided among the incorporators at the organization above named.

The appellee testified that Robinson and Peay approached him to borrow some money, representing that they were making a wonderful success of their company, and stating that they needed some money but could not borrow the same at the bank because it was not a bankable proposition; that they wished the sum of $5,000 if appellee would loan the same to the company, and Peay stated that they would guarantee appellee as much as 35 or 40 per cent to be paid on easy dividends. Appellee stated that he did not want any guarantee of that kind, but that if he loaned the money he would want the assurance of getting the money back with 10 per cent interest on it.

They told appellee to get them the money and they would guarantee it. Appellee arranged for the money at the bank on condition that they were to pay it back to him on demand. The contract was to be drawn up by appellee's attorney, and was thoroughly understood by all of them. The contract above set out was entered into and was signed by all of the parties whose names appear thereto before the money was paid over. It was read over by every one of them and agreed to. Nick Peay and Robinson and all understood the contract. Before the contract was signed Robinson and Peay stated that they wanted the money to pay for the machinery they had ordered, and it was understood that every nickle of the money was to go to the company. Robinson at that time stated that he had promised to give Carl Bentley $1,000, but that he had not given the stock to him at that time. J. K. Robinson also stated at the time in regard to Guy Robinson, "He is my boy, and he will resign and you will be the secretary" (meaning appellee). Before Robinson and Peay stated that Guy, who was absent, would sign the proposition and agree to everything in it, both Robinson and Peay stated, "Now, you get your lawyer to write these minutes up the way they ought to be; all we want to do is to secure you for your money." It was a $5,000 transaction in which they simply wanted to secure appellee. They further stated, in regard to the meeting of the stockholders, "We waive the formality of a special call meeting, or, at least, sending out notices to the stockholders. We are all here and have got to get this money immediately, and we will waive the formality of sending out notices."

The witness then testifies that he and Mr. Wooten afterward prepared the minutes, which were dated as of the date of the contract, in accordance with the agreement between them, and exhibited these minutes. The minutes, among other things, after reciting that Robinson held 2,399 shares and Nick Peay 1,600 shares, recited that Nick Peay offered a resolution to the effect that it was necessary to create a cash fund "for the purpose of com-

pleting existing contracts and for successfully carrying on the operations of this company," and that J. K. Robinson had turned back into the treasury of the company 200 shares of the stock held by him free to the company. The minutes then recited that Hutton (appellee) offered to purchase 200 shares of the stock at its face value of $5,000 cash, "upon the company's entering into a written contract with him to guarantee him certain returns upon his investment; that the company accepted said 200 shares of stock from said J. K. Robinson, free of cost, and that the president and secretary be authorized to enter into the contract with Hutton; that Hutton produced the contract referred to above and the same was executed by all parties, $5,000 in cash being paid by Mr. Hutton to the treasurer and 200 shares of stock being issued to him therefor;" that Robinson tendered his resignation, and that Hutton was appointed by the president to fill the vacancy.

The minutes further recited that at the same meeting the monthly salaries were directed to be paid as part of the operating expenses, as follows: J. K. Robinson $100, Nick Peay $100, and W. G. Hutton $25.

Appellee then states that some time in April he visited the plant and looked over the order books and discovered that the representations that they had made about getting $100,000 worth of orders were not true. He became dissatisfied with the way they were running the business and asked them to give him his money and he would get out. It was understood at the time the contract was entered into that they were to have reasonable notice if appellee should demand a return of his money, and it was thoroughly understood between them that three or four days would be reasonable time. Appellee waited until April 12, and then wrote them a letter, addressed to the company, calling its attention to clause 8 of the contract, giving appellee the right at any time to withdraw the amount invested by him if he saw fit to do so upon tendering back the certificates of stock upon reasonable notice. He stated in the letter that he desired a return

of the money paid by him for the stock issued to him, towit, $5,000, and tendered to the company the certificates representing said stock. He expressed dissatisfaction because one of the stockholders had pledged his holdings without giving appellee an opportunity to object to it, contrary to the stipulation of their contract. He closed the letter by demanding a salary of $6.25 per week from February 25, 1914, and the $5,000 and interest on the same at 10 per cent from the same date. This letter was served on J. K. Robinson, as president of the company, by a deputy sheriff.

The appellee further stated that all he wanted was his money; that he felt kindly toward Robinson and Peay personally, but that he did not want to see the company put in the hands of a receiver.

On cross-examination, appellee admitted that the minutes were prepared in accordance with the understanding; that the parties signed up the contract, and they handed him the stock as additional security, saying that they wanted him with them, that they were all friends and would work harmoniously together. He did not want any job in the company except to protect himself in getting his money, and he accepted the secretary's place with that in view, but he accepted the secretary's position in good faith all the way through and expected to go down and help in any way he could. He was elected as director at the meeting, according to the contract, and the contract speaks for itself. It was understood that the minutes were to be made up so as to reflect the contract between them and appellee acquiesced in it.

Appellee was asked this question: "Whose stock did you understand you were getting that day?" and answered, "I only knew the company. I didn't know whose when I was buying. I didn't ask them or anything else."

The certificate that was delivered up was in the name of Guy A. Robinson, secretary, and Jas. K. Robinson, president, and was issued to appellee. They had already prepared it and handed in to appellee.

The testimony of June P. Wooten, a practicing attorney, who represented W. G. Hutton, states that he was present at the meeting of the "J. K." Siphon Ventilator Company on February 25, 1914, when Hutton paid the company the sum of $5,000. Hutton had explained the matter of the negotiations between himself and the company relative to letting it have the $5,000. Witness prepared the agreement between them. The witness says: "The matter was gone over thoroughly between us, and I got the understanding, as I suppose, from both parties about what was to be done and what sort of an agreement was to be drawn for the signatures of both parties. The agreement as written out and signed by all the parties was reached."

The witness corroborates substantially the testimony of appellee, whom he represented in the negotiations. He states that he had personal knowledge of who constituted the stockholders. He states that at the meeting, after the contract had been signed by Nick Peay and J. K. Robinson, they stated that Guy A. Robinson, the other stockholder, knew of the proposed agreement and that he was willing for the agreement to be made and would sign the same at any time it was presented to him. J. K. Robinson stated also, at that time, "that he had promised Dr. Carl Bentley $1,000 worth of the shares of the company in payment of a personal debt which he owed to Doctor Bentley."

The witness, continuing, says: "I explained that that being true, the stock not already having been issued, it would not be necessary to have Doctor Bentley's signature at this time; that when the stock was issued to him Mr. Robinson could explain that such an agreement had already been entered into. At the same meeting Mr. J. K. Robinson and Mr. Nick Peay stated that the stock then owned by them was held by them, none of it having been put up as collateral or having been transferred to any one."

The witness then proceeds to show that it was understood and stated that the money was for the ventilator

company and for its use alone. He represented Hutton in the effort to have the money repaid and prepared the letter in the form of a notice to the company, and he tells of the efforts that he thereafter made to have Robinson and Peay settle the indebtedness; and that to this end he represented Hutton and obtained an agreement with Robinson and Peay by which they were to execute a sixty-day note in the sum of $5,193, the indebtedness of the company to the appellee at that time; that he prepared the note, which was signed by the company by J. K. Robinson, its president, and by Robinson and Nick Peay; that it was understood and specified in the note that Robinson had deposited and pledged as collateral security for the payment of the note certificates of stock of the face value of $46,000; that Robinson, afterward, the following morning after the note had been signed, stated that after a conference with his attorney he did not desire to attach the stock. The witness then stated that he would retain the note as an evidence of the acknowledgment of the indebtedness. The witness further testified as to the minutes that Robinson and Peay told him "to draw any kind of minutes which, in his judgment, would protect the money of Mr. Hutton," and that he drew the minutes in conformity with the understanding had between all the parties, and that the minutes "substantially stated what took place in fact, though the same may not have taken place in actual words and phraseology."

Nick Peay, on behalf of the appellant, testified that he was vice president of the company, and owned $40,000 worth of its stock. He stated that at the time the contract in evidence was signed there had been no transfer of his stock, and that he pledged the stock as additional security for the sum of $5,000 which he had borrowed of the State National Bank. The contract in evidence represented the contract with the different parties to it. It was reduced to writing by Mr. Wooten, Mr. Hutton's attorney, at the instance of Mr. Hutton, inasmuch as the obligation was to him. He states that Robinson, Hutton and Wooten were present; that J. K. Robinson, Guy Robinson and

himself were the stockholders. Guy Robinson was not present. His resignation as secretary was tendered by J. K. Robinson. There was no notice given witness of a stockholder's meeting.

In regard to the $5,000 transaction with appellee, witness says: "Mr. Hutton says, 'Nick, are you fellows going to sell any of the stock?' and I says, 'I have got $40,000, Bill, and there ain't any of it for sale, and Robinson has got approximately $60,000, and neither of us want to sell any of the stock unless we have got to.' 'Well,' he says, 'that looks pretty good to me.' So when it came time that we thought the sale of this stock would be of benefit, I suggested to Robinson to sell him (Hutton) this stock, and he told me to go down and see him and see if he still wanted it, and I did, and after talking it over Mr. Hutton bought the stock. The facts show for themselves, whether it was a sale or a loan. The written contract shows what it was." He then tells about the execution of the note signed by the company, by Robinson as president, and himself and Robinson individually, when Mr. Wooten, for the appellee, was pressing them for the payment of the amount that Hutton claimed to be due him.

On cross-examination the witness stated that Hutton let the company have the money in good faith; that the company used every cent of the money in its business. Witness was willing at that time to protect Mr. Hutton in every way possible, and was still willing. Witness was asked the following questions:

Q. Didn't you state to me on several occasions that the company owed it? A. I may have said we owed him, and, of course, Robinson and I are virtually the company.

Q. Do you mean to say, now, that you and Mr. Robinson are the company? A. We were the company.

Q. Do you mean to leave the impression that you and Mr. Robinson individually were to redeem, or the company would? A. It amounts to one and the same thing.

Q. That is what I am asking you, if you didn't acknowledge to me that the company did owe him the

money? A. I don't know whether you call it the company or not; it was he and I, and we owned the company.

Q. When you said "we," did you mean Mr. Robinson and you individually, or did you mean the company? A. I presume it was me and him; we had the total stock.

Q. Then you don't deny that the company owes the money, do you, under your written agreement? A. I don't think I am competent to say.

Q. Have you ever denied that the company owed the money? A. That would be a construction to be placed by the court, I should say, Mr. Wooten.

Q. I am asking you, as a matter of fact, whether you didn't admit on several occasions that the company owed him the money and would pay it? A. Well, the company had given its note for it, hadn't it?

Further on in his testimony, on cross examination, he said, in answer to questions, that he was not competent to acknowledge the debt for the company. He was asked if up to a certain period he had not acknowledged that the company owed the money, and answered, "Well, I don't know whether you call it the compnay or not. I acknowledged that Robinson and I owed it."

When asked why he and Robinson signed the name of the company to the note for $5,193, of date May 30, 1914, he answered: "Well, the presumption would be that we signed that to strengthen the note." He further says, in answer to questions, that the company's name was signed by Robinson and he signed individually. Robinson signed the company's name in witness's presence and with his approval, and he and Robinson were two of the three of the board of directors.

Witness was asked further along if he and Robinson did not give Wooten, as the attorney for Hutton, authority to "draw the proceedings of the minutes of that meeting to protect Hutton in every possible way?" and answered, "Yes; we told you to draw those minutes to assure what protection was necessary to Mr. Hutton." Further on in his testimony, in answer to questions propounded by the court, he stated that Robinson was paid

the money; that the checks were given to Mr. Robinson; he didn't know to whom they were payable; he did not deposit them.

Robinson testified that the agreement of February 25 was the only agreement that he had with appellee; that the stockholders of the company at that time were Nick Peay, Doctor Bentley, Guy Robinson and himself. Bentley got his stock on the 17th of February and Hutton got his on the 25th. Witness testified that the recital in the minutes to the effect that Robinson had turned back to the treasurer of the company 200 shares of stock was not correct; that was never done. Appellee did buy 200 shares of the stock. Witness stated that they guaranteed Hutton a dividend; that Guy Robinson never tendered his resignation, and knew nothing of it, but witness said he would have him to resign. The company, as a company, never acknowledged any indebtedness on the part of the company to Hutton. Hutton bought $5,000 worth of witness's stock. He handed witness two checks of $2,500 each, payable to the appellant company, and these were deposited in the bank to the credit of the company. Peay and witness agreed to repurchase the stock on reasonable notice, and witness thought a year's notice would be reasonable. About a month after the transaction witness notified Guy Robinson of what had been done and got him to resign, telling him that he had appointed Mr. Hutton in his place.

The record shows that in order to obviate the appointment of a receiver, at the time the decree was rendered the question of the insolvency of the appellant was held in abeyance and all parties agreed that the court should render a final decree on the validity of plaintiff's claim, and expressly waived all questions of jurisdiction. The court entered a decree in favor of the appellee for $5,193, with interest at 10 per cent from May 30, 1914, until paid. To reverse this decree, appellant duly prosecutes this appeal.

J. A. Comer and *J. W. Blackwood,* for appellant.

1. There was no meeting of the stockholders, nor of the board of directors, lawfully convened, so as to bind the corporation for the payment of the debt, but it was merely a sale of stock to appellee and no one was bound except J. K. Robinson and Nick Peay personally. 55 Ark. 477; 54 Ark. 58-60; 96 Ark. 300; 62 Ark.

2. Robinson and Peay stood in a fiduciary relationship to the minority stockholders and creditors and their agreement attempting to guarantee 10 per cent dividends on appellee's stock, to make him a director and pay him a salary as secretary and to return him his money at all hazards, was against public policy and void. 120 Mass. 501; 15 Am. & Eng. Enc. of L. (2 ed.), 947, *et seq.;* 135 U. S. 507; 34 L. Ed. 254, 257, 258; 31 L. R. A. 557-564; 62 S. W. 795.

3. If this contract was with Peay and Robinson, they are not sued in this action; if it was made or attempted to be made in the name of the corporation, it is void and can not be enforced. 149 S. W. 1162; 24 Mo. App. 338; 25 *Id.* 184; Kirby's Dig., § 860. If, as is alleged in the complaint, the corporation is insolvent, then the right of creditors is involved. 68 S. W. 1029.

June P. Wooten, for appellee.

1. Under the circumstances, shown in this case, the law presumes that notice of the meeting was given to Guy Robinson. 1 Thompson on Corp., § 538. He having been told by his father of the meeting and of the proceedings, and having made no objection to lack of notice, waived the alleged irregularity and acquiesced in the proceedings. J. K. Robinson having been present and participating in the meeting, can not raise the objection of irregularity for himself, nor for another stockholder. 1 Thompson on Corp., § § 824, 825; 22 L. T. 400; 3 Kay & J. 408; 139 U. S. 417, 35 L. Ed. 227.

Even if the action of Peay and Robinson was done by them as individuals, if it was actually carried out and Guy A. Robinson acquiesced, it was valid. 2 Thompson

on Corp., § 1074; 44 W. Va. 175; 28 S. E. 730; 62 Kan. 463; 63 Pac. 756; 30 Wash. 147; 70 Pac. 247.

The action taken was really by the board of directors, notwithstanding the term "stockholder" was used in the minutes, and the board had authority to borrow money the same as an individual. 3 Thompson on Corp., § § 2165-67; 10 Cyc. 1100-1102, 1104. See also on the question of acquiescence and ratification, 10 Cyc. 1066-69, 1072, 1075-77; *Id.* 1080; 2 Thompson on Corp., § 1071; 107 Ala. 572; 18 So. 137; 30 Wash. 147; 70 Pac. 247; 44 W. Va. 175; 62 Kan. 463.

2. This is not a case of a corporation decreasing its capital by purchasing its own stock, but a case where all of the stock had been fully paid for and issued, and the transaction was one which enabled the corporation to raise funds with which to operate its plant. No creditors rights were involved, and, all the stockholders agreeing to it, the transaction was legal. 10 Cyc. 452-456; *Id.* 1109; 97 Wis. 585; 73 N. W. 333; 4 Thompson on Corp., § § 4075, 4080.

3. The court did not err in holding that the notice given by appellee for a return of his money was reasonable. The reasonableness of the time was a question of fact for the chancellor. 10 Cyc. 1077, 1078.

WOOD, J., (after stating the facts). (1) The first question to be considered is as to whether or not the transaction was a purchase of stock of the corporation or a loan of money to the corporation.

While the negotiations between the appellee and the parties representing the appellant culminated in a contract which recites that the $5,000 was "in consideration of the purchase for cash of 200 shares of the capital stock," and while there are other recitals which, unexplained, would tend to show that the transaction between the appellant and the appellee was a sale of stock and not a loan, yet when the contract is viewed in the light of the testimony of the witnesses who conducted the negotiations, we are of the opinion that the chancellor was cor-

rect in treating the transaction as a loan on the part of the appellee to the appellant.

The testimony of Peay, and the testimony of appellee himself, and of his attorney, leaves no doubt of the fact that it was the intention of the parties to the contract that appellee should advance to the corporation, to be used for its purposes alone, the sum of $5,000. The testimony shows that appellee advanced this sum, and that it was received by the appellant and used by it.

While J. K. Robinson testifies that it was his stock that was sold to the appellee, the contract itself and the testimony of the other witnesses and the minutes of the corporation which were drawn to reflect the proceedings of the meeting, show that the 200 shares of stock that were delivered to appellee were turned by Robinson into the treasury of the company. In other words, the effect of all the testimony, except that of Robinson, was to show that Robinson, in order to induce the appellee to advance the money for the corporation, donated 200 shares of his stock to the corporation to be given to appellee and to be held by him as security for the money he had advanced on behalf of the corporation. The corporation, at the time the negotiations were pending, had no treasury stock; all its stock had been issued and was paid up. That Robinson himself considered the transaction as a loan to appellant is shown by the fact that he afterward signed appellant's name to the note which included the $5,000 advanced by appellee.

As we view the contract, so far as the $5,000 is concerned, it creates a liability on the part of the appellant in favor of the appellee for this sum, with interest at the rate of 10 per cent per annum, payable to appellee upon demand, after reasonable notice, upon the appellee tendering back to the appellant the certificates of stock held by him. This construction clearly reflects the intention of the parties to the transaction, and the chancery court did not err in so holding.

The appellant contends that, even though the transaction be treated as a loan, that the contract was void be-

cause Guy Robinson, one of the directors, had no notice of the meeting when the contract was executed, and that there was therefore no legal meeting of the directors, and that it was also void because there was no legal meeting of the stockholders.

(2) Endorsed on the contract itself was a statement, signed by Robinson and Peay, to the effect that they constituted the stockholders of the company and consented to the contract. A clear preponderance of the testimony shows that at the time the contract of February 25 was executed the stockholders of appellant were J. K. Robinson, Guy Robinson, his son, and Nick Peay. J. K. Robinson and Nick Peay owned all of the stock except one share held by Guy Robinson, and it is manifest that this one share was simply held by him in trust for the purpose of the organization. For J. K. Robinson, at the time of the meeting, treated this one share as his own stock in making the negotiations with the appellee and permitted appellee to hold same in order to elect him secretary, and there was never any objection to this on the part of Guy Robinson. True, J. K. Robinson testified that at the time the contract was executed Doctor Bentley owned forty shares of the stock, but his testimony in this respect is contradicted by his own statement in writing endorsed on the contract and by the testimony of the other witnesses who were present. At the time of the meeting, therefore, and when the contract was consummated all of the stockholders and the directors were present or represented. But if Guy Robinson had in fact any beneficial interest in the share of stock held by him, the evidence shows that he was notified of what was done, and it was not shown that he objected to the transaction. His testimony was not taken. The minutes recite that notice in writing was waived by each of the stockholders. It must be held, under these circumstances, that Guy Robinson had notice of the meeting of the directors, or that if he did not have notice, when he was told by his father of the transaction and made no objection thereto, he acquiesced in and rati-

fied the same. See 1 Thomp., Corp., § § 824-25. He is estopped from gainsaying it. 10 Cyc. 1066.

"Acquiescence by stockholders in the action taken by the directors separately and where such action was carried out by the corporation was held sufficient to render the acts valid." 2 Thompson on Corporations, § 1074, and cases cited in note.

(3) But a conclusive answer to the contention urged by counsel that the contract was void because the board of directors was illegally convened is that the appellant was the beneficiary of the proceeds of the contract that was authorized at that meeting. Knowing the facts, it received the funds from the appellee and appropriated them to its own use. It is therefore estopped from setting up the invalidity of the contract.

(4) Estoppel by written contract or *in pais* operates against corporations in like manner as natural persons. The law is accurately stated in 10 Cyc., pp. 1067, 1068, as follows: "If an officer of a corporation or other person assuming to have power to bind the corporation by a given contract enters into the contract for the corporation, and the corporation receives the fruits of the contract and retains them after acquiring knowledge of the circumstances attending the making of the contract, it will thereby become estopped from afterward rescinding or undoing the contract." See also pp. 1065-66.

The appellant contends that those paragraphs in the contract by which the appellant guarantees to appellee 10 per cent dividend on the stock held by him and to make him a director and pay him a salary as secretary, and to return to him his money at all hazards, render the contract void as against public policy. If the transaction under consideration were a sale and purchase of stock instead of a loan, then there would be ground for appellant's contention. But, treating the transaction as a loan, it was within the power of the directors to make it in this form and to prescribe these or any other terms by way of inducement to appellee to enter into the contract and for his satisfaction and security after he had done so.

(5) In the absence of express limitations a corporation has the implied power to borrow money to carry out the purposes of its organization and to execute evidences of its indebtedness, and to give security therefor. It may bind itself by any form of obligation not forbidden by its charter. See 10 Cyc., pp. 1102-1104; 3 Thompson on Corporations, § § 2165-7.

Concerning the validity of the contract under review it must not be overlooked that the naked question before us is as to whether or not that contract makes appellant liable to the appellee. While the complaint alleges the insolvency of the appellant, the answer denied it, and by the agreement of counsel this question was not submitted, and as to whether or not there were other creditors of appellant besides the appellee, or as to what effect the contract would have on the rights of creditors generally was not involved.

(6) The appellant contends that the clause in the contract guaranteeing appellee a dividend of 10 per cent on the stock held by him was a fraud upon the minority stockholders. This is not well taken, for another clause in the contract gives to all the stockholders the same dividend. Moreover, treating the transaction as a loan, this was but a provision whereby appellee was to receive 10 per cent per annum on his loan. Besides, at the time this transaction was entered into there were no minority stockholders who were not present or represented in the meeting and consenting to this provision. They are therefore bound by it. The testimony of J. K. Robinson that Bentley was a stockholder at this time is contrary to the clear preponderance of the evidence.

As to whether or not demand was made upon the appellant for a return of the money a reasonable time before the institution of the suit was a question of fact for the chancellor, and his finding to the effect that appellant had reasonable notice is correct. See 10 Cyc., pp. 1077-1078.

(7) There was error in the matter of interest. It is admitted by the appellant in its answer that the appel-

lee was entitled to the amount which he claimed as salary. The basis for the amount of the judgment was the note for $5,193 executed by the appellant, through its president, on May 30, 1914. This should be taken as an admission of the amount due on the contract up to that date, including the salary.

The court's decree, however, was erroneous in making this entire sum bear interest from May 30, 1914. Only the sum of $5,000, under the terms of the loan agreement, should bear 10 per cent interest from May 30, 1914. The amount included in the judgment as salary, which has not been shown, and which the clerk may ascertain, should only bear interest at the rate of 6 per cent from May 30, 1914. The decree will be modified to this extent, and, with such modification, affirmed.

DISSENTING OPINION.

McCULLOCH, C. J. It is well that the court has so plainly labeled the contract in this case as one for the lending of money, otherwise it would never be recognized as such. The plain English of it is for the sale of stock of a corporation. It not only provides for the sale of the stock to appellee, but stipulates that he is to be made a director and the secretary and to receive a salary as such. He does not fail in his complaint to sue for his salary as secretary, and it appears that he has actually been drawing a salary, yet his attitude now is one purely of lender of money to the corporation. The contract is very plain in its terms and is one that was dictated by appellee himself and written by his own attorney. I am unable to see how it can be treated as a contract for the loan of money. It does provide that appellee "shall have the right at any time to withdraw the amount invested by him, if he sees fit to do so, upon tendering back the certificates of stock held by him," but that clause, instead of making it a contract for the loan of money, clearly characterizes it as one for the sale of shares of stock, with the guaranty that the dividends should amount to as much as 10 per cent, and that the shares would be repurchased by the corporation if the purchaser so elected. No amount of

testimony with respect to what the parties actually intended can alter the express language of the contract, for it must be judged by what was written down and not by what the parties thought they were writing. The rule that contemporary or antecedent negotiations are merged into the writing is so elemental that it is unnecessary to cite authorities. Parol evidence of such negotiations is inadmissible to contradict the express terms of the contract.

Treating the contract as one for the sale and repurchase of the stock at a guaranteed price, it was clearly *ultra vires* and void. If the corporation could make a valid contract of that kind with appellee, it could make the same with every other stockholder, and in that way could denude itself of all of its assets, leaving innocent stockholders and creditors without anything but the empty shell. The case of *Boley* v. *Sonora Development Co.,* 126 Mo. App. 116, 103 S. W. 975, is precisely in point, and it was there held that "a corporation has no power to sell stock and agree with the purchaser to buy it back within a given time at the price paid, upon his election to sell, thus releasing him from his responsibility as a stockholder." To the same effect see *Chrisman-Sawyer Banking Co.* v. *Independence Wool Mfg. Co.,* 168 Mo. 634, 68 S. W. 1026, and *Wilson* v. *Torchon Lace & Mercantile Co.* (Mo.), 149 S. W. 1156. The reasons are so clearly stated in those opinions, it is unnecessary to go into the subject further, for the injustice of permitting such conduct is obvious.

Now, if Robinson and Peay, the persons who negotiated this contract with appellee, were the only ones interested in the corporation, the contract might be upheld as their own and they would be estopped, as sole owners of the corporation, to raise the question of *ultra vires.* But such is not the facts of this case. It is true, there is evidence tending to show that they were the only two at the time the contract was made, except Robinson's son, who owned one qualifying share. The evidence shows, however, that at the time this suit was brought there was

another stockholder owning eighty shares of stock, and that there were creditors, and that both Robinson and Peay had hypothecated their own stock to other persons. Subsequent purchasers of stock and subsequent creditors of the corporation are entitled to protection from the effects of such a contract as this and they are not chargeable with notice of its provisions. The policy of the law is to facilitate the negotiability of corporate stock by treating it as free from all equities and liens except such as are created under statutes. *Bankers Trust Co.* v. *McCloy,* 109 Ark. 160. The same principle would seem to forbid the making of such a contract as this which gives a preference to a stockholder thus favored.

Appellee shows in his complaint that the corporation is insolvent and is tottering toward the doors of the bankruptcy court, and yet the decision in this case permits him, after having speculated upon the contingencies of the investment, to hold the corporation liable at the expense of other stockholders and creditors who doubtless dealt with it on the faith that it is assets would not be spent in retiring any of its stock.

Justice SMITH concurs in the dissent.

EAGLE v. OLDHAM.

Opinion delivered February 8, 1915.

1. WILLS—MEANING OF WORDS—EXTRINSIC EVIDENCE.—Extrinsic evidence may be admitted to interpret a will, not to show what the testator meant, as distinguished from what his words express, but for the purpose of showing the meaning of the words used.
2. WILLS—CONSTRUCTION—INTENTION OF TESTATOR.—The intention of the testator must govern the construction of a will, but in determining the testator's intention, the court should place itself where he stood, and consider the facts which were before the testator, in deciding what he intended by the language which he employed.
3. WILLS—DESCRIPTION OF LAND—INTENTION—EVIDENCE.—In determining what a testator meant by the description of certain lands in a will devising real property, the court may look to the testator's land book, tax receipts, deeds and plats.

4. WILLS—DEVISE OF LAND—MISDESCRIPTION—INTENTION.—A testator stated in his will that he wished to divide his lands equally between certain devisees. In the will certain lands were improperly described, and others omitted; *held*, the intention of the testator, as determined by extrinsic evidence, would govern, so as to give effect to his expressed intention.

5. APPEAL AND ERROR—TRANSFER OF ACTIONS—HARMLESS ERROR.—A decree in equity will not be reversed although the cause was improperly transferred from law, where, under the law and facts, the judgment, if rendered at law, must necessarily have been the same.

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

STATEMENT BY THE COURT.

The appellants brought ejectment against appellee to recover possession of three tracts of land situated in Lonoke County, Arkansas. The parties to this litigation claim under the will of Gov. James P. Eagle, who died a widower and childless, and undertook, by his will, to dispose of all property owned by him. By clauses 4 and 5 of his will he devised to his brothers and sisters and their heirs, two large bodies of land, in the description of which several errors occurred. Among such errors were three descriptions, each of which would have covered a particular subdivision of a section of land.

The sixth clause of the will is as follows: "Sixth. For the love I have and bear for my beloved wife, Mary K. Eagle, deceased, and for the love and good will I have for her brothers and sisters, W. K. Oldham, Kate Miller, Mag O. Doty, Kie Oldham and I. B. Oldham, I will and bequeath to them, to be equally divided between them, the following described lands."

And among other lands there described were the following: "The southwest part of section 31, one hundred and fifty acres; in township 1 north, range 8 west. The west half and the northeast northwest of section 5, one hundred and thirteen acres; the east part east half of section 1, one hundred acres, in township 1 south, range 8 west."

The will further recited that the testator had deeded

to his wife during her lifetime his home in Little Rock, together with other lots in this city, and recited that Mrs. Eagle was possessed of $5,600 in cash, which the testator had divided equally between her brothers and sisters, and this statement of fact is followed by this recital: "In executing this will, it has been my purpose, after giving my brothers and sisters the advantage of the value of the property I inherited from my father's estate, to divide my estate equally between Mrs. Eagle's brothers and sisters and my brothers and sisters, taking into consideration the city property and the cash herein mentioned."

Other clauses of the will which are of importance in this case are as follows:

"*Eleventh.* That all lands owned by me at my death not mentioned in this will, moneys, notes, accounts and all other personal property that I may be possessed, including G. W. Reeves' life policy, shall be used in paying my debts and in settling the bequests provided for in this will."

"*Twelfth.* After settling all my debts and all the bequests made in this will, if there is a residue, it shall be equally divided between my brother, W. H. Eagle, or his heirs, the heirs of my sister, R. C. Long, deceased, my sister, Mary J. Jones, or her heirs, and my sister, Mattie A. Boyd, or her heirs."

Clause No. 13 of the will appointed appellee and R. E. L. Eagle and Robert S. Boyd, nephews of the testator, as executors, and another clause, also numbered 13, provided the amount of the bond which these executors should execute. Other clauses made munificent gifts of moneys to the church of which Governor Eagle was a member, and to the institutions of that church. The will was dated February 15, 1904, and was not attested by witnesses. The testator died on December 20, 1904, and the will was duly probated.

Notwithstanding the inaccuracies in the description of the lands devised to the Eagle heirs, those lands were taken possession of by them, and no question was then made as to the right of the Oldham heirs to take possession of the lands which they claimed had been devised to

them, including the three tracts now in controversy, except the one hundred-acre tract. However, appellee took possession of that tract for himself and the other Oldham heirs, but upon the understanding that he would be responsible for the rents if the Oldham heirs were not entitled to them. In the administration of the estate of the testator it was not necessary for the executors to dispose of any of the lands mentioned in clause 11 of the will.

This suit was brought by the residuary legatees mentioned in the twelfth clause of the will as an action in ejectment against appellee, who was in possession, it being alleged that the lands were not mentioned in the will, and they, therefore, passed under the residuary clause. By mesne conveyances appellee had acquired the title of the other Oldham heirs to these lands. Appellee answered, and the cause was transferred to equity on his motion and over appellant's objection. The answer alleged, in substance, that the testator intended to, and did in fact, devise the tracts in controversy to the Oldham heirs, and there was prayer that the inaccuracies of description be reformed, and that appellee's title be quieted against any claim of appellants.

There is no real conflict in the evidence, and it appears that the facts are that Governor Eagle was much attached to the brothers and sisters of his deceased wife, and spent a considerable portion of his time at the home of appellee. That while Governor Eagle was a successful business man, of wide experience, he was not skilled in the use of land descriptions, and he is shown to have made a number of mistakes in the use of such descriptions in important legal instruments which he had prepared with care. Indeed, as has been stated, there were errors in the descriptions of the lands devised to the Eagle heirs as well as in the descriptions of the lands involved in this litigation.

It appears that, notwithstanding the declaration of the testator of his intention to divide his estate equally between his heirs and those of his wife, after giving his heirs the benefit of the value of all property which he had inherited from his father, the lands given the Eagle

heirs were, in fact, much more valuable than those given the Oldham heirs. This disparity in value is accounted for, in a measure, by the fact that the Oldham heirs took the residence in Little Rock and the Eagle "home place" in Lonoke County, to both of which places the testator was so attached that his estimate of market value may have been influenced by sentimental considerations. At all events, if the lands in controversy are not awarded the Oldham heirs, the testator's declared intention of dividing his lands equally will largely fail. The testator's "land book," together with a plat of his lands which he had, were offered in evidence, and also a plat of a survey of these lands which had been made after his death.

Trimble & Trimble and *T. D. Crawford,* for appellants.

1. Equity had no jurisdiction to construe the will. 70 Ark. 432; 88 Ark. 1. Neither had it jurisdiction to reform the will. 15 Ark. 519; 80 Ark. 458; 86 Ark. 446; 34 Cyc. 924; Page on Wills, § 809; 22 Mo. 518, 66 Am. Dec. 630; Jones, Eq. 110, 59 Am. Dec. 602; 87 Kan. 597, 41 L. R. A. (N. S.) 1126; 28 Ala. 374; 56 Ia. 676; L. R. 3 Eq. 244; 117 U. S. 219; 3 Redf. Wills, 48; 119 Cal. 571; 39 L. R. A. 689; 6 Madd. 216; 196 Ill. 230; 122 Ind. 349; 17 Am. St. 349; 142 Ill. 214; 34 Am. St. 64; 73 Miss. 188; 55 Am. St. 527.

2. Extrinsic evidence is not admissible either to show a mistake in a will or to ascertain the correction. 2 Pomeroy, Eq. Jur., § 871.

Extrinsic evidence in the interpretation of wills is admissible, not to show what the testator meant, as distinguished from what his words express, but simply to show what is the meaning of his words. 55 Md. 575.

An alleged mistake in the description of land devised can not be corrected by the admission of extrinsic evidence, unless the language of the will itself furnishes the basis of the correction. 103 Ind. 281; 132 Ind. 186.

The intention of a testator can not be established by parol proof, but must be determined by the language he has used. 73 Ala. 235; 115 Ala. 328; 6 Conn. 270, 16 Am.

Dec. 53; 50 Conn. 501, 47 Am. Rep. 669; 5 Fla. 542; 14 Ga. 370; 197 Ill. 398; 77 Ind. 96, 40 Am. Rep. 289; 103 Ind. 281; 6 B. Mon. 219; 66 Md. 193; 72 Md. 235; 9 Allen 109; 34 Mich. 250; 40 Miss. 758; 139 Mo. 456; 14 Johns. 1, 7 Am. Dec. 416; 90 N. C. 597; 3 Watts 240; 31 S. C. 606; 18 How. 385.

3. The first tract described in the will is "the east part, east half of section 1, 100 acres, in township 1 south, range 8 west." This description is defective in locating the land in range 8, instead of range 9, and also because the description "east part" of section 1, 100 acres, etc., is insufficient to identify the land. 48 Ark. 419; 80 Ark. 458; 60 Ark. 487; 34 Ark. 534; 41 Ark. 495; 3 Ark. 57; 30 Ark. 657; 11 How. 329.

The second tract "the northeast northwest of section 5, 113 acres, in township 1 south, range 8 west," the testator did not own, and there is nothing in the will to identify the *southeast* quarter of the northwest quarter of that section, which he did own, if the incorrect description of the former tract should be stricken out.

The third tract, purporting to be devised to the Oldhams, viz., "the southwest part of section 31, 150 acres, in township 1 north, range 8 west," is open to the same objection of indefiniteness as the first tract above.

Moore, Smith & Moore, for appellee.

1. The rigid rule adopted in some of the early English cases of adhering literally to the terms of a will, has, in this country been relaxed in the interest of justice and for the purpose of carrying out the intention of testators. The courts that feel called upon to enforce the more rigid rule, seek every means of avoiding its effect. Even under the Illinois rule as modified by expressions and rulings of the court, the testator's intention, in this case, as to the land in section 1, can be sustained by rejecting as surplusage the interlineation giving the township and range. 89 Ill. 11; 30 L. R. A. (N. S.) 307; 197 Ill. 398; 170 Ill. 290; 156 Ill. 116.

2. When all the provisions of the will relating to section 1 are brought together, it is obvious upon the face

of the will that the testator was referring to the same section in all the descriptions of section 1, and by rejecting the erroneous description of the range as surplusage, it is easy to reconcile the language of the will with the testator's intention. The township and range are not regarded as essential where the land can be identified in other ways. 64 Ark. 580; 76 Ark. 261; 8 Vin. Abr. Tit. Devise 51, pl. 21.

The weight of modern authority is to construe wills in accordance with the intention of the testator where that intention is plain enough, as in this case, to be obvious to the court. 26 L. R. A. 370, 91 Ia. 54; 156 Ill. 116, 28 L. R. A. 149; 117 U. S. 212-220; 218 Ill. 629; 6 L. R. A. (N. S.) 974, note; 161 Ind. 533; 61 Kan. 636; 95 Md. 148; 91 Minn. 299; 150 Mo. 655; 181 Mo. 262; 41 N. Y. S. 874; 119 Wis. 352; 22 Ark. 569; 79 Ark. 363; 81 Ark. 235; 98 Ark. 553.

3. As to the southeast quarter of the northwest quarter of section 5, which the testator erroneously described in the will as the *northeast* quarter, etc., attention is directed to the language used by him throughout the will which shows conclusively that he intended to make the devise out of his *own property*.

Recitals of ownership, such as are contained in this will, are held to warrant a court in applying the description in the will to another tract of land than that which it actually described, when it appears that the testator did not own the land answering the description. 122 Ind. 134, 22 N. E. 996; 113 Ill. 53, 55 Am. 395; 180 Ind. 573, 9 N. E. 473; 140 Ind. 399, 39 N. E. 54; 142 Ind. 24, 21 N. E. 311; 91 Ia. 54, 58 N. W. 1093. See also 6 L. R. A. (N. S.) 969, note par. 15.

4. As to the land described in the will as "the southwest part of section 31, 150 acres, in township 1 north, range 8 west," one can look to all of the provisions of the will and to the location and natural characteristics of the property for the purpose of determining what the intention of the testator was in making the gift. In that light, there is no ambiguity. 68 Ark. 546. This is not a case seeking to reform the will by setting up an intention

inconsistent with the will itself, but rather an effort to establish the intention of the testator in accordance with the provisions contained in the will, viewed in the light of the facts and circumstances surrounding him at the time of its execution.

5. Appellant's objection to the description in the will, "east part of east half of section 1, 100 acres," as insufficient to identify the land intended to be devised is without merit. The description manifests an intention to lay the 100 acres off in a parallelogram, with the east line of the section as a base. 56 Ark. 45; 68 Ark. 544; 45 Ark. 17-28.

SMITH, J., (after stating the facts). (1) The state of the evidence in this case leads to the conclusion that the beneficiaries under this will were correct in the original interpretation which they gave it in entering into the possession of their respective portions. But while we may feel sure of the testator's intention, we must gather that intention from the will itself. This idea has been expressed in a variety of ways by all the courts. But extrinsic evidence is generally held admissible in the interpretation of wills, not to show what the testator meant, as distinguished from what his words express, but for the purpose of showing the meaning of the words used. *Hammond* v. *Hammond,* 55 Md. 575.

A leading case on the subject of the construction of a will containing unenforceable provisions resulting from a mistake in the description of property devised is the case of *Patch* v. *White*. 117 U. S. 210. This is a case which has been much criticised by other courts as announcing an extreme rule, and was decided by a court which stood five for the opinion, and four against it, but it is a well considered case, and announces the rule which the majority of this court thinks is most conducive to effectuating the right of making testamentary disposition of property. The syllabus in that case is as follows:

"1. In the construction of wills, a latent ambiguity may be removed by extrinsic evidence.

"2. A latent ambiguity may arise upon a will, when it names a person as the object of a gift, or a thing as the

subject of it, and there are two persons or things that answer such name or description; or it may arise when the will contains a misdescription of the object or subject.

"3. Where a latent ambiguity consists of a misdescription, if it can be struck out and enough remain in the will to identify the person or thing, the court will so deal with it; or if it is an obvious mistake, will read it as if corrected.

"4. Where the testator devised 'lot 6' in a certain block, to a brother, and disposed of the remainder of his estate to others, and it appeared that he did not own lot 6, but did own lot 3 in said block, and that lot 3 was otherwise properly described in the will, said lot 3 is held by this court to have been lawfully devised."

In volume 11, page 90, of Rose's Notes to the U. S. Supreme Court Reports will be found a collection of a number of cases citing, and generally approving, the view of the majority in that case.

Another case decided by the same court is the case of *Smith* v. *Bell,* 31 U. S. 68. In that case the testator had devised certain property to his wife and son, and the devise to his wife was so worded that if its language was given its ordinary interpretation, the son could take nothing under the will. In the opinion in that case, by Chief Justice Marshall, it was said:

The first and great rule in the exposition of wills (to which all other rules must bend), is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. (Doug. 322; 1 Black. Rep. 672). This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be 'the legal declaration of a man's intentions, which he wills to be performed after his death.' (2 Black Com. 499). These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law. * * *

In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his lega-

tees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them. * * * No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole."

After referring to the inconsistent provisions of the will, and after pointing out what the effect would be if the language which devised to the wife her interest was given the construction which such language would ordinarily have, but which was not there given it, because, to have done so would have defeated the purpose of the testator as manifested by the entire instrument, the court said:

"As this construction destroys totally the legacy, obviously intended for the son by his father, it will not be made unless it be indispensable. No effort to explain the words in a different sense can do so much violence to the clause as the total rejection of the whole bequest, given in express terms to an only son."

(2) We must look to the will to determine the testator's intention, but in getting this view we should place ourselves where he stood, and should consider the facts which were before him in deciding what he intended by the language which he employed. If the rule were otherwise, the making of wills would be so difficult that the very purpose of permitting this method of disposition of property would frequently be defeated. The will now under consideration is wholly in the handwriting of a former Governor of this State, a man who was not a lawyer, but who had had much experience in public affairs generally, and a man whose place in the confidence and affection of the people of this State is firmly fixed. The will declares the purpose of its execution to be to divide the testator's property, which he owned as the result of his own accumulations, equally between his own heirs and those of his wife, and he has described lands which he evidently thought accomplished that result. Did he so

far fail to express his intention in his will, as that, in its construction, we must defeat its manifest purpose because of his inaccurate employment of language to accomplish that purpose?

(3-4) It is said that the devise of "the southwest part of section 31, 150 acres, in township 1, range 8 west," is not effective because the description is void. This section is crossed by Baker Bayou, and from the survey of it which we have before us, it appears that all of Governor Eagle's lands in the south half of the section lay west of this bayou, there being about twenty acres in the southeast quarter west of the bayou, and about 130 acres in the southwest quarter west of the bayou. This description and this acreage correspond with the description and acreage which appear in the receipts for taxes paid by the testator, although a survey made since the death of the testator shows the exact area to be 153 acres, instead of 150. The testator owned the north half of this section and included it in the part given the Oldhams by a proper description, and the only other land owned by him in this section was this southwest part consisting of 150 or 153 acres. Such a description would avoid a tax sale, because there we look only to the record of the sale, but here we may look to the testator's land book and tax receipts, and his deeds and plats to determine what he meant by the description he employed, and, when we have done so, all uncertainty passes away.

The trouble with the hundred acre tract is that it is described as being in range 8 west, when the land owned by the testator answering to the description used is in range 9 west. As has been said, the testator divided his lands into practically three parts, one of which went to his sister, Mrs. Mewer, another to the other Eagle heirs, and the third part to the Oldhams. The Oldhams were given lands in section 31, township 1 north, range 8 west, and in section 6, township 1 south, range 8 west, which lands are divided by the base line, and the range line divides this section 6 from section 1, township 1 south, range 9 west. Baker Bayou runs through all three of these sections, which constitute a solid body of land, and

if range 8 was intended, instead of range 9, then the 100 acres described as being in section 1 joins the land in section 6, about which section numbered 6 no question is made, as the Oldham title to the land in section 6 under the will is undisputed. These are matters which are plain to one familiar with land descriptions and the public surveys, but are confusing to others.

The remaining tract in controversy was described in the will as northeast northwest of section 5, township 1 south, range 8 west, which tract was not owned by the testator at the time the will was made nor at the time of his death. He did own, however, southeast northwest section 5, township 1 south, range 8 west, and if this was not the forty acres intended, then he has left that forty acres entirely isolated from all the other lands. Southeast northwest of section 5, if assigned to the Oldhams, makes a part of a compact body of land, while lands, which, without dispute, were given the Oldhams, lie between this forty acres and the lot of lands given Mrs. Mewer, and this forty-acre tract lies a mile and a half from the nearest tract constituting the body of lands given the other Eagle heirs.

A very well considered case which discusses the questions here under consideration, is the case of *Graves* v. *Rose,* 246 Ill. 76, 92 N. E. 601, 30 L. R. A. (N. S.) 303. A great many cases are cited and reviewed in that opinion. It is true the majority opinion in that case does not fully comport with the views which we have here expressed, but there was a strong dissenting opinion, in which three members of that court concurred, which expresses the better view, according to the opinion of the majority of this court, and the reasoning of this dissenting opinion supports the conclusion we have reached.

Another very interesting and well considered opinion is the case of *Stewart* v. *Stewart,* 65 N. W. 976, in which case the majority opinion gives support to the view of the majority in this case, and decides a point identical with the point in this case involving the misdescription

of the southeast quarter of the northwest quarter of section 5.

For the reasons stated, the majority of the court are of the opinion that the chancellor was correct in finding for appellee and in quieting his title against the claims of appellant.

Affirmed.

McCULLOCH, C. J., and KIRBY, J., dissent in part.

ON REHEARING.

SMITH, J. (5) It is urged in the petition for rehearing that our refusal to reverse the judgment in this cause, and to remand it for a new trial, because of the error committed in transferring it to equity, overrules the opinions in the case of *Head* v. *Phillips,* 70 Ark. 432, and *Frank* v. *Frank,* 88 Ark. 1. No such purpose is entertained, and we think no such result is accomplished. We think our action is authorized by the opinion in *North American Trust Co.* v. *Chappell,* 70 Ark. 507, in which case the syllabus is as follows: "Though the trial court erred in transferring a law case to equity, and in dismissing the complaint upon the ground alleged in the decree, an affirmance will nevertheless be ordered if it appears that the dismissal of the complaint was proper upon another ground."

Under the statute this court reverses only for prejudicial errors, and, if the view of the majority of the court upon the main question is correct, a judgment must necessarily have been rendered in appellee's favor; consequently, no prejudice has resulted from the fact that the cause was not tried at law, and the motion for rehearing is therefore overruled.

McCULLOCH, C. J. (dissenting). It is too well settled for further controversy that a court of equity will reform a last will and testament only in the exceptional class of cases where the instrument represents a contract between the parties and a reformation will be decreed so as to make it conform to the intention of the testator in carrying out the contract. Where there is no contract,

reformation will not be decreed for the obvious reason that a gift by will is purely voluntary, and if the language used in the instrument is insufficient to express the will of the donor with sufficient clearness to indicate his intention, the gift must fail. This court has steadily adhered to the rule that the intention of a testator must be gathered from the language employed in his will and not from oral testimony. *Cook* v. *Worthington,* 116 Ark. 328; 173 S. W. 395. Courts may construe wills, but not reform them; and the effect of the decision of the majority is, it seems to me, to reform the will of the testator rather than to construe it, and they have considered oral testimony for that purpose.

In reaching the conclusion, the majority seem to be controlled entirely by the case of *Patch* v. *White,* 117 U. S. 210. That case announces a correct principle, I think, in laying down the rule that "where a latent ambiguity consists of a misdescription, if it can be struck out and enough remain in the will to identify the person or thing, the court will so deal with it; or if it is an obvious mistake, will read it as if corrected." The case has been frequently cited and more often criticized than approved; but it is, to say the least of it, very doubtful whether the facts of the case warranted the application of the principle stated above. However, that principle has no application to the facts of the present case, at least as to two of the tracts of land involved in the controversy.

I agree that there is sufficient description to uphold the decree as to the tract referred to as the Baker's Bayou tract, but as to the other tracts in controversy it seems clear to me that to substitute a correct description for the improper ones used in the will amounts to nothing short of reformation of the will to conform to what the oral testimony shows to have been the real intention of the testator. We have before us nothing to explain or alter the imperfect descriptive words used by the testator except the bare fact that he did not own the lands answering the descriptive words of the will, but did own other lands which he doubtless intended to de-

scribe. The only fact stated in the opinion of the majority, as affording a basis for upholding the decree is that the testator did not own the hundred-acre tract described in the will as being in range 9 west, but did own a tract in range 8 west answering the description except as to the township and range. It is difficult to understand how there can be a substitution of descriptive words for the purpose of conforming to a proper description of the tract that the testator owned unless the court resorts to the remedy of reformation or permits oral testimony to vary the terms of the will. There is no escape from the conclusion, it seems to me, that when the court undertakes to substitute words, it applies a remedy which is in effect a reformation of the terms of the will or permits oral testimony to vary them. This is not a case like *Patch* v. *White,* where the property devised is described in two methods in the will, one of which is correct and the other incorrect, and the court can disregard the incorrect description, for we have only one description here, and when that is discarded there is nothing left. The process of the court is therefore substitution pure and simple, based upon oral testimony. Nor is this a case where you can treat the error as an obvious mistake, for it will not do to change a description merely because the testator does not own the land which he described in the will, but does own another tract which it is thought he intended to describe.

In the very recent case of *Cook* v. *Worthington, supra,* we said: "Where there is an obvious clerical misprision in the use of a word, or where the words, by reference to the context can better effectuate the intention of the maker by transposition to other parts of the instrument without destroying the sense, or where there is an obvious omission of a word or words, shown by reference to the other words used, then the rules of construction will permit the court to transpose or to supply these in order to effectuate the manifest purpose of the maker of the instrument, when ascertained from the instrument

taken as a whole. But further than this the court will not go."

Another tract in controversy is the southeast quarter of the northwest quarter of section five in township one south, range eight west, which the court holds was intended to answer the description in the will of "the northeast quarter of the northwest quarter of section five." The only reason for concluding that the testator, when he described the northeast quarter of the northwest quarter, meant the southeast quarter of the northwest quarter is that he owned the southeast quarter but did not own the northeast quarter. This is, I think, merely a substitution which amounts to a reformation of the will merely upon the ground that the description should be altered so as to include the tract which the testator owned and which the oral testimony is sufficient to show that he intended to devise. The cases cited on appellant's brief demonstrate very clearly the fallacy of the position taken by the majority in holding that the words of description used by the testator can be wholly discarded and other words substituted merely because it is shown that he owned property answering to the substituted words of description and does not own land which is described by the words employed in the will.

It is a dangerous thing, I think, to tamper with the unambiguous words of a last will and testament, for to do so is to set aside what the testator himself did for the purpose of substituting what the court conceives to be the thing intended by the testator. The safe rule is to follow the language which is clear and unambiguous even though the acceptance of it results in an ineffectual attempt on the part of the testator to dispose of his property.

Mr. Justice KIRBY concurs.

APPENDIX

I.

IN MEMORIAM

WILLIAM G. WHIPPLE

Col. George W. Murphy, in presenting the resolutions of the Little Rock Bar Association, on the death of Hon. William G. Whipple, said:

If the Court please: I rise to present, with as much brevity as may be consistent with the proprieties of the occasion, the following resolutions of the Little Rock Bar Association upon the death of Colonel William G. Whipple, long a member of the Bar of this Court:

"RESOLUTIONS OF THE LITTLE ROCK BAR ASSOCIATION ON THE DEATH OF COLONEL W. G. WHIPPLE.

"Col. William George Whipple was born at Windsor, Connecticut, on August 4, 1834. He was educated at Wesleyan University, Middletown, Connecticut, where he graduated with distinction. He then studied law at the Albany Law School, in the same class with the late Justice Brewer of the Supreme Court of the United States. Graduating there, he removed to Milwaukee, Wisconsin, and entered upon the practice of law. His close application to study and the severity of the climate impaired his health; but on the outbreak of the Civil War, he was appointed a major of volunteers. After a short term of service, his health failed completely, and he was compelled to give up his command.

"In 1869 he was appointed by President Grant United States District Attorney for this district, and took up his abode in Little Rock, where he continued to reside until his death.

"He was a strong partisan, and was active in the Reconstruction movement; but in a period of bitter dissension, there was no stain upon his integrity. He was the friend and adviser of Joseph Brooks in his effort to overthrow the Republican regime of the times, and adhered to the fortunes of Governor Brooks to the end.

"In 1887 he was elected Mayor of the city of Little Rock, and served two terms. He was the first mayor who realized the possibilities of our city, and who endeavored to bring it into the line of modern progress. He began the paving of our streets, inaugurated our electric light plant, and started a movement for civic development which has since continually grown, and which has resulted in making Little Rock the prosperous city that it is today.

"He was again appointed United States District Attorney for this district by President McKinley, and was reappointed by Presidents Roosevelt and Taft. He died on the 17th of July, 1914.

"On October 26, 1870, he married Miss Mary Dodge, a member of one of our oldest families, and who, with their only son, Durand Whipple, now standing master of the United States Court, survives to lament his death.

"Colonel Whipple was devoted to the State of his adoption, and not without reason; for his health, which had always been frail in the north, became in Arkansas very robust. Though he differed from the majority of our people in his political opinions, and was most earnest in his convictions, he was deeply interested in the welfare of our State, and did all that he could to build it up, to bring it to the attention of the world, and to develop its resources.

"He was a man of inflexible integrity, and vigorous and earnest in the practice of the law, throwing himself into his cases with all his heart. He was a student, not only of law, but of literature and history, and a man of varied accomplishments, including a proficiency in music, of which he was very fond. He was a hard fighter; but he was a true and faithful friend, and singularly tenacious in his gratitude for any kindness. His private life was worthy of all praise. He was a gentleman without a stain, frugal and temperate in his habits, courteous in his demeanor, kind and charitable. He was a lifelong member of the Episcopal Church, and was for many years a member of the vestry. As such he was largely instrumental in the building of Christ Church in our city.

"Therefore, Be It Resolved, That in the death of Colonel Whipple, our Bar has lost a valuable member, distinguished for his public spirit, his integrity, and his devotion to duty, while his wife has lost a good and faithful husband, and his son a kind and generous father.

"Resolved, Further, That a copy of these resolutions be sent to the widow of the deceased, and that they be presented to the Supreme Court by Col. George W. Murphy, and to the United States Court by Mr. H. H. Myers.

"G. B. ROSE,
"C. C. WATERS,
"H. H. MYERS,
"*Committee.*"

After presenting the above resolution, Colonel Murphy addressed the Court as follows:

Death is not more mysterious than the mortal life it terminates. To say that it is worse, or not as good, would be to deny to human existence a plan. It may be true, probably is true, that it is the Great Teacher some have supposed it to be; but if so its great lessons lie beyond the stretch of mortal span. It casts no backward light upon either the basis of its necessity or the nature of its design. Reason finds no means to unravel the knot of its mystery—nothing to point a sure way through its dark domain. The goal of hope, beyond, is seen by faith alone.

It has been said to be the greatest of all evils; and this may be true, if, contrary to our instinctive belief, it has no part or place in a plan or scheme of ever-continuing existence. To such as look upon it as the mere end of a short flickering life journey from the cradle into a midnight of endless nothingness, where no ray of light is ever seen, no voice of sound ever heard, its cold clammy touch brings a colder shudder of horror, by reason of the unspeakable dread of utter annihilation, than any measure of uncertainty or apprehension as to the worst possible condition of a future existence could inspire.

Again, it has been too broadly called the King of Terrors. It is certainly not universally so; and whether it is so in given instances must depend largely upon the beliefs and states of conscience under which it is met. Is it the open doorway to a further stage in an endless course of existence, where past virtues are rewarded and past evils punished? Do we so regard it? And is the conscience clear? Is it stirred with no soul-harrowing memory of former wrong? Does it look back over a considerate, unselfish, well-lived past? Does its faith grow brighter and stronger as the dissolving hour draws nearer? Does it grasp more firmly the nearing goal of hope? Does the parting soul catch the dissolving limits of earth knowledge and earth aspirations? Does its enlightening vision glimpse the glories of an ever-expanding field of life, love and usefulness? Then death brings no dread, no terror. It had none for the subject of these resolutions. He had lived his life well. He had asked of others no more than he was always ready to accord to them. He had set his house in order early, and had kept it in order. He looked upon life as immortal, and upon death as a necessary step in the progressive changing of its plane of operations and scenery. His favorite poem, entitled "After Death in Arabia," recited by him with intense pathos, at the bier of one of his life-long friends, and, only a few years later, read at his own funeral,

is so accurately expressive of his belief along these lines as to, here, impel me to a quotation of its following stanzas:

He who died at Azan sends
This to comfort all his friends:

Faithful friends: It lies, I know
Pale and white and cold as snow;
And ye say, "Abdallah's dead,"
Weeping at the feet and head,
I can see your falling tears,
I can hear your sighs and prayers;
Yet I smile and whisper this
"I am not the thing you kiss;
"Cease your tears, and let it lie;
"It *was* mine, it is not I."

Sweet friends, what the women lave
For its last bed of the grave,
Is but the hut which I am quitting,
Is a garment no more fitting,
Is a cage from which, at last,
Like a hawk my soul hath passed.
Love the inmate, not the room—
The wearer, not the garb—the plume
Of the falcon, not the bars
Which kept him from those splendid stars.

Loving friends, be wise and dry
Straightway every weeping eye.
What ye lift upon the bier
Is not worth a wistful tear.
'Tis an empty sea shell—one
Out of which the pearl is gone;
The shell is broken, it lies there;
The pearl, the all, the Soul is here.
'Tis an earthen jar, whose lid
Allah sealed, the while it hid
That treasure of His treasury,
A mind that loved Him; let it lie.
Let the shard be earth's once more,
Since the gold shines in His store.

Allah glorious! Allah good!
Now Thy world is understood;
Now the long, long wonder ends;
Yet ye weep, my erring friends,
While the man whom ye call dead,
In unbroken bliss, instead,
Lives and loves you; lost 'tis true,
By such light as shines for you;
But in the light ye can not see
Of unfulfilled felicity—
In enlarging Paradise
Lives a life that never dies.

Unequal to the task of pronouncing upon Colonel Whipple's life an oratorical eulogy, such as it merits, I must content myself with paying to his memory the more enduring, but still inadequate, tribute of a brief reference to his leading characteristics.

He was, both morally and intellectually, an extraordinary man. While it is not claimed that he was altogether exempt from all the frailties and imperfections to which humanity in general is heir, he was free from the debasing passions of hate, malice and revenge, and was full of charity for the frailties of others. In his social relations, including business transactions, he was unselfish and unexacting. His self-mastery enabled him to subordinate his self-love to his lofty sense of justice. He was the soul of honor. He never disregarded any promise he ever made, and never disappointed any expectation his conduct, either active or passive, had justified. He was true to every trust ever reposed in him, whether of a public or private nature. He had in him a great, warm heart, and was full of generous traits and impulses. But in all these regards, he was undemonstrative; his noble qualities were best known and best appreciated by those who knew him best.

He was a profound scholar and thinker. He read deeply in the book of nature, as well as in the books of men. He "looked through nature up to nature's God." The studious habits of his school days, which enabled him to lead his classes, attended him through life. He kept fully abreast of the times he lived in. But his love of learning was for its own sake; he did not gather his pearls to cast them "before swine." He made no parade of his scholarly attainments. To a just appreciation of his intellectual, as well as of his moral worth, an intimacy of acquaintance with him was essential. This I know as the result of a close, personal friendship and association with which he favored me for more than twenty years. From my viewpoint, thus enlightened, he was a philosopher.

As a lawyer he was deeply read. In his practice, he made his clients' interests his own. He was a logical and forceful advocate,

and a safe counsellor. He never advised a resort to litigation, until he was convinced that justice could not be otherwise attained. In the trial of his cases, he sought no advantage by indirection. He would have preferred defeat to success obtained through improper means. He never, either personally or through another, solicited a client or a case. He made the highest standard of professional ethics the measure of his professional conduct.

He was a man of strong convictions, and always took a decided stand on questions of great public moment. In our great war between the States, he was conscientiously, as well as geographically, opposed to us, of the South; but when, after it was all over, he came to dwell among us, he brought with him no malice, but, on the contrary, an exhaustless fund of good will. For evidence of this, I need go no further than to call attention to the well known fact that his gifted and only son, Durand, was, in accordance with his sentiments and wishes, during the Reunion of the United Confederate Veterans here, in 1911, active, tireless and unremitting in his efforts, both day and night, as a member of the committee for that purpose, to make "the old Confederate soldiers" comfortable, and to make the Reunion a success. Arkansas never gained, or had a truer, better, more patriotic or more devoted citizen; and the city of Little Rock, which he served as mayor for two terms, is still reaping, and will long continue to reap the benefits of his diligent industry and wise and discriminating policy.

In his family circle, composed of himself, his wife and son, he was kindness personified. There was no faultfinding there. There all was peace, love, contentment, happiness. He was an ideal husband and father.

He was tall in stature, refined in features, graceful in movement, courtly in manners and easy, chaste and fluent in conversation. No one who had ever seen him was likely to forget him or to mistake him for another. It is not often that we see his like.

Temperate and regular in all his habits, and studiously conservative of his vital forces, he attained the ripe old age of seventy-nine years, eleven months and fourteen days. The end of his earth life came at Roan Mountain, Tennessee, where he had gone from his home only a few days before, attended by his devoted wife, who tenderly and lovingly watched over him and ministered to him to the last, in the hope of palliating his rapidly declining state of health. He was "ready for the summons." He had filled "the circle marked by Heaven." He had been a slave to no sect. He had taken no devious road. There was no unwelcome spectre of the past to disquiet his parting hour. He knew that "faith, law, morals, all" begin and "end in love of God and love of man." His faith in virtue's eternal reward was unconfined. He was ready to go. Without even a tremor or trace of fear he "passed over" to his final account. Just what his balance is—just what his advanced station is, "over there," the limits of time and sense pre-

clude us from knowing; but as his moral and religious life here was far above the average, we know that his credits must be large, and that his advancement must be far beyond the average "over there."

We must soon follow him, but we may be long in overtaking him.

I move that the resolutions be spread upon the records.

The Chief Justice responded on behalf of the Court, after the conclusion of the above remarks.

II.

OPINIONS NOT REPORTED.

Nance *v.* Polk; appeal from Clay Chancery Court, Western District; Charles D. Frierson, Chancellor; affirmed December 21, 1914, *per* McCulloch, C. J.

Winter *v.* Humble; appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor; reversed December 21, 1914, *per* Wood, J.

Chicago, R. I. & P. Ry. Co. *v.* Hawkins; appeal from Saline Circuit Court; W. H. Evans, Judge; affirmed December 21, 1914, *per* Wood, J.

Lee *v.* State; appeal from Union Circuit Court; C. W. Smith, Judge; affirmed January 4, 1915, *per* Wood, J.

First National Bank of Corning *v.* McNeill; appeal from Clay Chancery Court, Western District; Charles D. Frierson, Chancellor; affirmed January 4, 1915, *per* Wood, J.

Glover *v.* State; appeal from Pulaski Circuit Court; Robert J. Lea, Judge; affirmed January 11, 1915; *per* Hart, J.

Lee *v.* State; appeal from Pike Circuit Court; Jefferson T. Cowling, Judge; affirmed January 18, 1915; *per* Wood, J.

Cox *v.* State; appeal from Pike Circuit Court; Jefferson T. Cowling, Judge; affirmed January 25, 1915; *per* Smith, J.

Avant *v.* State; appeal from Crittenden Circuit Court; W. J. Driver, Judge; affirmed February 1, 1915; *per* Hart, J.

III.

CASES DISPOSED OF ON MOTION.

J. H. Adams, G. H. Adams and L. H. Adams *v.* J. R. Jackson; Ouachita Circuit Court; Charles W. Smith, Judge; affirmed under rule 7, December 21, 1914; *per curiam.*

Sam A. Clark & Company *v.* M. Baum; Washington Circuit Court; J. S. Maples, Judge; appeal dismissed on appellee's motion January 18, 1915, the same not having been granted by the clerk within one year from rendition of judgment by the lower court; *per curiam.*

Chicago, Rock Island & Pacific Railway Company *v.* W. L. George, administrator of the estate of John Merriwether, deceased; Perry Circuit Court; W. G. Hendricks, Judge; settled, and appeal dismissed on appellant's motion, January 18, 1915; *per curiam.*

A. P. Gunther *v.* Fort Smith Cotton Oil Company; Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; appeal dismissed for noncompliance with rule 9, February 8, 1915; *per curiam.*

INDEX

ACCOUNT:

effect of failure of defendant to plead or deny the correctness of an account in an action thereon, after a demurrer to the complaint has been overruled. *Stiel & Co.* v. *Ide & Co.*, 244.

ACTIONS:

what constitutes a penal action. *State ex rel. Attorney General* v. *Arkansas Cotton Oil Company*, 74.
what constitutes a remedial action. *Id.*
ground for transfer to equity. *Rogers* v. *Ogburn*, 233.
actions in which a husband and wife are joint plaintiffs may be consolidated under the act of May 11, 1905, p. 798. *Little Rock Gas & Fuel Co.* v. *Coppedge*, 334.
effect of erroneous transfer from law to equity, where a proper judgment is rendered by the chancery court. *Eagle* v. *Oldham*, 565.

ADMINISTRATION:

jurisdiction of probate court to adjust partnership accounts between an executor or administrator of the deceased and his surviving partner. *Fowler* v. *Frazier*, 350.

ANIMALS:

right of owner to recover for negligent killing of dog. *Taylor* v. *St. Louis, I. M. & S. Ry. Co.*, 47.
liability of railroad for transporting tick infected cattle into quarantined territory. *St. Louis, I. M. & S. Ry. Co.* v. *Campbell*, 119.
in criminal prosecution admissibility of evidence of performance of bloodhounds. *Holub* v. *State*, 227.
liability of principal where plaintiff is bitten by a vicious dog in the custody of its agent. *Holt et al., Receivers*, v. *Leslie*, 433.
liability for injuries done by a vicious dog kept with knowledge of its vicious habits. *Id.*
liability and duty of bailee of vicious dog. *Id.*
sale of stallion with guarantee as to breeding qualities. *Holland Banking Co.* v. *Hearn*, 238.
stallion as nuisance to neighbor of owner. *Jackson* v. *Columbia County*, 386.

APPEALS:

where appellant's amended complaint is stricken out as to appellee, the order is a final judgment from which an appeal may be taken. *Hastings* v. *United States Fidelity & Guaranty Co.*, 220.

order of probate court granting an appeal to the circuit court, is jurisdictional. *Williams* v. *Bowen, Executor*, 266.

appeal from probate court, failure to file affidavit or petition for; waiver. *Id.*

prosecuting an appeal by the defendant from a justice to the circuit court operates as a general appearance, and waives the want of process or any defect therein. *Linn-McCabe Co.* v. *Williams*, 307.

agreement of council as to bill of exceptions, when complete. *Hodges* v. *Collision*, 420.

APPEAL AND ERROR:

failure to abstract record as to measure of damages; practice where cause is reversed. *Hall* v. *Gage*, 50.

presumption of court where appellant fails to abstract the record. *Crane* v. *Jackson*, 100.

assumption of risk, harmless error in instruction on issue of. *Jones & Harrington* v. *Scott*, 108.

right of court in prosecution for larceny, to refuse to give a requested instruction after having read the statute to the jury. *Lucius* v. *State*, 260.

objection to wording of an instruction must be made specifically. *Garretson-Greeson Lumber Co.* v. *Goza*, 277.

effect of submission by the court, of issues not supported by any proof. *St. Louis, I. M. & S. Ry. Co.* v. *Middleton*, 284.

effect of failure to state ground for motion for a new trial, in the motion. *Linn-McCabe Co.* v. *Williams*, 307.

chancery cases are tried *de novo* on appeal. *Dyer* v. *Dyer*, 487.

force given to finding of chancellor on question of fact, on appeal. *Id.*

in an action for damages caused by negligence, right of court in instructing the jury to read from the statutes. *St. Louis, I. M. & S. Ry. Co.* v. *Elrod*, 514.

effect of erroneous transfer to equity, where a proper judgment is there rendered. *Eagle* v. *Oldham*, 565.

AUTOMOBILES:

corresponding rights of automobiles and teams to the use of public highways. *Butler* v. *Cabe*, 26.

duty of drivers of automobiles with reference to frightening animals on public highways. *Id.*

BANKS AND BANKING:

liability of stockholders of bank receiving deposit of funds belonging to a public school district. *Black* v. *Special School Dist. No. 2*, 472.

BIGAMY:

in prosecution for crime of, testimony of minister who performed the second marriage is admissible, when. *Tanner* v. *State*, 452.
proof of authority of justice of the peace to perform the first marriage. *Tanner* v. *State*, 452.
right of wife of bigamous marriage to dower. *Cooper* v. *McCoy*, 501.

BILLS AND NOTES:

certified check; right to stop payment, on. *Merchants & Planters Bank of Camden* v. *New First National Bank of Columbus, O.*, 1.
effect of certification of a check; duty of drawee bank. *Id.*
rights of *bona fide* purchaser of check payable at a future date. *Id.*
rights of *bona fide* purchaser of certified check. *Id.*
liability of endorser of note before delivery to payee. *Hodges* v. *Collision*, 420.
authority of officer of corporation to execute negotiable paper. *C. L. Kraft & Co.* v. *Grubbs*, 520.

BILL OF EXCEPTIONS:

signature of judge may be dispensed with, when. *Hodges* v. *Collison*, 420.

BLOODHOUNDS:

admissibility of evidence of performance of, when pursuing person charged with the commission of a crime. *Holub* v. *State*, 227.

BROKERS: See REAL ESTATE BROKERS.

CERTIORARI:

is the appropriate method of bringing up for review, the record of the circuit court in an action contesting a county seat election. *Bowden* v. *Webb*, 310.

CIRCUIT COURTS: See CIRCUIT JUDGES.

creation of a new circuit, causes a vacancy in the office of judge, when. *State ex rel. Wood* v. *Cotham*, 36.
term of office of circuit judges. *Id.*
special election to fill a vacancy. *Id.*

CIRCUIT JUDGES:

tenure of office. *State ex rel. Wood* v. *Cotham*, 36.
vacancy in office of, when created, and how filled. *Id.*
term of office of, under the Constitution of 1874. *Id.*
Eighteenth Judicial Circuit; term of office of judge of. *Id.*
may exercise what judicial powers, in vacation. *Bowden* v. *Webb*, 310.

CONDEMNATION:

necessity for deposit in court. *Fort Smith & Western Rd. Co.* v. *Hare*, 10.
money deposited in condemnation proceedings, is subject to the court's order. *Id.*
where money is deposited in condemnation proceedings, effect of improper application thereof. *Id.*

CONFLICT OF LAWS:

where sale of personal property is made in another State with delivery to take place here, what law governs. *Summers, Receiver*, v. *Carbondale Machine Co.*, 246.
right of foreign guardian of nonresident ward to sell ward's real estate in this State. *Landreth* v. *Henson*, 361.
domicile of infant whose parents are dead, how determined. *Id.*
domicile of infant may be changed, how. *Id.*
jurisdiction of foreign court granting a divorce to a wife to award dower in lands of husband in this State. *Kendall* v. *Crenshaw*, 427.

CONTRACTS:

effect of marriage on contract between the parties. *McKie* v. *McKie*, 68.
construction of repugnant clauses. *English* v. *Shelby*, 212.
repugnancy between general and special provisions. *Id.*
construction, admissibility of evidence of contemporaneous agreement. *Id.*
rescission of contract for exchange of lands on the grounds of misrepresentations. *Loveless* v. *Davis*, 443.
parol agreement to convey lands, not enforceable, when. *Dyer* v. *Dyer*, 487.
an agreement between the insured and the beneficiary in a life policy, held to be a wagering contract, when. *Langford* v. *National Life & Accident Co.*, 527.
where a note is given to secure a debt, it will be treated as evidence of the same, when, and to what extent. *The J. K. Siphon Ventilator Co.* v. *Hutton*, 545.

CONTRIBUTORY NEGLIGENCE:

question of, one for the jury, when. *Jones & Harrington* v. *Scott*, 108.

CORPORATIONS:

dissolution and surrender of charter, effect on action against, to enforce a penalty for violation of anti-trust statutes. *State ex rel Attorney General* v. *Arkansas Cotton Oil Company*, 74.
the right of a corporation to surrender its charter has not been abridged by the anti-trust statutes. *Id.*
use of funds of, by a president of, for his own use, where he is the principal owner of the stock therein. *Buena Vista Veneer Co.* v. *Hodges, Receiver*, 253.
authority of officer to execute negotiable paper. *C. L. Kraft & Co.* v. *Grubbs*, 520.
although corporate stock is transferred to the name of a certain person, where that person paid a certain sum of money to the corporation, the transaction will be teated as a loan with the stock given as security, when. *The J. K. Siphon Ventilator Company* v. *Hutton*, 545.
acquiescence of stockholder in acts of directors. *Id.*
act of directors binding, when, in the absence of a legal meeting; estoppel. *Id.*
binding effect of acts of directors which are beneficial to the corporation. *Id.*
may borrow money for what purpose. *Id.*
agreement guaranteeing a certain per cent dividend, will be treated as an agreement to pay certain interest, when. *Id.*

COUNTY COURTS:

liability of county for fees to architect of county building. *Klingensmith* v. *Logan County*, 65.

COUNTY FUNDS:

liability of surety on bond of depositary of county funds. *Roberts* v. *State, use Logan County*, 410.
personal liability of stockholders of depositary bank of public funds. *Id.*

COUNTY OFFICERS:

proceedings to set aside the judgment of the county court confirming settlement made by a collector for various drainage districts are authorized by Kirby's Digest, sections 7174 and 7175. *Haley* v. *Thompson*, 354.
errors in settlements made by county officers may be corrected, how. *Id.*

COUNTY SEATS: See ELECTIONS.

removal of; contest of election. *Bowden* v. *Webb*, 310.

CRIMINAL LAW:

statements of deceased immediately after the killing, admissible as part of *res gestae*. *Plumley* v. *State*, 17.
plea of self-defense in homicide case. *Id.*
defendant, as witness, credibility of. *Lucius* v. *State*, 260.

CARRIERS:

liability for transporting tick-infected cattle into quarantined territory. *St. Louis, I. M. & S. Ry. Co.* v. *Campbell*, 119.
delivery of freight without surrender of bill of lading. *Tedford* v. *Chicago, R. I. & P. Ry. Co.*, 198.
remedy of carrier after delivery of freight without surrender of bill of lading. *Id.*

CATTLE QUARANTINE:

liability of railroad for transporting tick-infected cattle into quarantined territory. *St. Louis, I. M. & S. Ry. Co.* v. *Campbell*, 119.

DAMAGES:

effect of failure to abstract record on issue of. *Hall* v. *Gage*, 50.
amount of, in personal injury action, where injuries are serious. *Jones & Harrington* v. *Scott*, 108.
liability of corporation for exemplary or punitive damages for wilful tort of employee. *Pine Bluff & Arkansas River Ry. Co.* v. *Washington*, 179.
damages for future pain and suffering may be assessed, when. *Id.*
amount of compensatory and punitive damages for malicious tort. *Id.*
malicious destruction of ornamental shade trees; treble damages. *Laser* v. *Jones*, 206.

DEBT:

note given to secure payment of, to be treated as evidence of the amount of. *The J. K. Siphon Ventilator Co.* v. *Hutton*, 545.

DEEDS: See VOLUNTARY CONVEYANCES.

may be set aside for incapacity of grantor, when. *Jones* v. *Travers*, 95.
effect of undue influence upon grantor. *Id.*
voluntary conveyance from wife to husband, effect of failure to deliver the deed. *Wood* v. *Wood*, 142.

DEEDS—*Continued.*

what constitutes delivery of. *Id.*
intention of grantor as to delivery. *Id.*
parol evidence to vary statement of consideration in a deed. *Mewes* v. *Mewes*, 155.
effect of naming excessive consideration in a deed. *Id.*
an express trust may not be engrafted upon a deed by oral proof. *Queen* v. *Queen*, 370.
lost deed may be proved how. *Id.*

DEFINITIONS:

"consortium" defined. *Little Rock Gas & Fuel Co.* v. *Coppedge*, 334.
"services" of wife defined. *Id.*

DESCENT AND DISTRIBUTION:

in an action to determine how property shall descend, who shall be parties. *Mewes* v. *Mewes*, 155.
dower right of widow where there are no children. *Kendall* v. *Crenshaw*, 427.
right of illegitimate children to inherit. *Cooper* v. *McCoy*, 501.

DIVORCE:

right of divorced wife to dower. *Kendall* v. *Crenshaw*, 427.
jurisdiction of foreign court granting divorce to award dower in lands of husband in this State. *Id.*

DOMICILE:

domicile of infant how determined, and how changed. *Landreth* v. *Henson*, 361.

DOWER:

foreclosure of mortgage made by husband as affecting dower right of wife. *Brignardello* v. *Cooper*, 103.
dower interest vests when and how. *Barton* v. *Wilson*, 400.
failure to assign. *Id.*
nature of dower estate. *Id.*
death of widow, dower estate descends how. *Id.*
jurisdiction of probate court. *Kendall* v. *Crenshaw*, 427.
right of divorced wife to. *Id.*
rights of widow, where no children survive the husband. *Id.*
right of widow to allotment of dower in chancery action. *Id.*
right of wife of bigamous marriage to dower. *Cooper* v. *McCoy*, 501.

DRAINAGE DISTRICTS:

right of collector of, to fees. *Haley* v. *Thompson*, 354.

ELECTIONS:

removal of county seat; contest. *Bowden* v. *Webb*, 310.
returns of county seat election, made how. *Id.*
inspection of poll books may be ordered, when. *Id.*
contest of, on ground of fraud, an inspection of the records may be ordered, when. *Id.*
power of circuit judge in contest case, to order inspection of records, and the custody of the same. *Id.*
order of circuit judge in an election contest, that the election book be produced for inspection, is final, and when made in vacation, a writ of certiorari is the appropriate method of bringing up the record for review. *Id.*

EMINENT DOMAIN: See CONDEMNATION.

effect of deposit made in court. *Fort Smith & Western Rd. Co.* v. *Hare*, 10.

ESTATE TAIL:

what constitutes, under the statutes. *Rogers* v. *Ogburn*, 233.
conveyance by life tenant of, rights of remainder-man. *Id.*

EVIDENCE:

proof of negligence by the mere existence of a certain state of facts. *Malvern Lumber Co.* v. *Sweeney*, 56.
evidence of contract of indemnity insurance, when admissible in personal injury action. *Jones & Harrington* v. *Scott*, 108.
burden of proof in personal injury action. *Bain* v. *Fort Smith Light & Traction Company*, 125.
duty of going forward with evidence. *Id.*
what evidence must be introduced in chief. *Id.*
rebuttal testimony; nature of; may be introduced, when. *Id.*
incorrect consideration named in a deed, parol evidence to vary. *Mewes* v. *Mewes*, 155.
evidence of performance of bloodhounds, in criminal prosecution. *Holub* v. *State*, 227.
written confirmation of oral contract of sale of land may be proved by parol evidence, when. *Southern Cotton Oil Co.* v. *Coleman*, 268.
parol evidence may be admitted to show agreement as to conditions upon which a real estate broker was to receive commissions. *Worthen* v. *Stewart*, 294.

EVIDENCE—*Continued.*

effect of a general objection to the introduction of evidence. *Linn-McCabe Co.* v. *Williams*, 307.
objection to the introduction of evidence can not be made for the first time on appeal. *Id.*
where two actions in which a husband and wife are plaintiffs, each may testify, when. *Little Rock Gas & Fuel Co.* v. *Coppedge*, 334.
in action for personal injuries caused by escape of gas evidence of experiments admissible, when. *Id.*
in prosecution for crime of bigamy the authority of the persons performing the two marriages, may be proved, how. *Tanner* v. *State*, 452.
self-serving declarations; admissibility of evidence tending to confirm. *The Fechheimer-Kiefer Co.* v. *Kempner*, 482.
where a note is given as evidence of a debt, it will be treated as an admission of the debt to the extent of the note, and at the time it was given. *The J. K. Siphon Ventilator Co.* v. *Hutton*, 545.

FERRIES:

who may operate. *Crane* v. *Jackson*, 100.
exclusive right to operate. *Id.*
remedy for infringement of right of. *Id.*
abandonment of, what constitutes and affect of. *Id.*

GAS:

liability of gas company for injuries due to negligence caused by escape of. *Little Rock Gas & Fuel Company* v. *Coppedge*, 334.
admissibility of evidence of experiments with. *Id.*
admissibility of evidence of condition of pressure of, prior to the injury. *Id.*

GIFTS:

voluntary conveyance of land from wife to husband. *Wood* v. *Wood*, 142.

GUARANTY AND SURETYSHIP:

liability of surety on bond of contractor. *English* v. *Shelby*, 212.
street improvement, construction of guaranty bond. *Id.*

GUARDIAN AND WARD:

sale of ward's land by nonresident guardian. *Landreth* v. *Henson*, 361.
act of illegally appointed foreign guardian; conflict of laws. *Id.*

GUARDIAN AND WARD—*Continued.*

guardian may be appointed in state of ward's domicile, for what purpose. *Id.*

sale by foreign guardian of property belonging to nonresident ward must be made in compliance with the laws of this State. *Id.*

nonresident guardian must show bond, when. *Id.*

necessity for confirmation of lease of ward's lands. *Gaines* v. *Gaines*, 508.

GUARDIANSHIP:

jurisdiction of probate court where appointment of guardian by the clerk is void. *Hastings* v. *United States Fidelity & Guaranty Co.*, 220.

void appointment of guardian of insane person; legal responsibility of equitable guardian. *Id.*

liability of surety on bond of guardian holding void appointment. *Id.*

HOMESTEAD:

nature of the estate and right of. *Brignardello* v. *Cooper*, 103.

effect of abandonment. *Id.*

HOMICIDE:

statements of deceased as part of *res gestae*. *Plumley* v. *State*, 17.

plea of self-defense, when availing. *Id.*

proof of retreat. *Id.*

HUSBAND AND WIFE:

effect of intermarriage between parties to contract; extinguishment. *McKie* v. *McKie*, 68.

presumption where title to property is taken in wife's name, although paid for by the husband. *Wood* v. *Wood*, 142.

effect of transfer of property by wife to husband; presumption of coercion; burden of proof. *Id.*

personal injury to wife, right of husband to maintain action. *Little Rock Gas & Fuel Company* v. *Coppedge*, 334.

where wife has sustained personal injuries, amount of damages recoverable by husband. *Id.*

authority of husband when acting as agent for wife, to execute negotiable paper for her. *Morris* v. *Friend*, 424.

damages for loss of wife's services and consortium. *Little Rock Gas & Fuel Company* v. *Coppedge*, 334.

IMPROVEMENT DISTRICTS:

in action involving legality of formation of, jurisdiction of circuit court, on appeal from county court. *Jacks Bayou Drainage District* v. *St. Louis, I. M. & S. Ry. Co.*, 30.
question of advantage of, may be determined how. *Id.*
contemplated drainage district not beneficial to land owners, when. *Id.*
incorrect description of boundaries in petition for the formation of. *Bell* v. *Phillips*, 167.
validity of initial petition is jurisdictional. *Id.*
effect of validating act. *Id.*
right of Legislature to dispense with the filing of the initial petition. *Id.*
formation of levy district; place of meeting of property owners. *West* v. *Cotton Belt Levee District No.* 1, 538.
levee district; continuing powers of the board. *Id.*
construction of statutes governing, powers of board of improvement. *Id.*

INSANE PERSONS:

right of clerk to issue letters of guardianship for adult insane person, without order of court. *Hastings* v. *United States Fidelity & Guaranty Co.*, 220.
where appointment of guardian is void probate court is without jurisdiction. *Id.*
practice where appointment of guardian is void. *Id.*

INSTRUCTIONS:

not conflicting, when. *Bain* v. *Fort Smith Light & Traction Co.*, 125.
necessity for asking correct instruction. *Lucius* v. *State*, 260.
in an action for damages caused by negligence right of court in instructing the jury to read from the statutes. *St. Louis, I. M. & S. Ry. Co.* v. *Elrod*, 514.

INSURANCE: See LIFE INSURANCE.

JUDGMENTS:

absence of defendant as grounds for motion to set aside. *Stiel & Co.* v. *Ide & Co.*, 244.
duty of court to render where defendant fails to plead after his demurrer to the complaint has been overruled. *Id.*
res adjudicata; circuit court judgment as, when identical action is brought in chancery. *Morris* v. *Lyons*, 416.

LARCENY:

sufficiency of evidence to warrant a conviction of crime of. *Holub* v. *State*, 227.
refusal of instruction after reading the statute to the jury. *Lucius* v. *State*, 260.

LEGISLATIVE ACTS:

presumed to act prospectively. *Black* v. *School District No.* 2, 472.

LEGITIMACY:

of children of marriage void in law. *Cooper* v. *McCoy*, 501.

LEVEE DISTRICTS:

formation of, place of meeting of land owners to consider the improvement. *West* v. *Cotton Belt Levee District No.* 1, 538.
continuing powers of the levee board. *Id.*
power of the board to protect the property of the district from loss or destruction. *Id.*

LICENSES:

may be issued by mayor of incorporated town, when. *Town of Dardanelle* v. *Gillespie*, 390.

LIFE ESTATES:

conveyance by life tenant; rights of remainder-man. *Rogers* v. *Ogburn*, 233.
effect of surrender to one of several remainder-men. *Id.*
statute of limitations runs against remainder-men, when. *Id.*

LIFE INSURANCE:

right of insured to name beneficiary; result where the beneficiary has no insurable interest. *Langford* v. *National Life & Accident Insurance Co.*, 527.
right of beneficiary to pay premiums. *Id.*
agreement between insured and beneficiary, will be treated as a wagering contract, when. *Id.*
beneficial interest in a life policy may be assigned to whom. *Id.*
false representations by insured in the procurement of a policy of life insurance, question for jury. *Id.*

LIMITATION OF ACTIONS:

where carrier delivers freight without surrender of bill of lading, right of action of carrier barred by the statute, when. *Tedford* v. *Chicago, R. I. & P. Ry. Co.*, 198.
concealment as affecting the running of the statute. *Id.*
where life tenant conveys the estate, the statute runs against a remainder-man, when. *Rogers* v. *Ogburn*, 233.

LOCAL IMPROVEMENT:

incorrect description of boundaries in petition for the formation of a local improvement district. *Bell* v. *Phillips*, 167.
void ordinance may not be validated by legislative enactment, when. *Id.*
necessity for petition of majority. *Id.*
street improvement, construction of guaranty bond. *English* v. *Shelby*, 212.
liability of sureties upon contractor's bond. *Id.*

LOOKOUT STATUTE:

application of, to street railways. *Bain* v. *Fort Smith Light & Traction Co.*, 125.

LOST INSTRUMENT:

in an action on, may be proved how. *Queen* v. *Queen*, 370.
loss of written instrument as affecting the rights and liabilities of the parties thereto. *German National Bank* v. *Moore*, 490.
jurisdiction of equity, in suits on. *Id.*
in an action to recover amount of a lost certificate of deposit, the depository bank may not exact an indemnity bond. *Id.*
discretion of the trial court in the matter of requiring indemnity. *Id.*

MANDAMUS:

is an appropriate remedy for requiring a public officer to discharge his duty. *Bowden* v. *Webb*, 310.

MARRIED WOMEN:

separate right of action of, for personal injury. *Little Rock Gas & Fuel Company* v. *Coppedge*, 334.

MASTER AND SERVANT:

action for personal injury; defense of assumed risk; acts of plaintiff. *Malvern Lumber Co.* v. *Sweeney*, 56.

MASTER AND SERVANT—*Continued.*

duty of master to warn of danger, assumption of risk. *Jones & Harrington* v. *Scott*, 108.
liability of corporation for exemplary or punitive damages for tort of servant. *Pine Bluff & Arkansas River Ry. Co.* v. *Washington*, 179.
admissibility of evidence of discharge of servant committing a wilful tort. *Id.*
liability of master for injury to servant engaged in notching trees, where servant is injured by falling tree. *Chapman & Dewey Land Co.* v. *Woodruff*, 189.
duty of master to warn servant of danger; effect of custom or agreement among servants. *Id.*
duty to furnish employee with safe place in which to work. *Garrettson-Greeson Lbr. Co.* v. *Goza*, 277.
duty of care of master to person substituting for regularly employed servant. *Id.*
injury to servant, question of negligence for the jury, when. *Id.*
assumption of risk. *St. Louis, I. M. & S. Ry. Co.* v. *Middleton*, 284.
duty to supply servant with necessary assistants. *Id.*
duty of machinist to inspect a lathe for defects. *Id.*
contributory negligence, where servant neglects to inspect machinery for defects. *Id.*
liability of master for negligence of loaned servant. *Arkansas Logging Company* v. *Martin*, 318.
defendant master held to have control over servant of another corporation, when. *Id.*

MECHANIC'S LIENS:

office of affidavit filed in the circuit court. *Barnett Brothers* v. *Wright*, 44.
affidavit held sufficient, when. *Id.*
description of property in affidavit. *Id.*
claim of lienor may be assigned, when. *Id.*

MORTGAGES:

mortgage of property subject to contract of sale; liability of mortgagor and seller. *Smith* v. *Joyce*, 61.
foreclosure of; wife must be party defendant, when. *Brignardello* v. *Cooper*, 103.
foreclosure of, plea of homestead, adjudication of, as affecting dower rights of wife. *Id.*
efficacy of foreclosure decree upon wife's right where she did not join in the mortgage. *Id.*

MUNICIPAL CORPORATIONS:

right of, to create special rights and liabilities as between individuals. *Bain* v. *Fort Smith Light & Traction Co.*, 125.
extent of rights and powers of. *Id.*
after grant of franchise to public service corporation, right of, to pass ordinances protecting the safety of individuals, and creating liabilities as against the corporation. *Id.*
reservation in grant of franchise of right to pass ordinances subsequent to the grant of the franchise, and affecting the exercise of same. *Id.*
right of, by ordinance, to create a special liability on the part of a public service corporation, in favor of third parties, for the violation of a city ordinance. *Id.*
a city may regulate a street railway company under its police power. *Id.*
effect on right of United States mail carrier of city ordinance giving him right-of-way in the use of city streets. *Id.*
water supply, right of, to borrow money to move pumping station. *The City of Forrest City* v. *Bank of Forrest City*, 377.
right to borrow money and give notes therefor to purchase machinery for water supply. *Id.*
may execute notes in payment of indebtedness of, when. *Id.*
may not issue interest bearing evidences of indebtedness. *Id.*
provision for payment of interest in note of, will be regarded as surplusage, when. *Id.*
right of city council to prohibit maintenance of a public pool hall. *Town of Dardanelle* v. *Gillespie*, 390.
mayor of town may issue licenses, when. *Id.*

NEGLIGENCE:

proof of injury; concurrent causes; question for jury. *Malvern Lumber Company* v. *Sweeney*, 56.
action for wrongful death; sufficiency of the evidence where there are concurrent causes. *Biddle et al., Receivers*, v. *Jacobs*, 82.
what negligence must be shown in action for wrongful death. *Id.*
causal connection must be shown, how. *Id.*
death of deceased held to have been caused by defendant's negligence. *Id.*
personal injury caused by negligence. *Jones & Harrington* v. *Scott*, 108.
liability of gas company for negligence in permitting escape of natural gas. *Little Rock Gas & Fuel Company* v. *Coppedge*, 334.
liability of receivers of railroad company where a passenger is bitten by a dog in their custody. *Holt et al., Receivers*, v. *Leslie*, 433.

PARTNERSHIP:

adjustment of accounts of; jurisdiction of probate court. *Fowler* v. *Frazier*, 350.

PLEADING AND PRACTICE:

in action for personal injury after defendant has admitted that plaintiff was in his employ, right of defendant to amend denying that fact. *Chapman & Dewey Land Co.* v. *Woodruff*, 189.

right to join new parties after a demurrer to the complaint has been sustained. *Hastings* v. *United States Fidelity & Guaranty Co.*, 220.

where appellant's amended complaint is stricken out as to appellee, the order is a final judgment. *Id.*

objection to a complaint should be made by motion to make more specific, and not by demurrer, when, in an action on an account. *Stiel & Co.* v. *Ide & Co.*, 244.

absence of defendant as ground for motion to set aside a judgment; diligence of council. *Id.*

effect of failure to plead after a demurrer is overruled, in an action on an account. *Id.*

appearance of defendant waives plaintiff's failure to file affidavit for a warning order. *Linn-McCabe Company* v. *Williams*, 307.

where a demurrer is sustained and a cause dismissed, the merits will not be held to have been adjudicated. *Cooper* v. *McCoy*, 501.

POOL HALLS:

right of city council to regulate and prohibit the maintenance of. *Town of Dardanelle* v. *Gillespie*, 390.

operation of may be prohibited, when. *Id.*

PRINCIPAL AND AGENT:

authority of general agent to execute negotiable paper. *Morris* v. *Friend*, 424.

where husband is agent of wife, authority to execute negotiable paper for her is a question for the jury. *Id.*

knowledge of an agent of an express company and of the receivers of a railroad company that a dog in their custody is vicious, will be held to be the knowledge of the principals. *Holt et al., Receivers*, v. *Leslie*, 433.

duty of express agent who receives for delivery a vicious dog, where he has knowledge of the facts; duty to keep dog restrained. *Id.*

PROBATE COURT:

has no jurisdiction to try questions involving title to property. *Fowler* v. *Frazier*, 350.

PUBLIC FUNDS: See COUNTY FUNDS.

PUBLIC HIGHWAYS:

corresponding rights of drivers of teams and automobiles to the use of. *Butler* v. *Cabe*, 26.

PUBLIC LANDS:

duty of State to issue deed to person to whom it has issued its certificate. *Sorrells* v. *Warnock*, 496.

PUBLIC SERVICE CORPORATIONS: See MUNICIPAL CORPORATIONS; see also STREET RAILWAYS.

right of municipal corporation to impose burdens upon not provided for in the grant of franchise rights. *Bain* v. *Fort Smith Light & Traction Co.*, 125.

QUARANTINE: See CATTLE QUARANTINE.

RAILROADS:

liability of, for negligent killing of dog. *Taylor* v. *St. Louis, I. M. & S. Ry. Co.*, 47.

where a dog is killed by the operation of a train, presumption of liability. *Id.*

duty of, to maintain lookout; effect of curve in track. *Id.*

injury to animal, negligence question for jury, when. *Id.*

liability for injury to cattle running at large upon the right-of-way. *St. Louis, I. M. & S. Ry. Co.* v. *Wilson*, 163.

effect of railroads permitting food, attractive to animals to remain on its right-of-way, where an injury results. *Id.*

liability for injury to animal where fence bordering right-of-way is defective. *Id.*

liability for wilful tort of employee. *Pine Bluff & Arkansas River Ry. Co.* v. *Washington*, 179.

liability for exemplary or punitive damages. *Id.*

liability of railroad for acts of employee of receiver thereof. *Holt et al., Receivers*, v. *Leslie*, 433.

Act 116, Acts 1907, requiring certain breaking crews on freight trains, construed; constitutionality of said law. *Kansas City S. Ry. Co.* v. *State*, 455.

RAILROADS—*Continued.*

defense of contributory negligence can not be pleaded under Kirby's Digest, sections 6652-6655. *Kansas City & Memphis Ry. Co.* v. *Huff*, 461.
length of time that employees of, may work, in freight service. *Id.*
injury to servant, degree of negligence as between the parties as affecting liability. *Id.*
overworking employees as affecting defense of contributory negligence. *Id.*
liability for injury to servant because of any insufficiency of clearance of obstructions, under Act 88, Public Acts 1911. *Id.*
duty to drunken trespasser on track; duty to maintain lookout for all persons. *St. Louis, I. M. & S. Ry. Co.* v. *Elrod*, 514.

REAL ESTATE BROKERS:

right to commissions. *Meyer* v. *Holland.*
same. *Horton & Co.* v. *Beal*, 273.
agreement to pay commissions, effect of. *Worthen* v. *Stewart*, 294.
effect of bad faith on the part of the broker. *Id.*
will be held to have failed to complete a sale so as to be entitled to commission. *Id.*
accord and satisfaction as to broker's claim for commissions, question for jury, when. *Id.*

RECEIVERS:

duty of agents of receivers of a railroad company to see that a station building is maintained in a safe condition. *Holt et al., Receivers* v. *Leslie*, 433.
liability of receivers of a railroad company for an injury to a passenger caused by bite from a vicious dog in their custody. *Id.*

RECEIVING STOLEN PROPERTY:

unexplained possession of stolen property sufficient to warrant conviction for what crime. *Sons* v. *State*, 357.

RES ADJUDICATA:

identity of issues; judgment of circuit court as, where identical action is later brought in chancery. *Morris* v. *Lyons*, 416.
a former judgment will be held binding, when. *Cooper* v. *McCoy*, 501.

SALES:

coupon contest. *Millsaps* v. *Urban*, 90.
duty of offerer to abide by the terms of his offer, in a coupon contest. *Id.*

SALES—*Continued.*

liability of offerer for breach of contract in coupon contest. *Id.*
change in contract of, without loss of reservation of title. *Summers, Receiver,* v. *Carbondale Machine Co.*, 246.
governed by what law. *Id.*
sale of stallion under contract that he should be a sure breeder; knowledge of purchaser. *Holland Banking Co.* v. *Hearn*, 238.

SCHOOL DISTRICTS:

required notice where change in, is proposed. *Lewis* v. *Young*, 291.
effect of failure to give notice of proposed change. *Id.*
custodian of funds of, who is. *Black* v. *Special School District No.* 2, 472.
liability of stockholders of bank where funds of, are deposited. *Id.*
proper parties in action to collect funds of. *Id.*

STATUTES:

construction of; when presumed to act prospectively. *Black* v. *Special School District No.* 2, 472.
construction of; intention of Legislature, how determined. *West* v. *Cotton Belt Levee District No.* 1, 538.

STATUTES CITED:

KIRBY'S DIGEST:

Chapter 100.....539
Chapter 115.....134
§ 733..... 65
735.....236
957-8 78
1011..... 67
1414.....354
1502..... 67
1694-5 63
1826.....265
1990 414-480
1993.....475
2640.....508
2684.....431
2709 405-429
2720.....432
2741.....500
2759.....116
2760.....118
2832-3 314
2838.....314
2955-6 14
2994.....430

KIRBY'S DIGEST—*Continued.*

3095.....337
3111.....317
3151.....246
3789.....512
3791.....512
3793.....365
3794.....512
3798.....513
3801-2-3.....512
3813.....365
3902.....106
4431..... 12
4929.....542
4938.....543
4941.....541
4961.....542
4994..... 47
5057.....501
5214..... 71
5438.....392
5442.....382
5443.....134-381
5473.....381
5665-6 177

STATUTES CITED—*Continued.*

KIRBY'S DIGEST—*Continued.*

6128 46
6652-55 465
6654 470
6658-60 518
6287 348
7174-5 354
7540 292
7544 292
7669 416
7696-9 478
7976 207

ACTS:

1891, No. 137, p. 230 476
1905, Anti-Trust Statute 81
1905, p. 798 337
1907, No. 69, section 1 196
1907, No. 116 455
1907, No. 409 122
1909, p. 829 33
1909, No. 196 411
1909, No. 321 416
1911, State Employers' Liability Act 470
1911, No. 88 Public Acts, p. 55 465
1911, No. 114, p. 78 39
1911, p. 192 423
1911, p. 193 33

ACTS—*Continued.*

1911, No. 284, p. 275 49-140
1913, No. 57 413
1913, No. 113, p. 462 475

OTHER ACTS:

Rev. Stat. 1899, p. 1096, section 4590 (Mo.) 65
Rev. Stat. 1909, section 464 (Mo.) 364
Federal Employers' Liability Act of Apr. 22, 1908 285-467
Interstate Commerce Act, App. June 26, 1906 456
Acts of Congress, Act. Mch. 3, 1905, ch. 1496, 33 St. L. 1264 122
Rose's Notes U. S. Sup. Ct. Repts., vol. 11, p. 90 573

CONSTITUTION OF 1874:

Art. 7, § 15 493
7, 17 40
7, 46 478
7, 50 40
9, 7 71
12, 9 14
16, 1 385
19, 27 178

CONSTITUTION OF UNITED STATES:
Fourteenth Amendment ..456

STATUTE OF FRAUDS:

confirmation in writing of oral contract for sale of land sufficient, within the statute of frauds. *Southern Cotton Oil Co.* v. *Coleman*, 268.
parol agreement to convey lands after the expiration of a certain time, not within the statute of frauds, when. *Dyer* v. *Dyer*, 487.
value of improvements as affecting parol agreement to convey land. *Id.*

STREET RAILWAYS:

liability for injury to U. S. mail carrier, who had been given right-of-way in city streets. *Bain* v. *Fort Smith Light & Traction Co.*, 125.

STREET RAILWAYS—*Continued.*

injury to person on track, duty to maintain lookout. *Id.*
duty of person using streets to look out for street cars. *Id.*
burden of proof to show negligence. *Id.*

STREETS:

liability of guaranty bond, where street is improperly constructed. *English* v. *Shelby*, 212.

SURETYSHIP: See GUARANTY AND SURETYSHIP. See also LOCAL IMPROVEMENT.

liability of surety on bond of guardian holding void appointment. *Hastings* v. *United States Fidelity & Guaranty Co.*, 220.

TAX SALES:

recovery of forfeited land, necessity for tender of amount of taxes, interest and costs. *Wolf & Bailey* v. *Phillips*, 115.
action to recover forfeited lands, sufficiency of affidavit. *Id.*

TIMBER:

right of holder of equitable title of land under certificate from State, to cut timber. *Sorrells* v. *Warnock*, 496.

TIMBER CONTRACTS:

breach of contract to remove timber within a certain time. *Newton* v. *Warren Vehicle Stock Co.*, 393.
construction of terms in a contract for the removal of timber with reference to the time of removal. *Id.*

TITLE:

presumption of ownership in favor of the holder of the record title. *Wood* v. *Wood*, 142.
duty of State to issue deed to holder of certificate of title therefrom. *Sorrels* v. *Warnock*, 496.

TRESPASS:

treble damages for destroying shade trees. *Laser* v. *Jones*, 206.

TRIAL:

may decline to hear further testimony in a trial, when. *Jacks Bayou Drainage District* v. *St. Louis, I. M. & S. Ry. Co.*, 30.
expression of opinion of circuit judge as to veracity of witness constitutes prejudicial error. *The Fechheimer-Kiefer Co.* v. *Kempner*, 482.
prejudicial effect of remarks of council may be removed by the court, how. *St. Louis, I. M. & S. Ry. Co.* v. *Elrod*, 514.

TRUSTS EX-MALEFICIO:

may be shown to exist, when. *Queen* v. *Queen*, 370.

VENDOR AND PURCHASER:

vendor of chattels may change the contract of sale, without destroying his reservation of title, how. *Summers, Receiver*, v. *Carbondale Machine Co.*, 246.
rights of purchaser of land from the State, under a certificate; right of action of ejectment, or to sell and convey. *Sorrells* v. *Warnock*, 496.

VERDICT:

verdicts can not be predicated upon conjecture. *Biddle et al., Receivers* v. *Jacobs*, 82.
negligence, concurrent causes, uncertainty, effect of verdict. *Id.*

VOLUNTARY CONVEYANCES:

conveyance of person of weak mind, may be set aside, when. *Jones* v. *Travers*, 95.
deed to valuable property will be set aside where the grantor was unduly influenced, when. *Id.*
transfer by wife to husband without consideration. *Wood* v. *Wood*, 142.

VOTING AND COUPON CONTESTS: See SALES.

WALLS:

falling wall, *prima facie* evidence of negligence; when. *Hall* v. *Gage*, 50.
duty of land owner with reference to, after a fire. *Id.*
liability for damage done by falling wall. *Id.*
effect of act of neighbor. *Id.*

WILLS:

uncertainty as to the subject or object of a devise is fatal. *Cook* v. *Worthington*, 328.
failure of gift for uncertainty. *Id.*
the intention of the testator must be given effect to, and when unambiguous must be gathered from the will itself. *Id.*
in the construction of wills the court may transpose or supply words in order to effectuate the manifest purpose of the testator. *Id.*
admissibility of extrinsic evidence to interpret the meaning of words used. *Eagle* v. *Oldham*, 565.

WILLS—*Continued.*

the intention of the testator governs in matters of construction, and is to be derived from the language employed. *Id.*

description of lands by testator, what lands intended, may be discovered how. *Id.*

intention of the testator where there is a misdescription in a devise of land. *Id.*

WITNESSES:

credibility of defendant as witness in criminal prosecution. *Lucius* v. *State*, 260.

right of husband and wife to testify where they are joint plaintiffs. *Little Rock Gas & Fuel Co.* v. *Coppedge*, 334.

WRONGFUL DEATH:

liability of railroad for negligent killing of deceased. *Biddle et al., Receiver*, v. *Jacobs*, 82.