ARKANSAS REPORTS

VOL. 117

CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

FEBRUARY, 1915, to MARCH, 1915

JAMES V. JOHNSON
REPORTER

PUBLISHED
BY THE
STATE OF ARKANSAS
1916

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

MAR 16 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

Adams (Jonesboro, Lake City & Eastern Railroad Co. *v.*) 54
Allen *v.* State 432
Anderson (St. Louis Southwestern Railway Co. *v.*) . 41
Andrews *v.* Andrews 90
Armour *v.* City of Fort Smith 214
Ashabranner (Jonesboro, Lake City & Eastern Railroad Co. *v.*) 317
Augusta, Town of, *v.* Smith 93

B

Baker *v.* Hudson 492
Belote *v.* Coffman 352
Ben Hur, Supreme Tribe of, *v.* Gailey 145
Benton, City of (Cotten *v.*) 190
Black *v.* Hill 228
Blackwood (Gray *v.*) 100
Blaylock (St. Louis, Iron Mountain & Southern Ry. Co. *v.*) 504
Board of Improvement Waterworks Imp. Dist. No. 22 of Texarkana (Hodges, Sec. of State, *v.*) 266
Bowser Furniture Co. *v.* Johnson 496
Bradley Lumber Co. *v.* Hamilton 127
Brockman (Donnell *v.*) 132
Brown (Polk *v.*) 321
Buckeye Cotton Oil Co. *v.* Horton 1
Bulger & Son (Swearingen *v.*) 557

C

Cantrell *v.* State 233
Carpenter *v.* Leatherman 531
Chambers *v.* Ogle 242

Chaney (Wilson *v.*) 287
Chicago Mill & Lumber Co. *v.* Drainage Dist. No. 15 292
Chicago, Rock Island & Pacific Ry. Co. *v.* Watkins .. 488
Citizens Bank Building (Wertheimer *v.*) 50
Clay County (Western Clay Drainage District *v.*) .. 334
Coffman (Belote *v.*) 352
Cole *v.* Schoonover 254
Collins *v.* Stewart 4
Cotten *v.* Benton, City of 190

D

Davie *v.* Padgett 544
Davis *v.* Receivers St. Louis & San Francisco Rd. Co. 393
Davis and Thomas *v.* State 296
Dicken *v.* Simpson 304
Dickinson, Auditor, *v.* Johnson 582
Dinsmore (Tate *v.*) 412
Donnell *v.* Brockman 132
Doughton (Pekin Cooperage Co. *v.*) 410
Drainage District No. 15 (Chicago Mill & Lumber Co. *v.*) 292
Dreyfus (Maryman *v.*) 17
Drifoos *v.* State 491
Dunavant (Jonesboro, Lake City & Eastern Railroad Co. *v.*) 451

E

Ellis (Surridge *v.*) 223

F

Fidelity-Phenix Fire Ins. Co. *v.* Friedman 71
First National Bank of Huntsville (Harrison *v.*) ... 260
Fort Smith, City of (Armour *v.*) 214
Frazier *v.* McHaney, Receiver 394
Friedman (Fidelity-Phenix Fire Ins. Co. *v.*) 71

G

Gailey (Supreme Tribe of Ben Hur *v.*) 145
Garanflo (Ozark Diamond Mines Corporation *v.*) .. 552
Goldman (Kimball *v.*) 446

Gray *v.* Blackwood..... 100
Graysonia-Nashville Lumber Co. *v.* Wright..... 151

H

Hadley Milling Co. *v.* Kelley..... 173
Hager *v.* St. Louis, Iron Mountain & Southern Ry. Co. 311
Hamilton (Bradley Lumber Co. *v.*)..... 127
Harlow *v.* Mason..... 360
Harrison *v.* First National Bank of Huntsville..... 260
Henderson (Maynard *v.*)..... 24
Higgins (Massachusetts Bonding & Insurance Co. *v.*) 372
Hildreth *v.* Taylor..... 465
Hill (Black *v.*)..... 228
Hill *v.* Southwestern Telegraph & Telephone Co.... 104
Hodges, Sec. State, *v.* Board of Improvement of Waterworks Imp. Dist. No. 22 of Texarkana..... 266
Holder (Western Union Telegraph Co. *v.*)..... 210
Horton (Buckeye Cotton Oil Co. *v.*)..... 1
Howell (The Railways Ice Co. *v.*)..... 198
Hubbard *v.* McMahon..... 563
Hudgins (Little *v.*)..... 272
Hudson (Baker *v.*)..... 492
Huffman *v.* Sudbury..... 628

I

Israel (Sovereign Camp Woodmen of the World *v.*). 121

J

Jameson *v.* Jameson..... 142
Johnson (Bowser Furniture Co. *v.*)..... 496
Johnson (Dickinson, Auditor, *v.*)..... 582
Jokische (Phillips *v.*)..... 221
Jones-Wise Commission Co. (Maloney, Receiver, *v.*) 180
Jonesboro, Lake City & Eastern Railroad Co. *v.* Adams 54
——— *v.* Ashabranner..... 317
——— *v.* Dunavant 451

K

Kansas City Southern Railway Co. *v.* Miller..... 396
Kansas City & Memphis Railway & Bridge Co. (State *ex rel. v.*)..... 606
Kelley (Hadley Milling Co. *v.*)..... 173
Kennedy *v.* State..... 113
Kimball *v.* Goldman..... 446
Kimbrell (St. Louis, Iron Mountain & Southern Railway Co. *v.*)..... 457
King *v.* State..... 82
Knights of Pythias of North American, etc., *v.* Long 136

L

Langston *v.* Matthews & Lawton..... 626
Leatherman (Carpenter *v.*)..... 531
Leatherwood (Pine Bluff, Sheridan & Southern Railway Co. *v.*)..... 524
LeSieur *v.* Spikes..... 366
Liles *v.* State, *ex rel.* Johnson..... 408
Litteral (Mathis *v.*)..... 481
Little *v.* Hudgins..... 272
Little Rock Railway & Electric Co. (Pankey *v.*).... 337
Long (Knights of Pythias of North America, etc., *v.*) 136
Longan and Smith (State *v.*)..... 384
Luke (Rhodes *v.*)..... 600

Mc.

McCall Co., The *v.* Smith..... 118
McHaney, Receiver (Frazier *v.*)..... 394
McLaughlin *v.* State..... 154
McMahon (Hubbard *v.*)..... 563
McNeill *v.* State..... 8

M

Maloney, Receiver, *v.* Jones-Wise Commission Co... 180
Maryman *v.* Dreyfus..... 17
Massachusetts Bonding & Insurance Co. *v.* Higgins. 372
Mason (Harlow *v.*)..... 360
Mathis *v.* Litteral..... 481
Matthews (Merideth *v.*)..... 442

Matthews and Lawton (Langston *v.*) 626
Mauney *v.* Millar 633
Maynard *v.* Henderson 24
Merideth *v.* Matthews 442
Millar (Mauney *v.*) 633
Miller (Kansas City Southern Ry. Co. *v.*) 396
Moore *v.* Moss 593
Moore (Williams *v.*) 535
Morris (Mullett *v.*) 377
Moss (Moore *v.*) 593
Mudd *v.* St. Francis Drainage District 30
Mullett *v.* Morris 377

N

Nelms *v.* State 188
Newman *v.* Peay 579

O

Ogle (Chambers *v.*) 242
O'Kane *v.* O'Kane 33
Oliver *v.* Scott 275
Ozark Diamond Mines Corporation *v.* Townes and Garanflo 552

P

Padgett (Davie *v.*) 544
Pankey *v.* Little Rock Railway & Electric Co. 337
Peay (Newman *v.*) 579
Pekin Cooperage Co. *v.* Doughton 410
Phillips *v.* Jokische 221
Pine Bluff, Sheridan & Southern Railway Co. *v.* Leatherwood 524
Polk *v.* Brown 321
Proutt, Receiver (Walton *v.*) 388

R

Railways Ice Co., The, *v.* Howell 198
Rawlings *v.* State 539
Raywinkle *v.* The Southern Coal Co. 283
Receivers, St. Louis & San Francisco Rd. Co. (Davis *v.*) 393

Rhodes (Luke *v.*) 600
Robinson (St. Louis, Iron Mountain & Southern Ry. Co. *v.*) 37

S

St. Francis Drainage Dist. (Mudd *v.*) 30
St. Louis, I. M. & S. Ry. Co. *v.* Belcher 638
——— *v.* Blaylock 504
——— (Hager *v.*) 311
——— *v.* Kimbrell 457
——— *v.* Robinson 37
——— *v.* Spillers 483
——— *v.* Tilby 163
——— *v.* Williams 329
St. Louis & San Francisco Rd. Co., Receivers of (Davis *v.*) 393
St. Louis Southwestern Ry. Co. *v.* Anderson 41
——— *v.* Wynnegar 47
Schoonover (Cole *v.*) 254
Scott (Oliver *v.*) 275
Silvie *v.* State 108
Simmons (State *v.*) 159
Simpson (Dicken *v.*) 304
Simpson (Western Union Telegraph Co. *v.*) 156
Smith (Town of Augusta *v.*) 93
Smith (The McCall Co. *v.*) 118
Smith and Longan (State *v.*) 384
Southern Coal Co., The (Raywinkle *v.*) 283
Southwestern Telegraph & Telephone Co. (Hill *v.*) . 104
Spikes (LeSieur *v.*) 366
Spillers (St. Louis, Iron Mountain & Southern Ry. Co. *v.*) 483
State (Allen *v.*) 432
——— (Cantrell *v.*) 233
——— (Davis and Thomas *v.*) 296
——— (Drifoos *v.*) 491
——— (Kennedy *v.*) 113
——— (King *v.*) 82
——— (McLaughlin *v.*) 154
——— (McNeill *v.*) 8

State (Nelms *v.*) 188
——— (Rawlings *v.*) 539
——— (Silvie *v.*) 108
——— *v.* Simmons 159
——— *v.* Smith and Longan 384
——— (Stevens *v.*) 64
——— *v.* Stokes 192
——— (Thomas and Davis *v.*) 296
State *ex rel.* Johnson (Liles *v.*) 408
State *ex rel.* *v.* Kansas City & Memphis Railway & Bridge Co. 606
Stevens *v.* State 64
Stewart (Collins *v.*) 4
Stokes (State *v.*) 192
Storthz *v.* Watts 500
Storthz (Wilson *v.*) 418
Sudbury (Huffman *v.*) 628
Supreme Tribe of Ben Hur *v.* Gailey 145
Surridge *v.* Ellis 223
Swearingen *v.* Bulger & Son 557

T

Tate *v.* Dinsmore 412
Taylor (Hildreth *v.*) 465
Thomas *v.* State 296
Tilby (St. Louis, Iron Mountain & Southern Ry. Co. *v.*) 163
Townes and Garanflo (Ozark Diamond Mines Corporation *v.*) 552

W

Walton *v.* Proutt, Receiver 388
Watkins (Chicago, Rock Island & Pacific Ry. Co. *v.*) 488
Watts (Storthz *v.*) 500
Wertheimer *v.* Citizens Bank Building 50
Western Clay Drainage District *v.* Clay County 334
Western Union Telegraph Co. *v.* Holder 210
——— *v.* Simpson 156
Williams *v.* Moore 535

Williams (St. Louis, Iron Mountain & Southern Ry. Co. *v.*) 329
Wilson *v.* Chaney 287
Wilson *v.* Storthz..... 418
Woodmen of the World, Sovereign Camp *v.* Israel.. 121
Wright (Graysonia-Nashville Lumber Co. *v.*)..... 151
Wynnegar (St. Louis Southwestern Railway Co. *v.*) 47

TABLE OF CASES
CITED BY THE COURT

A

Abeles *v.* Cochran, 22 Kan. 405 561
Adams *v.* Primmer, 102 Ark. 380 365
Adams *v.* State, 4 Eng. 33 363
Albright *v.* Oyster, 60 Fed. 644 482
Alexander *v.* Fisher, 7 Ala. 514 36
Allen *v.* Swope, 64 Ark. 576 417
Allison *v.* State, 74 Ark. 444 89
American Bonding Company *v.* Morrow, 80 Ark. 49 375
Amis *v.* Conner, 43 Ark. 337 248
Anderson *v.* Ritterbush, 98 Pac. 1002 619
Andrews *v.* State, 100 Ark. 184 300
Arizona & New Mexico Railway Co. *v.* Clark, 35 Sup. C. R. 210 406
Arkansas Central Railway Co. *v.* Williams, 99 Ark. 167 463
Atkins *v.* Graham, 99 Ark. 496 365
Atkinson *v.* Cox, 54 Ark. 444 265
Austin *v.* Appling, 88 Ga. 54 286

B

Bain *v.* Fort Smith Light & Trac. Co., 116 Ark. 125, 172 S. W. 84 344
Baldwin *v.* Tucker, 23 Ky. Law Rep. 1538, 57 L. R. A. 451 177
Bank of the State *v.* Bates, 10 Ark. 631 362
Banks *v.* Walters, 95 Ark. 501 311
Bardes *v.* Hawarden Bank, 178 U. S. 526 21
Barnett *v.* State, 16 Ark. 530 115
Bauer *v.* Bd. of Denmark Township, 157 Mich. 395, 122 N. W. 121 471
Beard *v.* State, 77 Ark. 293 155
Beasley *v.* Mutual Aid Association, 94 Ark. 502 141
Beavers *v.* Myar, 68 Ark. 333 611
Bell *v.* Altheimer, 99 Ark. 529 145
Bell *v.* Castleberry, 96 Ark. 564 326
Benton County *v.* Rutherford, 30 Ark. 665 394
Biddle *v.* Jacobs, 116 Ark. 82 643
Bivens *v.* State, 11 Ark 455 88
Black *v.* Webb, 72 Ark. 336 370
Blackstad Mercantile Company *v.* Bond, 104 Ark. 45 445
Block *v.* Price, 24 Mo. App. 14 286

Bluff City Lumber Co. *v.* Bank of Clarkesville, 95 Ark. 1 286
Blumberg *v.* Life Interests & R. S. Corp., 1 Ch. Div. 171, 66 Law J. Ch. 127 177
Blumenthal *v.* Bridges, 91 Ark. 212 600
Bolen *v.* Cumby, 53 Ark. 514 482
Boyers *v.* Crane, Auditor, 1 W. Va. 176 591
Bozeman *v.* Browning, 31 Ark. 364 548
Bradley Lumber Co. *v.* Hamilton, 109 Ark. 1, *Id.* 598 128
Branch *v.* Moore, 84 Ark. 462 600
Bronnenberg *v.* Coburn, 110 Ind. 169 251
Broughton *v.* Sillaway, 114 Mass. 71 177
Brown *v.* Bocquin, 57 Ark. 97 427
Brown *v.* Nelms, 86 Ark. 368 612
Brown *v.* Rice, 30 Neb. 236 366
Browne *v.* Bentonville, 94 Ark. 80 218
Brownfield *v.* Dudley E. Jones Co., 98 Ark. 495 445
Buck *v.* Bransford, 58 Ark. 289 186
Bucklen *v.* City of Chicago, 46 N. E. 1073 366
Burke *v.* Shaver, 92 Va. 345 549
Burkee *v.* Matson, 34 L. R. A. (N. S.) 924 251
Burritt, Hiram B. *v.* Commissioners of State Contracts, 120 Ill. 322 .. 591
Bush *v.* Elliott, 202 U. S. 479 22
Bush *v.* Prescott & Northwestern Ry. Co., 83 Ark. 210 514

C

Callahan *v.* Jennings, 27 Pac. 1055 613
Camden *v.* Bennett, 64 Ark. 155 575
Campbell *v.* Sneed, 5 Ark. 399 362
Carrier *v.* Comstock, 108 Ark. 521 150
Carruth *v.* Clawson, 97 Ark. 50 ..... 124, 140
Cave *v.* Smith, 101 Ark. 348 120
Central Coal & Coke Co. *v.* John Henry Shoe Co., 69 Ark. 302 130
Chambers *v.* Michael, 71 Ark. 373 575
Chapline *v.* State, 77 Ark. 444 240
C., B. & Q. Ry. Co. *v.* Babcock, 204 U. S. 585 619
Chicago Mill & Lumber Co. *v.* Cooper, 90 Ark. 326 207
Chicago, R. I. & P. Ry. Co. *v.* Miles, 92 Ark. 573 455
——— *v.* Perry County, 87 Ark. 406 258
Choate *v.* O'Neal, 57 Ark. 299 605
C., O. & G. Rd. Co. *v.* Baskins, 78 Ark. 355 463
——— *v.* Thompson, 82 Ark. 11 47
Chowning *v.* State, 91 Ark. 503 439
Chrisman *v.* State, 54 Ark. 283 440
City Railway Co. *v.* Citizens Street R. R. Co., 166 U. S. 557 612
Clement *v.* Wheeler, 25 N. H. 361 36
Codman *v.* Armstrong, 28 Me. 91 266

Collier *v.* Board of Directors, 106 Ark. 151 619
Collins *v.* Mack, 31 Ark. 684 ..... 405, 551
Collier *v.* Newport Water, Light & Power Co., 100 Ark. 47 391
Common School Dist. *v.* Oak Grove School Dist., 102 Ark. 411 614
Connolly *v.* Bollinger, 20 Am. & Eng. Ann. Cas. 1352 549
Cook *v.* State, 80 Ark. 495 112
Coolidge *v.* Burke, 69 Ark. 237 606
Cooney *v.* U. S. Wringer Co., 101 Ill. App. 468 177
Cope *v.* Collins, Admr., 37 Ark. 649 258
Cortesy *v.* Territory (N. M.), 32 Pac. 504 613
Coulter *v.* Sypert, 78 Ark. 195 92
County of Redwood *v.* Winona & St. Peter Land Co., 42 Minn. 181 .. 619
Craig *v.* Meriwether, 84 Ark. 303 416
Crebbin *v.* Deloney, 75 Ark. 59 311
Crismon *v.* Kingman, 106 Ark. 166 310
Cross *v.* Fomberg, 54 Ark. 184 416
Crossett Lumber Co. *v.* Files, 104 Ark. 602 416
Culler *v.* Edwards, 44 Ark. 423 605
Cumbie *v.* St. Louis, I. M. & S. Ry. Co., 105 Ark. 415 168
Cumnock *v.* State, 87 Ark. 34 ..... 240, 386

D

Danaher *v.* Southwestern Tel. & Tel. Co., 94 Ark. 533 107
Davis, *In re*, 49 Pac. 160 (Kan.) 591
Davis *v.* Gaines, 48 Ark. 370 32
Davis *v.* Munson, 43 Vt. 676 251
Davis *v.* State, 115 Ark. 566 492
Davis *v.* Webber, 66 Ark. 190 514
Della *v.* Della, 98 Ark. 540 575
Dempsey *v.* Davis, 98 Ark. 570 370
Dimpfel *v.* Beam (Col.) 91 Pac. 1107 613
Donahue *v.* Mills, 41 Ark. 421 326
Downs *v.* State, 60 Ark. 521 155
Dozier *v.* Grayson-McLeod Lumber Co., 100 Ark. 244 383
Drain *v.* Doggett, 41 Ia. 682 177
Drainage Dist. No. 1 *v.* Rolfe, 110 Ark. 374 ..... 6, 630
Drainage Dist. No. 7 *v.* Stuart, 104 Ark. 113 6
Dunn *v.* State, 2 Ark. 229 238
Durr *v.* Hervey, 44 Ark. 306 185

E

Eager *v.* Jonesboro, L. C. & E. Express Co., 103 Ark. 288 56
Eaton *v.* Langley, 65 Ark. 448 130
Ellenbogen *v.* Griffey, 55 Ark. 274 416
Ellwood *v.* Wilson, 21 Ia. 523 514
Ely *v.* Horton, 15 N. Y. 595 611

Evans *v.* People, 90 Ill. 384 388
Evans *v.* State, *ex rel* Freeman, 165 Ind. 369 116

F

Fayetteville B. & L. Assn. *v.* Bowlin, 63 Ark. 573 611
Federal Union Surety Co. *v.* McGuire, 111 Ark. 373 377
Ferrell *v.* Keel, 105 Ark. 380 477
Fields *v.* Danehower, 65 Ark. 392 417
First National Bank *v.* Title & Trust Co., 198 U. S. 291 22
Fletcher *v.* State, 97 Ark. 1 112
Florida, C. & P. R. R. Co. *v.* Reynolds, 183 U. S. 471 616
Fly *v.* Grieb's Admr., 62 Ark. 209 187
Fones Hardware Co. *v.* Erb, 54 Ark. 645 337
Foohey Dredging Co. *v.* Mabin, 118 Ark. 1 516
Ford *v.* Ford, 7 Am. & Eng. Ann. Cas. 249 326
Fordyce *v.* McPhetridge, 71 Ark. 327 514
Fordyce Lumber Co. *v.* Wallace, 85 Ark. 1 311
Forsythe *v.* Murnane, 113 Minn. 181 251
Fort Smith Lumber Co. *v.* Shackleford, 115 Ark. 272, 171 S. W. 99 ..... 407, 519
Fort Smith Light & Traction Co. *v.* Barnes, 80 Ark. 169 ..... 522, 530
Fort Smith & Van Buren Bridge Dist., *Ex parte*, 62 Ark. 461 619
Foster *v.* Beidler, 79 Ark. 418 576
Foster *v.* Essex Bank, 16 Mass. 245 623
Fourche River Valley & I. T. Ry. Co. *v.* Tippett, 101 Ark. 376 207
Fourche River Lumber Co. *v.* Walker, 96 Ark. 540 496
Franklin Life Ins. Co. *v.* Galligan, 71 Ark. 301 140
Frazier *v.* Poindexter, 78 Ark. 241 376
Freeborn *v.* Smith, 2 Wall 160 623

G

Gaar *v.* Higgins & Bro., 12 Bush (Ky.) 259 289
Gale *v.* Harp, 64 Ark. 462 555
Galveston City Rd. Co. *v.* Hewitt, 67 Tex. 473, 60 Am. Rep. 32 349
Georgia S. & F. Ry. Co. *v.* DuBois, 71 S. E. 945 450
Gibney *v.* Crawford, 51 Ark. 34 258
Gibson *v.* Martin, 38 Ark. 207 309
Gilbertson *v.* United States, 168 Fed. 672 21
Goldie *v.* Stewart, 99 N. W. 225 366
Goodright *v.* Moss, 2 Cowp. 591 115
Graham *v.* Remmel, 76 Ark. 140 554
Grand Trunk Western Ry. Co. *v.* Lindsay, 233 U. S. 42 46
Grant *v.* Hardage, 106 Ark. 506 467
Gray *v.* Blackwood, 112 Ark. 332 103
Grayson-McLeod Lbr. Co. *v.* Carter, 76 Ark. 69 204

Gregg *v.* Pierce, 53 Barb. 387 251
Green *v.* State, 96 Ark. 175 ..... 156, 190
Gregley *v.* Jackson, 38 Ark. 487 430
Grider *v.* Apperson, 38 Ark. 388 605
Grooms, *Ex parte*, 102 Ark. 322 144
Grove, Town of *v.* Haskell, 24 Okla. 707, 104 Pac. 56 471
Gulf Coast & S. F. Ry. Co. *v.* Riney (Tex. Civ. Ct.), 92 S. W. 54 491

H

Halbot *v.* Lens (1901), 1 Ch. 344 562
Halbrook *v.* State, 34 Ark. 511 12
Hale *v.* Brown, 70 Ark. 471 534
Hall *v.* Cox, 104 Ark. 303 576
Hall *v.* Lauderdale, 46 N. Y. 70 563
Halley *v.* State, 108 Ark. 224 111
Hammond *v.* Clark, 136 Ga. 313 471
Hammons *v.* State, 73 Ark. 495 13
Harbour *v.* Harbour, 103 Ark. 273 575
Harding *v.* State, 94 Ark. 65 70
Hargadine-McKittrick Dry Goods Co. *v.* Hudson, 122 Fed. 232 22
Harlan *v.* Ely, 68 Cal. 522 177
Harlow *v.* Mason, 117 Ark. 360 394
Harnwell *v.* White, 115 Ark. 88, 171 S. W. 108 98
Harris *v.* Moore, 70 Cal. 502 251
Hatheway *v.* Jones, 20 Ark. 113 362
Hawes *v.* Robinson, 44 Ark. 308 499
Henderson *v.* Dearing, 89 Ark. 598 32
Henderson *v.* Los Angeles Traction Co., 150 Cal. 689 349
Henry & Bro. *v.* Wells, 48 Ark. 485 503
Chew Heong *v.* United States, 112 U. S. 536 611
Hill *v.* Draper, 54 Ark. 395 606
Hodges *v.* Dawdy, 104 Ark. 583 474
Holt *v.* Schneider, 57 Neb. 523 177
Honerine Min. & Mill Co. *v.* Tallerday Steel Pipe & Tank Co., 85 Pac. 626 365
Hormel *v.* American Bonding Co., 33 L. R. A. (N. S.) 513 375
Horsley *v.* Hilburn, 44 Ark. 458 370
Horton *v.* Hilliard, 58 Ark. 301 144
Hot Springs Street Railway Co. *v.* Johnson, 64 Ark. 420 347
Houston *v.* Minneapolis, St. Paul & S. S. M. Ry. Co., 141 N. W. 994 315
Howard County *v.* Lambright, 72 Ark. 330 337
Huddleston *v.* Coffman, 90 Ark. 219 6
Hudson *v.* Wadsworth, 8 Conn. 348 28
Hughes *v.* State, 109 Ark. 403 300
Humphrey *v.* Jones, 71 Mo. 62 563

I

Improvement District No. 1 of Wynne *v.* Brown, 86 Ark. 61..... 219
Industrial Mutual Indemnity Co. *v.* Armstrong, 93 Ark. 84..... 82
Ivy *v.* State, 109 Ark. 446..... 300

J

Janesville Water Co. *v.* City of Janesville, 156 Wis. 655, 146 N. W. 784..... 470
Jeffery *v.* Jeffery, 87 Ark. 496..... 425
Jennings *v.* McIlroy, 42 Ark. 236..... 186
Johnson *v.* Hall, 55 Ark. 210..... 140
Johnson *v.* Hubbell, 10 N. J. Eq. 332..... 232
Johnson *v.* Knights of Honor, 53 Ark. 259..... 26
Jones *v.* Commonwealth, 31 Gratt. (Va.) 836..... 388
Jones *v.* Jones, 234 U. S. 615..... 429
Jones *v.* Bichols, 46 Ark. 207..... 3

K

Kansas City, F. S. & M. Ry. Co. *v.* Joslin, 74 Ark. 552..... 514
Kansas City Southern Ry. Co. *v.* Cook, 100 Ark. 476..... 517
——— *v.* Henrie, 87 Ark. 443..... 47
——— *v.* Leslie, 112 Ark. 305..... 404
——— *v.* Mabry, 112 Ark. 110..... 172
——— *v.* Morrison, 103 Ark. 522..... 456
Keith *v.* Wheeler, 105 Ark. 318..... 575
Kelley *v.* Graham, 70 Ark. 492..... 416
Kennedy *v.* State, 117 Ark. 113..... 409
King *v.* Mullins, 171 U. S. 404..... 621
Kinn *v.* First National Bank, 118 Wis. 537, 99 Am. St. Rep. 1012... 251

L

Lambert *v.* Tucker, 83 Ark. 416..... 144
Laycock *v.* Parker, 103 Wis. 161..... 131
League *v.* Texas, 184 U. S. 156..... 623
Leggett *v.* Allen, 110 U. S. 741..... 21
Lewis *v.* Lewis, 15 Ohio 715..... 514
——— *v.* State, 110 Ark. 204.....60, 196
Lipsey *v.* Battle, 80 Ark. 287..... 92
Lithographing Co. *v.* Henderson, 18 Col. 259..... 591
Little Rock *v.* Parish, 36 Ark. 166..... 191
Little Rock & Fort Smith Ry. Co. *v.* Pankhurst, Admr, 36 Ark. 371.. 228
——— *v.* Worthen, 46 Ark. 312..... 615
Little Rock & Monroe Ry. Co. *v.* Russell, 88 Ark. 172..... 522

Little Rock Railway & Electric Co. *v.* Bracy, 111 Ark. 613..... 522
——— *v.* Newman, 91 Ark. 91..... 135
——— *v.* Sledge, 108 Ark. 95..... 347
Little Rock Traction & Electric Co. *v.* Morrison, 69 Ark. 289..... 346
Longer *v.* Beakley, 106 Ark. 219..... 425
Longer *v.* Carter, 102 Ark. 73..... 150
Ludlum *v.* Otis, 15 Hun 410..... 27

Mc

McClaughey *v.* King, 147 Fed. 463, 7 L. R. A. (N. S.) 216..... 248
McClellan *v.* State, 32 Ark. 607..... 111
McCreary, Governor *v.* Speer, 156 Ky. 783..... 470
McIntire, *In re*, 142 Fed. 593..... 21

M

Magill Lbr. Co., J. H. *v.* Lane-White Lbr. Co., 90 Ark. 426..... 632
Mallett *v.* Hampton, 94 Ark. 119..... 365
Manning *v.* Louisville & Nashville Rd. Co., 16 L. R. A. 55..... 490
Mantooth *v.* Hopkins, 106 Ark. 197..... 92
Markover *v.* Krauss, 31 N. E. 1047..... 27
Marsh *v.* Wells Fargo & Co. Express, 88 Kan. 538, 43 L. R. A. (N. S) 133..... 251
Marshall *v.* State, 71 Ark. 415..... 112
——— *v.* State, 84 Ark. 92..... 543
Martin *v.* Turpin, 57 S. W. 459..... 187
Mason *v.* Harkins, 82 Ark. 569..... 576
Mason *v.* Harlow, 91 Kan. 807, 139 Pac. 384..... 361
Mason *v.* Manning, 150 Ky. 805, 43 L. R. A. 131..... 351
May *v.* McGaughey, 60 Ark. 357..... 186
May *v.* Rice, 91 Ind. 546..... 591
Maxey *v.* State, 85 Ark. 500..... 113
Meek *v.* State, 80 Ark. 579..... 223
Memphis L. & T. Co. *v.* St. Francis Levee Dist., 64 Ark. 258..... 619
Merritt *v.* State, 73 Ark. 32..... 112
Meyer *v.* Stone, 46 Ark. 210..... 176
Michael *v.* Jones, 84 Mo. 578..... 563
Midland Val. Ry. Co. *v.* Ennis, 109 Ark. 206..... 643
Miller *v.* Churchill, 78 N. C. 372..... 27
Miller *v.* Montgomery, 31 Ill. 350..... 266
Mills *v.* Sanderson, 68 Ark. 130..... 6
Milner *v.* Freeman, 40 Ark. 62..... 575
Missouri & North Arkansas Rd. Co. *v.* Daniels, 98 Ark. 352..... 405
Mondschein *v.* State, 55 Ark. 380..... 613
Moody *v.* Jonesboro, Lake City & Eastern Rd. Co., 83 Ark. 371..... 365
Moore *v.* Camden Marble & Granite Works, 80 Ark. 274..... 539
Moore *v.* Childress, 58 Ark. 510..... 371

Moore *v.* State, 65 Ark. 330 383
Morrell *v.* Quarles, 35 Ala. 544 251
Morrilton Waterworks Imp. Dist. *v.* Earl, 71 Ark. 4 ..... 97, 221
Morrow *v.* James, 69 Ark. 539 371
Mullan *v.* State, 114 Cal. 578 691
Mutual Life Ins. Co. *v.* Hillman, 145 U. S. 285 77

N

Naylor *v.* Shelton, 102 Ark. 30 231
Nelson *v.* Green, 22 Ark. 547 605
Newman *v.* Sylvester, 42 Ind. 106 562
Newport, City of *v.* Railway, 58 Ark. 270 99
Newport *v.* Smith, 61 Minn. 277 562
N. Y. & O. M. R. R. Co. *v.* Van Horn, 57 N. Y. 473 611
Nevada County *v.* Williams, 72 Ark. 394 258
Nicklace *v.* Dickerson, 65 Ark. 422 580
North Carolina R. R. Co. *v.* Zachary, 232 U. S. 248 45
Nunn *v.* Lynch, 89 Ark. 41 131

O

Ogden *v.* Ogden, 60 Ark. 70 371
Ogden *v.* Raymond, 22 Conn. 379 56
Olds *v.* State Land, Commr., 134 Mich. 442, 86 N. W. 956 590
Ozan Lumber Co. *v.* Bryan, 90 Ark. 223 204

P

Pacific Mutual Life Ins. Co. *v.* Carter, 92 Ark. 378 82
Palmore *v.* State, 29 Ark. 250 88
Parcel *v.* Barnes & Bro., 25 Ark. 265 267
Parsons *v.* Sharpe, 102 Ark. 611 427
Pate *v.* Westacott, 1 L. R. Queen's Bench (1894) 272 177
Pennington *v.* Philadelphia, Wilmington & Balt. Rd. Co., 62 Md. 95 491
People *v.* Richards, 51 Am. Dec. 84 388
——— *v.* Seymour, 16 Cal. 332 619
Persinger *v.* Tinkel, 51 N. W. 299 366
Petty *v.* Grisard, 45 Ark. 117 326
Phillips *v.* Atlantic Coast Line Rd. Co. (N. C.) 10 S. E. 556 491
Phillips *v.* Grubbs, 112 Ark. 562 502
Pickens *v.* Richmond & D. R. Co. (N. C.) 10 S. E. 556 491
Pickett *v.* State, 91 Ark. 570 89
Pinkerton *v.* Hudson, 87 Ark. 506 600
Pinney *v.* French, 73 Pac (Kan.) 94 266
Plumley *v.* State, 116 Ark. 17, 171 S. W. 925 69
Pond *v.* The New Rochelle Water Co., 183 N. Y. 330, 1 L. R. A. (N. S.) 958 390

Poole *v.* Oliver, 89 Ark. 578 575
Porter *v.* Waterman, 77 Ark. 383 32
Poston *v.* Hall, 97 Ark. 23 600
Price *v.* Greer, 76 Ark. 426 154
Price *v.* St. Louis, I. M. & S. Ry. Co., 75 Ark. 479 316
Prohibition Cases, 24 Kan. 700 471
Puckett *v.* Reed, 31 Ark. 131 185
Puritan Trust Co. *v.* Coffey (Mass.) 62 N. E. 970 286

Q

Qualls *v.* State, 92 Ark. 200 115
Queen of Ark. Ins. Co. *v.* Malone, 111 Ark. 229 176

R

Rachels *v.* Doniphan Lumber Co., 98 Ark. 529 514
Radford *v.* Samstag, 113 Ark. 185, 167 S. W. 491 394
Read *v.* State, 63 Ark. 618 542
Reid *v.* Walls, 56 S. C. 435 266
Rex *v.* Reading, Cas. T. Hardwicke, 79 115
Reynolds *v.* Blue, 47 Ala. 711 593
Rhea *v.* State, 104 Ark. 176 238
Rice *v.* Palmer, 78 Ark. 432 467
Richardson *v.* Boyd, 69 Ark. 368 412
Rittenhouse *v.* Bell, 106 Ark. 315 560
Robbins *v.* Bangor R. & E. Co., 100 Me. 496, 1 L. R. A. (N. S.) 963 .. 390
Robinson *v.* St. Louis, I. M. & S. Ry. Co., 111 Ark. 208 39
Roddle *v.* Hollweg, 19 Ind. App. 222, 49 N. E. 282 187
Rose *v.* Wynn, 42 Ark. 257 274
Russell *v.* State, 94 Ark. 92 112
Russell *v.* St. Louis S. W. Ry. Co., 113 Ark. 353 643
Russell *v.* Webb, 96 Ark. 190 581

S

St. Louis, Iron Mountain & Southern Ry. Co. *v.* Ayres, 67 Ark. 371 .. 130
——— *v.* Belcher, 117 Ark. 638 487
——— *v.* Brooksher, 86 Ark. 91 227
——— *v.* Cleere, 76 Ark. 377 209
——— *v.* Coke, 118 Ark. 51 530
——— *v.* Coolidge, 73 Ark. 112 171
——— *v.* Corman, 92 Ark. 102 206
——— *v.* Enlow, 115 Ark. 584 643
——— *v.* Garner, 90 Ark. 19 463
——— *v.* Grafton, 51 Ark. 504 251
——— *v.* Graham, 83 Ark. 61 517
——— *v.* Hempfling, 107 Ark. 476 643

St. Louis, Iron Mountain & Southern Ry. Co. *v.* Humbert, 101 Ark. 532 ..... 643, 487
——— *v.* Kimbrell, 111 Ark. 134 460
——— *v.* McMichael, 115 Ark. 101 ..... 461, 487
——— *v.* Magness, 93 Ark. 46 227
——— *v.* Newman, 94 Ark. 459 4
——— *v.* Owens, 103 Ark. 61 643
——— *v.* Pape, 100 Ark. 269 455
——— *v.* Prince, 101 Ark. 315 463
——— *v.* Puckett, 88 Ark. 207 ..... 517, 523
——— *v.* Raines, 90 Ark. 482 77
——— *v.* Smith, 82 Ark. 105 529
——— *v.* Stacks, 97 Ark. 405 463
——— *v.* Standifer, 81 Ark. 275 517
——— *v.* Thurman, 110 Ark. 188 522
——— *v.* Webster, 99 Ark. 265 520
——— *v.* Williams, 108 Ark. 387, 158 S. W. 494 405
——— *v.* Wilson, 116 Ark. 166, 171 S. W. 471 4
——— *v.* Wood, 99 Ark. 363 455
——— *v.* Worthen, 52 Ark. 529 615
St. Louis & San Francisco Rd. Co. *v.* Conarty, 106 Ark. 421 45
——— *v.* Vaughan, 88 Ark. 138 522
St. Louis Southwestern Ry. Co. *v.* Kavanaugh, 78 Ark. 468 467
——— *v.* Kilberry, 83 Ark. 87 172
——— *v.* Mulkey, 100 Ark. 71 ..... 151, 554
Saleski *v.* Boyd, 32 Ark. 74 120
Sanford *v.* McArthur, 18 B. Monroe, 411 561
Satterwhite *v.* State, 82 Ark. 64 440
Schneider *v.* Mobile L. R. R. Co., 146 Ala. 344 348
Scott *v.* Dunkle Box & Lbr. Co., 106 Ark. 83 154
Scott *et al v.* Henry *et al,* 13 Ark. 112 309
Scott *v.* Patterson, 53 Ark. 52 600
Seawell *v.* Young, 77 Ark. 309 425
Seitz *v.* Meriwether, 114 Ark. 289, 169 S. W. 1175 336
Sembler *v.* Water & Light Imp. Dist., 109 Ark. 90 217
Setzer *v.* State, 110 Ark. 226 302
Seymour *v.* City of Tacoma, 6 Wash. 427, 33 Pac. 1059 471
Sharum *v.* Fry, 95 Ark. 385 6
Shibley *v.* Fort Smith & Van Buren Dist., 96 Ark. 410 619
Shields *v.* Coyne, 29 L. R. A. (N. S.) 472 375
Shreveport *v.* Cole, 129 U. S. 36 612
Silvie *v.* State, 117 Ark. 108 492
Simon & Sternberg, *In re,* 151 Fed. 507 21
Singer *v.* Naron, 99 Ark. 446 427
Smith *v.* Lee, 73 Ark. 451 187
Smith *v.* Pendell, 19 Conn. 107 27
Smith *v.* Ragsdale, 36 Ark. 297 499

Smith *v.* Vernon County, 188 Mo. 501, 70 L. R. A. 59 251
Smithsonian Institution *v.* Meech, 169 U. S. 398 575
Smoky Mountain Land, etc., Co. *v.* Lattimore, 119 Tenn. 636 619
Smout *v.* Ilbery, 10 M. & W. 1 562
Somerset Bank *v.* Edmund, 11 L. R. A. (N. S.) 1170 251
Southwestern Tel. & Tel. Co. *v.* Danaher, 102 Ark. 547 107
——— *v.* Garrigan, 107 Ark. 611 107
——— *v.* Murphy, 100 Ark. 576 107
Spear *v.* Arkansas National Bank, 111 Ark. 29 499
Spillers *v.* Smith, 85 Ark. 228 32
Spybuck Drainage Dist. *v.* St. Francis County, 115 Ark. 591, 172 S. W. 893 630
Stanley *v.* Supervisors of Albany, 121 U. S. 535 619
State *v.* Boyce, 65 Ark. 82 112
——— *v.* Dowdy, 86 Ark. 140 311
——— *v.* DuLaney, 87 Ark. 17 302
——— *v.* Jackson, 7 S. C. 283, 24 Am. Rep. 476 388
——— *v.* Little, 94 Ark. 217 619
——— *v.* McDowell, 101 N. C. 734 116
——— *v.* McDuffie, 107 N. C. 885 14
——— *v.* Mallory, 73 Ark. 236 195
——— *v.* Moore, 76 Ark. 197 356
——— *v.* Sloan, 66 Ark. 575 356
——— *v.* Tom, 13 N. C. 569 388
——— *v.* Vaughan, 14 Ark. 424 362
State, *ex rel* Peyton *v.* Cunningham, 18 Am. & E. Ann. Cas. 707 ... 588
——— *v.* Donaghey, 106 Ark. 56 474
State, *ex rel* Norwood *v.* K. C. & M. R. & B. Co., 106 Ark. 248 610
——— Thompson *v.* Winnett, 78 Neb. 379, 10 L. R. A. (N. S) 149. 471
——— Woods *v.* Tooker, 15 Mon. 8, 25 L. R. A. 560 470
Stephens *v.* School Dist. No. 85, 104 Ark. 145 534
Stiewel *v.* Lally, 89 Ark. 195 600
Stone *v.* C. & N. W. Ry. Co., 47 Ia. 82, 29 Am. Rep. 458 490
Storthz *v.* Williams, 86 Ark. 460 424
Street Railroad Co. *v.* Morrow, 87 Tenn. 406 617
Stull *v.* Graham, 60 Ark. 461 144
Sturges *v.* Carter, 114 U. S. 519 619
Supreme Lodge K. & L. of Honor *v.* Johnson, 81 Ark. 512 141
Swan *v.* Manchester & Lawrence Rd. Co., 132 Mass. 116, 4a Am. Rep. 432 491
Swantz *v.* Pillow, 50 Ark. 300 499
Sweeney *v.* State, 35 Ark. 585 88
Swigert *v.* Aspden, 54 N. W. (Minn.) 738 286

T

Talleferro *v.* Barnett, 37 Ark. 517 26
Tarantia *v.* Louisville & N. R. Co., 98 N. E. 999 315

Taylor *v.* Godbold, 76 Ark. 395 600
Texarkana *v.* Friedell, 82 Ark. 531 99
Tharp *v.* Bennett, 93 Ark. 263 630
Thomas *v.* Croom, 102 Ark. 108 224
Thompson *v.* State, 88 Ark. 447 88
Threet *v.* State, 110 Ark. 152 90
Tillar *v.* Henry, 75 Ark. 446 576
Tiner *v.* Christian, 27 Ark. 306 605
Tioga County *v.* South Creek Township, 75 Pa. St. 433 115
Tipton *v.* Parker, 71 Ark. 193 589
Tomlinson Bros. *v.* Hodges, 110 Ark. 528 271
Trapnall's Admr. *v.* State Bank, 18 Ark. 53 548
Turner *v.* Israel, 64 Ark. 244 185
Turner *v.* Watkins, 31 Ark. 437 416

U

United States *v.* Flint Lumber Co., 87 Ark. 80 130
——— *v.* Matthews, 173 U. S. 381 251
——— *v.* Villalonga, Book 23, p. 64, L. C. P. Co. (Ed.) U. S. Sup. Ct. Repts. 186
United States Bedding Co. *v.* Andre, 105 Ark. 111 176
Union Saw Mill Co. *v.* Felsenthal, 85 Ark. 346 64

W

Walker *v.* Noll, 92 Ark. 148 630
Walker *v.* Wills, 5 Ark. 167 120
Walnut Ridge Merc. Co. *v.* Cohn, 79 Ark. 338 445
Ward *v.* State, 70 Ark. 204 15
Ware *v.* Morgan, 67 Ala. 461 562
Watson *v.* Hardin, 97 Ark. 33 371
Watson *v.* Wolff-Goldman Realty Co., 95 Ark. 23 370
Webster *v.* Carter, 99 Ark. 458 555
Wells *v.* State, 102 Ark. 627 112
Wells Fargo & Co. Express *v.* Crawford County, 63 Ark. 576 619
Western Cement Co. *v.* Jones, 8 Mo. App. 373 563
Western Union Telegraph Co. *v.* Brown, 234 U. S. 542, 58 L. Ed. 1457 ..... 158, 212
——— *v.* Compton, 114 Ark. 193, 169 S. W. 946 ..... 158, 212
——— *v.* Johnson, 171 S. W. 859, 115 Ark. 564 ..... 158, 212
Weyerhauser *v.* Minnesota, 176 U. S. 550 616
Wheat *v.* Smith, 50 Ark. 266 470
Wheelock *v.* Simons, 75 Ark. 21 29
Whitcomb *v.* Gans, 90 Ark. 469 628
White *v.* Schloerb, 178 U. S. 542 21
White Sewing Machine Co. *v.* Wooster, 66 Ark. 382 26

Wilmans *v.* Robinson, 67 Ark. 517.....29, 370
Wilson *v.* White, 82 Ark. 407..... 291
Winn *v.* Carter Dry Goods Co., 43 S. W. 436..... 366
Winona & St. Peters Land Co. *v.* Minnesota, 159 U. S. 526..... 616
Wishard *v.* State, 115 Pac. (Okla.) 796..... 542
Wiswald *v.* Campbell, 93 U. S. 347..... 21
Wood *v.* Holland, 57 Ark. 198..... 417
Woodmen of the World *v.* Jackson, 80 Ark. 419..... 141
Wulff *v.* Claibourne, 107 Ark. 329..... 294

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

BUCKEYE COTTON OIL COMPANY *v.* HORTON.

Opinion delivered February 8, 1915.

NEGLIGENCE—ANIMALS—INJURY TO COW.—Where defendant permitted cotton seed and hulls, which it knew were attractive to cattle, to accumulate at a spot on its premises which could be easily reached by cattle on the public highway, and which were dangerous to cattle, the same will be held to be negligence, and defendant will be liable in damages for an injury received by plaintiff's cow as a result thereof.

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

Cockrill & Armistead, for appellant.

1. The court erred in its charge to the jury. The two instructions given by the court are conflicting. One who suffers his stock to go at large takes the risk incident. He takes the permissage pasturage with its accompanying perils. 48 Ark. 369.

2. There is no obligation on the owner to keep grounds in safe condition against trespassers or stray animals. 57 Ark. 16. The only duty owing is to refrain from attracting or drawing cattle to a dangerous place or substance, and no liability occurs if the injury is the natural and probable result of the act which a prudent man would not have foreseen. 57 Ark. 16; 94 *Id.* 459.

3. If the object, substance or condition is not inherently harmful, there is no negligence as a matter of law. 84 Ark. 42.

W. D. Jackson and *Gus W. Jones,* for appellee.

1. The appellant was bound to use ordinary care to keep its premises free from substances that would attract cattle into dangerous places. The law as to stock running at large, or on the range, is well settled in this State. 37 Ark. 562; 1 Rul. Cas. Law 1171; 94 Ark. 460.

2. Instructions should be considered as a whole. Construed together, they fairly present every phase of the case. 100 Ark. 107; 67 *Id.* 531; 100 *Id.* 132; 100 *Id.* 199.

HART, J. A. A. Horton instituted this action before a justice of the peace against the Buckeye Cotton Oil Company, a corporation, to recover the sum of $150, the value of a Jersey cow which he alleged came to her death on account of the negligence of the defendant.

The plaintiff recovered before the justice of the peace and the case was appealed to the circuit court and a trial anew there resulted in a verdict and judgment for the plaintiff in the sum of $65.

The defendant, the Buckeye Cotton Oil Company, was engaged in operating an oil mill. It had three tunnels about five feet high used in conveying cotton seed. The plaintiff's cow fell into one of these tunnels and was injured to such an extent that she had to be killed. The mouth of the tunnel was "A" shaped and cotton seed and hulls were scattered about the mouth of the tunnel and in it.

The record shows that there was no fence around the oil mill and that it was situated so that switch tracks extended from it to the railroad. The tunnel in question was about thirty feet from the highway and the evidence shows that cows were accustomed to come around the oil mill and eat the seed and hulls which were scattered around there but that none had ever before fallen into any of the tunnels.

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

The court of its own motion gave to the jury the following instruction:

"No. 1. If you find from the evidence that defendant had erected such structure as has been described, and that, acting as a reasonably prudent person, ought to have foreseen under all the circumstances that, if left open, a cow would be attracted, and would enter and be injured, and that defendant negligently left same open, and that plaintiff's cow did enter, and was so injured that her death resulted, you will find for the plaintiff for such an amount as the evidence shows to have been the value of the cow."

"No. 2. If you find from the evidence that plaintiff was familiar with the premises, and, as a reasonably prudent person, ought to have anticipated that his cow might enter said structure and be injured, yet took no steps for her protection from such danger, you will find for the defendant."

We think the facts bring the case within the principles of law laid down in *Jones* v. *Nichols,* 46 Ark. 207. There the defendant dug a pit under his cotton gin for a cotton press, near the public highway, and left it unenclosed, and with corn and cotton seed scattered about it. The plaintiff's cow fell into this pit, and the court said: "The pit, which the appellants dug and into which the cow fell, in the night time, was close to the highway; it was unenclosed and was without signal of warning or protection; moreover, cotton seed and corn had been left by the appellants scattered in the neighborhood of it, so that, in the language of one of the witnesses, it was not only a stock trap, but was actually baited for the game. The court instructed the jury, in effect, that if they should find such a state of facts from the proof, the appellants were guilty of negligence which would render them liable for the injury done. This proposition can not be controverted."

So here the testimony shows that the tunnel into which the cow fell was situated within thirty feet of the public highway and that cattle had been accustomed to congregate around there for the purpose of eating cotton seed and hulls which were scattered about there by the

defendant, and that this state of facts had existed for a considerable length of time. From these facts the jury might have inferred negligence on the part of the defendant.

The negligence did not consist in the fact that the defendant left its premises unenclosed, but in the fact that it baited the tunnel by leaving there for a considerable length of time cotton seed and hulls which were attractive to cattle and naturally calculated to lure them into danger.

Neither was the plaintiff guilty of contributory negligence for he was not familiar with the premises of the defendant in regard to the tunnel and did not know that his cow was accustomed to going in there. See 1 Ruling Case Law, paragraph 76, page 1134. Also, *St. Louis, I. M. & S. Ry. Co.* v. *Newman,* 94 Ark. 459.

So, too, in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Wilson,* 116 Ark. 163, 171 S. W. 471, we said that if the railroad company permitted feed stuff to be placed upon its right-of-way in such a manner as is calculated to attract cattle thereto, it would be liable in damages to the owner of animals injured by reason of such negligence. In that case no recovery was allowed the plaintiff because the railroad company had its right-of-way fenced and there was nothing to show that the defective condition of the fence had existed for such a length of time as to warrant the inference that the company had notice of its defective condition.

The judgment will be affirmed.

COLLINS v. STEWART.

Opinion delivered February 8, 1915.

DRAINAGE DISTRICTS—FORMATION—APPEAL FROM ORDER OF COUNTY COURT—RIGHT OF PETITIONERS.—Under Kirby's Digest, § 1428, the petitioners, as well as the remonstrants, have a right to appeal from an order of the county court, adverse to their interests and relative to the formation of a drainage district.

Appeal from Craighead Circuit Court; *J. F. Gautney,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellants were petitioners in the Craighead County Court for the establishment of a drainage district in that county, which would have resulted, had the prayer of the petition been granted, in the formation of a large drainage district, which would have embraced several smaller districts previously created by orders of the county court of that county, and territory embraced in another district under process of formation by the county court at that time. The petitioners prayed that the district be established under the authority of sections 1414 to 1450, inclusive, of Kirby's Digest, and the amendments thereto. A large number of land owners in the proposed district were made parties to the proceeding, and protested against the formation of the district. In response to the prayer of the petition the court appointed an engineer and viewers, and fixed the day for the hearing of the reports of the viewers and engineer, and the establishment of the district was recommended in these reports. On the final hearing of the petition the court refused to grant the prayer thereof, and ordered it dismissed. Some days later the petitioners, by their attorneys, prayed an appeal in conformity with section 1487 of Kirby's Digest, but without attempting to comply with the provisions of section 1428 of Kirby's Digest. Upon the hearing below a motion was filed to dismiss the appeal from the county court, for the reason that the appeal had not been properly taken, and that the affidavit or prayer for appeal did not specify the matters appealed from; that there was no order of the county court granting the appeal; that there was no order of the court fixing the amount of the bond upon appeal, and that no bond for costs had been filed, and that the prayer for appeal did not specify the matters appealed from as required by law. Upon the hearing of the motion in the circuit court, to dismiss this appeal, the appellants then contended, as they do now, that the provisions of section 1428, regulating appeals from the orders of county courts in drainage matters, did not apply to petitioners for the establishment of drainage

districts, but that the provisions of that section were applicable only to remonstrants.

Appellants, pro se.

Hawthorne & Hawthorne, N. F. Lamb and *Baker & Sloan,* for appellees.

SMITH, J., (after stating the facts). In the case of *Sharum* v. *Fry,* 95 Ark. 385, it was contended that, where the county court, upon final hearing of a petition for the establishment of a drainage district, refused to make the order prayed for, no right of appeal was given to the petitioners. In the decision of that case, however, the court quoted in its entirety section 1428 of Kirby's Digest and followed this quotation with the following statement: "This statute clearly gives the right of appeal to 'any person or corporation' aggrieved by the judgment, whether petitioner or remonstrant. But, even if it did not, as contended, give the right of appeal to petitioners, the Constitution and the general statutes confer that right. Constitution, art. 7, § 33; Kirby's Digest, § § 1487, 1493; *Huddleston* v. *Coffman,* 90 Ark. 219."

It was not there decided that petitioners might appeal under the provisions of section 1487. It was merely said that the right of appeal would not be denied, even though the drainage statute had made no provision for the appeal, the right being one guaranteed by the Constitution. But in this case of *Sharum* v. *Fry, supra,* it was expressly held that "this statute clearly gives the right of appeal to 'any person or corporation' aggrieved by the judgment, whether petitioner or remonstrant." And in the case of *Huddleston* v. *Coffman,* 90 Ark. 221, it was said: "The provisions of section 1428 in regard to the time and manner of taking appeals from the county court must govern in regard to the particular cases mentioned in that section. *Mills* v. *Sanderson,* 68 Ark. 130."

In the case of *Drainage District No.* 7 v. *Stuart,* 104 Ark. 113, and again in the case of *Drainage District No.* 1 v. *Rolfe,* 110 Ark. 374, it was held that the appeal of a remonstrant taken from any action of the county court

in the matter of establishing drainage districts, under the authority of section 1428, must conform to the requirements of that section. In those cases it was held that it was necessary (a) that the appellant pray an appeal, which must be granted at the same term of court; (b) that the court fix the amount of the appeal bond, and such order be spread upon the record; (c) that there be a motion in writing specifying the matters appealed from, and that such motion be spread upon the record.

It is not here contended that this section was complied with. It is only urged that its provisions are not applicable, where the petitioners for the district, take an appeal from the judgment of the county court. We think it appears from the cases of *Sharum* v. *Fry* and *Huddleston* v. *Coffman, supra,* that the statute applies alike to the petitioner, and to the remonstrant. We should so hold, even though it had not been previously so decided. Section 1428 provides, among other things, that "any person or corporation may appeal from the order of the court." This language is not limited to remonstrants, but grants the right of appeal to any one who has become a party to the proceedings. This drainage law does not contemplate that the court will necessarily grant the prayer of the petition to establish the district. The court may find that the improvement will not be conducive to the public health, convenience or welfare. This is shown by the language employed in the first subdivision of that section, enumerating the matters from which any person or corporation may appeal. This language is:

"*First.* Whether such improvement will be conducive of public health," etc. The court's finding may be one way or it may be the other, and the right of appeal is granted whether it be for the improvement or against it.

We conclude, therefore, that, as section 1428 applies alike to petitioner and remonstrant, the action of the court below, in dismissing the appeal, because it had not been properly taken, was correct, and its judgment is, therefore, affirmed.

McNeill v. State.

Opinion delivered February 8, 1915.

1. Appeal and error—incompetent evidence—harmless error.—In a prosecution for bigamy, the introduction in evidence of an improperly authenticated certificate of marriage between defendant and his first wife, will be held harmless error, when the marriage was proved by other uncontradicted testimony.
2. Bigamy—corpus delicti—proof.—In a prosecution for bigamy the second marriage constitutes the *corpus delicti*, and must be proved by the record of the marriage to have been a marriage which was in all respects legal except that the accused had another wife at the time.
3. Bigamy—first marriage—how proved.—In a prosecution for bigamy the first marriage may be established by proof of admissions of accused, by reputation or by any other proof tending to show a marriage.
4. Evidence—handwriting—competency of a witness.—In a prosecution for bigamy, the testimony of a witness, who did not claim to be an expert on handwriting, but who had made a study of penmanship and was familiar with defendant's signature, is competent to identify defendant's signature to certain papers offered in evidence.
5. Evidence—intercepted letters—husband and wife.—In a prosecution for bigamy, the prosecution offered in evidence letters purporting to be written by defendant to his first wife, for the purpose of showing his marriage to her. *Held*, when the letters fell into the hands of a third person, without being forcibly taken from the wife or by other sort of compulsion to obtain them from her, they are competent evidence against the husband.
6. Evidence—proof of marriage—privileged communications.—In a prosecution for bigamy, where the question at issue is defendant's marriage to the first wife, letters written by him to her are admissible in evidence to establish that fact.

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

J. C. Pinnix, W. T. Kidd, A. D. DuLaney, Langley & Steel and *Steel, Lake & Head*, for appellant.

1. The Missouri record could only be proved in the way pointed out by the act of Congress. The papers produced at the trial were not properly authenticated, and should not have been admitted in evidence.

The marriage license itself was the best evidence, and in the absence of proof of its loss secondary evidence was not admissible. 72 Ark. 47; 49 Ark. 156.

The testimony of a witness to the effect that a certain copy of a document is substantially the same as the original, is inadmissible. 1 Ark. 232.

2. The letters marked "4 to 14" were improperly admitted. No one of the three witnesses who testified concerning them qualified as an expert on handwriting.

If properly identified, they were still not admissible, because they were privileged communications. 70 Ark. 204; 137 U. S. 496; 62 L. R. A. 172; 17 *Id.* 723; 59 *Id.* 588; 86 N. E. 476; 120 Am. St. Rep. 1009; 114 S. W. 811.

The mere fact that the alleged wife voluntarily surrendered the letters to the prosecution does not render them admissible. It does not render them admissible any more than if they had been taken by force. 40 Cyc. 2357; 17 S. E. 990; 50 Cent. Dig., "Witnesses," subdiv. 738.

3. The marriage in Missouri must be proved as an existing fact. The admissions of appellant to Doctor Cox were wholly insufficient to establish that there was a marriage in Missouri between appellant and Estelle Williams. 4 Minn. 335; 12 Minn. 476; 103 Mo. 266; 35 Kan. 626; 5 Utah, 621; 94 Tenn. 86; 34 Tex. Crim. 296.

Wm. L. Moose, Attorney General, *Jno. P. Streepey*, Assistant, and *C. A. Fuller*, Prosecuting Attorney, for appellee.

1. The photographic exhibits to the testimony of the witness Terrell were properly admitted. 49 Ark. 157, 158.

Certified copies of records of other States, when under the seals of duly elected and qualified officers, are admissible in evidence. 26 Ark. 530, 531.

Where a witness swears that a paper offered in evidence is a correct copy of the original, it is admissible, even though he does not swear that he compared them. 1 Crawford's Dig. 678; 12 Ark. 672.

2. The letters from appellant to his alleged wife were properly admitted, and the identification thereof was sufficient. 73 Ark. 499, 500.

The testimony of the alleged wife would have been admissible. Kirby's Dig., § 3092; 68 Ia. 155; 55 *Id.* 217; 31 *Id.* 24; 107 N. C. 885; 61 Neb. 589.

3. The admissions of appellant were sufficient. They were voluntarily made and thereafter proof was supplied that the offense was committed. 99 Ark. 453.

McCulloch, C. J. Appellant was indicted by the grand jury of Pike County for the crime of bigamy, alleged to have been committed in that county by marrying Pearl Kelley. The first marriage was contracted in the State of Missouri. There was no dispute about the marriage alleged to have been bigamous, but the sole controversy in the trial below was whether or not appellant had contracted a former marriage and was a married man at the time he entered into the marriage with Pearl Kelley. Appellant did not introduce any testimony, but saved several exceptions to that adduced by the State.

(1) The first exception relates to the introduction of a copy of the marriage record at Springfield, Missouri, showing the intermarriage of John McNeill and Estelle Williams. The ground of the objection was that the copy was not authenticated in accordance with the statutes of the United States on that subject. This exception is well taken, for the record was certified by the recorder of deeds, who is the custodian of marriage records in the State of Missouri, and by the clerk of the county court, but not "by the presiding justice of the court of the county, parish or district in which such office may be kept, or of the Governor or Secretary of State, the chancellor or keeper of the great seal of the State, Territory or country" as required by the Federal statute. Revised Statutes of the United States, § 906. The marriage was, however, proved by other uncontradicted testimony, and if that testimony was competent the erroneous admission in evidence of the certified copy was not prejudicial to appellant. There was also an objection interposed to the other testimony, and that, too, is urged as grounds

for reversal. A witness testified that he examined the original record in the hands of the proper custodian in Missouri and compared a photograph of it which was also introduced in evidence. He testified that the photograph was an exact copy, showing the signature of appellant to the application for license. There was other testimony tending to the identification of the signature as that of appellant. That testimony came from other witnesses who are experts in handwriting. Now, the testimony, taken together, showed that one John McNeill was married to Estelle Williams in Springfield, Missouri, on September 8, 1911, and that the signature of John McNeill to the application for license was that of appellant. A brother of Estelle Williams testified that on September 8, 1911, he saw his sister and appellant on board the train at Rolla, Missouri, bound for Springfield, whence his sister was going to attend school. The State also proved a statement of appellant's to an acquaintance in Pike County to the effect that he had "married a girl in Missouri," and that appellant showed the witness a photograph of the girl he claimed to have married, which the witness identified at the trial as the picture of Estelle Williams. There was still other testimony in the form of letters proved to be in the handwriting of appellant which contained statements tending to show that he was married to Estelle Williams. The introduction of those letters was objected to, and their admissibility in evidence will be discussed later.

(2-3) There is no escape from the conclusion, if all this testimony be considered, that appellant was married to Estelle Williams, and that he had a lawful wife at the time he entered into the bigamous marriage with Pearl Kelley as charged in the indictment. The last marriage constituted the *corpus delicti* and must be proved by the record of the marriage to have been a marriage which was in all respects legal except that the accused had another wife at the time. The first marriage may be proved by other modes. It may be established by proof of admissions of the accused, or by reputation or by any other

proof tending to show a marriage. *Halbrook* v. *State*, 34 Ark. 511. There are authorities cited in appellant's brief to the effect that the first marriage can not be proved by admissions of the accused, but the weight of authority is the other way, and our court in the Halbrook case adopted the other rule, which we think is perfectly sound for the reason that the last and not the first marriage constitutes the body of the offense and the first may be established by admissions of the accused without any other proof on that point. We think that so far as concerned the first marriage, it was competent to prove the fact in the way it was done in this case, other than by introduction of a properly authenticated copy of the marriage record. There was no prejudice, then, in the erroneous admission of the insufficiently authenticated copy of the record, for, as above stated, the competent testimony on that subject was undisputed.

(4) It is insisted that the court erred in permitting a witness, one Terrell, to testify concerning the signature of appellant without first showing himself to be an expert on handwriting. The witness disclaimed being an expert on that subject, but said that he was in the mercantile business, had studied penmanship, and that he was entirely familiar with appellant's signature. We are of the opinion that this qualified him to give his opinion as to whether or not the signatures to the papers introduced in evidence were those of appellant. If it had been a matter of comparison of handwriting which the witness was not acquainted with, it would perhaps be correct to say that he was not sufficiently qualified as an expert to testify on that subject, but he only testified about the signature with which he claimed to be familiar, and we entertain no doubt that that testimony was competent to go to the jury for what it was worth.

(5-6) The next ground urged for reversal is that the court erred in permitting the State to introduce in evidence the letters said to have been written by appellant to his wife whom he married in Missouri. These letters all contained statements which the jury might

have accepted as admissions that the woman to whom they were addressed was his wife. The name of the person to whom they were addressed was one of endearment used by members of her family in addressing her, and the evidence is sufficient to establish the fact that appellant wrote the letters. It is insisted, however, that the letters constituted privileged communications on account of the fact that they were written by appellant to his wife, and that for that reason they should not have been admitted in evidence. The letters were produced by the prosecuting attorney and were introduced in evidence during the examination of witness Terrell, who identified the signatures thereto as being those of appellant. It was shown by the testimony of a brother-in-law of appellant's wife (Estelle Williams) that a few days before the trial he procured the letters from his sister and turned them over to the prosecuting attorney. The court refused to permit the wife to testify as a witness in the case, but allowed the letters to be read. We think this question is concluded by the decision in *Hammons* v. *State,* 73 Ark. 495, where it was held that intercepted letters from the husband to the wife could be used in evidence against the former in a trial on a charge against him of rape. In that case the letters accidentally fell into the hands of the prosecution before they reached the hands of the wife. The case differs from this in that the evidence here shows that the wife, after receiving the letters, turned them over to her brother and that he delivered them to the prosecuting attorney for the purpose of being used in evidence. The authorities on this subject are fully reviewed in the *Hammons* case, *supra,* and this court adopted the rule that it was not a violation of the privilege to admit the letters in evidence unless the wife was called to testify or forced to produce them, or that they were wrongfully taken from her custody. The only conclusion to be logically drawn from that decision is that where the letters fall into the hands of a third person, without being taken forcibly from the wife or by other sort of compulsion to obtain them from her, they

are competent evidence against the husband. Moreover, we are of the opinion that the letters were competent in this case, on another ground, and that is that there was no privilege in withholding letters tending to establish the first marriage. While appellant did not testify in the case or introduce any testimony, his attitude of defense was one that he had not entered into a marriage prior to that contracted with Pearl Kelley; therefore, it was an inconsistent position for him to occupy, and at the same time claim the right to exclude letters written to Estelle Williams on the grounds that she was his wife. Some of the courts hold that in a bigamy case the first wife is the injured party and for that reason may testify. The cases are cited on the State's brief. The weight of authority is perhaps against that view, but the difference arises in cases where facts are sought to be proved by the wife other than the fact of marriage. We agree fully with the North Carolina court in the statement that "the fact of marriage is not within the reason of the rule of public policy which makes the husband or wife incompetent to prove any transactions after marriage. In its nature marriage is intended to be not confidential but public and notorious." *State* v. *McDuffie*, 107 N. C. 885. In other words, the cases are not confined to those where the marriage only is sought to be proved, and we are of the opinion that the sound rule is that where only the fact of marriage is involved the privilege is not violated by the introduction of letters containing admissions as to the marriage.

We conclude that the trial of this case was free from any prejudicial error and that the judgment of conviction should be affirmed.

It is so ordered.

Hart, J., (dissenting). It will be noted that the letters written by the defendant to his wife and delivered by her to her brother for the purpose of being given to the prosecuting attorney to be used as evidence in this case, have been held competent on the authority of *Hammons* v. *State*, 73 Ark. 495. The court says in effect that

where letters fall into the hands of a third person without being taken forcibly from the wife or obtained without any other sort of compulsion, they are competent evidence against the husband. In my judgment this is to overrule *Ward* v. *State,* 70 Ark. 204, and to greatly extend the doctrine in *Hammons* v. *State, supra.*

In the Ward case a letter was taken from the wife after it was delivered to her and the court held that it was not admissible in evidence against the husband. In the *Hammons* case a letter was intercepted before it reached the wife and the letter was admitted in evidence, but the court expressly disclaimed any intention of overruling the Ward case. The court went no further in the Hammons case than to hold that a letter written by a husband to his wife may be offered in evidence against the husband when not in the custody of the wife or control of her agent or representative, but is in the control of a third person without her connivance or voluntary act.

In the case before us the court has held that a wife may voluntarily and with hostile intent deliver a letter written to her by her husband to a third person for the purpose of having it introduced in evidence against the husband. It is true some courts have held that when papers or letters are offered in evidence the court can take no notice of how they were obtained because to try that question would be to permit a collateral issue to be tried; but it will be noted that our court in the Ward and Hammons cases has not adopted that view and the decision in the present case does not rest on that ground. The rule which protects confidential communications of this nature was established on grounds of public policy for the purpose of encouraging mutual confidence between husband and wife and thereby promoting the happiness of the married state. To this end the common law provides that all communications between husband and wife which are of a confidential nature shall be kept inviolate. In the Ward and Hammons cases it was recognized that this provision extended to written as well as oral communications. It is obvious that the present de-

cision limits the protection to oral communications and to such written communications as are taken from the spouse by force; for the spouse having possession of the letters can always deliver them to a third person for the purpose of being used in evidence against the spouse who wrote them, and thus by his or her voluntary act defeat the very purpose of the rule.

That the court did not intend that such construction be placed upon its opinion in the Hammons case is evident from the language contained in the opinion. Stress is laid several times in the course of the opinion on the fact that there was no evidence connecting Mrs. Hammons in any way with the delivery of the letter to the witness. I think also that the language of the dissenting opinion bears out the views I have here expressed. Otherwise, in discussing the difference between the Ward and Hammons cases why say, "The fact that the letter was forcibly taken from the wife on the one hand, and that it was intercepted before it reached the wife on the other hand, should not be a controlling distinction."

The court also held that the letters were competent because it is inconsistent for the defendant to claim the right to exclude the letters to Estella Williams on the ground that she is his wife and at the same time claim that he had not been married to her. The defendant entered a plea of not guilty and it then devolved upon the State to prove beyond a reasonable doubt that he was guilty. It was not incumbent upon the defendant to introduce any testimony whatever. One of the essential elements of the offense was that he should have a wife living at the time he married another. It was incumbent upon the State to prove that he had a living wife when he married the second time and this proof should have been made by competent testimony.

Therefore, if I am correct in holding that the letters written to his first wife could not be used in testimony against him the defendant would not be bound by any rule of estoppel from objecting to the introduction of such letters.

MARYMAN v. DREYFUS.

Opinion delivered February 8, 1915.

1. BANKRUPTCY — BANKRUPTCY COURT — JURISDICTION. — Bankruptcy courts have no jurisdiction of independent suits at law or in equity, and the bankruptcy act does not give to the bankruptcy courts jurisdiction to render personal judgments against bankrupt debtors as in civil suits or in equity.
2. BANKRUPTCY—ACTION IN STATE COURT—RIGHT OF CREDITOR.—Under the Bankruptcy Act of 1898, a creditor, after proving his claim, may prosecute a suit to judgment in the State courts, unless a stay is procured by a trustee in bankruptcy.
3. BANKRUPTCY—BANKRUPTCY COURT—POWER TO RENDER JUDGMENT.—A bankruptcy court is without jurisdiction or power to render a personal judgment against the bankrupt for the amount of the creditor's claim proved.
4. BANKRUPTCY—ALLOWANCE OF CLAIM—JUDGMENT.—The allowance of a creditor's claim, by a referee in bankruptcy, does not amount to a judgment in favor of the creditor within the meaning of the statute permitting suits to be brought thereon within ten years.

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

STATEMENT BY THE COURT.

Appellee, a corporation, successor to the partnership of S. G. Dreyfus & Co., sued for a balance claimed to be due upon a judgment and alleged that a petition in involuntary bankruptcy was filed against Maryman, who confessed in writing his insolvency and willingness to be adjudged a bankrupt, that he was duly adjudicated a bankrupt; that the said company succeeded to all the rights of S. G. Dreyfus & Co., which proved its claim against the bankrupt's estate and the same was duly allowed in the full amount thereof and became a judgment against the appellant under the laws of the State and the United States, and that appellee was indebted to it in the sum of said judgment, less the dividends credited thereon.

A general demurrer was interposed to the complaint alleging its insufficiency, and that the record of the judgment did not show a valid judgment against the defendant in plaintiff's favor, and that the alleged judgment

was not made by a court of record having jurisdiction of the subject-matter and person of the defendant.

The demurrer was overruled and appellant denied the material allegations of the complaint, interposed the plea of *nul tiel* record and plead the three and five-year statutes of limitation.

It appears from the testimony that an involuntary petition in bankruptcy was filed against T. W. Maryman, who admitted his insolvency and willingness to be adjudged a bankrupt; that he was duly adjudicated a bankrupt and the claim of said Dreyfus & Co. was proved against the estate and allowed by the referee for the full amount. The entry being, "Filed and allowed January 31, 1905, 11 A. M. A. H. Sevier, Referee."

The estate was closed and the records turned over to the clerk on July 6, 1905, and an application for discharge was filed in September, 1905, and withdrawn May 15, 1906.

The testimony further shows that no part of the Dreyfus claim has been paid except the small amounts of dividends, which were credited thereon, and appellee corporation succeeded to all the rights of the partnership therein.

The court rendered judgment against the defendant in favor of the plaintiff for the amount claimed with interest for nine and one-half years, from which judgment this appeal is prosecuted.

Henry Moore, Jr., for appellant.

1. The bankruptcy court did not attempt to render a personal judgment and was without jurisdiction to render such a judgment. Collier on Bankruptcy (4 ed.), pp. 11, 12; 11 Enc. Pl. & Pr., pp. 879-882. No personal judgment can be obtained by proving up a claim in a bankruptcy court when an individual has been declared a bankrupt. 93 U. S. 347; 110 *Id.* 741; 178 *Id.* 526; 202 *Id.* 479; 169 Fed. 1017; 109 *Id.* 313.

2. The formalities required by law were not complied with and the courts of Arkansas will not grant a judgment upon the record shown. 13 Ark. 34; 11 Enc.

Pl. & Pr., p. 1153, note 10; 45 Ark. 190. No judgment against defendant was ever shown. 47 Ark. 124; 70 *Id.* 345; 23 *Id.* 170; 48 *Id.* 282. The demurrer should have been sustained.

Will Steel, for appellee.

1. The bankrupt court had jurisdiction over the estate and person of Maryman, and in a proceeding in a State court he can not attack collaterally his adjudication or the allowance of appellee's claim by the referee for lack of personal service or otherwise. Bankrupt Act, § § 18 F. and 38-1; 1 Loveland on Bankruptcy (4 ed.) 498, 503-4-6. The adjudication binds the bankrupt until set aside in a direct proceeding, or on appeal, and can not be collaterally attacked. 152 Fed. 64; 164 *Id.* 823; 160 *Id.* 619; 172 *Id.* 353; 168 *Id.* 672; 101 *Id.* 971; 170 *Id.* 677; 145 *Id.* 396; 99 *Id.* 256; 149 *Id.* 636. The court had jurisdiction, and the bankrupt is bound by all orders made by the court. 93 U. S. 347. A jury trial could not be demanded. 198 U. S. 289; 124 Fed. 182; 101 *Id.* 243; 104 U. S. 126.

2. The question is *res adjudicata.* 23 Cyc. 1118; 78 S. W. 882; 111 Fed. 361; 122 *Id.* 232. The act of the referee is the act of the court. 1 Loveland on Bank. (4 ed.) 205; 178 U. S. 542; 151 Fed. 507; 142 *Id.* 593.

3. The judgment was properly authenticated. 23 Cyc. 1544-1598. It is conclusive. *Ib.* 1293, 1295, 1239. The action of the referee was a judgment. 48 Ark. 282; 124 Fed. 371; 23 Cyc. 670.

KIRBY, J., (after stating the facts). It is contended that the bankruptcy court was without jurisdiction to render a personal judgment against the bankrupt upon proof of a claim against his estate in bankruptcy and that it in fact did not do so, the allowance of the claim by the referee not becoming a judgment against the bankrupt upon which suit could thereafter be brought as upon other judgments.

Bankruptcy laws were not made nor bankruptcy courts instituted for the purpose of preserving and perpetuating claims against bankrupts, but for releasing and

discharging insolvent persons from their debts and liabilities, after distributing the proceeds of their estate in payment thereof in accordance with the procedure prescribed therefor.

Section 2 of the present bankruptcy law of 1898 prescribes the powers and jurisdiction of the bankruptcy court, granting power, "2. To allow and disallow claims against bankrupt estates. * * * 15. To make such orders, issue such process and enter such judgment in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

"As courts of bankruptcy, their origin is statutory, and they have no powers or jurisdiction other than is conferred on them by or necessarily implied, from the statute."

"By the first clause of section 2, their jurisdiction is limited to proceedings in bankruptcy, *i. e.,* bankruptcy proceedings, *per se,* as distinguished from civil actions at law, or plenary suits in equity. 2 Collier on Bankruptcy (4 ed.), 11 and 12.

"Subdivision 15 is the omnibus clause of the section. Generally speaking, it may be availed of to compel anything, which ought to be done for, or to prevent anything which ought not to be done against the enforcement of the law; provided, the court of bankruptcy otherwise has jurisdiction of the person or the subject-matter." Collier on Bankruptcy, 23.

"On the call of claims duly proved and filed, an objection can be made, but only by parties in interest."

"Under the former law, a creditor who proved his claim could not proceed thereon in another court. This is not the law now. He can proceed, though he will usually be halted by a stay." Collier on Bankruptcy, 122, 123.

It is also true that referees in bankruptcy "take the same oath of office as judges of the United States courts," are referred to "as an arm of the bankruptcy court, invested with certain judicial powers," and as "a court of very great importance in the administration of bankrupt

assets and the determination of conflicting rights arising thereunder," and in their hearings within the scope of their powers are clothed with the authority of judges. *White* v. *Schloerb,* 178 U. S. 542; Loveland on Bankruptcy, 205; *Gilbertson* v. *U. S.,* 168 Fed. 672; In re *Simon & Sternberg,* 151 Fed. 507; In re *McIntire,* 142 Fed. 593. Judge, however, as defined in the act means a judge of a court of bankruptcy not including the referee. See Bankruptcy Act.

Proceedings by creditors to prove their demands against the estate of a bankrupt are part of the suit in bankruptcy and are not separate or independent suits in law or in equity, the bankruptcy act being passed to provide a quick and summary settlement of debts against the bankrupt out of the proceeds of his estate and proceedings originally commenced as part of the bankruptcy suit are not separate from it and converted into a suit at law. *Wiswall* v. *Campbell,* 93 U. S. 347; *Leggett* v. *Allen,* 110 U. S. 741.

(1) It is settled that bankruptcy courts under the present bankruptcy act have no jurisdiction of independent suits at law or in equity. *Bardes* v. *Hawarden Bank,* 178 U. S. 526. It was there said:

"Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words 'at law,' in the opening sentence conferring on the courts of bankruptcy 'such jurisdiction' at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings, may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law, and not in equity."

"The section nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties, 'in proceedings in bankruptcy,' and in clause 15 to make orders, issue process

and enter judgments necessary for the enforcement of the provisions of this act."

In *Bush* v. *Elliott,* 202 U. S. 479, the court said:

"The bankruptcy act of 1898 in respect to matters now under consideration was a radical departure from the act of 1867, in the evident purpose of Congress to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the Federal courts as bankrupt courts and to preserve to a greater extent than by the former act, the jurisdiction of the State courts over actions which were not distinctly matters and proceedings in bankruptcy."

"As said in the Bards case, Congress, by the second clause of section 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as asests of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, unless by consent of the proposed defendant, of which there is no pretense in this case." See also *First Natl. Bank* v. *Title & Trust Co.,* 198 U. S. 291.

It is evident from these authorities that there was no intention upon the part of the lawmakers to give the bankruptcy courts jurisdiction to render personal judgments against bankrupt debtors as in civil suits at law or in equity and there was no such judgment attempted to be rendered in said court. The allowance by the referee of the claim was within the jurisdiction of the referee in the bankruptcy proceeding and binding and conclusive against the bankrupt's estate, unless reversed upon appeal.

It is insisted by appellee that the case of *Hargadine-McKittrick Dry Goods Co.* v. *Hudson,* 122 Fed. 232, is authority for holding the allowance of a claim by the referee to be a judgment binding upon the bankrupt. In that case the plaintiff brought suit on a Texas judgment

and the pleadings developed that he had previously filed proof of claim setting up the judgment in the bankruptcy proceedings against the defendant in Colorado and his claim was disallowed by the referee as being barred by the statute of limitations, and on review the district court affirmed the referee's decision. The bankrupt was discharged and suit was afterward brought in the United States Circuit Court on the original judgment and the court held that the judgment of the district court of Colorado remained in force and effect and constituted a bar to the action, saying if the judgment was for any reason erroneous, the remedy was by appeal and not by suit on the same cause of action in another jurisdiction against the bankrupt. The bankrupt there received his discharge in bankruptcy and the plaintiff could not have successfully prosecuted his action, even if his claim had not been presented and disallowed, the discharge relieving the bankrupt from all provable debts. After the claim was disallowed by the referee, it was reviewed by the judge of the district court and a formal judgment entered of record, which was of course conclusive, the referee and the court each having jurisdiction to disallow the claim.

(2) Under the old bankruptcy law of 1867 a creditor by proving his debt in bankruptcy, waived his right to enforce it by any other legal remedy, but under this present bankruptcy law, the creditor, after proving a claim, may prosecute a suit to judgment in the State courts, unless a stay is procured by a trustee in bankruptcy. Section 11, Bankruptcy Act; Collier on Bankruptcy (4 ed.), 124, 386.

(3-4) It is conceded that the claim as allowed is long since barred by the statute of limitations unless the allowance thereof constituted a judgment within the meaning of the statute, permitting suits to be brought thereon within ten years, and having held that the bankruptcy court was without jurisdiction or power to render a personal judgment against the bankrupt for the amount of the creditor's claim proved and allowed against his estate

and that no such judgment in fact was attempted to be rendered, it necessarily follows that the lower court erred in its rendition of judgment against the appellant.

The judgment is reversed, and, since the cause of action is barred, judgment will be rendered here, dismissing same. It is so ordered.

MAYNARD v. HENDERSON.

Opinion delivered February 8, 1915.

1. CLOUD ON TITLE—DEED—INJUNCTION.—Equity will interpose to prevent the execution of a deed which it would cancel as a cloud if it were executed.
2. DEEDS—GRANT TO M. AND "TO HER NATURAL HEIRS."—A grantor deeded lands to M. "and to her natural heirs." M. died leaving a husband and son surviving. *Held*, the term "natural heirs" meant "heirs of the body," and that the land descended to M.'s son.
3. ESTATE TAIL—PASSES, HOW.—Under Kirby's Digest, § 735, a common law fee tail is turned into a life estate in the first taker and passes in fee simple to the person to whom the estate would first pass from that person according to the course of the common law.
4. ESTATE TAIL—CONSTRUCTION OF DEED.—Property was deeded to M. and the heirs of her body. M. died, leaving a husband and son surviving. *Held*, the deed gave to M. a fee tail estate, which, under the statute, is an estate for life, with remainder in fee to her son, and the husband took no interest whatever in the land.

Appeal from Randolph Chancery Court; *George T. Humphries*, Chancellor; reversed.

S. A. D. Eaton, for appellant.

1. If the granting clause in the deed had contained the words "bodily heirs," or "heirs of her body," there would be no question but that the deed conveyed to Nevada P. Maynard a life estate only, with remainder in fee to appellant, and that her husband surviving would have no curtesy right in the lands. Kirby's Dig., § 735; 44 Ark. 458.

The words, "natural heirs," as used in the deed are of the same legal import and effect as the words "bodily heirs," or "heirs of her body." 13 Cyc. 605; *Id.* 659,

et seq.; Kirby's Dig., § 1343; 31 N. E. 1047; 48 Am. Dec. 146; 15 Hun (N. Y.) 410; 78 N. C. 372; 21 Cyc. 430; 23 Ark. 378-387.

2. If the sheriff's deed would create a cloud upon appellant's title, he has the right to maintain this suit. It meets the test. 37 Ark. 315; 2 Words & Phrases, 1233; 7 Cyc. 255. See, also, Kirby's Dig., § 649.

A. J. Witt, for appellees.

1. The demurrer was properly sustained. Only the interest of L. F. Maynard was sold. If he had none, how could a sale of his interest create a cloud on the title of his minor son?

A cloud on title is a title or incumbrance apparently valid, but, in fact, invalid; something which shows *prima facie* some right of a third person to it, etc. See 2 Words & Phrases, 1233, and cases cited.

Victor P. Maynard's rights can be adjudicated if appellees get a deed and sue for possession; but L. F. Maynard ought not to be permitted, in his minor son's name to have adjudicated the question as to whether or not he, the father, has title, and thereby settle whether he should redeem or not.

2. If this is to be treated as an action to reform the deed to Nevada P. Maynard, no cause of action is stated. 59 Ark. 187; 95 Me. 265; 21 Utah, 192; 34 Cyc. 967.

3. The deed as made gives L. F. Maynard a curtesy interest in the land. The words, "natural heirs," are equivalent to "heirs generally," and not "heirs of her body." Black, Law Dict., 801.

SMITH, J. Appellant, L. F. Maynard, sued as next friend for his infant son, and stated the following facts as constituting his cause of action. That on July 19, 1897, one Eli Abbott conveyed to his daughter, Nevada P. Maynard, a tract of land situated in Randolph County, Arkansas, comprising 440 acres. That said lands were granted to said Nevada P. Maynard and "to her natural heirs," and the consideration therefor was the love and affection of the father for his daughter. That on December 1, 1897, the said Nevada P. Maynard died intestate,

leaving her surviving her husband and the said Victor P. Maynard, her only child and natural heir. That while the deed recited a consideration of $5,000, there was in fact no consideration, except love and affection, and that the term, "natural heirs," used in said deed was intended and understood by both grantor and grantee to mean heirs of her body, and was so expressed at and before the time of the execution of said deed by said grantor. That on July 22, 1913, judgments were rendered in the Randolph circuit court against L. F. Maynard in his individual capacity, and an execution later issued against him, and was levied upon his curtesy interest in the lands above referred to, and on April 4, 1914, the sheriff of that county sold said interest to appellees and executed a certificate of purchase, and, upon the expiration of the period of redemption, will make a deed therefor, which will constitute a cloud on the title of said infant. A demurrer to this complaint was sustained, and, appellant declining to amend, the complaint was dismissed, and this appeal has been duly prosecuted.

The question in the case is whether L. F. Maynard had curtesy in these lands, and that question is decided by a determination of the construction to be given the deed to Nevada P. Maynard.

(1) Equity will interpose to prevent the execution of a deed, which it would cancel as a cloud, if it were executed. 5 R. C. L. 663. *Talieferro* v. *Barnett,* 37 Ark. 517. And the execution of a deed by the sheriff would constitute a cloud on the infant's title. *White Sewing Machine Co.* v. *Wooster,* 66 Ark. 382.

This sheriff's deed will not only purport to convey an interest in these lands, but will actually convey an interest, if the term, "natural heirs," is to be given the meaning contended for by appellee.

In the case of *Johnson* v. *Knights of Honor,* 53 Ark. 259, it was held that the word "heirs," when used in any legal instrument, with no context to explain it, should be understood in its legal and technical sense. There is nothing in the context of the deed under consideration to

indicate the term, "natural heirs," was not used in its legal and technical sense. This conveyance was not to the daughter and her heirs general, but to her and her "natural heirs," and as we can not assume this word "natural" was surplusage, we must give it its technical meaning, whatever that may be, when thus used.

Bouvier's Dictionary gives the following definition of natural heirs: "As used in a will and by way of executory devise, they are considered as of the same legal import as 'heirs of the body.' "

The definition given in Anderson's Dictionary is "Heir of the body or natural heir. An heir begotten of the body, a lineal descendant."

Black's Law Dictionary, however, defines the term as follows: "Heirs by consanguinity as distinguished from heirs by adoption, and also as distinguished from collateral heirs."

Four cases are cited in support of the definition given in Black's Law Dictionary as follows: *Smith* v. *Pendell,* 19 Conn. 107; *Markover* v. *Krauss,* 31 N. E. 1047; *Miller* v. *Churchill,* 78 N. C. 372; *Ludlum* v. *Otis,* 15 Hun 410.

The case of *Ludlum* v. *Otis,* involved the construction of the will of a testator who left no descendants. The syllabus in that case is as follows: "The testator left him surviving a mother, a sister and cousins, but no widow or children. *Held,* that by the term, his 'natural heirs,' the testator meant his mother and sister."

We quote the following language from the opinion in that case: "Who were his natural heirs? We should say to a man reared and educated in New York the term, 'natural heirs,' would be understood and regarded as a mother and sister, rather than cousins in any degree. * * * It results from these views that the devise of New York property is to his mother and sister as his natural heirs, or that the devises are so indefinite as to invalidate it as a devise to any one, and in that case the property descends to the mother and sister, and, after the death of the mother, to the sister alone."

The North Carolina case cited above supports the definition given by Bouvier and Anderson. The syllabus in that case is as follows: "Where a testatrix bequeathed a certain sum to each of two sisters, M. and N., and, 'in the event of the death of either without natural heirs,' the amount I have bequeathed shall go to the survivor.' *Held,* that the words, 'natural heirs,' mean children or issue, and, upon the death of M., the bequest to her goes to N."

The case of *Markover* v. *Krauss* involved the construction of a statute of the State of Indiana relating to the adoption of children.

The New York case and the North Carolina case referred to above construe the wills of testators who used the term, "natural heirs," but there were no children or descendants of children to whom that term could be applied in either of those cases. The remaining case cited in support of Black's definition is the case of *Smith* v. *Pendell,* 19 Conn. 107, in which case the testator devised his lands to his granddaughter in the following terms:

"And to my beloved granddaughter, Elizabeth Smith, I do give all the remainder of my lands and estate, hoping that she may live to enjoy the same, but if the said Elizabeth Smith should die leaving no natural heirs, my will is that the same shall go to my said daughter-in-law, Hannah Smith, mother of the said Elizabeth, and to be her own."

In construing this will that court said: "The words, 'natural heirs,' and 'heirs of the body,' in a will and by way of executory devise, are considered as of the same legal import. The cases are very numerous which confirm this construction, many of which are referred to in the case last cited (*Hudson* v. *Wadsworth,* 8 Conn. 348.)."

(2) While the subject is not free from doubt, we think the term, "natural heirs," is not to be construed as meaning heirs general. To so construe the term would be to treat the word "natural" as surplusage; and we think the definition given in Bouvier's and Anderson's

dictionaries is to be preferred to the one given in Black's Dictionary, in so far as those definitions differ.

(3) Having reached the conclusion that the term, "natural heirs," does not mean heirs general, we find the remaining questions involved in this case have already been decided by this court. By statute, a common law fee tail is turned into a life estate in the first taker, and passes in fee simple to the person to whom the estate would first pass from that person according to the course of the common law. Kirby's Digest, § 735; *Wheelock* v. *Simons,* 75 Ark. 21.

In the case of *Wilmans* v. *Robinson,* 67 Ark. 517, it was decided (to quote the syllabus):

"A deed of conveyance to the grantee and her bodily heirs creates a fee tail at common law, whereby, under the statute, the grantee takes an estate for her natural life, with remainder in fee in her children."

The opinion in that case quoted from Kerr on Real Property, section 496, as follows: "The rule in Shelley's case * * * is a rule of construction, and not of law; simply providing that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation; that is, the ancestor takes the whole estate comprised in the term. If the limitation be to the heirs 'of his body,' he takes a fee-tail. If to his heirs generally, he takes a fee simple."

(4) It follows, therefore, that Nevada P. Maynard took an estate for life, with remainder in fee to the infant who sues here by his next friend, and, therefore, L. F. Maynard has no curtesy interest in the lands sold under the execution, and the decree of the court below will, therefore, be reversed and the cause will be remanded with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

MUDD v. ST. FRANCIS DRAINAGE DISTRICT.

Opinion delivered February 8, 1915.

1. IMPROVEMENT DISTRICTS—ACT CREATING—ASSESSMENTS—CONSTITUTIONALITY.—An act creating a drainage district is not unconstitutional because it authorizes assessments upon benefits and not upon the value of the property itself.
2. IMPROVEMENT DISTRICTS—EXTENDED BOUNDIRIES—BENEFITS.—It is within the power of the Legislature to extend the boundaries of an improvement district so as to include benefited lands which were not theretofore included.
3. IMPROVEMENT DISTRICTS—VALIDITY OF ASSESSMENT—COLLATERAL ATTACK.—The eligibility of an assessor and other questions looking to the validity of an assessment of the property in an improvement district, where the assessor was a *de facto* assessor, can not be inquired into collaterally.

Appeal from Clay Chancery Court, Eastern District; *Charles D. Frierson,* Chancellor; affirmed.

L. Hunter and *Edward D'Arcy,* for appellant.

1. An assessment which is not based upon the judgment of the assessor is capricious, arbitrary and void. 37 Cyc. 1009, note 28; 2 Pick. (Mass.) 391; 70 Ia. 87; 47 Mich. 282; Welty on Assessments, 235.

2. The acts of the Legislature, upon which the drainage assessments and taxes in this case are based, are unconstitutional and void, because not based upon the value of the property itself. Const. Ark., art. 16, § 5.

3. An assessment based upon the value of the property itself, and not upon the benefits of the improvement, is legal. 77 Ark. 386; 81 Ark. 567; 32 Ark. 31.

4. Act 235 of 1909 is void because by section 7 thereof a large tract of land benefited by the drainage improvement was arbitrarily excluded from the district. Act 196 of 1911, § 1; 48 Ark. 370.

R. H. Dudley, for appellee.

When a land owner appears and objects to the assessment, and the assessment is confirmed, it becomes conclusive and can not be questioned collaterally. 81 Ark. 80; 82 Ark. 75.

McCULLOCH, C. J. Appellant owns land in Clay County, Arkansas, within the boundaries of the St. Francis Drainage District, and this is an action instituted against him and other land owners by the drainage district to enforce payment of assessments levied for constructing the improvement. The district was created by special act of the General Assembly of 1905, and amended in 1909, and again in 1911. This suit is to recover the assessment levied for the year 1912. The statute as last amended provides for the appointment of an assessor in each county, who is a resident of the county and not the owner of lands within the district, and that such assessor, together with the engineer, shall compose the board of assessors for that county. The act further provides that after the assessments have been made the board of assessors shall meet at the time and place designated in notice for the purpose of hearing complaints of land owners aggrieved by such assessments and for correcting errors therein. It also provides that any land owner may appeal to the county court within twenty days after the meeting of the assessors for the purpose of equalizing the assessments. Appellant challenges the constitutionality of the statute creating the district and also the validity of all the proceedings thereunder.

(1) It is contended that the statute is unconstitutional for the reason that it authorizes assessments upon benefits and not upon the value of the property itself. We have held in many cases that benefit to the land affected by improvement is the only thing which justifies special assessments, and that the provision of the Constitution with reference to *ad valorem* taxation relates to taxation for general purposes. Uniformity is required in special assessments for local improvements, but there is nothing in the statutes of this State nor in the Constitution requiring that such assessments shall be based upon the value of the property. We have upheld assessments based upon value solely upon the theory that such method of assessment constitutes a legislative determination that benefits will accrue in proportion to the value and that

that constitutes, after all, an assessment based upon the value of benefits and not upon the value of the property itself. There is, therefore, no foundation for the argument that the act creating the district is unconstitutional.

(2) It is also contended that the act is void because as originally enacted it omitted lands that were subsequently found to be benefited and included in the district by a later statute. The act of 1911 extended the boundaries so as to include certain lands not theretofore included. The assessment which is the subject of this controversy was levied subsequent to the enactment of the statute of 1911 extending the boundaries of the district, and it would seem that the question of the status of the district before that time is not important. However, this court has held that it is in the power of the Legislature to extend the boundaries of an improvement district so as to include benefited lands which were not theretofore included. *Porter* v. *Waterman,* 77 Ark. 383; *Spillers* v. *Smith,* 85 Ark. 228; *Henderson* v. *Dearing,* 89 Ark. 598.

Counsel rely on the case of *Davis* v. *Gaines,* 48 Ark. 370, as sustaining their contention on this point, but we think the case is not an authority on this point as presented here. The court in that case was dealing with a statute which on its face included certain lands as a part of the territory benefited by the improvement but exempted those lands from taxation for certain years. The court held that the statute was void on its face for that reason. No such situation is presented in the statute now under consideration, for the reason that no property within the prescribed limits is exempted from taxation.

(3) The validity of the assessment is attacked on several grounds; first, that one of the assessors was ineligible for the reason that he owned land in the district; next, that the assessor did not exercise his judgment, but merely adopted the views of the engineer and put the assessment on the wrong basis; and, lastly, that the assessments on the plaintiff's land were excessive. All these attacks upon the validity of the assessment are successfully answered by saying that this is a collateral at-

tack and that such matters can not be inquired into. The act provides for the meeting of the assessors for the purpose of equalizing the assessments and hearing complaints of taxpayers and for an appeal to the county court. Appellant appeared before the assessors and also appealed to the county court and he can not renew the attack collaterally in this proceeding to enforce the payment. He is, in other words, bound by the judgment of the county court upon his appeal. This is true as to the question of ineligibility of the assessor, as well as other points of attack upon the assessment, for the reason that the assessment was made by a *de facto* assessor and the validity of his official acts could not, on the ground of ineligibility, be inquired into collaterally.

We find nothing in the record which would justify us in declaring the statute or the proceedings thereunder void, so the decree of the chancellor is affirmed.

O'KANE *v.* O'KANE.

Opinion delivered February 8, 1915.

1. EQUITABLE WASTE—WHAT CONSTITUTES.—Equitable waste is defined as that which a prudent man would not do with his own property.
2. EQUITABLE WASTE—ORNAMENTAL TREES—RIGHT OF LIFE-TENANT TO CUT—INJUNCTION.—The life-tenant of an estate will be enjoined from committing equitable waste committed by cutting down trees on the estate, where the same have been reserved by the owner of the fee for ornament and use on a proposed building site.

Appeal from Franklin Chancery Court, Ozark District; *W. A. Falconer,* Chancellor; reversed.

STATEMENT BY THE COURT.

Walter O'Kane instituted this action in the chancery court against Lizzie O'Kane to enjoin her from cutting and removing from a certain tract of land a walnut and pecan grove comprising between two and four acres. The facts are as follows:

In 1912 Lizzie O'Kane obtained a decree of divorce from Walter O'Kane. The latter owned at that time,

among other lands, a tract of bottom land comprising about 470 acres. When the decree of divorce was granted to Lizzie O'Kane under section 2684 of Kirby's Digest she was allotted four hundred acres of this land to hold during her natural life. The tract of land allotted to her bordered on the Arkansas River and next to the river there was a grove of pecan and walnut trees variously estimated at from two to four acres. Walter O'Kane inherited the land from his mother, and he wished to preserve this grove because it had been preserved by his ancestors for a building site and because he thought it added to the value of his inheritance. It had been determined in the lifetime of his mother that the trees should not be cut down and they had been carefully preserved ever since. The remainder of the four hundred acres was in cultivation. The rental value of the land was variously estimated at from seven to eight dollars per acre.

According to the testimony of several witnesses introduced by the plaintiff it was shown that it would not be good husbandry to cut down the trees, and that pecan and walnut trees were very scarce in that part of the country.

On the other hand, several witnesses were introduced by the defendant who testified that it would be more profitable to the land to cut down the trees than to let them remain standing.

The life expectancy of the defendant was thirty-five years. Other facts will be referred to in the opinion. The chancellor found the issues in favor of the defendant and dismissed the complaint for want of equity. The plaintiff has appealed.

J. D. Benson, J. V. Bourland and *J. D. Arbuckle,* for appellant.

It would be equitable waste to cut the grove of timber. 62 N. E. 210-213; 193 Ill. 372; 55 L. R. A. 701; 8 Am. & Eng. Decisions in Equity, 493; *Id.* 498. Equitable waste may result even where the tenant has a right at law to take timber, as where trees are being cut too

young, or are growing for ornament, for fruit, or building site, or the like. 6 Jur. N. S. 647; 113 Ga. 894; 193 Ill. 372; 101 Ill. App. 164.

A life-tenant can not cut growing timber, except so far as is necessary to the reasonable enjoyment of his estate, pursuant to good husbandry; and he will not be permitted to materially lessen the value of the inheritance. 95 Ark. 246; 129 S. W. 534; 63 Ark. 10; 37 S. W. 306; 37 L. R. A. (N. S.) 771; 4 Barb. (N. Y.) 109; 3 Wend. (N. Y.) 104; 20 Am. Dec. 667; 3 N. C. 110; 7 Gray (Mass.) 8; 66 Am. Dec. 450.

A widow has no right to cut trees growing upon the dower land except in so far as it may be necessary to the proper enjoyment of the life estate. 93 Ark. 353; 124 S. W. 758.

Robert J. White, for appellee.

The trees, as the evidence shows, had evidently matured, and were falling into decay to such an extent that twenty-one of the fifty trees were either dead or dying. Since it was entirely improbable that they would survive the life expectancy of the appellee, and be of use to the remainderman, it was not good husbandry to leave them standing.

The interest of the appellee here is not to be measured by the strict rules governing life-tenants created by deed or will; but it is in the nature of a dower interest which the law is zealous to protect in the interest of the widow's support and maintenance. 6 Yerger (Tenn.) 347; 93 Ark. 355; *Id.* 392.

A widow in possession of a dower estate is not guilty of waste in cutting timber which works no permanent injury to the estate in remainder. 33 S. W. 561; 63 Ark. 10; 37 S. W. 306; 40 Cyc. 501, 502; *Id.* 501-512, title "Waste."

The evidence wholly fails to show that the cutting of the timber would be equitable waste. 28 Am. & Eng. Enc. of L. 875-877.

HART, J., (after stating the facts). We are of the opinion that under the facts and circumstances in evi-

dence it would be equitable waste for the defendant to cut down the walnut and pecan trees.

(1) Equitable waste has been defined to be "that which a prudent man would not do with his own property." Professor Pomeroy says that the cases of equitable waste are almost, if not exclusively, confined to the destruction or removal of buildings, the carrying away of the soil, the cutting of ornamental or sheltering trees and shrubs and the cutting of saplings and stripping the land of timber.

Continuing, the same author said: " 'Ornamental' as applied to trees and shrubs in matters of equitable waste is a technical term," and he quoted with approval the following language from an opinion rendered by Lord Eldon: "The question is not, whether the timber is or is not ornamental; but the fact to be determined is that it was planted for ornament; or, if not originally planted for ornament, was, as we express it, left standing for ornament by some person having the absolute power of disposition." Pomeroy's Equity Jurisprudence (3 ed.), vol. 5, § 490.

In the case of *Clement* v. *Wheeler,* 25 N. H. 361, the court said that a tenant for life will be enjoined from committing equitable waste by cutting timber planted and left standing for the shelter or ornament of a mansion house or grounds and that this principle has been extended from the ornament of a house to outhouses and grounds, and then to the vistas and avenues of the estate. See, also, *Alexander* v. *Fisher,* 7 Ala. 514.

The facts in the case before us show that all of the four hundred acre tract of land allotted to Mrs. O'Kane for her life was in cultivation except this small grove of walnut and pecan trees, that this grove was situated next to the river bank and had been reserved by the owners of the fee for the purpose of a building site; also that it had been reserved because of the fruit the trees might bear and for the purpose of ornament. The testimony shows that all the remainder of the estate had been cleared up and that this small grove of walnut and pecan trees

had been left by the owners in fee and that it was intended that the trees should never be cut down or destroyed.

(2) Under these circumstances we think the case clearly falls within the definition of equitable waste and are of the opinion that the chancellor should have enjoined the defendant from cutting down the trees as prayed for by the plaintiff.

It follows that the decree will be reversed and the cause remanded with directions to the chancellor to enter a decree in accordance with this opinion.

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

Opinion delivered February 8, 1915.

MASTER AND SERVANT—TORTIOUS ACT OF SERVANT—KNOWLEDGE AND AUTHORIZATION.—Defendant railroad company employed a call boy to call its train crews when directed to do so. While in the performance of his duty, the call boy, riding a bicycle, ran into and injured plaintiff. In an action by plaintiff against the railroad company for damages, *held*, the railroad company was not liable, there being no evidence to warrant a finding that the bicycle was necessarily used in the service of the railway company by the call boy, with the knowledge of its servants of the use and necessity therefor, and that, therefore, there was no negligence shown on the part of the defendant company.

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

STATEMENT BY THE COURT.

Appellee was injured on the Main Street in the town of Gurdon on April 28, 1913, by being run into or struck with a bicycle, ridden by a call boy in the employ of the railway company, going at the rate of from ten to fifteen miles an hour. It was his duty to call the different train crews as directed, there being three or four of them to be called each day. The division foreman on the morning of the injury directed him to make calls of certain crews and while on his way to do this the injury was inflicted.

The appellee was crossing the street in the usual way, and just after walking around the front of a team and wagon was struck with great violence by the bicycle, ridden by the call boy, who after passing around the team appeared to be looking north up the railroad track and away from her, and did not discover her presence until it was too late to avoid the collision.

The boy was not employed to perform his service on a bicycle nor provided with or required to have one. None of his predecessors had ever attended to the duties of calling the train crews with the aid of a bicycle. He rode from his home, which was beyond the call limits of the station, on his wheel when the weather conditions were favorable, and frequently performed his service of notifying the train crews by riding the wheel instead of walking. He kept the wheel at the office of the railway company when not in use, and the superintendent or foreman saw it there and also knew that he was using it in performing his duties.

The court instructed the jury, and from the judgment against it the railroad company has appealed.

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

The testimony tends to show that the use of the bicycle was merely for the convenience of the call boy, and that on this occasion there was no reasonable necessity for the use of the bicycle. There is no testimony tending to show that, in employing the call boy, appellant either contemplated or authorized, expressly or impliedly, the use of a bicycle. 111 Ark. 208; 63 N. J. L. 385, 43 Atl. 894; 3 Car. & P. 167.

McRae & Tompkins, for appellee.

1. Appellant is liable because the call boy was acting within the scope of his employment, and used a convenient and customary way of discharging his duty to the appellant. 111 Ark. 213; 40 Ark. 323; 75 Ark. 579.

2. It is liable because the use of the bicycle was known to, and by implication authorized by, the appel-

lant. Thompson on Negligence, § 614; 89 Ark. 103; 96 Ark. 638; 4 Thompson on Neg., § 4892; 26 Fed. 912; 132 U. S. 518; 67 Atl. 188; 128 S. W. 276; 29 L. R. A. (N. S.) 856.

KIRBY, J., (after stating the facts). Appellant contends that it is not liable for the injury because the use of the bicycle by the call boy was not necessary to the service in which he was engaged, and it was not required to be used in such service upon his employment, and that the court erred in not directing a verdict in its favor.

The testimony is undisputed that the predecessors of this call boy had walked to the houses of the employees in performing his service and notified them of the time for their appearance for duty, and that all of the employees required to be called by him lived within less than a mile, the call limits of the station or office, and that there was ample time for the caller to give notice to all employees, who had to be called by him, by walking to their residences, and without using the bicycle in the performance of his duty.

It is also undisputed that he was not required to use a bicycle by the company nor provided with one and the machine used by him was his own and used for his own convenience, notwithstanding it is true that the agents of the railway company who employed him knew that he was at times using a bicycle in the performance of his duties. The man whom he was proceeding to call at the time of the injury lived within two or three blocks of the station.

In the former opinion, *Robinson* v. *St. Louis, I. M. & S. Ry. Co.*, 111 Ark. 208, the court on demurrer held the complaint sufficient, which alleged "the defendant maintained a call boy whose duty it was when so ordered by the defendant to go immediately and quickly to the residences, and boarding places of the trainmen and call them to take out their trains or to perform their other duties. That said call boy has for a long time, with the knowledge and consent of the defendant, discharged his duties by riding a bicycle, which it was necessary for him to use in

order for him to expeditiously discharge his duties," etc. And quoted with approval, "The action is deemed to be maintainable or not maintainable, according as the servant's use of the instrumentality was or was not authorized, expressly or impliedly, by the master. Such authorization is manifestly a proper inference whenever it is provided by the contract of hiring that the servant is to use, for the purpose of the work, an instrumentality belonging to himself." 6 Labatt, Master & Servant, § 2282.

It is not contended that there was any express authorization of the servant to use the bicycle in the performance of his duty, but insisted that he was impliedly authorized to so use it because he was directed to make the call, and the agent directing him knew that he was using the instrumentality in the performance of his duty and he was in the line thereof at the time of the collision with appellee.

The court instructed the jury that if Sturdivant was employed as a call boy, "and in making his calls he necessarily used a bicycle of which use and necessity therefor the servant of defendant knew and at the time of the injury to the plaintiff he was making a call under the order of the defendant or its servant," etc., it should find for the plaintiff.

The facts did not warrant the jury in finding that the call boy necessarily in making his calls used a bicycle of which use and necessity therefor the agents of the railway company knew. It certainly did not furnish a bicycle for his use in the service nor require him to provide one therefor, and the duties imposed upon him to notify the other employees did not necessitate such dispatch in reaching them as required the use of a bicycle. It was employed by the caller to facilitate the performance of his duties, mayhap, and certainly for his own convenience and the mere fact that the agents of the railway company knew that the call boy was using the instrumentality in the performance of his service was not an implied authorization of the use thereof by the master nor sufficient evi-

dence of the necessity therefor. If the service required of the call boy could not have been performed in the time given therefor without the aid of the instrumentality used, the bicycle, it would have occasioned a necessity, and the knowledge by the agent of such use in the performance of the service would have amounted to an implied authorization thereof, making the railroad liable for a negligent injury thereby. But such is not this case, and there was no testimony to warrant the jury in finding that the bicycle was necessarily used in the service of the railway company by its call boy, with the knowledge of its servants of the use and necessity therefor, and consequently no negligence shown in the injury to appellee for which it is required to answer or respond in damages.

The court erred in refusing to instruct a verdict for the appellant.

The judgment is reversed and the cause dismissed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. ANDERSON.

Opinion delivered February 8, 1915.

1. CARRIERS—INJURY TO EMPLOYEE—INTERSTATE COMMERCE—SUFFICIENCY OF THE EVIDENCE.—In an action for damages due to negligence by an employee, against a railroad company, *held*, under the facts, the jury was warranted in finding that the work the plaintiff was engaged in at the time he received his injuries was interstate commerce, within the meaning of the Federal Employer's Liability Act (Act April 26, 1908).

2. INTERSTATE COMMERCE—EMPTY CARS.—The hauling of empty cars from one State to another is interstate commerce, within the meaning of the Federal Employer's Liability Act.

3. NEGLIGENCE—FEDERAL EMPLOYER'S LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.—In an action by an employee against a railroad company for damages growing out of negligence, brought under section 3 of the Federal Employer's Liability Act, where the negligence of the employer does not consist in the violation of a statute, the contributory negligence of the employee operates in diminution of the damages so that the recovery shall be only the proportionate amount, bearing the relation to the full amount of damage, as the negligence attributable to the employer bears to the entire negligence attributable to both.

4. NEGLIGENCE—INTERSTATE COMMERCE—INJURY TO RAILWAY EMPLOYEE—VIOLATION OF FEDERAL STATUTE—CONTRIBUTORY NEGLIGENCE.—In an action for damages for an injury to an employee of a railroad company, received while working on a train engaged in interstate commerce, the plea of contributory negligence will be unavailing where the injury was caused by a defect in an automatic coupler, in violation of the Safety Appliance Act.

5. NEGLIGENCE—INJURY TO RAILWAY EMPLOYEE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—Where safety coupling appliances have not been provided, or where those provided have got out of repair, and it becomes necessary to couple cars without them, it is a question of fact for the jury to determine, under the particular circumstances of each case, whether an employee, who went between the cars to couple them, was guilty of negligence in so doing.

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

STATEMENT BY THE COURT.

This was an action by L. O. Anderson against the St. Louis Southwestern Railway Company under the Employers' Liability Act of April 26, 1908 (Fed. Stat. Ann. 1909 Supp., p. 584), to recover damages for injuries received by him while in the employ of the railway company as a switchman.

The facts are as follows: The plaintiff, Anderson, was at the time he received his injuries a switchman in the employ of the defendant railway company, and was injured on the night of the 18th of August, 1912, at Illmo, Missouri, while attempting to couple two cars equipped with automatic couplers. The pin lifter is an iron rod with a shank at each end. One shank rested upon the coupler and the other upon an adjacent corner of the car. To effect a coupling, the trainman raises the shank near the end of the car to a horizontal position, thereby placing the opposite shank in a vertical position. To the opposite shank is attached a chain, the other end of which is connected with the coupling pin. It is this pin which, in descending upon the impact of two cars, effects the coupling. Standard automatic couplers, when in good working order, are so adjusted that the brakeman may

lift the long shank to a horizontal position where it remains locked by the operation of a clutch, until the coupling is effected by the impact of the cars. The coupler in question had become so defective that the clutch designed to hold it in position failed to accomplish its purpose. In such event it becomes necessary for the person who makes the coupling to hold the longer shank in a horizontal position until the coupling is made in order that the pin may be in the proper place.

At the time Anderson was injured, he testified, the automatic coupler was in such a defective condition that it was necessary for him to hold the shank until the coupling was effected. He said that when the two cars came together the drawbars had too much slack and the pin lifter of the coupler was too long and that his finger was caught between the pin lifter and the end of the sill of the car.

In short, there was testimony from which the jury might have found that the drawbars were defective and that on account of the defect in the automatic coupler the impact of the cars caught appellee's hand between the long shank of the pin lifter and the end of the car and thus occasioned his injury.

Other testimony was adduced by him tending to show the character and extent of his injury, but inasmuch as no complaint is made that the verdict is excessive, it is not necessary to abstract this testimony.

The evidence on the part of the defendant tended to show that the automatic coupler was not in a defective condition. Other testimony will be stated or referred to in the opinion. The court of its own motion gave the following instructions:

"No. 1. You are instructed that it is the duty of the master, in this instance the St. Louis Southwestern Railway Company, to furnish the servant, in this instance the plaintiff in the case, with safe appliances with which the servant may perform his duties, and to keep such appliances safe, and the failure on the part of the master to discharge this duty makes him liable in law for any in-

juries received by the servant in consequence of his use of such appliances so furnished."

"No. 2. And in this case, if you find from a preponderance of the evidence that the plaintiff would not have been injured but for the plaintiff's use of an unsafe coupler, drawheads or parts thereof, then your verdict will be for the plaintiff, otherwise you will find for the defendant."

"No. 3. You are instructed that unless you find from the evidence in this case that the use of such unsafe coupler, drawheads, or parts thereof, was the proximate cause of the injury complained of, then your verdict will be for the defendant."

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

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

1. Under plaintiff's own testimony he was not engaged in interstate commerce. 34 S. C. Rep.; 109 Ark. 206.

2. Plaintiff assumed the risk, if there were two ways to make the coupling, and one was more dangerous than the other, and he voluntarily chose the more dangerous way, and was thereby injured, when by using the less dangerous way he would not have been injured. 70 Ark. 603; 56 *Id.* 232; 97 *Id.* 486; 18 Fed. 229; 17 *Id.* 882; 84 *Id.* 772.

Spence & Dudley and *R. P. Taylor,* for appellee.

1. Defendant was an interstate carrier, and the Federal Employers' Liability Act applies. 100 Ark. 467; 106 *Id.* 421; 229 U. S. 146; 223 *Id.* 473.

2. The defenses of assumed risk and contributory negligence were not ignored, but under the "Federal Act" they can not be invoked. 3 U. S. Com. Stat. 3174; 106 Ark. 421.

HART, J., (after stating the facts). It is insisted by counsel for the defendant that the testimony is not sufficient to warrant a finding by the jury that the plaintiff was engaged in interstate commerce at the time he was

injured. The testimony on that point most favorable to the plaintiff is the following:

Illmo, Missouri, is a station on defendant's line of road where five switch crews work at night. The plaintiff at the time he was injured was engaged in coupling a car, marked "bad order," to a coal car which had a card on it on which were the words, "Bush, Illinois." One of the witnesses for the defendant said that the train from which this car was taken came in from Poplar Bluff, Missouri, or Paragould, Arkansas, and that the train always had cars from points outside of the State of Missouri.

Another witness for the defendant stated that Bush, Illinois, was in the mining district and that nearly all the coal cars which arrived at Illmo were consigned to some point in the coal mining district in Southern Illinois.

Another witness testified that at the time Anderson was injured he was engaged in breaking up a train and making up one, and that the coal car in question was billed to Illmo and listed to him for the mines in southern Illinois.

The plaintiff himself testified that at the time he was injured he was rounding up the coal cars to put them in the train under directions from the yardmaster and that the destination of the train was to the coal mines in Illinois.

There was also testimony from which the jury might have inferred that the train which brought in the cars came from the State of Arkansas.

(1) Under this state of facts the jury was warranted in finding that the work the plaintiff was engaged in at the time he received his injuries was interstate commerce within the meaning of the act.

(2) In the case of *North Carolina Railroad Company* v. *Zachary,* 232 U. S. 248, the court said that the hauling of empty cars from one State to another is interstate commerce within the meaning of the act. See, also, *St. Louis & S. F. Rd. Co.* v. *Conarty,* 106 Ark. 421.

It is next contended by counsel for the defendant that the court erred in giving instruction No. 1, but in this contention we do not agree with them. The third section of the Employers' Liability Act contains the following language:

"The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

(3) Under this section the rule approved by the Supreme Court of the United States is that the rule of proportionate negligence applies, that is, that where the negligence of the employer does not consist in the violation of a statute the contributory negligence of the employee operates in diminution of the damages so that the recovery shall be only the proportionate amount, bearing the same relation to the full amount as the negligence attributable to the employer bears to the entire negligence attributable to both.

The section also contains the following provision: "Provided, 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 of any statute enacted for the safety of employees contributed to the injury or death of such employee."

(4) So, according to the evidence adduced by the plaintiff, he was injured on account of a defect in the automatic coupler in violation of the safety appliance act. The Supreme Court of the United States has held that the question of comparative negligence does not arise where the negligence of the carrier consists in the violation of a Federal statute, for in such cases the defense of contributory negligence is entirely abrogated by the provision of the act above quoted. *Grand Trunk Western Railway Co.* v. *Lindsay,* 233 U. S. 42.

Finally it is insisted by counsel for the defendant that the court erred in refusing to give instruction No. 6 requested by it. The instruction is as follows: "The

jury is instructed that if there were two ways for the plaintiff to perform his duty in coupling the cars, and one was more dangerous than the other, and he voluntarily chose the more dangerous way, and was thereby injured, when, by using the less dangerous way, he would not have been injured, he assumed the risk in so choosing, and your verdict will be for the defendant."

(5) This contention has been decided adversely to the defendant in *Choctaw, Oklahoma & Gulf Rd. Co.* v. *Thompson,* 82 Ark. 11. See, also, *Kansas City So. Ry. Co.* v. *Henrie,* 87 Ark. 443. In the *Henrie* case, the court said:

"When safety coupling appliances have not been provided, or where those provided have got out of repair, and it becomes necessary to couple cars without them, it is always a question of fact for a jury to determine, under the particular circumstances of each case, whether an employee who went between cars to couple them was guilty of negligence in so doing. It is not correct to say, as a matter of law, after balancing the chances, that an employee was necessarily guilty of negligence because he selected a method of doing his work which turned out to be the more dangerous way. This, as we have already said, is to make the servant the insurer of his own safety, notwithstanding the fact that the master has failed to discharge his duty."

It follows that the judgment must be affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. WYNNEGAR.

Opinion delivered February 8, 1915.

RAILROADS—INJURY TO PASSENGER—INFANT—AMOUNT OF DAMAGES.—Where an infant of eight years, a passenger with its parents on defendant's train, had one finger injured by the negligence of a brakeman in letting the back of a seat fall on his hand, *held,* the infant plaintiff could recover only for pain and suffering, since his loss of time could be of no value, and where there was no impairment of the use of the finger nor substantial disfigurement

resulting from the injury, a judgment for $600 damages will be held excessive, and the judgment will be reduced to $200.

Appeal from Cross Circuit Court; *W. J. Driver,* Judge; modified and affirmed.

STATEMENT BY THE COURT.

Appellee, a baby boy, eight (8) months old, was making a journey with his parents from his home in Mississippi by way of Memphis, Tenn., to visit his grandparents near Hughes Springs, in Texas. After the train left Memphis, on the 5th of September, 1911, and while near Wynne, Arkansas, his mother laid him asleep on the seat in front of her, and a brakeman came along and turned or pushed down the back of the seat and either mashed the nail off of his right fore-finger, or mashed it so that it came off and bruised the end of the finger badly. No complaint was made to any of the train crew about the injury.

His parents called a doctor, after arriving at Hughes Springs, who treated the injured finger and bound it up, telling them that no bone was bruised. For this service he charged fifty cents. The baby was wakeful, crying and fretting, for a day or two after the injury, and the nail was some two or three months growing back; the use of the finger is not impaired, but his mother said, "It is kinder sloped and does not look round like the other fingers, it tapers around and is not as plump as the other fingers."

The doctor testified that the baby was brought to him for treatment, that the injury was very slight, so slight that he paid little attention to it; the tip end of the finger was bruised and possibly the nail came off later. He bandaged it and told the parents to use phenolated camphor on it. He charged fifty cents for the service. He said, further, in describing the extent of the injury, that it would probably require some time for the nail to grow off, that the parents mentioned bringing suit against the railway company for damages, and he told them the injury was too slight, there was nothing about it to be permanent, and in his opinion there was no reason for the disfigurement of the finger.

The father also brought suit for damages and the jury returned a verdict in his favor for $50, and in appellees' favor for $600 damages. Upon the motion for a new trial, the father waived his claim for damages, and judgment was rendered for $600 damages, for appellee, from which this appeal comes.

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

There is no permanent injury. The damages must be limited to pain and suffering. The verdict was grossly excessive. 89 Ark. 9; 104 Pac. 249; 174 Fed. 477; 131 S. W. 714; 83 N. W. 181; 76 S. W. 402; 79 S. W. 351; 30 Pac. 149.

A. J. McIntire and *Killough & Lines,* for appellee.

The amount of the damages allowed was a question of fact for the jury, and this court will not interfere unless the jury has wantonly abused its function. The fact that the trial court, on a motion addressed to the excessiveness of the verdict, has previously reviewed the amount fixed, and approved it, ought to cause this court to be more reluctant to disturb the verdict. 104 Pac. 249; 76 S. E. 786.

KIRBY, J., (after stating the facts). It is contended by appellant that the damages awarded are excessive, and this contention must be sustained. The infant, plaintiff, could only have recovered for pain and suffering since his loss of time, if any, could not have been of any value, and there was no impairment of the use of the finger nor substantial disfigurement resulting from the injury. He suffered pain evidently and was wakeful, crying and fretting, for a few days, and under these circumstances the court has concluded that an award of more than $200 as damages, resulting from the injury would be grossly excessive.

The judgment is therefore reduced to that sum and as modified will be affirmed. It is so ordered.

WERTHEIMER v. CITIZENS BANK BUILDING.

Opinion delivered February 8, 1915.

LEASES—CONDITIONS—RESERVATION OF RIGHT TO CANCEL UPON HAPPENING OF CONDITION.—Appellant leased a storeroom from appellee, the contract providing that in case the prohibition of the sale of liquor in the city or county should be established, and the appellant prohibited from carrying on a wholesale and retail liquor business by operation of law, then, at his option, and upon notice, the lease might be terminated. Subsequent to the execution of the lease Act 59, page 180, Acts 1913, known as the "Going Law," was enacted, prohibiting the sale of liquor until the performance of certain conditions set out in the act. This act went into effect January 1, 1914, and was not complied with in the jurisdiction where this action was pending, until April 6, 1915, and it was, therefore, unlawful to sell liquor in that city between those dates. *Held*, the condition had arisen against which appellant had contracted, and that the appellant had the right on February 1, 1914, to exercise the option of cancelling the lease.

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

STATEMENT BY THE COURT.

Appellee brought suit against appellant, a corporation, before a justice of the peace upon five notes, for $100 each. A written complaint was filed, in which the notes were set out as five separate causes of action. The execution of the notes was admitted, but in the answer which was filed appellant stated that it had entered into a lease with the appellee whereby it leased, for a term of five years, beginning January 1, 1911, a storeroom situated in a building owned by appellee in the city of Pine Bluff. The lease was in writing and contained the following clauses:

"The said lessor agrees to install in said building a heating plant necessary to properly heat said building, and especially the storeroom occupied by the said lessee, and to maintain the same during the term of this lease; and the said lessee on its part agrees to conduct a legitimate and proper liquor business, wholesale and retail.

"It is further understood and agreed between the parties, that in case the prohibition of the sale of liquor

in Jefferson County, or the city of Pine Bluff, should be established and the said lessee prohibited from carrying on its business as wholesale and retail liquor dealers in said building, by operation of law, then, at the option of the lessee, and upon written notice given by it, this lease shall terminate and be at an end."

It was further alleged that divers adult white inhabitants living within the incorporated limits of the city of Pine Bluff, Arkansas, filed a petition with the county court of Jefferson County on the 1st day of January, 1914, asking that license for the sale of intoxicating liquor be issued for the city of Pine Bluff; but it later appeared that this petition did not contain the requisite number of signatures, and it was withdrawn on the 18th day of February, and thereafter a second petition, to the same effect, was filed on the 28th day of February, 1914. The prayer of this petition was granted on the 6th day of April, 1914, and it was thereafter, during the remainder of said year, lawful to sell liquors in said city upon obtaining the necessary license. On or about the 1st day of February, 1914, appellant elected to terminate the said lease, and notified appellee that, inasmuch as the sale of liquor was prohibited in the city of Pine Bluff, and appellant was thereby prohibited from carrying on its business as a liquor dealer, by operation of law, it desired to exercise the option given it in said lease to terminate the same, and notified appellee that it would surrender the possession of the premises on the 1st day of March, 1914, and prior to that date appellant moved its fixtures and other property from the said building and notified appellee that it had done so, and surrendered possession of the premises to appellant. Appellant has not at any time since used or occupied said premises for any purpose.

Appellee states the issue in this case in the following language: "The pivotal and sole question in this case is a proper construction of a clause in the contract of lease reading as follows: 'It is further understood and agreed by the parties that in case the prohibition of the sale of liquor in Jefferson County, or in the city of Pine Bluff, should be established and said lessee prohib-

ited from carrying on its business as wholesale and retail liquor dealer in said building, by operation of law, then, at the option of the lessee and upon written notice given by it, this lease shall terminate and be at an end.' "

A demurrer was interposed and sustained to this answer, and, appellant declining to plead further, judgment was rendered against it for the amount of the notes sued upon, and this appeal has been duly prosecuted.

Coleman & Gantt, for appellant.

1. At all times from the 1st of January to the 6th of April, 1914, it was unlawful to conduct a liquor business in Jefferson County. Appellant was, therefore, prevented by operation of law from using the leased premises for the purpose for which they were leased. Being so prohibited from using the premises, it had the right, at the time it exercised the option, to terminate the lease. See statutes embraced in chapter 103, Kirby's Digest, and amendments thereto; Act No. 59, Acts 1913.

A lease is to be construed according to the intention of the parties as gathered from the whole instrument, and in case of doubt or uncertainty it should be construed most strongly in favor of the lessee. 24 Cyc. 914, 915.

2. If the terms of the lease had not been sufficient in themselves to justify appellant in terminating the lease, the passage of the Going Act was such a change in the law on the subject of selling intoxicating liquors as to terminate the contract. 2 Elliott on Contracts § 685; 3 *Id.,* § 1901; 9 Cyc. 629-631; 10 L. R. A. (N. S.) 414; *Id.* 415, note; 113 S. W. (Tenn.) 364; 60 So. 876-878; 123 N. W. 24.

Taylor, Jones & Taylor, for appellee.

1. Delay in the grant of license for a period of time reasonably necessary for the court to determine whether it had the right to grant license, did not authorize a termination of the lease.

The option to terminate the lease is given only "in case the prohibition of the sale of liquor * * * should be *established,* and the said lessee prohibited from carrying on its business, etc., by operation of law," making it plain

that the parties understood that no option could be exercised until the question whether or not the sale of liquor in the city of Pine Bluff during the year should be *established,* determined, decided.

2. If appellant had any right at all to exercise its option to terminate the lease, that right arose on the 1st of January, 1914, for then, according to apellant's contention, it became unlawful to sell liquor in Pine Bluff; and having failed to exercise that right when it arose, it waived it and elected to continue the lease. 71 Ark. 251; 29 L. R. A. (N. S.) 175, and note.

SMITH, J., (after stating the facts). At the time of the execution of the lease herein sued on, the law in regard to the sale of intoxicating liquors was that intoxicating liquors could not be lawfully sold unless both the county and the township, or ward, in which it was desired to sell liquors had voted "For License" at the preceding general biennial election. Subsequent to the execution of this contract, an act was passed by the General Assembly of this State and approved February 17, 1913, Act 59, page 180, Acts 1913, commonly known as the Going Act, by which it was provided that it should be unlawful for any court, town or city council, or any officer thereof, to issue a license or permit, or any other authority to sell alcoholic or other intoxicating liquors unless a majority of the adult white inhabitants living within the incorporated limits of any incorporated town or city shall have signed a petition to the county court asking that license for the sale of intoxicating liquors be issued for that town or city. Intoxicating liquors could not, therefore, be sold in the city of Pine Bluff until the Going Act had been complied with, and the order of the court ascertaining that this act had been complied with was not made until the 6th day of April, 1914. Consequently, it was unlawful to sell liquors in said city during the year 1914 prior to the 6th day of April of that year. Until the Going Act had been complied with liquor could not be lawfully sold in said city, and its sale was prohibited. Appellant could not have conducted the business for which

it leased appellee's building without violating the law, and each and every sale of intoxicating liquors which it might have made prior to April 6, in that year, would have constituted a violation of the law and subjected it and its employees and servants to the fines and penalties prescribed by the statute. The condition, therefore, had arisen against which appellant had contracted. It having become unlawful to sell liquor, appellant had the right to exercise the option of cancelling the lease.

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

JONESBORO, LAKE CITY & EASTERN RAILROAD COMPANY v. ADAMS.

Opinion delivered February 15, 1915.

1. GAME—INTERSTATE SHIPMENT—FEDERAL STATUTE.—Section 3 of the Lacey Act (Act of Congress of May 25, 1900), concerning interstate shipments of game animals which have been killed is violated when game which had been lawfully killed in this State, is shipped into another State.
2. GAME—INTERSTATE SHIPMENT—CONFLICT OF LAWS—DUTY OF CARRIER.—Appellees shipped game, that had been killed in this State, into Illinois. Under the Illinois statute, at the time it was shipped into that State, it was lawful to ship game into Illinois, and there was, therefore, no violation of section 5 of the act of May 25, 1900, known as the Lacey Act, in making the shipment into Illinois, and it was the duty of the carrier to protect the consignment from any unlawful seizure by the authorities of the State of Illinois.
3. GAME AND FISH—PRESERVATION—STATUTORY PROVISIONS.—The rule of equality prescribed by article 2, section 18, Constitution 1874, which prohibits the law-makers from granting to any citizen or class of citizens privileges, which, upon the same terms, shall not equally belong to all citizens, does not prevent the Legislature, in the enactment of laws for the preservation of game and fish, from exempting from the operation of such laws territory in which it is found unnecessary to impose any regulations.
4. GAME AND FISH—PRESERVATION—LEGISLATIVE POWER.—The Legislature has the power to preserve the game and fish of the State and to make regulations which result in preservation. The Legislature may select territory where preservation is found necessary and prescribe regulations there, which are not imposed elsewhere.

5. GAME AND FISH—PRESERVATION—LEGISLATIVE POWER.—The only justification for any regulation for the preservation of game and fish, is the necessity for preservation in the State, and any unjustifiable regulation or exclusion in a given territory is obnoxious to the Constitution.

6. GAME AND FISH—PRESERVATION—EQUALITY OF REGULATION.—All measures for the preservation of game must bear equally on all citizens, and whatever privileges are extended in the taking of game must be open to all in equal degree.

7. GAME AND FISH—SHIPMENT OF—DISCRIMINATION—VALIDITY OF STATUTE.—Act No. 397, page 1131, Acts 1909, providing for the shipment of game out of certain territory in Mississippi county, *held* to be void, being in violation of article 2, section 18, Constitution 1874, since it grants to the citizens of one county privileges denied those of other counties.

8. GAME AND FISH—PRESERVATION—INVALID STATUTE.—Act 397, page 1131, Acts 1909, being invalid, because in conflict with article 2, section 18, Constitution 1874, Kirby's Digest, § § 3618, 3619 and 3630, being the general law on the subject, are in full force and effect in Mississippi county.

Appeal from Mississippi Circuit Court, Chickasawba District; *W. J. Driver,* Judge; reversed.

C. A. Cunningham, for appellant.

1. The act, Acts 1909, page 1131, is unconstitutional. Const. 1874, art. 2, § 18; 58 Fla. 255, 19 Ann. Cas. 235; 110 Ark. 204; 5 Pac. 927; 38 L. R. A. 561; 26 L. R. A. (N. S.) 794.

If the act is unconstitutional, sections 3618-19-20, of Kirby's Digest, and Act No. 37 of 1905, are still in effect. The contract of shipment was in violation of law, and appellant is not liable for the failure of its connecting carrier to make delivery. 103 Ark. 288.

2. Even if the act is constitutional, appellant is not liable for the seizure of the shipment by the game warden of Illinois. 40 L. R. A. 251; 56 Ark. 267; 73 Ark. 236; 211 U. S. 31; 108 Fed. 623; 103 Cal. 476; 169 Ill. 218; 43 Atl. 929; 107 N. Y. Supp. 1076; 51 Ohio, 209; 103 Ark. 293; Lacey Act, § 5 (act May 25, 1900, chap. 553, 31 Stat. L. 187); 3 Fed. Stat. Ann. 152; 49 Ohio, 489.

3. The carriers should not be held liable for failure to deliver the shipment to the consignees, if the failure

to do so was through no lack of care or diligence on their part. 74 Mo. 351; 35 Barb. 188.

Appellees, pro se.

McCULLOCH, C. J. Appellees, Adams, McMasters and Rice, instituted separate actions against appellant to recover the value of barrels of wild ducks consigned from Manila, Arkansas, to Chicago. The ducks were killed on Big Lake in Mississippi County, Arkansas, and shipped on through bill of lading from Manila, a point on appellant's line of road. Appellant received the consignments and transported the same to Blytheville and delivered them to the Wells Fargo & Co. Express, the last named carrier transporting the shipment to Chicago. The ducks were seized at Chicago and confiscated by a game warden acting for the United States and also for the State of Illinois, and appellant defended on the ground that it is not liable for the value of the shipment because of such confiscation by lawful authority at the destination. The three cases were consolidated and tried together and resulted in judgments in favor of each of the plaintiffs. The issues were the same in each case.

Appellant contends that it is not liable because the ducks were shipped in violation of the laws of this State; that the shipment was also in violation of the act of Congress of May 25, 1900, known as the Lacey Act; and, third, that the ducks were confiscated in Chicago pursuant to the authority conferred by statutes of the State of Illinois. If either of these contentions be sound, then it follows that there is no liability on the part of the carrier, for if the shipment was unlawful, or if the seizure in Illinois was by lawful authority, the carrier can not be held responsible for damages. *Eager* v. *J., L. C. & E. Express Co.*, 103 Ark. 288.

The Federal statute provides, in substance, that it shall be unlawful for any person to deliver to a common carrier for shipment from one State or territory to another State or Territory any wild animals or birds which have been killed in violation of the laws of the State in which the same were killed, but that nothing in the act

shall prevent the transportation of dead birds or animals killed during the season when the same may be lawfully captured and the exportation of which is not prohibited by the laws of the State or Territory in which the same are killed. Another section provides that all packages containing "such dead animals, birds or parts thereof, * * * shall be plainly and clearly marked, so that the name and address of the shipper and the nature of the contents may be readily ascertained on inspection of the outside of such packages." Still another section provides that "the dead bodies or parts thereof of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

(1) If the ducks shipped by appellees were lawfully killed and exported, that is to say, if the statute of this State was not violated in killing or exporting the ducks, there was no violation of the section of the Lacey Act (section 3) first referred to above. The evidence tends to show, and the jury have upon proper instructions found, that the packages were prepared and shipped as required by the statute "so that the name and address of the shipper and the nature of the contents may be readily ascertained on inspection of the outside of such package."

(2) The next contention of appellant is that the game was lawfully seized and confiscated by the game warden in Illinois, and that the carrier was thereby absolved from any liability. It was an interstate shipment, but section 5 of the Lacey Act quoted above places the game imported into any State under the police power of that State, and makes it lawful for the State to legislate with reference thereto. The inquiry, then, is whether or

not the statutes of Illinois authorized the seizure and confiscation of the property; for if it did, the carrier is absolved from liability; but, on the other hand, if there was no such authority, the carrier relinquished possession at its peril. Appellant attempts to show that the laws of Illinois justified the seizure, but an examination of the statutes does not bear out that contention. The statute there provides that game may be received from other States between the first day of October and the first day of February of each year, and the evidence in this case shows that this game was killed and shipped during the open season prescribed by the Illinois Act. Therefore there was no justification, under the laws of Illinois, for the seizure, for it was the carrier's legal duty to protect the consignment from any unauthorized seizure.

So the vital point in this case is whether or not appellees violated the laws of this State in exporting the game. There is a special statute making it lawful to purchase or sell wild ducks in certain portions of Mississippi County, where those shipped by appellees were killed, and also making it lawful to ship them out of the State from that locality. Appellant insists, however, that the special statute is void, and that for that reason the shipment of game was unlawful. That question was not decided in the Eager case, *supra*. The general statutes of the State provide that it shall be unlawful for any person or corporation to purchase or have in possession for barter or sale any wild game or wild fowl of any kind; also that it shall be unlawful for any person or corporation to export or carry beyond the lines of the State any such wild game or fowl, and penalties are prescribed for violation of either of those provisions. These provisions are found in sections 3618, 3619 and 3620 of Kirby's Digest. The General Assembly of 1909 enacted a special statute applicable to certain townships in the Chickasawba District of Mississippi County (Acts 1909, page 1131, No. 397), (the point of shipment in this case being a railroad station in one of those townships), entitled "An Act prohibiting the selling or shipping of certain game from certain town-

ships in the Chickasawba District of Mississippi County, Arkansas, and repealing sections 3618, 3619 and 3620 of Kirby's Digest, in so far as they apply to said townships." The first three sections of the act were substantially copied from the sections of Kirby's Digest above named, except that the purchase or sale or exportation of wild ducks and geese is excluded from the operation of the statute. Section 4 of the act provides that the above named sections of Kirby's Digest are repealed "in so far as same affect and apply to Big Lake, Neale, Hector and Bowen townships in the Chickasawba District of Mississippi County." Section 5 of the act provides that it shall apply only to the townships named above. The contention of appellant is that this act is void for the reason, in the first place, that it is in hopeless obscurity as to what the lawmakers meant, and also that it amounts to an unjust discrimination against other citizens of the State. When the whole of the special statute is carefully considered, we think that the meaning of the Legislature is manifest and that such meaning is expressed with sufficient certainty to accomplish the design of the lawmakers. It is clear that the Legislature intended to repeal the sections of Kirby's Digest mentioned, so far as the same applied to the designated territory in Mississippi County, and to substitute therefor the three sections set forth in the special act which excluded wild ducks and geese from its provisions. The effect of this statute is to repeal, so far as applicable to that territory in Mississippi County, the inhibition against purchasing, selling or exporting wild ducks and geese and to make it lawful to sell and export that kind of wild game. The further argument against the validity of the act is that it is unconstitutional in that it violates the section of the Constitution which provides that the General Assembly "shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Const. 1874, art. 2, § 18. It is contended that while any person in the State may go to this territory and kill game and ship it out of the State, it would be such

an inconvenience to persons living in distant portions of the State as to practically exclude them from the enjoyment of the privilege and in effect to deny them the privilege which is enjoyed by those who reside in the territory named. The rule laid down by this court in the case of *Lewis* v. *State,* 110 Ark. 204, is invoked as sustaining that contention. That case involved the question of the validity of a statute which required non-residents of a certain locality to pay a license fee for the privilege of hunting and fishing therein, but exempted residents of the locality from that imposition. We said that all the citizens of the State had equal right to enjoy the privilege of hunting and fishing, and that no one citizen nor class of citizens could be granted a privilege in that regard which did not equally belong to all other citizens.

(3-4-5) The statute now under consideration does not in express words, as did the one in the *Lewis* case, *supra,* classify the people in a favored territory and grant to them privileges not extended to citizens of other parts of the State; but if the effect of the statute in its operation necessarily results in discrimination, it is equally obnoxious to that provision of the Constitution which prohibits the lawmakers from granting "to any citizen or class of citizens privileges * * * which upon the same terms shall not equally belong to all citizens." We do not mean to say that the rule of equality prescribed by the Constitution prevents the Legislature, in the enactment of laws for the preservation of game or fish, from exempting from the operation of such laws territory in which it is found unnecessary to impose any regulations. There may result, in the practical operations of such exemptions, inconvenience in the enjoyment of the privilege which amounts to an exclusion of certain persons, but that does not necessarily render the statute void. Absolute equality in the enjoyment of privileges and immunities is not always practicable, any more than is the disposition of other benefits or burdens. The Legislature undoubtedly has the power to preserve the game and fish of the State and to make regulations which result in pres-

ervation. The lawmakers may select territory where preservation is found necessary and prescribe regulations there which are not imposed elsewhere, and that does not constitute discrimination, even if some citizens are by reason of inconvenience excluded from the enjoyment of the privilege of hunting or fishing in the territory excluded from the regulatory provisions. But the only justification for any regulation at all is the necessity for the preservation of the game and fish in the State, and any unjustifiable regulation or exclusion in a given territory is obnoxious to the Constitution if it results in denial to one class of citizens of privileges in the way of hunting or fishing on equal terms with all others. The Constitution requires that the opportunity to enjoy a privilege shall be equal. Not precise equality, of course, but substantial equality, and the opportunity must be equal in degree.

(6) We said in the *Lewis* case that "when the sovereign undertakes to regulate or restrain the individual in his right as a member of the community to enjoy the right to take and use this common property of all it must do so upon the same terms to all members of the community alike. The common right, which one individual of the whole community is entitled to enjoy as much as another can not be made by law the exclusive privilege of the people of a certain class or section upon terms and conditions that do not apply to the whole people alike."

It remains only for us to apply the principles thus announced to the statute now under examination. Wild ducks and geese are migratory fowls, and do not propagate in this State, but come from colder latitudes. A few species of wild ducks found here are not migratory, but those which are found in large numbers during the winter season, and which are generally sought by hunters, are of the migratory sort. It is impossible, therefore, to enact laws in a single State or locality for the preservation of such fowls. Nevertheless, the people of this State are interested in the preservation of all kinds of wild game and fowls, and the lawmakers contributed to the preserva-

tion of wild ducks and geese, as well as other wild game, by enacting a general statute prohibiting the purchase, sale or exportation thereof. Kirby's Digest, § § 3618-19-20. The purpose of that legislation was to restrict the taking of game for use only by persons who by their own skill may kill or capture it, and such others in the State to whom they may see fit to give it. It was thought in that way the wholesale slaughter of game could be prevented. The Legislature subsequently passed the special statute under consideration, whereby a selection was made of four townships in Mississippi County and that territory was exempted from the operation of the general statute so far as concerned the purchase, sale or exportation of wild ducks and geese. Those four townships embrace a large body of water known as Big Lake, and wild ducks and geese are found there during the winter season. It is in line with what investigators and writers on the subject term "migration routes" along the valleys of great waterways. Now, it is readily seen that the lawmakers, instead of protecting this kind of game in the place where it is most abundant, have removed all restrictions upon its slaughter and have thrown wide the door to destruction. It is impossible to find any reason for the exemption except one of favoritism to the people of that locality, who doubtless have been importunate enough through their representatives in the Legislature to induce that body to confer the special privilege. If the exemption applied to non-migratory game, we might indulge the presumption that the lawmakers found it was so abundant there that restraints were unnecessary to preserve it; but in the case of migratory fowls, that reason entirely fails. The supply is easiest exhausted at the place where it is most abundant. The exemption of a territory free from the visits of such migrants would be unobjectionable, as the importance of measures for preservation of that kind of game in a given territory lessens in the ratio of its scantiness therein. If it is plentiful, the drain on the source of supply is great and restraints

are necessary; but if meager, the exhaustion there has little effect at the source of supply.

(7-8) It follows, therefore, that the enactment of the special statute exempting the territory named from the operation of the general statute was wholly arbitrary and without any foundation whatever in its relation to the preservation of game. In searching for a reason for it, there is no escape from the conclusion that it was intended as a special privilege to the people who live in that territory or close enough to participate in the enjoyment of the privilege especially conferred. At any rate, such is the effect of the statute in its practical operation, and as no justification can be found for the discrimination, it falls within the inhibition in the Constitution against the grant of special privileges. No argument is needed to show that the privilege is discriminatory. Wild ducks and geese are found in great abundance in other parts of the State distant from this exempted territory, but the inhabitants of those localities can not sell or export them when killed, nor can any person purchase them. What reason is there for withholding from citizens of Chicot County or of Lafayette County the privilege of selling, exporting or purchasing wild ducks, while the privilege of doing so is freely extended to citizens of certain townships in Mississippi County? Such game comes from the same source, the cold climates of the North, and visits our State during the winter season. While here it is subject to the regulatory laws of the State and is preserved for the common use of our citizens. All measures for preservation must bear equally on all citizens, and whatever privileges are extended in the taking of game must be open to all in equal degree. It is true that under this statute any citizens of the State may go to the exempted territory and purchase, sell or export wild ducks and geese, but for all practical purposes citizens of distant portions of the State are excluded by reason of the inconvenience of going there. The privilege can not be said to be extended to them on equal terms. Besides, they are not granted the privilege of purchasing, selling or ex-

porting such game at or near their own homes and that amounts to a discrimination. So the failure of any reason for an exemption necessarily stamps the statute as a discriminatory one and renders it void. Being wholly void, it leaves the general statutes, which it sought to repeal, in full force and operation in that territory as well as in all other portions of the State. *Union Sawmill Company* v. *Felsenthal,* 85 Ark. 346. The shipments by appellees were unlawful under the laws of the State, and in consequence thereof, in violation of the Lacey Act. The carrier is not liable.

The judgment in each case is reversed and the cause dismissed.

STEVENS v. STATE.

Opinion delivered February 15, 1915.

1. WITNESS—IMPEACHMENT—EVIDENCE.—A witness may be impeached during a trial by being asked if he did not make contradictory statements to certain persons before the trial, but evidence of his probable reasons for making contradictory statements is collateral to the issue and inadmissible.
2. EVIDENCE—EXCLAMATIONS—RES GESTAE.—In a prosecution for homicide, evidence of spontaneous exclamations of deceased, made at the moment she was shot, are admissible as part of the *res gestae.*
3. EVIDENCE—EXCLAMATIONS OF DECEASED—OPINION.—In a prosecution for homicide, where the killing occurred in the night time, while evidence of exclamations made by deceased, at the time she was shot, that appellant had shot her, is admissible, it is proper to submit to the jury the issue as to whether the exclamations were the mere expression of opinion or the statement of a fact.

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

STATEMENT BY THE COURT.

The appellant and his wife had been separated about a month on account of domestic troubles. On the 16th of February, 1914, she was killed. Appellant was indicted for such killing, the charge being murder in the first degree. He was convicted and appeals to this court.

The proof on behalf of the State by the stepfather of Hattie Stevens, the deceased, tends to show that on the night of the killing appellant went to witness's house, where the deceased had been staying, and when appellant reached there his wife left. Appellant's conduct caused witness to inquire of appellant whether he intended to kill his wife, and he said he was not going to kill her or hurt her. Witness told appellant that he and his uncle's children had fixed to kill Hattie, and appellant made no reply. Later in the night the killing occurred.

Josie Cooper, the mother of Hattie, testified that after appellant and his wife had separated Hattie was staying at her house, and that when appellant was not there in the day he was there at night. Hattie moved to witness's house one Thursday and appellant came on Saturday and asked where his wife was, and where her bed was located, and about everything she had there. Witness told him, and appellant replied: "If she comes here it is all right, but I thought she went to her uncle's house and I was going to give her three days to get away." Appellant came to witness's house also on the night that Hattie was killed. At that time he carried with him a pair of pants for his son. Witness heard appellant say on that occasion that he was not going to hurt Hattie and not to be in any ways uneasy.

Hattie Stevens was killed at the house of one Ellen Vincent, where she had gone to attend a dance.

Witness Robert Davis testified that he was at the dance; he arrived there about 9 o'clock, and saw appellant there at that time. Appellant, when witness first saw him, was out of doors about four feet from the window. Witness next saw him about 12 o'clock standing at the corner of the house. This was about half an hour before the killing occurred.

On cross-examination the witness admitted that he had sworn in the justice court that he had not seen appellant at Ellen Vincent's that night, and, on redirect examination, he reiterated that he saw appellant at Ellen Vincent's on the night that Hattie was killed.

Buster Williams testified that he was at Ellen Vincent's on the night that Hattie was killed and saw the appellant there in the early part of the night before the play began. At that time he was in the house sitting down. He next saw him between 12 and 1 o'clock at the window in the east end of the house. Robert Hall was with witness, and they both saw appellant at the window. When they first went to the window appellant was right up against it. This time was about four minutes before the killing. Witness heard Hattie say, after she was shot, "Lord, have mercy; Lem's done shot me." When she said that she ran in the house and fell. She did not say anything after she fell.

On cross-examination, witness was asked by counsel for appellant if he had not stated to Mr. Roleson, in the presence of Mr. Harris, that the appellant was standing some four feet away from the window, and witness denied that he made such statement.

Robert Hall corroborated the testimony of Buster Williams as to seeing appellant at Ellen Vincent's and he further testified that between 12 and 1 o'clock he saw appellant standing close up to the window four or five minutes before the shooting occurred; that the moon was just rising above the tops of the trees, and that it was light enough for him to see appellant outside of the window, and that appellant was right at the window.

Other witnesses testified that Hattie Stevens exclaimed, immediately after being shot, "Lem's done shot me," and that she died without saying anything else.

It was shown that on Saturday evening before the killing appellant purchased some twelve gauge shells, and it was also shown that appellant had a twelve-gauge gun. It was also shown that appellant's gun had the appearance the next morning after the killing of having been fired within twenty-four hours; and there was mud on the stock of the gun.

One witness testified that about midnight she heard Hattie Stevens's voice speaking in an excited tone and

heard her scream; that immediately after the scream the gun fired.

Another witness testified that he had a talk with appellant a short time before the killing, and that appellant told witness the following: "I am going to see if I can make up with her, and if I can it will be all right, and if we don't get back together she will never be of much service to anybody else."

The deceased was shot with a shotgun in the right shoulder, from the back, with No. 2 or No. 3 shot.

Appellant introduced testimony tending to prove an *alibi,* and appellant testified himself, denying at length and in detail that he was present at Ellen Vincent's on the night of the killing.

The testimony showed that on the morning after the killing when appellant was arrested he was at the place where he lived and was at work. There was testimony tending to show that the gun was fired a distance of about thirty feet away.

Witness Harris, on behalf of the appellant, was asked if he heard the conversation between Roleson and Buster Williams in regard to what Williams said about seeing appellant standing some four feet from the window at Ellen Vincent's on the night that Hattie was killed, and witness testified that Buster Williams said "he was standing inside the window and looked out of the window and saw Lem standing about four or five feet from the window." Here the appellant offered to prove by witness Harris "that Roleson asked the said Buster Williams how it was that he could see defendant four or five feet out in the dark through the window glass when there was a light in the room; that said Buster Williams made no reply, but afterward, in justice court, a few hours later, he testified that the defendant had his face against the window glass." The court, over the objection of appellant, would not permit the offered testimony to be introduced.

Appellant, among others, asked an instruction which, in effect, told the jury that the evidence of the declara-

tion of deceased should be received with caution and weighed with care; that before the jury would be authorized to give such declaration of deceased any weight against the accused they should first find beyond a reasonable doubt that the language was used and that the deceased knew the truth of the declaration; that if there was a reasonable doubt that the deceased knew the truth of the statement, but was merely expressing a belief or opinion, such declaration should be disregarded in determining the guilt or innocence of the defendant. The court refused this prayer for instruction.

The court, at the instance of appellant, among others, gave the following instructions:

"1. The court has permitted some evidence to go to the jury as to an exclamation said to have been made by the deceased just after she was shot. This testimony should not be considered by the jury in arriving at a conclusion as to whether the defendant did the shooting, unless the jury first find beyond a reasonable doubt that the deceased knew that it was the defendant who shot her. If the jury find that such exclamation was made upon a mere suspicion or belief that it was defendant who shot they should disregard it. All the facts and conditions surrounding the parties at the time of the shooting should be taken into consideration by the jury in arriving at its conclusion."

"4. In determining whether deceased knew the truth of her declaration or whether the same was made from opinion or belief, you may take into consideration all the facts and circumstances surrounding the event, including the interest of the deceased, her mental and physical condition at the time, the circumstances under which it was made, her means of knowing the facts stated by her and all the other evidence in the case should be considered by you in determining whether or not the statement so made was true."

Roleson & McCulloch, for appellant.

On appellant's objection to the admission of testimony as to the exclamation of the deceased after the

shooting, the court should have withdrawn the jury and given a hearing on the *voir dire,* to determine its admissibility. 127 La. 1077; 56 L. R. A. 432, *et seq.*

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

The case of *Plumley* v. *State,* 116 Ark. 17, 171 S. W. 927, settles the admissibility of this testimony.

WOOD, J., (after stating the facts). (1) The court did not err in excluding the proffered testimony of witness Harris in regard to the impeachment of witness Buster Williams. Buster Williams had stated, in the presence of Roleson and Harris before the trial, that he saw appellant at the house of Ellen Vincent four or five feet from the window. At the trial Buster Williams testified that when he saw appellant his face was right at the window. The court permitted the appellant to impeach the witness by showing that he had made the statement to Roleson before the trial, which contradicted his testimony on the trial. But the appellant sought by the testimony of Harris to go further and show the reasons or probable reasons why the witness made these contradictory statements. Such testimony was collateral to the issue, the only issue being as to whether the witness was impeached by his contradictory statements.

(2) The exclamation of Hattie Stevens, "Oh, Lem," made just before the gun fired, and the execlamation just after the gun fired, "Lord have mercy, Lem's done shot me," were spontaneous emanations from the transaction itself. They were so closely connected with it as to be a part of it. They were so contemporaneous with the main fact of the shooting or so nearly related to it as to illustrate its character, and the state of the mind of the person injured before she had time to think and concoct an accusation against the one causing it. They were verbal facts of the transaction, so to speak, and therefore should have been admitted as a part of it. *Plumley* v. *State,* 116 Ark. 17, 171 S. W. 925, and cases cited.

The exclamations here were very similar, and made under similar circumstances, to those made by the party

injured in the case of *Plumley* v. *State, supra,* the only difference being that in the *Plumley* case it was daylight, and it was shown that the injured party knew that Plumley shot him. But this difference does not change the character of the declarations here or make them any less a part of the *res gestae.*

The contention that the uncontroverted evidence shows that these exclamations were only the expression of an opinion on the part of Hattie Stevens, and that they should have been excluded for that reason is not sound.

(3) The circumstances were sufficient to warrant the court in submitting to the jury the issue as to whether or not the exclamations were the mere expression of opinion or the statement of a fact, and the court correctly instructed the jury on this issue in instructions given at the instance of the appellant numbered 1 and 4. These instructions covered all that was necessary to say upon that subject, and all that the appellant requested in prayer No. 3. There was no error, therefore, in refusing to grant that prayer. The ruling of the court in refusing to grant prayer No. 3 was correct for the further reason that such prayer was argumentative in form, and because it submitted to the jury to say whether or not the exclamation was used. In this particular the prayer was abstract, because the uncontroverted testimony showed that Hattie Stevens did make the exclamation.

No question was raised at the trial as to the admissibility of the testimony of Gib Cooper, complained of here. No error, therefore, can be predicated upon the admission of that testimony. *Harding* v. *State,* 94 Ark. 65-68.

The testimony was amply sufficient to sustain the verdict.

The judgment is correct, and it is therefore affirmed.

FIDELITY-PHENIX FIRE INSURANCE COMPANY v. FRIEDMAN.

Opinion delivered February 15, 1915.

1. CONTINUANCES—ABSENCE OF WITNESSES—DISCRETION OF COURT.—In an action to recover on certain policies of fire insurance, an architect made certain estimates of the damage sustained by the building. At the time of trial he was prevented from attending, by sickness. *Held*, the court did not abuse its discretion in refusing to grant a continuance, where the absent witnesses' estimates were read to the jury, and when other architects testified in behalf of the defendant, as to the damage.
2. TRIAL—CONSOLIDATION OF CAUSES OF ACTION—SELECTION OF JURY—NUMBER OF PEREMPTORY CHALLENGES.—Where two or more actions are consolidated under the act of May 11, 1905, the act requires that the parties shall proceed to trial as one action, and the procedure shall be governed by the rules applicable to one action; and where the cases are so treated the plaintiffs and the defendants are only entitled to three peremptory challenges each, under Kirby's Digest, § 4536.
3. FIRE INSURANCE—NOTICE OF LOSS.—The failure of the insured to give to several fire insurance companies notice of a fire loss, will not defeat an action against the companies, when, shortly after the fire, adjusters representing all the companies, met and investigated the fire with a view to settling the loss.
4. FIRE INSURANCE—PROOF OF LOSS—BINDING EFFECT.—Statements in a proof of loss after a fire are not binding upon the insured, so as to preclude his recovery of the real amount of the loss, unless there has been a violation of some provision of the policy; the proof of loss is merely an estimate of the insured, and where a settlement is not made upon it, it is not conclusive of the amount due by the insurance company to the insured, but the insured may recover in a suit upon the policy the amount established by the evidence as the true amount of his loss.
5. WITNESSES—HUSBAND AS WITNESS—WIFE'S AGENT.—In an action in which a wife is a party plaintiff, to recover on certain policies of fire insurance, the husband may testify as to things done by him while acting as the duly appointed agent of his wife, and any objection to his testimony must be made specifically.
6. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.—It is proper to refuse to grant a new trial on the ground of newly discovered evidence, where the basis of defendant's motion was evidence tending to rebut a fact established by plaintiff's proof, and which, by the exercise of ordinary diligence, could have been offered at the trial.
7. APPEAL AND ERROR—VERDICT—SUFFICIENCY OF EVIDENCE.—Where there is substantial evidence to support the verdict, the cause will not be reversed on appeal on the ground of insufficiency of the evidence.

8. INSURANCE—FIRE INSURANCE—PROPORTIONATE SHARE OF LOSS—SEPARATE JUDGMENTS.—Plaintiff held fire insurance policies in eight companies. In an action to recover for a fire loss, *held*, it was proper for the court to render separate judgments against each company for a proportionate amount of the total loss, based on the proportionate amount of each policy to the whole.

9. INSURANCE—FIRE INSURANCE—JUDGMENT—PENALTY AND ATTORNEYS' FEES.—Plaintiff sued defendants on certain policies of fire insurance after a loss. A verdict was rendered for the full amount sued for, but the court required plaintiff to enter a remittitur of $2,500, which the plaintiff did. *Held*, since the ultimate amount for which plaintiff obtained judgment, was less than the amount sued for, it was improper to assess attorneys' fees or the penalty provided by the statute.

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

STATEMENT BY THE COURT.

Leah Friedman was the owner of a four-story brick building in the city of Fort Smith, Arkansas, and in February, 1914, the building was damaged and partially destroyed by fire. Mrs. Friedman had policies in eight insurance companies, including the Fidelity-Phenix Insurance Company.

The New York Life Insurance Company was the holder of a mortgage upon the property and was protected from loss by the policies of insurance. After the fire occurred the adjusters for all the different companies visited Fort Smith and entered into negotiations with the plaintiffs for the adjustment of the losses. The parties failed to agree and the insurance companies refused to make payment under their policies. Mrs. Friedman and the New York Life Insurance Company then entered separate suits against the insurance companies to recover the amount alleged to be due them under the policies.

On motion of the plaintiffs and over the objection of the defendants the causes were consolidated and tried together. Upon the trial of the case, Lewis Friedman was offered as a witness on behalf of the plaintiffs and the defendants objected to his testifying on the ground that he was the husband of the plaintiff, Leah Friedman. Their objection was overruled and Lewis Friedman was

permitted to testify. He testified that his wife constituted him her agent to notify the defendants of the loss occasioned by the fire and to adjust the same; that pursuant to this authority he notified the agents of some of the insurance companies of the loss; that two adjusters, representing all of the insurance companies, came to Fort Smith and went with him to examine the building for the purpose of adjusting the loss; that at their suggestion an architect was employed to make an estimate of the loss but after some negotiations on the subject they were unable to agree as to the amount of the loss and the insurance companies refused payment, and that proofs of loss were made out by the plaintiffs and presented or mailed to the defendants within the time and in the manner provided for in the policies. The witness also described the part of the building burned as it appeared to him at the time he made the examination with the adjusters of the insurance companies. He further testified that a steel girder ran through the entire length of the building, that this girder was about the center of the building and that the front and rear walls of the building where this girder entered them were out of plumb but that he did not know from what cause.

The plaintiffs employed architects and contractors to examine the building and make a detailed estimate of the damage done to the building and the cost of placing it in the same condition it was before the fire. The total amount of the damage from the fire was variously estimated by the witnesses at from seventeen to more than twenty thousand dollars.

Architects and contractors employed by the defendants also made detailed estimates of the amount of damage occasioned to the building by the fire and the cost of placing the building in the same condition as before the fire, and their estimates placed the damages at not exceeding eight thousand dollars.

The jury returned a verdict in favor of the plaintiffs in the sum of $17,473.04, which was the amount sued for.

Upon the hearing of the motion for a new trial filed by the defendants the court announced that it would grant the same unless the plaintiffs would enter a remittitur of $2,500. The plaintiffs entered the remittitur as required by the court and the court overruled the motion for a new trial. The court then, on motion of the plaintiffs, allowed an attorney's fee of $1,000 and imposed a penalty of 12 per cent under the statute. The court entered judgment against each of the insurance companies for the proportionate amount due by each of them under the terms of their policies. The defendants have appealed. Other testimony will be referred to in the opinion.

Ira. D. Oglesby, for appellant.

1. It was error to refuse to postpone the case until the witness Klingensmith was able to testify.

2. Each defendant was entitled to separate challenges to jurors. 90 Ark. 484; 145 U. S. 285; Kirby's Dig., § 4536; 83 Ark. 290; 37 Mich. 490.

3. It was error to admit testimony as to damage to and by steel girders. No mention of this is made in the items of the proofs of loss.

4. It was error to refuse defendant's application to compel plaintiffs to permit the examination of Jennings and the mechanics under him to be completed.

5. The husband's testimony was inadmissible in behalf of the wife. Const. Ark.

6. Immediate notice of loss was not given. 72 Ark. 484.

7. The court had no authority under the verdict to enter separate judgments against the respective defendants. 83 Ark. 255; 90 *Id.* 482; 145 U. S. 285.

8. It was error to assess the attorney's fee and the penalty. 92 Ark. 378; 93 *Id.* 84.

9. A recovery could only be had for the items specified in the proof of loss.

Ben Cravens, for appellees.

1. The testimony of Klingensmith was cumulative merely. Motions for continuance are within the sound discretion of the court. 80 Ark. 376; 104 *Id.* 606; 93 *Id.* 346; 95 *Id.* 291.

2. After consolidation there was only one cause of action and only three peremptory challenges were allowable. 77 Ark. 74; 83 *Id.* 290; 86 *Id.* 137; 93 *Id.* 140; 90 *Id.* 484; 83 *Id.* 255; 107 Fed. 842; 148 *Id.* 824; 104 *Id.* 317.

3. Proofs of loss are primarily intended to secure an adjustment between the insured and the company, and the statements as to the amount and circumstances of the loss are not binding on the insured so as to preclude his recovery for the real amount of the loss. 19 Cyc. 854; 126 Ill. 329; 9 Am. St. Rep. 602; 106 Pa. St. 28; 24 Hun, 58; 55 N. Y. 222; 52 Ill. 464.

4. After the damages had been assessed and the trial completed the court had no power to compel appellees to permit an examination by Jennings.

5. Friedman was a competent witness as agent of his wife. In any event he was competent, as the New York Life Insurance Company was a plaintiff to whom the loss was payable. 62 Ark. 26.

6. Appellants had immediate notice of the loss. The burden is on the insurer to establish a forfeiture under the terms of the policy. 85 Ark. 33. No instruction was asked by appellants upon the question of immediate notice and this question was waived.

7. Defendants were each liable for their proportionate share of the entire loss, and it was not error for the court to prorate the liability. A separate verdict was not necessary as no prejudice resulted.

8. Act No. 115, Acts 1905, 307-8, authorizes an assessment of attorney's fee and penalty. 86 Ark. 115; 92 *Id.* 378. In the latter case, the amount recoverable was fixed by the policy, while in this case the amount recoverable was the amount of damage not in excess of the aggregate amount of the policies. Plaintiffs only sued for the loss or damage actually suffered and recovered that sum.

9. A recovery is not limited to the items stated in the proofs of loss. 126 Ill. 329; 19 Cyc. 854; 126 Ill. 329; 9 Am. St. Rep. 602; 106 Pa. St. 28; 24 Hun, 58; 55 N. Y. 193; 52 Ill. 464.

HART, J., (after stating the facts). (1) It is first insisted by counsel for the defendant that the court erred in refusing to continue the case upon their motion. The record discloses that about ten days before the cases were set for trial Klingensmith, an architect of the city of Fort Smith, was employed by the defendants to make an examination of the damaged building and to prepare plans and specifications of what was necessary to restore it to its original condition, with an estimated cost thereof. He performed this work, but when the case was called for trial, or a day before the cases were set for trial, he became suddenly ill and was not able to be present in court as a witness. Upon the hearing of the motion the plaintiffs introduced testimony tending to show that another architect could take the estimates and specifications prepared by Klingensmith and explain them to the jury. The court denied the motion for a continuance, and the specifications and estimates prepared by Klingensmith were read to the jury as his deposition, no objection being made by the plaintiffs. Under these circumstances, we do not think the court abused its discretion in refusing to continue the case on account of the illness of Klingensmith. Moreover, the record shows that the trial of the case continued for several days, that other architects for the defendants examined the building and testified for them in the case. Besides this, the record shows that they employed several contractors who made an examination of the building and testified in detail as to the parts damaged and the cost of restoring the building to its condition as it was before the fire.

(2) After the cases were consolidated and during the formation of the jury, the eight defendants contended that they were each entitled to three peremptory challenges under section 4536 of Kirby's Digest, and assign as error the action of the court in refusing them the same.

In support of their contention they cite the case of *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285. It must be conceded that that decision sustains the contention of the defendants, but we do not agree with the reasoning of the court in that case. The act of May 11, 1905, under which the cases were consolidated, provides, in effect, that when causes of action of like nature or relative to the same question are pending before any of the circuit courts of this State, the court may make such orders and rules concerning the proceedings therein as may be conformable to the uses of courts for avoiding unnecessary costs and delay in the administration of justice and may consolidate said causes when it appears reasonable to do so.

In the case of the *St. Louis, I. M. & S. Ry. Co.* v. *Raines,* 90 Ark. 482, and other cases cited therein, we held that the object of the act in question 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 transaction.

It is evident that if the contention now made by the defendants should be sustained by the court that one of the principal objects of the statute would be defeated. If the defendants were each entitled to three peremptory challenges then it follows as a matter of course that the plaintiffs would be entitled to three peremptory challenges against each of the defendants. The result would be an unnecessary consumption of time in the formation of the jury. New panels would have to be summoned because it is obvious that the regular panels would be exhausted before the jury could be obtained if the plaintiffs and defendants were allowed three peremptory challenges each, as contended for by counsel for the defendants.

It may be true that in some cases for special reasons some of the defendants might want to challenge certain jurors which the other defendants might want retained, and *vice versa;* but such matters as these would be properly urged as reasons why the cases should not be con-

solidated, or as reasons why the court abused its discretion in consolidating the cases.

We are of the opinion that the act of May 11, 1905, contemplates that when actions are consolidated under it, they shall proceed to trial as one action, and that the procedure shall be governed by the rules applicable to one action. It follows that if the case is to be treated as one action, the plaintiffs and defendants are only entitled to three peremptory challenges each, under section 4536 of Kirby's Digest.

In the case before us the record does not show that the court abused its discretion in consolidating the actions. The policies issued by the insurance companies were the standard forms of insurance policies and contained in all essential respects the same provisions. The same fire occasioned the loss under all of the policies and the defenses to be made by the defendants were substantially the same. The companies employed the same attorneys and the record does not show that the defendants were in any way prejudiced by the consolidation of the causes. Their only claim was that each of them had the right to exercise three peremptory challenges, and as we have already seen, we think the act of May 11, 1905, contemplates that the actions when consolidated, should proceed to trial as one action, and be governed by the statutes relative to the trial of a single action.

(3) The policies sued upon contain the provision that the insured shall give immediate notice in writing of any loss. This notice was not given to all of the companies and error is assigned on that account. The record shows that the adjusters for all of the companies came to Fort Smith a short time after the fire occurred for the purpose of adjusting the losses between the plaintiffs and defendants. The object to be effected by the provision for giving immediate notice of any loss to the company is that the company may investigate the extent and character of the loss and the circumstances surrounding it, and also that it may take such steps as are necessary to protect the property from further loss. This was one of the objects of the adjusters in visiting Fort Smith after the

fire occurred. The companies had notice of the loss and it would have been a vain and useless thing to have required the plaintiffs to give them notice.

(4) In making out their proofs of loss, the plaintiffs omitted therefrom the damages which were suffered by the front and rear walls of the building being out of plumb. This item of loss being omitted from the proofs of loss, it is contended by counsel for the defendants that the court erred in permitting proof to be introduced to the jury on that question. We do not agree with them in this contention. Proofs of loss are primarily intended for securing an adjustment between the insured and the insurer. The statements as to the amount and circumstances of the loss will not be binding on the insured so as to preclude his recovery of the real amount of the loss unless there has been a violation of some provision of the policy. 19 Cyc. 854.

It will be seen that the contention of counsel for the defendants is that, as a matter of law, the plaintiffs are bound by their proofs of loss as to the amount of the loss suffered by them. It is generally held that proofs of loss will not estop a plaintiff, but that in a suit upon the policy he may give evidence of the actual amount of his loss and recover accordingly. The reason is that proofs of loss are required for the purpose of furnishing the insurer with information upon which to determine the amount of his liability and to serve as a basis for the adjustment of the loss with the insured. It is merely an estimate of the party, and where a settlement is not made upon it, it is not conclusive of the amount due by the insurance company to the insured, but the insured may recover in a suit upon the policy the amount established by the evidence as the true amount of his loss.

(5) It is claimed by counsel for the defendants that the court erred in permitting Lewis Friedman to testify because he was the husband of one of the plaintiffs. There was no error in this for two reasons. One is that the life insurance company which had a mortgage on the property insured was a party plaintiff to the action. The husband of the plaintiff, Mrs. Friedman, was a competent

witness in behalf of the insurance company, and the record does not show that counsel for the defendants asked that the testimony be limited to the recovery sought by the life insurance company.

The fourth subdivision of section 3095 of Kirby's Digest provides that a husband or wife may be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent. The record shows that when the fire occurred, the plaintiff, Leah Friedman, constituted her husband her agent in all matters pertaining to the adjustment of the loss between her and the fire insurance companies. Therefore, under the statute the husband was a competent witness to testify as to all matters relating to the agency. It was clearly competent for him to state that he met the adjusters and went with them to the scene of the fire, and made an examination of the building and of other matters pertaining to a settlement of the loss.

It is true that the record shows that the husband also testified in regard to a steel girder running through the length of the building near its center which is alleged to have caused the damage to the front and rear walls of the building. We need not decide whether this was a matter pertaining to the agency or not, for no objection was made to the testimony of the witness in this regard. The objection made was when he took the stand as a witness, and was a general objection that he was incompetent to testify in the case. As we have already seen, he was competent to testify as to matters relating to his agency, and if he testified as to matters not within the scope of his agency, the defendants should have then made a specific objection as to this testimony. Not having done so, under the settled rules of this court, they are not now in an attitude to complain.

(6) After the completion of the trial and after the jury returned its verdict and judgment had been entered upon it, the defendant sent an architect to the building who attempted to uncover the steel girder throughout the whole length of the building. Before he had proceeded very far in this work, he was stopped by the plaintiffs.

It is now the contention of the defendants that if they had been permitted to expose the girder throughout the length of the building the fact would have been disclosed that the girder had not become heated and expanded so as to cause the wall in the front and rear of the building to become out of plumb, and the affidavit of the witness was introduced tending to show that the walls did not become out of plumb because of the expansion of the girder by the fire. We do not think the court abused its discretion in refusing to allow a new trial on this account. The trial lasted three or four days, and the burned building was situated in the same city in which the trial was had. The fact that the girder caused the front and rear walls of the building to become out of plumb was established by the testimony of plaintiffs and the defendants had ample time to make the examination during the course of the trial.

Besides this, some of the witnesses for the plaintiffs testified that the fire occurred on the coldest night of the winter, and that the next morning the water which had been thrown upon the building in an effort to extinguish the fire had become frozen and that the ice thus formed tended to force the walls out of plumb.

Still another witness for the plaintiffs testified that the action of the fire itself on the building might have caused the walls to crack and to become out of plumb. And in any event the defendants might have caused the examination to be made during the progress of the trial, and are not in an attitude now to complain.

(7) We have not been urged to reverse the case because the evidence is not sufficient to warrant the verdict, and for that reason we have not deemed it necessary to fully abstract and set out in detail the evidence pertaining to the amount of the damages suffered by the plaintiffs. It is not our province to pass upon the credibility of the witnesses or the weight to be given their testimony. If the verdict has any substantial evidence to support it, it is our duty to uphold it, and we are of the opinion that there was sufficient evidence to support the verdict.

(8) The jury returned a verdict for the whole amount of damages claimed by the plaintiffs, and the court ren-

dered judgment against each of the defendants for the proportionate amount of the loss due by it under the terms of its policy. Error is assigned by counsel for the defendant on this account. There was no error in the action of the court. The policies themselves fixed the proportionate amount that should be paid by each of the insurance companies in case of loss, and the action of the court in rendering separate judgments against each of the companies was the result of a calculation provided for in the policies themselves, and no possible prejudice could have resulted to the defendants therefrom.

(9) It is finally insisted by counsel for the defendants that the court erred in allowing attorneys' fees of $1,000 and a penalty of 12 per cent under the statute, and in this contention we think they are correct. It is true the verdict of the jury was for the amount sued for by the plaintiffs, but the court required them to enter a remittitur of $2,500 as a prerequisite to overruling the motion for a new trial filed by the defendants. The ultimate amount which the plaintiffs recovered was the amount for which the court rendered judgment, and this was less than the amount sued for. Therefore, we do not think the court should have assessed the attorney's fee against the defendants or the penalty under the statute. See *Pacific Mutual Life Insurance Co.* v. *Carter,* 92 Ark. 378; *Industrial Mutual Indemnity Co.* v. *Armstrong,* 93 Ark. 84.

It follows that the judgment of the court in this respect will be reversed and the amount of the attorney's fee and the penalty will not be allowed as a part of the judgment.

The judgment as to the amount due to the plaintiffs under the policies as damages will be affirmed.

KING v. STATE.

Opinion delivered February 15, 1915.

1. HOMICIDE—FIRST AND SECOND DEGREE MURDER.—No killing is murder unless it is done with malice, and the statute having made two degrees of murder, it follows that malicious killing is not necessarily murder in the first degree; it must also be wilful, deliberate

and premeditated, or committed in the attempt to commit some one of the felonies mentioned in the statute.

2. HOMICIDE—SECOND DEGREE MURDER.—Under the statute all homicides, which were murder at common law, except where the killing is with malice, and was preceded by a clearly formed design to kill, or a clear intent to take life, are now murder in the second degree.

3. HOMICIDE—FIRST DEGREE MURDER—ISSUE UNDER THE FACTS—INSTRUCTIONS.—In a trial for homicide, if there is no evidence whatever tending to establish a lower degree of homicide than murder in the first degree, it is the jury's duty to take the court's exposition of the law, and the court should decline to give the jury instructions as to any lower grade of homicide.

4. HOMICIDE—SECOND DEGREE MURDER—ISSUE UNDER THE FACTS—INSTRUCTIONS.—In a prosecution for homicide, if there is any testimony from which the jury might legitimately infer that the defendant was guilty of a lower grade of homicide than murder in the first degree, it will be the duty of the court to instruct the jury on that degree of the offense.

5. HOMICIDE—CONFESSION—EXPLANATION—OTHER EVIDENCE.—In a prosecution for homicide, where the admissions of the defendant in the nature of a confession are allowed in evidence against him, all that he said in that connection must also be permitted to go before the jury. Whatever explanation the defendant may make in regard to the killing, or in regard to the circumstances attending it, are to be admitted in evidence just as much as the admission of the killing itself, and when such is not done, and the jury properly instructed on the degrees of murder, a judgment of murder in the first degree will be reversed.

6. CRIMINAL LAW—LESSER CRIME—REVERSAL OF JUDGMENT.—Where the jury, in a prosecution for homicide, were not properly instructed on the law, relative to the degrees of murder, and convicted the defendant of murder in the first degree, the cause will be reversed, but where the facts are sufficient to warrant a conviction of second degree murder, the Supreme Court on appeal will order the Attorney General to elect if he will have the defendant sentenced for murder in the second degree.

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

J. N. Thomason and *S. L. Gladish,* for appellant.

There was evidence which, if believed by the jury, would have warranted a verdict of a lower degree than murder in the first degree, and the court erred in failing to instruct the jury as to murder in the second degree. Where there is the slightest evidence to warrant an instruction of this nature, it is error to refuse to give it.

102 Ark. 186; 91 Ark. 575; 74 Ark. 265; *Id.* 451; 43 Ark. 289; 109 Ark. 517; 162 U. S. 313; *Id.* 466.

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

The evidence is fully sufficient to show that all the elements of murder in the first degree exist in this case, and the failure to instruct as to murder in the second degree was not reversible error. 50 Ark. 506.

HART, J. Rice King prosecutes this appeal to reverse a judgment of conviction against him for murder in the first degree, charged to have been committed by shooting Mary Jones with a pistol. The facts as shown by the State are substantially as follows:

Tom Jones and Mary Jones, his wife, both colored, lived on the farm of H. E. Bowen in Mississippi County. Rice King, also colored, lived in the same neighborhood. On one Tuesday morning in June, 1914, Tom Jones arose early in the morning and discovered that his gate had been left open, and that his hogs and cows had got out. He went in one direction in search of them and directed his two little boys to go in another. Tom Jones, Jr., testified, that Rice King came around from the corner of the barn which was about two hundred feet north of the house, just after his father left, and drew a pistol on Mary Jones, who was at the time out in the yard getting wood. He said that he was just going out of the gate when he saw Rice King draw the pistol; that he then came back to the house, and that Rice King then drew the pistol on him; that he went into the house and got a .22 calibre rifle and pointed it at Rice King, and the latter then went away; that when Rice King drew the pistol on his mother, she threatened to tell his father, and that King said, "Damn Mr Jones and you, too;" that after Rice King went away he went on after the cows and brought them home, and that when he returned, his mother was not about the house anywhere, and that when his father came in he told him what had happened and about his mother being missing.

Tom Jones, Sr., testified that when his son told him about seeing Rice King around the barn earlier in the morning, he went out there and saw where the weeds had been pushed down as if a scuffle had taken place, and said that there was some blood on the weeds. He then went and told H. E. Bowen, the son of his landlord, about the matter. Bowen came back with him and examined the place back of the barn where the weeds were crushed down, and said that he discovered blood on them. Bowen and Jones then followed a trail which led from there toward the levee and toward a thicket. The dew was yet on the grass, and at intervals along the trail, which had grown up with weeds, they could see the weeds crushed over as if some heavy body had been laid there. They also discovered at times some blood on the weeds. They followed the trail an eighth or a quarter of a mile, and found the body of Mary Jones lying in the edge of the thicket, dead. She had been shot through the breast and had bled internally. There was no evidence of much blood on her body, and, according to the evidence of other witnesses for the State, there were no marks or powder burns on her breast where the bullet entered. She was a brown colored negro woman, and the evidence shows that powder burns would not show on her to the same extent that they would on a white object.

Other evidence for the State tends to show that Rice King had been having sexual intercourse with the deceased for some time, and that he had been warned by the deceased's husband to keep away from his place.

One witness for the State testified that on the Sunday preceding the killing, the defendant, pointing to Mary Jones, told him that his "kidding" woman was about to quit him, and that he was not going to stand for it. This conversation occurred at a church in the neighborhood.

Another witness testified that when the services were ended on that particular day Rice King came up where Mary Jones was, and began "jarring" with her; that she told him to let her alone; that he told her he would

"get her;" and that on the following Tuesday he heard of Mary Jones's death.

Other evidence for the State tends to show that on the morning after the killing, the defendant put on a clean shirt and overalls, ran away, and was not captured for several weeks.

One witness stated that he met him on the afternoon of the killing riding a mule, and that he told him how the killing occurred; that he said he and the deceased were playing, and that he was trying to get his gun from her, that she pointed it at him, and told him to get back, that he knocked the gun up, and it went off and shot her. On cross-examination he said that Rice King told him that he was scuffling and trying to get the pistol from Mary Jones, that she told him to get back off her, "kind of bluffing," and drew the pistol on him, that the pistol was cocked, and he was afraid she would shoot him, and he knocked it up and it went off and shot her.

The record shows that when the defendant was first put on trial for this crime, the trial resulted in a hung jury, but that at the same term of the court and the next week after the first trial, the trial was had from which this appeal is taken.

Rice King testified at the first trial, and a member of the petit jury at that trial said that Rice King testified that the killing did not occur at the barn, but that it took place three or four hundred yards from there; that Rice King stated that he was trying to take the pistol away from Mary Jones when the killing occurred; that he grabbed her to take the pistol away from her and that in the scuffle the pistol fired; that he did not say anything about her pointing it at him; that he did not say anything about any bruises being on her arm or back; that he said he did not know how the bruises came on her arm and back, if any were there; that after the shot was fired, she caught hold of him and walked about ten feet or ten steps, and that the deceased went down with her arms around him; that he stepped away from her and then went back and got the pistol; that this occurred near the borrow pits next the levee; that he admitted he was in the habit

of going to Jones's house and that he had been intimate with Jones's wife, and went there for that purpose; that this intercourse with Jones's wife had been going on for three years; that on all other occasions before the day of the killing, the deceased had met him outside, but that on this morning he had intercourse with her in her house.

On cross-examination this witness stated that Rice King testified that Mary Jones had the pistol in her hand, and that it was cocked; that she was walking along talking to him, and that the further they went, the more cussing they did; that he grabbed the pistol, and the killing then occurred; that Mary Jones had the pistol at the time he went there on the morning of the killing, and that she had taken the pistol away from him in the town of Luxora a few days before.

The defendant himself did not testify at the present trial, but evidence was adduced tending to show that there was blood on the weeds back of the barn, and none in the path leading from there to the place where the body of Mary Jones was discovered.

Other witnesses for the defendant testified that his reputation for peace and quietude in the neighborhood was good.

It was also shown that there were no bruises on the body of the deceased; some of the witnesses for the State had testified that there were bruises on the breasts and arms, and her husband had testified that he found a piece of iron back of the barn that had blood on it.

Without commenting upon the testimony, it is sufficient to say that it fully warranted the jury in bringing in a verdict of murder in the first degree.

Counsel for the defendant have insisted that the judgment should be reversed because of the refusal of the court to instruct the jury on murder in the second degree. This brings us to a discussion of the difference between murder in the first degree and murder in the second degree under our statute.

(1) No killing is murder unless it is done with malice and the statute having made two degrees of murder, it follows that malicious killing is not necessarily murder

in the first degree. It must also be wilful, deliberate and premeditated, or committed in the attempt to commit some one of the felonies mentioned in the statute. *Sweeney* v. *State,* 35 Ark. 585; *Palmore* v. *State,* 29 Ark. 250.

In *Bivens* v. *State,* 11 Ark. 455, the court said:

"It is indispensable then in such cases that the evidence should show that the killing with malice was preceded by a clearly formed design to kill—a clear intent to take life. It is not, however, indispensable that this premeditated design to kill should have existed in the mind of the slayer for any particular length of time before the killing. Premeditation has no definite legal limits, and therefore, if the design to kill was but the conception of a moment, but was the result of deliberation and premeditation, reason being upon its throne, that is altogether sufficient; and it is only necessary that the premeditated intention to kill should have actually existed as a cause determinately fixed on before the act of killing was done, and was not brought about by provocation received at the time of the act, or so recently before as not to afford time for reflection."

(2) It follows that under our statute all other homicide which was murder at common law is now murder in the second degree. This distinction has been followed by the court ever since.

(3) In the case of *Thompson* v. *State,* 88 Ark. 447, and in the cases there cited, it was held that where there was no evidence tending to prove the defendant was guilty of any offense lower than murder in the first degree, the court was not required to instruct the jury on any other grade of the offense. The reason is that if there is no evidence whatever tending to establish a lower degree of homicide than murder in the first degree, it is the jury's duty to take the court's exposition of the law, and the court should decline to give to the jury instructions as to any lower grade of homicide.

(4) On the other hand, if there is any testimony from which the jury might legitimately infer that the defendant was guilty of a lower grade of homicide than

murder in the first degree, it would be the duty of the court to instruct the jury on that degree of the offense.

(5) In the case before us, the record shows that on the former trial of the case, the defendant had testified as a witness, and admitted the killing, but the admission was accompanied by an explanation of the circumstances attending the killing, and it is an elementary rule of law that when admissions of a defendant in the nature of a confession are allowed in evidence against him, all that he said in that connection must also be permitted to go before the jury. That is to say, whatever explanation he may make in regard to the killing or in regard to the circumstances attending it, are to be admitted in evidence just as much as the admission of the killing itself.

The jury are the sole judges of the weight of the testimony, and the credibility of the witnesses and it was the duty of the jury to consider not only the testimony of the State to the effect that the defendant on the former trial had admitted the killing, but also the explanation he made at the time as to the circumstances attending it. The jury were not required to accept or reject such testimony in its entirety, but it was their duty to accept such portions of the testimony in the whole case as it believed to be true, and to reject that which they believed to be false. *Pickett* v. *State,* 91 Ark. 570; *Allison* v. *State;* 74 Ark. 444.

In the exercise of its right to accept such portions of the testimony as it believes to be true, and to reject that part which it believes to be false, it might have found that the killing, although done with malice, was not the result of a wilful, deliberate and premeditated specific intention to take life on the part of the defendant. Such being the case, the jury might have found that although the defendant was not justified in killing the deceased, or that the killing was not manslaughter within the meaning of the statute, still they might have found that it was a malicious killing and done under circumstances which would constitute murder in the second degree.

(6) Therefore, we think the court erred in refusing to instruct the jury on murder in the second degree, and

for that error, the judgment must be reversed, but inasmuch as the jury found the defendant guilty of murder, the State may elect, if it sees proper to do so, to have the defendant brought into court to be sentenced for murder in the second degree. Unless such election is made within fifteen days, the cause will be remanded for a new trial. See *Threet* v. *State,* 110 Ark. 152.

KIRBY, J., dissents.

ANDREWS v. ANDREWS.

Opinion delivered February 15, 1915.

1. PARENT AND CHILD—CUSTODY—FATHER.—The father is the natural guardian of his child and is *prima facie* entitled to its custody, and this right will be enforced unless some sufficient reason is shown for the court to order otherwise.
2. PARENT AND CHILD—CUSTODY.—The custody of a child of tender years will not be taken from the mother and awarded to the father, although the father secured a divorce for cause on the wife's part, where the wife and mother was living with her father, who was able to provide for her and the child, and where she was, under the evidence, a suitable guardian for the infant.
3. EQUITY JURISDICTION—CUSTODY OF CHILD.—Equity properly may retain jurisdiction of an action involving the custody of the child of a divorced husband and wife, so that proper orders may thereafter be made, looking to the welfare of the child.

Appeal from Sebastian Chancery Court; *W. A. Falconer,* Chancellor; affirmed.

Tom W. Neal, for appellant.

Under the law the father is first entitled to the custody of his child. 37 Ark. 27. This rule is universally followed by this court, and there is no reason why it should not be applied here. Of course, the State, as *parens patriae,* acting through the chancery court, can modify the rule, for good reasons shown, but this power is never exercised to the child's injury. The best interest of the child should always be considered. Upon the evidence, the decree is contrary to the evidence, and should be reversed. This is a case where the chancellor's discretion was abused.

Holland & Holland, for appellee.

The welfare of the infant is the controlling factor in cases of this kind. 42 Mich. 509; 80 Ark. 289; 78 *Id.* 193. Under the facts the chancellor was warranted in giving the custody to the mother. 78 Ark. 598. No abuse of discretion is shown.

SMITH, J. This case involves the right to the custody of an infant girl child named Alletta Andrews, and the parties to the litigation are its father and mother. The court below awarded the custody of the child to the mother, but imposed the condition that the father should be permitted to see the child at all reasonable times, and required the mother to give a bond, with her father, with whom she is now living, as surety, that the child should not be taken out of the jurisdiction of the court.

It appears that, after having borne a good reputation from earliest childhood, the wife forgot her duty and deserted her husband, and left the State in company with one Dave Scott, with whom she resided for some months as man and wife. But in her fall, she did not forget her child, and carried it with her, and appears never to have lost any of her affection for it. A child was born as the result of this illicit relation, and the mother now has that child, as well as the one involved in this litigation, in her custody. Appellee, the mother, was visited by her father, George Salsman, while she was living with Scott, in Missouri, and was induced to return with her father to his home in this State, where she has since resided. The proof is that appellee, after returning to her father's home, was deeply penitent and confessed her grievous wrong to the members of her church, and promised to make such atonement as she could by leading thereafter a blameless life. No question is made as to her present conduct, and her neighbors testified that they now regard her as morally fit to have the custody of the child, and she was again received by her church in full fellowship. Mr. Salsman is shown to be financially able to provide a suitable home, and is willing to do so.

Appellant resides in Oklahoma, and obtained a divorce in that State upon constructive service, after which

he instituted this proceeding. He is shown to be a man of good character and able to suitably provide for his child, and to have been without fault in his domestic troubles.

(1) The father is the natural guardian of his child, and is *prima facie* entitled to its custody. This right of the father is not an absolute one, however, to be enforced under all circumstances; yet it is so well recognized and established that it will be enforced unless some sufficient reason is shown for the courts to order otherwise. A late case on this subject is that of *Mantooth* v. *Hopkins,* 106 Ark. 197, where a number of previous decisions of this court are cited and reviewed, and in that case the court quoted from *Coulter* v. *Sypert,* 78 Ark. 195, as follows: "When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw it from other persons, it will look into all the circumstances and ascertain whether it will be for the real, permanent interest of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint and endeavor as far as possible to administer conscientious duty with reference to its parental welfare. It is an entire mistake to suppose that a court is at all events bound to deliver over an infant to its father, or that the latter has an absolute vested right in its custody."

In the case of *Lipsey* v. *Battle,* 80 Ark. 287-289, Judge RIDDICK said: "In questions of this kind concerning the custody of infants, the main consideration that should influence the court is the best interest and well-being of the child. *Coulter* v. *Sypert,* 78 Ark. 195. The courts may remove a child from the custody of its parent, but this will only be done when it is plainly necessary to secure the present and future well-being of the infant."

(2) A sufficient reason here for not taking the child from the mother and delivering it to the father is the tender age of the child, who is shown to be only four years old. This consideration, however, while always weighty, is not always controlling. It is to be counterbalanced against the child's real interest, and when that interest

requires it, the custody is not awarded to the mother of the child.

(3) The court below properly retained jurisdiction of this case for the purpose of making any orders that may hereafter become necessary for the well-being of the child. If its mother should again stray from the path of right living, or other considerations arise, which required such action, the court could, and should, make appropriate orders for the delivery of the child to its father. The decree is therefore affirmed.

THE TOWN OF AUGUSTA *v.* SMITH.

Opinion delivered February 15, 1915.

1. IMPROVEMENT DISTRICTS—AUTHORITY OF CITY COUNCIL.—Municipal corporations can exercise only such powers, with respect to improvement districts, and the control thereof, as are conferred upon them by statute or by necessary implication.
2. LOCAL IMPROVEMENT—ASSESSMENTS—AUTHORITY OF MUNICIPAL CORPORATIONS.—Property acquired by local assessment is taken over by a municipality in trust for the property owners of the district, who are the real owners, and it is a breach of the trust for the municipality to attempt to part with the title or to delegate the performance of the trust to some one else.
3. ESTOPPEL—MUNICIPAL CORPORATIONS—SALE OF LIGHT AND WATER PLANT—ACQUIESCENCE OF CITIZENS.—Under a special statute a light and water plant was purchased by a local improvement district, and purchased therefrom by the city. After due notice and a mass meeting of the citizens approving the act, the city sold the plant to one B. *Held*, although under the statute, the city had no right to sell the plant, nevertheless citizens, who, by silence, acquiesced in the sale of the plant, are estopped to come into equity and seek to have the sale set aside.
4. ESTOPPEL—MUNICIPAL CORPORATIONS—SALE OF LIGHT AND WATER PLANT—EXTENT OF ESTOPPEL.—Athough the citizens of a city are estopped by their conduct to seek to have set aside the sale of a light and water plant by the city to an individual, nevertheless they are estopped only so long as the purchaser maintains and operates the plant in strict accordance with the terms of the contract of sale made with the city.

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

Harry M. Woods, for appellant.

1. The ordinance was void, and the ratification gave it no validity. Dillon on Mun. Corp., § § 1301, 791-2; Pond on Pub. Utilities, § § 354-5, 348, 361-2; 16 Utah, 440; 160 Ind. 32; 7 S. D. 9; 71 Ark. 4; 86 *Id.* 1; 94 *Id.* 380; 109 *Id.* 90; 90 *Id.* 380; 93 *Id.* 490; 86 *Id.* 1; 71 *Id.* 4.

2. There is no estoppel. Dill., Mun. Corp., p. 797, § 777; 58 Ark. 271; 93 *Id.* 490; 83 *Id.* 276; 82 *Id.* 531; 126 Ia. 105; 117 *Id.* 258; 59 Cal. 517; 87 Wis. 496; 149 Mo. 36; 22 Mich. 104; Bigelow on Est. 754; 20 Wall. 655; 30 L. R. A. 848; 106 Mass. 549; Dill., Mun. Corp., p. 2455, § 1556.

3. The city and taxpayers had a right to intervene. Dillon on Mun. Corp., § § 1579-80; 101 U. S. 601; 52 Ark. 545-7; 169 S. W. No. 12, *Seitz* v. *Meriwether,* 114 Ark. 289.

Elmo CarlLee and *Bratton, Fraser & Bratton,* for appellee.

(1) There was ample authority for the transaction with Bratton, but, if not, (2) interveners are estopped, and (3) a court of equity will not entertain a bill for affirmative relief, by parties who stood by quietly and persuaded and encouraged a party to put money into a proposition, and then take the property away without compensation, or return of the money invested. 100 Ark. 588; 47 *Id.* 269; 67 *Id.* 36; 28 Cyc. 622; 22 W. N. C. 137; 216 Pa. 345; 5 O. St. 114; Dillon on Mun. Corp., § 1303; 94 Ind. 305; Kirby's Dig., § § 5442-3, 5448; 4 Wheat. 316; 80 Ark. 125; 47 Ind. 407; 14 Pa. St. 83; 16 Cal. 256; 76 Ark. 60; 87 *Id.* 389; 98 *Id.* 42; 28 Utah, 25; 70 Ia. 202; 103 Ga. 483; 15 A. & E. Enc., p. 1084. He who seeks equity must do equity. 16 Cyc. 141; 46 Ark. 64; 34 *Id.* 630; 32 *Id.* 346.

Manning, Emerson & Morris, for Peyton Smith.

1. The council had power to sell. Kirby's Dig., § 4436-5675; Dill., Mun. Corp., vol. 3, § 991; 84 Pac. 760; 67 Atl. 844; 47 Ark. 269; 68 *Id.* 39-66; 100 *Id.* 588; 176

Fed. 86-8; 31 Ark. 728; 27 *Id.* 572; 68 S. E. 399; 81 Ark. 244. The doctrine of estoppel applies to towns and cities. 81 Ark. 244; 58 *Id.* 270, and cases *supra.* The intervener's bill was properly dismissed.

McCULLOCH, C. J. A light and water plant was constructed in the town of Augusta by a private corporation under franchise granted by the city council, and in the year 1909 an improvement district was formed in said town for the purpose of raising funds to purchase said plant and to maintain and operate the same. A special act was passed by the General Assembly of 1909, ratifying the organization and authorizing the purchase of the plant and proceedings under the improvement district statutes of the State with reference to levying assessments, etc., and the statute also gave authority to issue bonds and to mortgage the plant for the payment of the price. Pursuant to the authority thus given, the organization of the improvement district was completed, assessments were levied on property in the district, based upon estimated benefits aggregating about $41,000, and the plant was purchased and bonds executed to raise money to pay the price, a mortgage on the plant being executed according to the terms of the statute. Thereafter the plant was taken over and operated by the town of Augusta pursuant to the terms of the statute, which reads as follows:

"In case of the construction of waterworks or gas or electric light works by any improvement district or districts, the city or town council after such works are constructed shall have full power and authority to operate and maintain the same instead of the improvement district commissioners, and said city or town council may supply water and light to private consumers and make and collect uniform charges for such service, and apply the income therefrom to the payment of operating expenses and maintenance of such works." Kirby's Digest, § 5675.

It appears from the testimony in the case that the operation of the plant was not altogether satisfactory

nor self-sustaining from a financial standpoint, and in January, 1913, U. S. Bratton entered into a contract with the town for the purchase of the plant and the operation thereof under a franchise to be granted to him by the town council. The deal was recommended by the board of improvement of the district and was discussed and ratified in a mass meeting of citizens which was, according to the testimony, very generally advertised in the town. Pursuant to this understanding, the city council passed an ordinance whereby it undertook to convey to Bratton the entire plant and all property connected therewith and to grant to him a franchise to operate the same for a term of fifty years. He agreed to enter into bond in the sum of $25,000, conditioned that he would pay the bonded indebtedness and interest thereon as the same became due and payable, and to furnish lights and water to the town for public purposes at a rate specified in the ordinance, and also to operate the plant according to certain regulations and schedules prescribed in the ordinance. It was also specified that Bratton agreed to change the electric light system from a direct to an alternating current and to pay the expenses of the change. Pursuant to this ordinance, Bratton executed a bond and took charge of the plant and operated the same until December, 1913, when appellee, Peyton Smith, one of his creditors, filed a bill in the chancery court alleging insolvency on the part of said Bratton and asserting a lien on the said property. Bratton had in the meantime, according to the testimony, gone to considerable expense in replacing machinery and in otherwise improving the plant. The town of Augusta and certain citizens and property owners intervened in the creditor's suit and alleged that the attempt on the part of the town council to convey the plant to Bratton was void, and asked that it be set aside and that possession be restored to the officers of the town. On final hearing the chancery court dismissed the intervention for want of equity and an appeal has been prosecuted.

The first contention is that the city council had no power whatever to sell and convey the light and water plant to Bratton, and counsel have, with great industry, brought to our attention the conflicting authorities on the question whether a municipal corporation has merely a proprietary interest in property of this character and has the power to sell and dispose of the same, or whether the ownership by the municipality is for strictly governmental purposes of a character which puts it beyond the power of the municipality to alienate the property so held in trust. There is a conflict in the authorities on that question, and, as it is not presented in this case, we find it unnecessary to discuss it.

(1-2) What we have to determine now is whether or not the municipality has authority under the statutes to sell and dispose of a light and water plant constructed or purchased through the agency of an improvement district and turned over to a municipality pursuant to the terms of the statute just quoted. That presents an entirely different question from that of the power of a municipality to dispose of a light and water plant purchased by the city itself with funds raised by general taxation. In this case we are compelled to look to the terms of the statute itself for the purpose of determining whether or not the municipality had any authority to make the conveyance, for it is too well settled for controversy that with respect to improvement districts, and the control thereof, municipal corporations can exercise only such powers as are conferred upon them by statute or by necessary implication. *Morrilton Waterworks Improvement District* v. *Earl,* 71 Ark. 4. Now, the statute merely provides that in case of construction of a water or light plant (and this applies under the special statute to a purchase by the improvement district after construction through some other agency), the city "shall have full power and authority to operate and maintain the same instead of the improvement district commissioners." It is apparent that the Legislature intended to limit the city council to the operation and maintenance of the plant, and there is

nothing in the language of the statute which would extend the authority beyond that. Property acquired by local assessments is taken over by the municipality in trust for the property owners of the district, who are the real owners, and it is a breach of the trust for the municipality to attempt to part with the title or to delegate the performance of the trust to some one else. We are, therefore, of the opinion that the attempted sale by the town of Augusta was unauthorized, and this brings us to the consideration of the further question of estoppel.

The evidence shows that the contract was entered into in perfect good faith and within the knowledge of all the citizens and taxpayers of the town. A public meeting was held, after publication of notice, and further notoriety was given to the project after the mass meeting was held. It is inconceivable that any one in the town was unaware of the transaction. Bratton gave bond pursuant to the terms of the ordinance and entered upon the discharge of his contract and spent his money in its performance, and it would be grossly inequitable to permit any one who acquiesced in the transaction to come into a court of equity and seek to set it aside. We are of the opinion that the doctrine of estoppel applies, notwithstanding the fact that the sale was unauthorized.

In the recent case of *Harnwell* v. *White,* 115 Ark. 88, 171 S. W. 108, we applied the doctrine of estoppel, but that was a case where there had been an affirmative act done by a property owner of an improvement district in recognition of the validity of the district, and we held that he was estopped from thereafter disputing the validity of the district. The court declined to commit itself to the doctrine that mere silence on the part of a property owner would be deemed to be such acquiescence as would estop him from setting up the invalidity of the district. The present case, however, is not one in which the result turns upon the invalidity of the formation of a district, and it is a different proposition here from that involved when the property owner is resisting the collection of assessments against his property and he has

a right to stand upon the invalidity of the district. Mere silence there need not be construed as acquiescence, as the property owner is not always bound to speak under those circumstances. But here, where the property owners have stood by and in a manner acquiesced in the transaction, they are in no position to come into a court of equity to ask the court to undo that which has been done within their knowledge and acted upon to the prejudice of the other party.

(3) Counsel for appellant rely upon the case of *City of Newport* v. *Railway,* 58 Ark. 270, and like cases, where it is held that an *ultra vires* contract of a municipal corporation could not be ratified. Another such case as that is *Texarkana* v. *Friedell,* 82 Ark. 531. Those cases, however, involved the question of the right to sue the city at law upon an obligation arising upon a contract which was beyond the power of the city to enter into, and we held that there could be no recovery because there was a lack of power to make the contract or to ratify it. In each of those cases the municipality was defending itself against the enforcement of a contract which it had no power to make. In the present case, however, the municipality and these citizens, who by silence acquiesced in this contract, have come into a court of equity and asked affirmative relief and seek to have the contract set aside. They are in no attitude, as we have already said, to ask affirmative relief, for the reason that they are estopped by their conduct, and we are of the opinion that the chancellor was correct in his conclusion that they were not entitled to the relief they seek.

(4) Now, it is proper that we should inquire further how far the doctrine of estoppel goes in this case. The contract imposed certain obligations on the part of Bratton and he accepted the franchise upon terms. The estoppel of the appellees only goes to the extent of closing the door on their objection so long as the contract is being performed, and it would be inequitable to extend the doctrine of estoppel any further than that. *Harnwell* v. *White, supra.* In other words, the property owners

acquiesced in the contract that was made, which can not be sustained as an absolute sale of the property in the sense that it may be disposed of and the plant dismembered. It was turned over to Bratton for the purpose of operating under a franchise, and any attempt on his part, or on the part of his successors in interest, to divert it from the use for which it was turned over, would constitute a breach of the contract, and would absolve the town and the property owners from the implied obligation to permit him to perform the contract. The estoppel will end when the reason for it ceases, which will not be as long as the plant is being operated under the franchise and for the benefit of the public according to the plan for which it was constructed. Those who have dealt with Mr. Bratton are deemed to have had knowledge of the limitations upon his right to incumber the property and no creditor has greater rights than he has. It was not sought, in the proceedings into which the appellants intervened, to dismember the plant or to divert it from its proper uses. The remedies of creditors are subordinated to the public rights, which are fully preserved under the contract. Nor would the estoppel bind the appellants in the event of the failure of Bratton to make good his obligation to pay off the bonds outstanding against the district. The plant is mortgaged to secure those bonds, and, in addition to that, the property owners are liable to the extent of the estimated benefits to their property; and if the property was about to be subjected to the enforcement of the assessments in order to pay for the bonds, they would be no longer bound by their implied acquiescence in the contract between Bratton and the town.

The decree is therefore affirmed.

GRAY v. BLACKWOOD.

Opinion delivered February 15, 1915.

INSURANCE—POSSESSION OF POLICY—REFUSAL TO ACCEPT—PRESUMPTION.—Although one who retains a policy of insurance in his possession will be deemed to have accepted it, and can not avoid liability for

the premium, the rule does not apply where the proof shows that there was an express refusal to accept the policy in any form.

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

W. C. Rodgers, for appellant.

1. Defendant applied for the policies; they were delivered to her at her request and she retained them. An acceptance is presumed. 86 Ark. 284; 89 *Id.* 416; 106 *Id.* 568; 102 *Id.* 146, 151.

2. Courts in charging juries should not express or intimate an opinion as to controverted facts. 51 Ark. 148; 94 *Id.* 566; 68 *Id.* 39-68; 75 *Id.* 273-5; 47 *Id.* 269-287; 80 *Id.* 167.

3. One who retains a policy will be deemed to have accepted it and can not avoid liability for the premium. 39 Ark. L. R. 431.

No brief for appellee.

McCULLOCH, C. J. Appellant instituted this action in the circuit court of Howard County to recover the premium alleged to be due on two policies of insurance on the life of appellee issued to her by the Texas Life Insurance Company of Waco, Texas. Plaintiff was the soliciting agent of the insurance company and he claims that appellee made a written application through him to the company for the policies, and that he subsequently delivered the policies to her when the same were forwarded to him by the company for delivery.

Appellee denied that she applied for the policies of insurance or that she ever accepted them. Her contention, which is supported by her testimony in the case, is that she made application through appellant to another insurance company domiciled in the State of Indiana, and that she was examined by a physician on that application but that the company refused to accept it and issue the policies, and she was notified to that effect; that subsequently appellant came to her house and brought the policies issued by the Texas Life Insurance Company of Waco, but that she refused to accept them on the ground

that she had not applied for them or obligated herself in any way to accept them. She also testified that when appellant came to deliver the policies and offered them to her, she refused to take them, and that he threw them down on the table in her room and left. She stated that the policies were thrown around the place as waste paper and that she never retained them or had them in her possession for the purpose of holding them as subsisting contracts.

Appellant testified that after the refusal of the Indiana company to issue the policies, appellee made a new application for policies from the Texas Life Insurance Company, which he forwarded to the company, and that when the policies were sent to him he delivered them to appellee and that she accepted them.

The issues of fact were submitted to the jury and the verdict was in appellee's favor.

There was enough evidence to have supported a verdict either way, and we do not feel at liberty to disturb the verdict in appellee's favor. We deem it proper to say in the outset that no question was raised as to appellant's right to sue, even though the premium alleged to be due was not evidenced by a note or other written obligation in the hands of appellant. He alleges in his complaint that the Texas Life Insurance Company sold and transferred to him its interest in the premium. We make no question about the right of appellant to maintain the action without joining the insurance company as a party, appellee not having raised any question of that sort below. We are of the opinion that the issues of fact were properly submitted to the jury upon correct instructions, and that the verdict of the jury is conclusive.

The case was formerly here on appeal and was reversed because the court instructed the jury that the burden of proof was on appellant to show that defendant had accepted the policies. We held, quoting the syllabus, "Where a party retained possession of a policy of life insurance, after commencement of a suit to collect a premium, defendant will be presumed to have ac-

cepted the same." *Gray* v. *Blackwood,* 112 Ark. 332. When the case was tried anew on the remand, the court followed the decision of this court and instructed the jury that the burden of proof was on appellee to show by a preponderance of the testimony that she did not accept the policies. Error is assigned in the refusal of the court to give an instruction which told the jury that if appellee "did not accept the policies when they were left there * * * yet if she afterward concluded to keep them she would be liable for the premium." We doubt very seriously whether appellant was entitled to this instruction, for there was no evidence that she ever changed her mind after refusing to accept the policies. The jury has found upon legally sufficient evidence that she did refuse to accept the policies, and there is no ground for contention that she ever changed her mind about it. Be that as it may, however, we are of the opinion that the same idea was sufficiently embraced in another instruction where the court told the jury that if appellee "declined to accept them (the policies) and refused to accept them, and the agent threw them down there and went off and left them, and she never accepted them at all, she would not be bound for the premium."

There is another assignment of error with reference to an instruction given by the court, that it amounted to an intimation of the court on the weight of the evidence, but a careful analysis of the language used by the court convinces us that no such impression as that was conveyed by it.

It is well settled that one who retains a policy of insurance in his possession will be deemed to have accepted it and can not avoid liability for the premium, but that principle does not apply when the proof shows there was express refusal to accept the policy in any form. Appellee was not bound to do anything more than her own testimony showed that she did in expressing her nonacceptance, and her testimony was sufficient to overcome any *prima facie* presumption of acceptance arising from the

fact that the policies were found in her house or possession.

The judgment is therefore affirmed.

HILL v. SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY.

Opinion delivered February 15, 1915.

TELEPHONE COMPANIES—SERVICE TO PATRONS—GOOD FAITH.—In an action against a telephone company to recover penalties for a refusal to furnish telephone service, the issue is whether or not there has been a wilful refusal, or whether the failure to furnish service resulted on justifiable grounds, or from an honest mistake of fact; the issue is as to the company's good faith or wilfullness in the failure or refusal to furnish service.

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

M. Danaher and *Palmer Danaher*, for appellant.

This is a clear case of discrimination, and the court erred in directing a verdict. 192 Fed. 200; 110 Ark. 484; 102 *Id.* 551.

Walter J. Terry, for appellee; *A. P. Wozencraft*, of counsel.

Penal statutes apply only to intentional and wilful discrimination and not to errors, mistakes or delays. Appellee was acting in good faith and thought it owned the line. 76 Ark. 124; 101 *Id.* 600; 100 *Id.* 546; 107 *Id.* 611; 58 *Id.* 490; 110 *Id.* 484; 192 Fed. 200; 109 Ark. 35; 103 *Id.* 564.

McCULLOCH, C. J. Appellant instituted this action against appellee, the Southwestern Telegraph & Telephone Company, to recover statutory penalties for alleged discrimination in refusing to furnish telephone service during the period named in the complaint. Appellant resided at Sulphur Springs, in Jefferson County, Arkansas, a few miles distant from the city of Pine Bluff, where there was a telephone system operated by appellee's predecessor, the Pine Bluff Telephone Company. Appellant

alleges that he constructed a private line from Sulphur Springs to the corporate limits of Pine Bluff and was permitted to connect with the system of the Pine Bluff Telephone Company and use the service at the rate of $3 per month for the telephone in his store and $2 a month for the telephone in his residence, and that other residents of Sulphur Springs and thereabouts were furnished service at the same rate. He alleges that appellee purchased the system of the Pine Bluff Telephone Company and thereafter continued to furnish telephone service to other patrons similarly situated to appellant in and about Sulphur Springs on the same terms as formerly given by the Pine Bluff Telephone Company, but refused to furnish service to appellant on those terms and imposed a charge of $9 a month for telephone service in his store and $8 a month in his residence, which was prohibitory.

Appellee denied that there was any discrimination against appellant, but alleged that the line used by appellant was in fact owned by appellee's predecessor, the Pine Bluff Telephone Company, and was within the terms of the conveyance of that company to appellee, and that there was no discrimination for the reason that the persons in and about Sulphur Springs who were given the old rate owned their private lines over which the service was furnished. The case was tried before a jury and the court gave a peremptory instruction upon appellant's own testimony, holding that it was insufficient to make out a case of discrimination. Appellee did not introduce any testimony.

Appellant testified that he owned the line and had been given service at the rate of $3 for telephone in his business house and $2 in his residence, the same as to other patrons in that locality; that when the Pine Bluff Telephone Company sold out to appellee, the manager of appellee came out to Sulphur Springs and informed appellant that he would be charged $9 for the telephone in his store and $8 for his residence, and gave as a reason for it that the company owned the line, and not appellant, and that the orders from the officers of the company at

Little Rock were to charge appellant the advanced rate. Appellant testified that he protested against it and informed the manager positively that he owned the line and was entitled to the reduced service given to others.

The point of difference between the parties was with respect to the ownership of the line used by appellant from the corporate limits of Pine Bluff to Sulphur Springs. The contention of appellee is that it purchased from the Pine Bluff Telephone Company the line used by appellant, and was informed at the time of the purchase that the line was owned by the Pine Bluff company. Appellee undertook to justify the charge of the advanced rate on the ground that it was a rate fixed applicable to all persons on rural routes where the lines were not owned by the patrons. Under those circumstances there was a fixed charge for 'phone rent and what they called a radius charge based upon mileage. It is clear under the evidence that if the company owned the line to Sulphur Springs there was no discrimination in the charge sought to be imposed on appellant; on the other hand, if appellant owned the line himself, he was entitled to service at the rate of $3 for the 'phone in business house and $2 in residence, the same as other patrons in that locality. Now, there was no testimony adduced by appellee tending to support its contention that it owned the line to Sulphur Springs or that it had any reason to believe that it owned the line. On the contrary, the uncontradicted testimony adduced by appellant showed that he owned the line to Sulphur Springs which he had been using, and that from the very first moment his service was withdrawn he informed the manager of his ownership and protested against the advanced rate. Notwithstanding his protest, service was refused at the old rate for about a month, and then after appellant had produced a written statement from the manager of the former company to the effect that it did not claim ownership of the private line to Sulphur Springs, the service was promised to appellant at the old rate but was not given for several weeks.

We have construed the statute under which appellant seeks to recover a penalty, and in regard to it said: "The manifest purpose of the statute is to inflict a penalty on a telephone company, not for negligence or inattention in failing to repair its instrumentalities for supplying service, but for wilful refusal to furnish telephone connections and facilities without discrimination or partiality to all applicants who comply with the rules. The statute forbids discrimination, and mere neglect or inattention in repairing instruments does not constitute that." *Southwestern Tel. & Tel. Co.* v. *Murphy,* 100 Ark. 546.

In the *Danaher* cases, 94 Ark. 533, 102 Ark. 547, we held that a refusal to furnish service based upon an effort to enforce an unreasonable regulation constituted discrimination which authorized a recovery under the statute. In those cases the suit was based on refusal to furnish service because the applicant had refused to pay a disputed bill for former service, and we held that the company had no right to refuse service in order to enforce the payment of a past due bill.

In the case of *Southwestern Telegraph & Telephone Company* v. *Garrigan,* 107 Ark. 611, we reiterated the doctrine of the *Murphy* case, *supra,* and held that where the testimony showed that the failure to furnish service was the result of misunderstanding or accident it was improper to take the case from the jury and instruct a verdict against the telephone company. The question in each case of this sort is whether or not there has been a wilful refusal or whether the failure to furnish service resulted on justifiable grounds or from an honest mistake of fact. It involves, in other words, the question of good faith or wilfulness in the failure or refusal to furnish service.

We are of the opinion that in this case the testimony adduced by appellant warranted a submission of that issue to the jury. The evidence was sufficient to sustain a finding that appellant owned the private line which entitled him to service at the old rate, the same as given to other patrons; that the company was fully informed of

that fact, and, in order to force him to pay the advanced rate, refused to furnish him service.

Under the testimony as adduced, if believed, the jury might have found that the claim by appellee to the ownership of the private line used by appellant was a mere pretext put forth for the purpose of exacting an exorbitant rate from appellant. In testing the legal sufficiency of the testimony, we must draw the strongest reasonable inference which is warranted.

The court erred in taking the case from the jury, and the judgment is reversed and the cause is remanded for a new trial.

SILVIE v. STATE.

Opinion delivered February 15, 1915.

1. CRIMINAL PROCEDURE—CONSOLIDATION OF CAUSES—PREJUDICE.—Where there were three indictments pending against defendant, in the absence of an objection by him, it will not constitute reversible error to consolidate and try the three charges in one trial, where the record does not show him to have been prejudiced thereby.
2. EMBEZZLEMENT—SUFFICIENCY OF INDICTMENT.—An indictment for embezzlement, after charging the conversion of certain checks into money, alleged that accused "did unlawfully, fraudulently and feloniously make way with, embezzle and convert to his own use the said sum" of money, specifying $86.40 in the one, and $116.00 in the other, with no other description of the money. *Held*, the indictment was defective in not describing the money embezzled in terms required by the statute.
3. EMBEZZLEMENT—DEFECTIVE INDICTMENT—ALLEGATION OF OWNERSHIP.—An indictment for embezzlement will be held defective which does not allege the ownership of the money alleged to have been embezzled.
4. EMBEZZLEMENT—PROOF—DUTY OF STATE.—In order for the State to convict accused of the crime of embezzlement, under the facts, it is necessary for the State to allege and prove that accused embezzled certain checks, the property of certain persons named, or that he embezzled their money.
5. OBTAINING MONEY UNDER FALSE PRETENSES—SUFFICIENCY OF INDICTMENT.—An indictment charging the obtaining of money under false pretenses, which alleges that accused "did unlawfully, falsely, fraudulently and feloniously obtain from E. H. $53.54, gold, silver

and paper money, of the value of $53.54," etc., *held* to sufficiently allege the ownership, and sufficiently describe the money.

6. OBTAINING MONEY UNDER FALSE PRETENSES—NECESSARY PROOF.—The allegations in an indictment, charging the crime of obtaining money under false pretenses, must be sustained by proof as to the kind of money described therein.

7. CRIMINAL PROCEDURE—INSTRUCTED VERDICT.—In a prosecution for obtaining money under false pretenses, where the proof fails to sustain the indictment, as to the kind of money obtained by the accused, upon request the court should give a peremptory instruction to find the defendant not guilty.

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

STATEMENT BY THE COURT.

At the September, 1914, term of the Sebastian Circuit Court, for the Fort Smith district, appellant was indicted for three distinct and separate offenses. One indictment charged him "of the crime of obtaining money under false pretenses committed as follows, towit: The said W. I. Silvie, in the county, district and State aforesaid, on the 18th day of July, 1914, did unlawfully, falsely, fraudulently, and feloniously obtain from Ed Haglin $53.54, by falsely and feloniously stating to the said Ed Haglin that he (the said W. I. Silvie) had paid to Meister Brothers-Bracht Company a bill for $53.54 for material used in the repair of the hotel of the said Ed Haglin by the said W. I. Silvie, which said statement was false and untrue," etc.

Another indictment charged Silvie "of the crime of embezzlement committed as follows, towit: The said W. I. Silvie, in the county, district and State aforesaid, on the 18th day of July, 1914, then and there being over the age of sixteen years and being the agent and bailee of Ben Wolf and Al Pollock, and having then and there in his custody and possession as such agent and bailee as aforesaid, a certain check for $86.40 of the value of $86.40, the property of the said Ben Wolf and Al Pollock did convert the same into money amounting to $86.40 and unlawfully, fraudulently and feloniously make way with, embezzle and convert to his own use," etc.

Another indictment charged appellant "of the crime of embezzlement committed as follows, towit: The said W. I. Silvie, in the county, district and State aforesaid, on the 18th day of July, 1914, then and there being over the age of sixteen years, and being the agent and bailee of E. H. Stevenson, and having then and there in his custody and possession as such agent and bailee as aforesaid, a certain check for $116 of the value of $116, the property of the said E. H. Stevenson, did convert the same into money amounting to $116 and unlawfully, fraudulently and feloniously make way with, embezzle and convert to his own use the said sum of $116," etc.

The appellant demurred to each of these indictments. The demurrer was overruled and appellant duly saved his exceptions. The causes were consolidated for the purposes of the trial.

The bill of exceptions recites, "The above entitled cause coming on for trial before the Hon. Daniel Hon, judge, presiding, came the State of Arkansas by its prosecuting attorney, Paul Little, and came the defendant by his attorney, G. W. Dodd, and the parties announcing ready for trial, a good and lawful jury was empaneled and sworn to try the issues joined," etc.

At the conclusion of the testimony the appellant asked the court to direct a verdict in his favor, which the court refused.

Appellant was convicted and sentenced to one year imprisonment in the State penitentiary on each of said indictments.

One of the grounds in the motion for a new trial was "that the court erred in consolidating the three indictments against the defendant."

Sam R. Chew, for appellant.

1. The indictments did not contain a sufficient description of the money. The demurrers for embezzlement should have been sustained. 51 Ark. 112; 42 *Id.* 517; 51 *Id.* 119; 65 *Id.* 82; 71 *Id.* 415; 80 *Id.* 495.

2. Ownership of the property is an essential element and must be averred. 97 Ark. 1; 97 *Id.* 92; 102 *Id.* 627; 73 *Id.* 32.

3. There is no proof of agency or that appellant was a bailee. 51 Ark. 119.

4. The offense of false pretense is statutory. Kirby's Dig., § 1689. There must be the *intent* and *design* to defraud, and both must be averred in the indictment. A variance between the averment of ownership and the proof is fatal. 97 Ark. 1; 99 *Id.* 121; 73 *Id.* 32; 55 *Id.* 244; 85 *Id.* 499; 37 *Id.* 443; *Ib.* 445; 60 *Id.* 141.

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

We confess error in the consolidation of the causes. 80 Ark. 495. Nor is the description sufficient. 109 Ark. 411. The judgment should be reversed and the cause remanded. 108 Ark. 224.

WOOD, J., (after stating the facts). The Attorney General confesses that the court erred in consolidating the causes for trial. This court, in *McClellan* v. *State,* 32 Ark. 609, and in *Halley* v. *State,* 108 Ark. 224, has criticised and condemned the practice of consolidating separate causes under separate indictments for the purpose of trial. In the latter case we said: "While the court would have no authority against the objection of the defendant to try the cases together, yet as the record affirmatively shows the defendant expressly consented to it, and inasmuch as the record does not show he was prejudiced thereby, he can not now be heard to complain of the action of the court which was superinduced by him."

(1) Here, while the record does not show the affirmative consent of the appellant to the consolidation, or that he requested the same, neither does it show that he objected to such procedure. Being present and not objecting, he must be held to have waived the irregularity, and since the record does not disclose that he was prejudiced thereby, he is in no attitude to complain.

(2) The Attorney General also confesses that the court erred in overruling the demurrers to the indictment for embezzlement, for the reason that there was no sufficient description of the money alleged to have been embezzled. This confession of error is well taken. The indictments, it will be observed, did not charge embezzlement of the checks, but, after charging the conversion of the checks into money, they alleged that he "did unlawfully, fraudulently and feloniously make way with, embezzle and convert to his own use the said sum" of money, specifying $86.40 in one case and $116 in the other, with no other description of the money.

In *Cook* v. *State,* 80 Ark. 495, the appellant was charged, among other things, with the larceny of six dollars in money of the value of six dollars." In that case we said: "The indictment describes it as 'six dollars in money of the value of six dollars,' without alleging the kind, whether gold, silver or paper, and the evidence goes no further than that in describing it. This is not sufficient, as the statute provides that 'it shall not be necessary to particularly describe in the indictment the kind of money taken or obtained, further than to allege gold, silver or paper money.' Kirby's Digest, § 1844."

If the indictment had charged, in the language of the statute, *supra,* that the money embezzled was "gold, silver or paper money," it would have been sufficient. *State* v. *Boyce,* 65 Ark. 82; *Marshall* v. *State,* 71 Ark. 415. But the indictments did not do this, and hence did not comply with the requirements of the statute.

(3) These indictments for embezzlement are further defective in not alleging the ownership of the money alleged to have been embezzled. *Merritt* v. *State,* 73 Ark. 32; *Fletcher* v. *State,* 97 Ark. 1; *Russell* v. *State,* 97 Ark. 92; *Wells* v. *State,* 102 Ark. 627.

(4) In view of further proceedings on the charges of embezzlement, it is not improper to state that in order to convict the appellant of these it will be necessary for the State to allege and prove either that appellant em-

bezzled the checks, the property of Wolf and Pollock and of Stevenson, or that he embezzled their money.

(5-6) The indictment for obtaining money under false pretenses was sufficient. There was a sufficient allegation as to ownership and as to the description of the property. The indictment charged that appellant "did unlawfully, falsely, fraudulently and feloniously obtain from Ed Haglin $53.54 gold, silver and paper money of the value of $53.54," etc. This was a sufficient allegation of ownership in Haglin, and a sufficient description of the money. But there is no proof in the record showing the kind of money that appellant obtained. We have held that the allegations of the indictment must be sustained by proof as to the kind of money described therein. *Maxey* v. *State,* 85 Ark. 500, and cases there cited.

(7) The court should have granted appellant's request for a peremptory instruction on the false pretense charge because of a failure of proof.

For the error in overruling appellant's demurrer to the indictments for embezzlement, and in refusing to grant his prayer for a peremptory instruction on the charge of false pretenses, the judgments are reversed and the causes are remanded with directions to sustain the demurrer to the indictments for embezzlement, and for a new trial on the charge of false pretenses.

KENNEDY v. STATE.

Opinion delivered February 15, 1915.

1. BASTARDY—MOTHER AS WITNESS.—Under Kirby's Digest, § 492, the mother is a competent witness in all cases of bastardy, unless she be legally incompetent in any case.
2. BASTARDY—MOTHER AS WITNESS—CORROBORATION.—In a bastardy case, where the mother is a witness (although she is married to another man), it is not necessary that she be corroborated, and she may testify to any fact tending to prove the illegitimacy of the child, except the single fact of nonaccess of her husband.
3. LEGITIMACY—WEDLOCK—PRESUMPTION.—Where a child is born in wedlock it is presumed to be legitimate.

4. BASTARDY—TESTIMONY OF WIFE—NONACCESS OF HUSBAND.—In bastardy proceedings, in the absence of a statute in express words making the mother competent to testify to the nonaccess of her husband, she will be held incompetent to do so.

5. BASTARDY—PRESUMPTION.—In a bastardy proceeding, the presumption of the legitimacy of the child will not be overcome where the mother, although testifying that the accused was the father of the child, stated that her husband was living, but did not testify to any fact which would tend to prove nonaccess on his part within the period of gestation, and where there is no other evidence tending to prove nonaccess of the husband.

Appeal from Sevier Circuit Court; *Jefferson T. Cowling,* Judge; reversed.

W. H. Collins and *Pole McPhetrige,* for appellant.

Our statutes do not in terms define who are to be considered bastards, but at the common law, which prevails in this State except where altered by statute, they are defined to be children born out of wedlock. Kirby's Dig., chap. 13; 2 Greenleaf on Evidence, Redfield's Ed., § § 150, 151, and marginal notes. See, also, 1 Bouvier's Law Dict., Rawl's Revision; 2 Kent, § 151. A child born in wedlock is presumed to be legitimate. 6 How. 550; 115 Fed. 124.

Husband and wife are alike incompetent to prove nonaccess of the husband while they lived together. 4 Jones, Com. on Evidence, 406, 407.

Where marriage is proved, nothing short of proof of facts showing it to be impossible that the husband could be the father, can suffice to show illegitimacy of the issue. 6 How. 550; 24 How. 563-609.

No brief filed for appellee.

WOOD, J. The question presented by this appeal is whether or not a verdict finding appellant to be the father of a child in bastardy proceedings is sustained by the testimony alone of the mother of the child, to the effect that the appellant had sexual intercourse with her on the 10th of September; that she discovered that she was pregnant about the middle of October, and that appellant was the father of the child, the witness stating also that at that time she had a living husband.

(1-2) Under our statute the mother is a competent witness in all cases of bastardy unless she be legally incompetent in any case. Kirby's Digest, § 492; *Barnett* v. *State,* 16 Ark. 530. It is not necessary that her testimony be corroborated. *Qualls* v. *State,* 92 Ark. 200. She may testify to any fact tending to prove the illegitimacy of the child except the single fact of nonaccess of her husband.

In 1734 Lord Hardwicke, in *R.* v. *Reading,* Lee, T. Hardwicke, 79, announced the rule that in affiliation proceedings the bastardy of a child could not be established upon the sole and uncorroborated testimony of the mother of such child as to nonaccess of her husband. This rule prevailed in England down to 1777, when Lord Mansfield, in *Goodright* v. *Moss,* 2 Cowp. 591, declared as follows: "It is a rule founded in decency, morality and policy that they" (husband and wife) "shall not be permitted to say, after marriage, that they have had no connection and that therefore the offspring is spurious."

The weight of authority in this country at the present time is in favor of the doctrine announced by Lord Mansfield, and it is now generally held that, in the absence of a statute authorizing a married woman to testify as to the fact of nonaccess of her husband, she is incompetent to testify to that single fact in an affiliation or bastardy proceeding. 3 Ruling Case Law, § 11, p. 731; 6 Am. & Eng. Ann. Cas. 816, note.

In *Tioga County* v. *South Creek Township,* 75 Pa. St. 433, the court said: "Many reasons have been given for this rule, prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this is not so much that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child who is in no fault but who must nevertheless be the chief sufferer thereby. * * * That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency, and hence the rule which forbids it."

There are respectable authorities holding that under statutes making the mother a competent witness in bastardy proceedings, she may testify to the nonaccess of her husband. See *Pleasant Evans* v. *State* ex rel. *Irene Freeman,* 165 Ind. 369; also, *State* v. *McDowell,* 101 N. C. 734. But we are in full accord with the doctrine that, on the ground of decency and morality and as a matter of public policy, a husband and wife should not be permitted to testify to nonaccess in affiliation proceedings. For when they so testify they proclaim their own lechery and their infidelity to each other and reveal secrets that are so purely delicate and personal as to make it grossly indecent to advertise them to the world. By so doing they not only scandalize the sacred marital relation, but they cast a cloud upon the life of the unoffending child, and subject it to handicaps and embarrassments that are always most hurtful and most difficult to overcome. In the interest of society and for the benefit of the innocent offspring, this should never be permitted.

(3) These are doubtless the reasons out of which grew the presumption that a child born in wedlock is legitimate. This presumption had its origin in remote times and for ages was deemed conclusive.

"It was a maxim of the Roman law, and one which the common law copied, that the presumption is that he is the father whom the marriage indicates, and Montiesquie, alluding to it, observed that 'the wickedness of mankind makes it necessary for the law to suppose them better than they really are. Thus we judge that every child conceived in wedlock is legitimate, the law having a confidence in the mother as if she were chastity itself.' * * * The early common law in England was that if the wife had issue while her husband was within the four seas, that is, within the jurisdiction of the King of England, such issue was conclusively presumed to be legitimate, except upon proof of the husband's impotency; and even if he was beyond the four seas, he must have been away for so long a period before the birth of the child as to

make it a natural impossibility that he could be the father." 3 R. C. L., § 6, p. 726.

This rule, however, was gradually relaxed in England, and now the rule there, as well as in this country, is that the presumption of legitimacy "may be wholly removed by proper and sufficient evidence showing that the husband was impotent, entirely absent so as to have had no intercourse or connection of any kind with the mother, entirely absent at the period in which the child must, in the course of nature, have been begotten, or present only under such circumstances as to afford clear and satisfactory proof that there was no sexual intercourse." 3 R. C. L., § 7, p. 727.

(4) In the absence of a statute in express words making the mother competent to testify to the nonaccess of her husband, we hold that she can not do so. Under our statute, as we have seen, the mother is a competent witness. She may testify to facts which tend to prove that access on the part of her husband within the period of gestation was impossible, and if she testified to facts of that character there would be a question for the court or jury trying the issue to determine as to whether or not the presumption of legitimacy had been overcome. But, in this case, there is no such testimony. She does not testify to any fact that would warrant the conclusion that her husband did not have access within the period of gestation.

Mr. Chamberlayne, in his work on Evidence, in speaking of the matters by which the presumption of legitimacy may be rebutted, says: "Impossibility of procreation must, however, be established, in order to justify the affirmative action of the court. Even a high degree of improbability is not sufficient for the purpose of bastardizing the offspring. * * * The question in each case is, of course, as to actual access on the part of the husband. That fact being proved or disproved, the judicial inquiry, as a rule, ceases. 2 Modern Law of Evidence, p. 1340, § 1089.

(5) In this case the mother testified that appellant had sexual intercourse with her and was the father of the child; but she also states that her husband was living, and does not testify to any fact that would tend to prove nonaccess on his part within the period of gestation, and there is no other evidence tending to prove nonaccess of the husband. Therefore, the presumption of legitimacy has not been overcome, and the evidence is not legally sufficient to sustain the verdict. The judgment is therefore reversed and the cause remanded for a new trial.

THE McCALL COMPANY v. SMITH.

Opinion delivered February 15, 1915.

1. APPEAL AND ERROR—ERROR IN FACE OF RECORD.—Where the error complained of appears on the face of the record, it is not necessary to have a bill of exceptions, in order to have the ruling of the trial court reviewed on appeal.
2. JUDGMENTS—CONSENT—APPEAL.—A judgment by confession or consent can not be appealed from.
3. JUDGMENTS—CONSENT.—The record of a justice read: "The evidence offered by the plaintiff being held inadmissible by the court, at the suggestion of plaintiff's attorney, the jury returned a verdict for the defendant." On appeal to the circuit court, the appeal was dismissed. *Held*, the recitals of the justice's record are not sufficient to show a judgment by confession or consent.
4. JUDGMENTS—CONFESSION OR CONSENT—EVIDENCE.—Before a judgment should be treated as one rendered on confession or consent, the recitals showing such confession or consent should be clear and unequivocal.

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

STATEMENT BY THE COURT.

Suit was instituted by the appellant against the appellees before a justice of the peace to recover for an alleged balance due on account for merchandise, etc., alleged to have been furnished on a contract between appellant and appellees. At the hearing the appellant, to sustain its claim, offered certain evidence which the justice of the peace held to be inadmissible. The record of the

justice of the peace contains this recital: "The evidence offered by the plaintiff being held inadmissible by the court, at the suggestion of plaintiff's attorney the jury returned a verdict for the defendants." Then follows the formal entry of the judgment.

The appellant appealed to the circuit court. In the circuit court the appellees moved to dismiss the appeal on the ground that the judgment was rendered against plaintiff "at its suggestion and by its consent." The court granted the motion and entered a judgment dismissing the appeal.

Cooke & Shouse, for appellant.

The justice excluded evidence offered by appellant, and his action, as shown by the whole record, was, in effect, a compulsory nonsuit. The record does not show a judgment by confession or by consent. The judgment was appealable. Kirby's Digest, § 4665. The action of the court was arbitrary. 32 Ark. 74; 59 *Id.* 330; 90 *Id.* 591. A mere "suggestion" is not a confession nor a consent. 5 Ark. 166; 32 *Id.* 74. The case of 101 Ark. 348, is not applicable.

Sam Williams, for appellee.

1. The record shows affirmatively that the judgment was rendered at the suggestion of plaintiff's attorney; this record, however, is only *prima facie,* and could have been contradicted or amended to conform to the facts. 43 Ark. 230; 46 *Id.* 153; 51 *Id.* 317; 52 *Id.* 373; 58 *Id.* 181; Kirby's Digest, § 4673. In the absence of a bill of exceptions the judgment is conclusive. 41 Ark. 225; 47 *Id.* 230; 44 *Id.* 482; 58 *Id.* 399; 54 *Id.* 463.

2. One can not appeal from a judgment by consent. 2 Stand. Enc. of Proc., 200-206; 32 Ark. 74; 101 Ark. 348.

WOOD, J., (after stating the facts). The only question presented by this appeal, is whether or not the record of the justice of the peace, stating that "at the suggestion of plaintiff's attorney the jury returned a verdict for the defendants" showed on its face, a judgment by consent.

(1) The error, if any, appears on the face of the record, and it was not necessary, therefore, to have a bill of exceptions in order to have the ruling of the trial court in passing on the motion to dismiss, reviewed.

(2-3) The recitals of the justice's record are not sufficient to show a judgment by confession or consent. Of course, a judgment by confession or consent could not be appealed from. *Saleski* v. *Boyd,* 32 Ark. 74; *Cave* v. *Smith,* 101 Ark. 348. But, at most, the recital under review only showed that the appellant's attorney, when the evidence offered by him was excluded by the court, suggested that the jury return a verdict for the appellant. This suggestion of the appellant's attorney was but tantamount to an admission on his part that, since the evidence offered to sustain appellant's claim was excluded by the court, it could not recover in that court, and in view of this ruling the verdict would necessarily have to be in favor of the appellees. This admission upon the part of appellant's attorney was far from a confession on his part that the appellees were entitled to a judgment or that he was consenting for a judgment to be entered against the appellant. The record further shows that on the same day that this judgment was entered the appellant "filed an affidavit for appeal to the circuit court."

(4) Taking the recitals of the record altogether it can not be said that they show that the judgment entered by the justice of the peace was on confession, or by the consent, of the appellant. The word *suggestion* is neither synonymous with *confession* nor *consent,* and before a judgment should be treated as one rendered on confession or consent the recitals showing such confession or consent should be clear and unequivocal. Such is not the case here.

Where "defendant agreed in open court that judgment might be rendered against him," we held that such recital was not a confession of judgment and could only be regarded as a judgment *nil dicit.* *Walker* v. *Wills,* 5 Ark. 167.

The court therefore erred in dismissing appellant's appeal from the justice court, and the judgment is therefore reversed and the cause remanded with directions for further proceedings according to law.

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* ISRAEL.

Opinion delivered February 15, 1915.

1. BENEFIT INSURANCE—CHANGE OF BENEFICIARY—RULES OF ORDER.—The constitution and by-laws of a fraternal order are part of the contract of insurance with holders of benefit certificates, and the rules provided therein for a change of beneficiary must be complied with, in order to make an attempted change effective.
2. BENEFIT INSURANCE—RULES OF ORDER—CHANGE OF BENEFICIARY.—Where the rules of a fraternal insurance order provided for the doing of certain specific things, when the holder of a policy desired to change the beneficiary therein, but had lost his certificate, *held*, the requirements of the rules of the order must be complied with, before a change of beneficiary in the certificate would become effective.

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

STATEMENT BY THE COURT.

Abner Israel sued the Sovereign Camp Woodmen of the World for $400, which he alleged was due him on a beneficiary certificate in that order. The facts are as follows:

William B. Bruce died in Fort Smith on June 29, 1914, leaving surviving him two minor children and his wife. He was at the time a member in good standing in the Sovereign Camp Woodmen of the World. The original beneficiary certificate issued to him was payable, $400 to his wife, and $300 each to his minor children. His wife had left him, and on June 25, 1914, while confined in a hospital in Fort Smith, Bruce executed an application for a duplication of the certificate, which he claimed had been lost, and asked to change the beneficiary, so far as the $400 was concerned, from his wife to Abner Israel. Abner Israel was his cousin with whom his children were

then living. He filed an affidavit in which he set out the terms of his benefit certificate and his desire to change the beneficiary from his wife to his cousin. He stated that his beneficiary certificate had been lost and that he did not know where it was and certified that it had not been assigned by him to secure the payment of any sum of money whatever and that it had not otherwise been disposed of by him. His application and affidavit for change of beneficiary were deposited in the mail for transmission to the order, but he died before it reached the clerk of the Sovereign Camp Woodmen of the World.

The constitution and by-laws of the order provide for a change of beneficiary and section 64 thereof prescribes the rule therefor as follows:

"(*a*) Should a member desire to change his beneficiary or beneficiaries he may do so upon the payment to the Sovereign Camp of a fee of twenty-five cents, with his request written on the back of his certificate, giving the name or names of such new beneficiary or beneficiaries, which sum, together with his certificate, he shall deliver to the clerk of the camp for attestation, who shall endorse thereon the fact of such payment and delivery and the date of same; and in case of the death of such member thereafter and before the issuance of a certificate payable to such new beneficiary or beneficiaries; then and in that event the amount payable upon such certificate shall be paid to such newly designated beneficiary or beneficiaries according to the terms of such member's request; and such camp clerk shall at once forward said payment and certificate to the sovereign clerk, and upon receipt thereof the sovereign clerk shall issue and return a new certificate, subject to the same conditions and rate as the one surrendered, which conditions shall be a part of the new certificate, in which he shall write the name or names of the new beneficiary or beneficiaries and shall record said change in the proper books of the Sovereign Camp.

"(*b*) In the event the beneficiary certificate is lost or the possession thereof is for any reason withheld from

the member desiring such change of beneficiary, before the change shall be made the member shall furnish the sovereign clerk satisfactory proof under oath of the loss of the certificate or proof under oath of the facts and circumstances of the withholding of such certificate from his possession, as the case may be, and waiving for himself and beneficiary or beneficiaries all rights thereunder, whereupon on payment of twenty-five cents the sovereign clerk, if such proof is satisfactory to him, shall issue to said member a new certificate in lieu of the old one, with the desired change of beneficiary, and shall at once mail to the last known postoffice address of the former beneficiary or beneficiaries notice of such change."

After the death of William B. Bruce, Abner Israel demanded payment as the beneficiary designated in the certificate and the order refused to pay him. Hence this suit. The case was tried before the court sitting as a jury, and from the judgment rendered in favor of the plaintiff the defendant has appealed.

Bradshaw, Rhoton & Helm, for appellant.

The change of beneficiary could only be made in the manner authorized by the terms of the contract. 130 N. W. 191; 141 N. W. 280; 132 N. W. 329; 131 Cal. 437; 137 Cal. 384; 110 Ia. 642; 94 Pac. 132.

The rules of the society must be followed to the exclusion of all others. 138 N. W. 615; 82 N. W. 331; 86 N. W. 216; 57 N. E. 787.

In order to change the beneficiary, the insured must substantially comply with the laws of the association, and the adoption of a particular method of changing a benefit certificate is the exclusion of all other methods. 124 S. W. 530; 89 Mo. App. 621; 34 Mont. 357; 115 Am. St. Rep. 532; 171 N. Y. 616; 57 O. St. 561.

Notice of a desire to change the designated beneficiary is not sufficient. 124 N. W. 475; 116 N. W. 188.

The death of a member before the change of beneficiary is completed, leaves the old certificate in force.

7 Ky. L. Rep. 751; 113 S. W. 698; 133 Ill. App. 398; 94 Pac. 132; 106 S. W. 176; 86 Pac. 423; 90 S. W. 526.

J. A. Gallaher, for appellee.

In insurance of this class the beneficiaries have no vested interest in the policy, and the insured can change the beneficiary at will. 29 Cyc. 125, 126; 97 Ark. 54.

When the insured has done all in his power to change the beneficiary and pursued the course pointed out by the laws of the association, his death before the issuance of a new certificate will not defeat the claim of the new beneficiary. 41 Fed. 1; 15 L. R. A. 350; 90 S. W. 528; 34 L. R. A. (N. S.) 277, 278, note.

HART, J., (after stating the facts). In the case of *Carruth* v. *Clawson,* 97 Ark. 50, we said that in the absence of provisions in a policy concerning the mode of changing the beneficiary, a change may be made by a member of a mutual benefit society in any method which clearly expresses his intention to make the change and gives direction to the proper officer of the society to carry his intention into effect; and where the member does all that he can toward effecting the change, the substitution is complete, though there remain acts to be done by the officers of the society in carrying the change into effect.

(1) Under the constitution and by-laws of the order in the case before us the right of the member to change the beneficiaries is absolute and the beneficiary can not prevent the change, if there is a substantial compliance with the rules of the order in making the change. The transaction, however, requires some formalities for the protection of the beneficiaries, and, the constitution and by-laws of the association being made a part of the contract, the change in the beneficiary can not be effected unless those rules are substantially complied with.

In the second edition of Niblack on Accident and Benefit Societies, at pages 415 and 416, the author said:

"When a mutual benefit society has, under the powers and within the limits of its charter, provided in its by-laws a particular method of changing a beneficiary, or has set forth in its certificate a way by which the

change may be made, no change of beneficiary may be made in any other mode or manner. The reason for this rule is not difficult to discover. It is based upon the familiar maxim that the expression of one thing excludes other and different things. When a society frames a set of rules providing for the distribution of a fund, and for the rights of beneficiaries and members, it must be assumed that it excludes every other mode and manner. Any other conclusion would lead to the most interminable confusion in the law applicable to the distribution of the insurance money, and fritter away, in the expenses of uncertain litigation, funds created for the benefit of widows, orphans and heirs. But there is still another reason. It can not be said that a beneficiary named in a certificate has no rights therein because he has no vested rights. The beneficiary has a right to the proceeds of the certificate of insurance, subject to the right of the member to change the beneficiary according to the terms of the by-laws and regulations of the society, which are a part of the contract of insurance; and the right of the beneficiary to have this contract carried out in the manner provided for is as binding upon the member as his right to change the beneficiary is binding upon the beneciary and the society. The power reserved to the member to change the beneficiary qualifies the right of the beneficiary in the contract. It makes the interest of the beneficiary a mere expectancy while the power to revoke the appointment continues; but this expectancy becomes an absolute right upon the death of the member, unless he has in the manner prescribed defeated it by the affirmative act of changing the beneficiary."

It will be noted that subdivision "a" of section 64 of the constitution and by-laws of the order, as set out in the statement of facts, prescribes the manner in which a member may change his beneficiary where his certificate has not been lost. Subdivision "b" provides the manner of making the change where the certificate has been lost.

Subdivision "a" provides, in substance, that where the member desires to change his beneficiary he may do so upon payment to the Sovereign Camp of a fee of twenty-five cents with his request written on the back of his certificate, giving the names of the new beneficiary or beneficiaries, which sum, together with his certificate, he shall deliver to the clerk of the camp for attestation. It is provided further that in case of the death of the said member before the issuance of a certificate payable to the said new beneficiary, then the amount payable on such certificate shall be paid to the newly designated beneficiary according to the terms of the member's request. In such a case, it will be noted, the act of the clerk of the camp in making the change is merely ministerial, and the member having done all that he was required to do in order to make the change, the constitution and by-laws provide that it shall be made, even though he should die before the formalities required of the sovereign clerk are complied with.

Subdivision "b," which applies in cases where the certificate has been lost, prescribes an essentially different manner of making the change. In such a case before the change shall be made the member is required to furnish the sovereign clerk satisfactory proof under oath of the loss of the certificate, and if such proof is satisfactory to him the clerk issues to the member a new certificate in lieu of the old one with the desired change of beneficiaries. This requires an exercise of judgment and discretion on the part of the sovereign clerk and his action is not merely ministerial or formal. It is his duty to see that satisfactory proof is made that the certificate is lost and he can only issue a new certificate in lieu of the old one when such satisfactory proof is made.

As we have already seen, the constitution and by-laws of the order are a part of the contract between the order and the members thereof and the rules in regard to the change in the beneficiary are for the protection of the order, the beneficiary and the member. Such a rule

is a reasonable one, and tends to protect the order from needless litigation.

(2) In the case before us the member merely stated that his old certificate had been lost. There was nothing in the affidavit tending to show the circumstances attending the loss of the certificate. In any event the constitution and by-laws of the order required the sovereign clerk to exercise some jugdment as to whether or not the proof of loss of the certificate was satisfactory, and, the member having died before the affidavit was presented to the sovereign clerk for his action and judgment, it can not be said that the rules of the order had been complied with, and for that reason we are of the opinion that no change was made in the beneficiaries before the death of the member.

This being the case, the plaintiff was not entitled to maintain his action. It follows that the judgment must be reversed, and, the cause of action having been fully developed, the complaint of the plaintiff will be dismissed.

BRADLEY LUMBER COMPANY v. HAMILTON.

Opinion delivered February 15, 1915.

1. TIMBER—STANDING TIMBER—CONVERSION—DAMAGES.—The measure of damages for the conversion of standing timber is the value of the timber, at the time and place of the conversion, if the cutting was done in good faith, but, if the cutting was done in bad faith, the enhanced value of the timber may be recovered.
2. TIMBER—CONVERSION—DAMAGES—PROOF.—In an action for damages for the conversion of standing timber, evidence is admissible tending to show the value of the timber, at the nearest shipping point, and the cost of cutting the same and transporting it there, being competent to show the value of the timber at the time and place where it was converted by the defendant.
3. TIMBER—CONVERSION—DAMAGES—INTEREST.—In an action for damages for conversion of standing timber, where the damages are capable of ascertainment, by reference to reasonably certain market values and the various items of damage have been duly and adequately presented, and payment demanded before suit is commenced, the claimant is entitled to interest, from the time of such demand.

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

STATEMENT BY THE COURT.

The Bradley Lumber Company bought certain lands situated in Bradley County, Arkansas, from C. C. Colvin in 1905, and in 1909 cut and removed the timber on said land. Colvin obtained a deed from the State of Arkansas and sold 120 acres of it to the Bradley Lumber Company and resided upon the remaining forty acres.

In 1912 Mrs. A. A. Hamilton and others instituted a suit in the chancery court for the recovery of this land and sought to cancel the deed from the State to Colvin and from Colvin to the Bradley Lumber Company as a cloud upon their title.

The chancery court decreed a three-fourths undivided interest to Mrs. Hamilton and the other plaintiffs and a one-fourth undivided interest to the Bradley Lumber Company. The case was appealed to the Supreme Court and affirmed. See *Bradley Lumber Co.* v. *Hamilton,* 109 Ark. 1.

In a subsequent opinion in the same case reported in the same volume at page 598 a motion was made to modify the decree and was overruled. 109 Ark. 598.

A master had been appointed and directed to determine the amount to be awarded as damages and the appeal upon that part of the decree cancelling the title of the Bradley Lumber Company and adjudging the title to be in the plaintiffs, Mrs. Hamilton, and others was prosecuted without waiting for the report of the master to come in. The court held that the adjudication of the value of the timber was a separate issue which the affirmance of the original decree did not affect. The master made a report upon the evidence taken before him and found a state of facts substantially as follows:

The timber was cut from the land within less than three years before the institution of the action. The defendant, Bradley Lumber Company, cut and removed the timber from the land while it had color of title and under the mistaken belief that it was the true owner, and 1,129,-

620 feet of pine timber were cut from it and and also a small quantity of oak timber. The master found that the pine timber in the trees was worth $2 per thousand and that the market value of the timber was $3.20 per thousand and fixed the value of the pine timber cut from the land at the latter sum. He found that this amounted to $3,615.42; and also found that there were three hundred oak ties made from the timber on the land and that their value was thirty-two cents per tie, amounting to $96. To the report of the master both the defendant and the plaintiffs filed their exceptions in due form. The court overruled the exceptions of both plaintiffs and defendant to the master's report except as to the three hundred oak ties. These were found to be of the value of $30 instead of $96 as reported by the master.

The court found that the plaintiffs owned a three-fourths interest and the defendant a one-fourth interest and it was ordered and decreed that the plaintiffs recover the sum of $2,734.07 with interest thereon at six per cent per annum from November 1, 1909, to the date of the judgment, and that the judgment bear interest at the rate of 6 per cent per annum. The defendant, Bradley Lumber Company, has appealed. Other facts will be stated in the opinion.

D. A. Bradham, for appellant.

1. The value of the timber cut at the time and place of cutting is the measure of damages where defendant did not act wilfully. 38 Cyc. 1130 (B); 87 Ark. 83; 186 U. S. 279; 106 *Id.* 432; 192 *Id.* 524; 65 Ark. 449; 117. Pac. 720; Ann. Cas. 1912, A. 919. Appellant thought and believed it was the true owner of the land. 153 Mo. App. 442; 134 S. W. 586.

2. There is error in the allowance of interest. Interest is not allowed on an unliquidated amount. 32 Ark. 573; 21 *Id.* 355; 50 *Id.* 177; 39 *Id.* 387; 76 *Id.* 388.

J. R. Wilson and *Williamson & Williamson,* for appellees.

1. The value of the timber at the most favorable market available to the real owner, less the cost of get-

ting the timber to that market, is the amount to which appellees are entitled. 38 Cyc. 1130 (B); 87 Ark. 83; 65 *Id.* 449; 22 Mich. 311; 37 *Id.* 322; Schouler on Per. Prop (2 ed.) 37; 91 N. W. 737; 106 U. S. 432; 105 N. W. 1073.

2. Interest was properly allowed at 6 per cent. 76 Ark. 388; Kirby's Dig., § § 1285, 5387; 85 Ark. 137.

HART, J., (after stating the facts). In *St. Louis, I. M. & S. Ry. Co.* v. *Ayres,* 67 Ark. 371, an action for the recovery of damages for the negligent burning of young oak trees, the damages were held to be the difference in the value of the land before and after the fire which destroyed the trees. In that case the trees were young and were not ready for the market. Therefore, the destruction of the trees was a depreciation of the value of the land of which they were a part.

In the present case the timber was ready for the market and no damages were sought for any depreciation in the value of the land. It will also be noted that the court found that the defendant, Bradley Lumber Company, cut timber from the land while it had color of title and under the mistaken belief that it was the true owner thereof. We do not deem it necessary to fully abstract the testimony on that point for it supports the finding of the court.

(1) The effect of our decisions in the cases of *Eaton* v. *Langley,* 65 Ark. 448, and the *Central Coal & Coke Co.* v. *John Henry Shoe Co.,* 69 Ark. 302, is that the measure of damages for the conversion of standing timber is the value of the timber at the time and place of the conversion if the cutting was done in good faith, but if the cutting was done in bad faith the enhanced value of the timber might be recovered.

To the same effect see *United States* v. *Flint Lumber Co.,* 87 Ark. 80.

(2) In the case before us testimony was introduced tending to show the value of the timber at the nearest shipping point and the cost of cutting the same and transporting it there. This testimony was competent to show

the value of the timber at the time and place where it was converted by the defendant. We do not think it necessary to abstract the testimony or to comment upon it in detail. We deem it sufficient to say that the testimony abundantly supports the finding of the master and of the chancellor that the market value of the timber at the time and place it was converted by the defendant was $3.20 per thousand.

It can be readily seen that timber at one place on account of its accessibility to the market might be worth much more than if it were situated at a more remote place where it would be more difficult to employ hands to cut it and would cost more to convey it to the market.

The court made a deduction in the value of the oak timber as found by the master but the defendant is not in a position to complain of that because, if an error, it was in defendant's favor.

(3) The timber was cut by the defendant in the year 1909 and before November of that year and there was no error in charging interest from November 1 of that year. See *Nunn* v. *Lynch,* 89 Ark. 41.

In *Nunn* v. *Lynch, supra,* the court cited with approval the discussion in the case of *Laycock* v. *Parker,* 103 Wis. 161. In that case the court held that where damages were capable of ascertainment by reference to reasonably certain market values and the various items of damage have been duly and adequately presented, and its payment demanded before suit is commenced, the claimant is entitled to interest from the time of such demand.

The claim of the plaintiffs in this case was capable of ascertainment by the defendant after its presentation by reference to the reasonably certain market value of the timber cut and removed by the defendant. Therefore, the plaintiff was entitled to interest, and no error prejudicial to the defendant was committed in the allowance made by the court.

It follows that the decree must be affirmed.

DONNELL v. BROCKMAN.

Opinion delivered February 15, 1915.

1. ELECTRICITY—READINESS TO SERVE—MINIMUM CHARGE.—A city ordinance, which provides that where a meter is used in the service of illuminating electricity, the rate charged shall not exceed fifteen cents per kilowatt, does not prohibit a consumer from contracting with the light company that the consumer will pay a rate per month of $1.50, as a minimum fee or readiness to serve charge, whether an amount of electricity of that value be used or not.
2. EVIDENCE—ELECTRICITY—MINIMUM CHARGE.—A city ordinance provided that consumers of electricity could be charged only at the rate of fifteen cents per kilowatt in the event a meter was used. Defendant, who supplied electricity, fixed a minimum rate of $1.50 per month, irrespective of the amount of electricity used. In an action to collect the charge of $1.50, where defendant claimed the charge to be in violation of the ordinance, evidence that such a rule and regulation had been in force since the establishment of the light plant was admissible.

Appeal from Franklin Circuit Court, Ozark District; *Jeptha H. Evans,* Judge; affirmed.

STATEMENT BY THE COURT.

George Brockman brought this suit against John Donnell, in the justice court in Franklin County to recover $1.50 for electric light service for the month of June, 1914. From the judgment against him, he appealed to the circuit court, where upon trial the court instructed a verdict in his favor, from which this appeal comes.

It appears that the appellee is the owner of the electric light plant at Ozark, which supplies that town, Altus and Denning. He purchased the same at a receiver's sale.

He testified that he was charging the same rates to all consumers and following the regulations prescribed by his predecessors in the operation of the light plant; that he charged $1.50 to all persons upon meters, a minimum fee or readiness to serve charge, whether the amount of electricity consumed at the prescribed rate equaled that or not. The manager and owners of the light plant before him, as well as the receiver, testified that they had charged the same uniform price to all consumers of electricity where meters were installed. This testimony was objected to as incompetent.

The appellant himself testified that he had installed lights and a meter in his home when it was constructed about seven years before, and that he had always paid the price charged him, which was a minimum of $1.50 per month, without regard to whether the electricity consumed equaled that amount at the prescribed rate; that he paid this charge supposing it was being made in accordance with the ordinance of the city granting the franchise, until 1914, when he learned of the provisions of the ordinance and refused to pay the charge of $1.50 per month, and was willing to pay only fifteen cents per kilowatt for the electricity shown to be consumed by the meter.

The franchise was introduced in evidence and shows the maximum price allowed to be charged per month for sixteen candle-power lights, $1 each; two lights, $1.50; three lights, $1.80, and four lights or more in one building, price not to exceed fifty cents per month each. Section 6 provides: "The use of an electric meter may be agreed upon by and between the said company and the consumer, and when such meter is used, the rate shall not exceed fifteen cents per kilowatt."

Appellant had nearly twenty lights in his home, according to the statement of appellee, and about nine or ten, according to his own statement.

Sam R. Chew, for appellant.

The ordinance introduced in evidence was the law and the contract between appellant and appellee, and was the sole means by which the amount appellant owed could be ascertained. 5 Ark. 595; 24 Ark. 96; 30 Ark. 128; 31 Ark. 494; 70 Ark. 300.

J. D. Benson, for appellee.

By section 6 of the ordinance, the basis upon which a consumer may have a meter is left open for agreement between the parties, the only limitation being that the rate shall not exceed fifteen cents per kilowatt. Such being the case, if a consumer desires to use a meter, the company has the right to fix the terms and conditions upon which it will agree to the use of the meter, and to

fix a reasonable minimum rate therefor. 15 Cyc. 470; 91 Ark. 89; 59 Ark. 344; 70 Ark. 481.

KIRBY, J., (after stating the facts). It is insisted that the court erred in directing a verdict for appellee, and in permitting the introduction of testimony of the former owners of the plant, showing the uniform collection of the minimum fee or readiness to serve charge of all consumers using meters.

Appellant had nearly twenty lights in his home, which at the flat rate would have cost him fifty cents per month, each, and by the terms of the ordinance the use of a meter could be agreed upon between the consumer and the company, "and when such meter is used, the rate shall not exceed fifteen cents per kilowatt." Of course, appellant was bound by the terms of his franchise, and could not make a higher charge for electricity than that fixed therein, under the terms prescribed. It is a well-nigh universal custom, however, for operators of electric lighting plants to establish and demand a minimum service fee, or readiness to serve charge of all consumers using meters.

(1) The ordinance by its terms authorizes the parties to agree upon the use of a meter, and provides when such meter is used the rate charged shall not exceed fifteen cents per kilowatt. It is also true that under the terms of the ordinance, if no meter was used, appellant would have been required to pay a much greater sum per month for the lights in his house than the amount demanded by appellee. The franchise permits the parties to agree upon the use of a meter, and although it limits the rate to be charged for electricity consumed when a meter is used, to not exceeding fifteen cents per kilowatt, it does not prohibit the right to contract or agree to pay so much per month as a minimum fee or a readiness to serve charge for the use of the meter, nor to agree that the consumer will pay for so much electricity each month at the prescribed rate, whether that amount be consumed or not. Any such agreement would not conflict with the provisions of the ordinance limiting the rate to be charged to not exceeding fifteen cents per kilowatt.

(2) The testimony of all the operators of the plant from its construction, shows the collection of this uniform monthly price demanded of appellant, which conduces to show that he agreed to pay such service charge, and was competent for that purpose. He, in fact, admitted that such was the agreement which he had performed for years and the testimony could not have been prejudicial in any event.

In *Little Rock Ry. & Elec. Co.* v. *Newman,* 91 Ark. 91, the court construed an act of the Legislature requiring gas and electric companies to furnish meters free of charge with tables of prices charged per thousand units for commodities consumed to be based upon readings of the meter, and held that the act did not prohibit the companies from making a minimum charge per month where meters were installed for readiness-to-serve, saying, "The Legislature did not intend to compel the company to put in a meter and hold itself in readiness to serve for all who used none of the commodity to be supplied, and the language of the act does not warrant the construction that the fixing of the minimum charge was to be forbidden. * * * The fact that the charge for meters is expressly forbidden negatives, under the maxim *expressio unius est exclusio alterius,* any intention to forbid any other charge uniformly made against all patrons using the same quantity of the commodity."

"A regulation of the charges for such service should be just to the company, as well as to all patrons, so as to allow compensation to the former and reasonable, uniform rates to the latter, according to the amount of the commodity consumed. One class of patrons should not be favored at the expense of another."

The testimony shows the operation of the light plant herein had never been a paying, but was a losing, proposition.

There being no prohibition of the right to contract for a minimum monthly charge for the use of the meter, nor to agree to pay for a minimum amount of electricity at the prescribed rate, and the testimony being undisputed that such contract was made and performed for a

long period, appellant can not insist upon the use of the lights without the payment of such charge.

No error was committed in instructing the verdict, and the judgment is affirmed.

KNIGHTS OF PYTHIAS OF NORTH AMERICA, ETC., *v.* LONG.

Opinion delivered February 15, 1915.

1. LIFE INSURANCE—VESTED INTEREST—CHANGE OF BENEFICIARY.—Where there is no authority in the by-laws and constitution of a fraternal order premitting a change of beneficiary in a policy of benefit insurance, nor any clause in the policy providing therefor, the beneficiary named in such policy has a vested interest and the holder has no power to change such beneficiary.
2. DEFINITIONS—"MODIFICATION."—A "modification" defined as an alteration which introduces new elements into the details or cancels some of them, but leaves the general purpose and effect of the subject-matter intact.
3. BENEFIT INSURANCE—BY-LAWS—MODIFICATION—CHANGE OF BENEFICIARY.—A benefit certificate did not provide for a change of the beneficiary named, but agreed to pay the amount of the certificate, "subject to such modifications as may be made by the Grand Lodge." After the issuance of such certificate, the order provided for a change of beneficiary. Deceased, who held a certificate, then undertook to change the beneficiary in his certificate. *Held*, the fraternal order could make by-laws regulating the conduct of its affairs and providing for a change of beneficiary, a modification of its obligation in that regard, upon a member's request, and where such laws were made affecting the payment of the policies of insurance or benefit certificates of the order, they became a part thereof, and that, therefore, deceased's change of beneficiary, when agreed to by the order, was valid and binding.
4. INSURANCE—CHANGE OF BENEFICIARY—IRREGULARITY—RIGHT TO COMPLAIN.—Only the lodge or order issuing a certificate of benefit insurance has the right to complain of an irregularity on the part of the holder of a benefit certificate, in an attempt by him to change the beneficiary therein.

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

STATEMENT BY THE COURT.

Cora Long brought this suit against the Knights of Pythias of North America, etc., a fraternal benefit asso-

ciation doing business in the State of Arkansas, upon a policy of insurance for $300, issued on the 28th day of May, 1906, to Tom Long, a member of one of its subordinate lodges, who died in Pulaski County on the 1st day of December, 1912, in good standing in his lodge with his policy of insurance in full force and effect at the time of his death, and appellee, Cora Long, named therein as his beneficiary.

Suit was also brought against the sureties on the bond of said company made to this State.

The appellant answered, admitting it was incorporated under the laws of the State of Arkansas, and doing a fraternal insurance business among its members; that it issued the policy sued on to Tom Long with Cora Long named as beneficiary therein, and further that on November 5, 1912, the said Tom Long made two affidavits in one of which he stated that he had lost his policy, and it could not be found and asked that a duplicate be issued; in the other he requested that Janie Davidson be given his life insurance and other effects. Both affidavits were filed with the Grand Keeper of Records and Seal of the Lodge, who, upon the 19th day of November, 1912, in accordance with the laws of the order, issued a new policy to Tom Long in lieu of the old, which it alleged thereby became void. It pleaded payment of the new policy to Janie Davidson, the beneficiary named therein, and denied any liability upon the policy or contract sued on. The sureties denied that they were liable under the terms of the bond.

It appears from the testimony that Cora Long, the named beneficiary in the policy sued on, had been married to Tom Long for about twelve years, but left him in July, 1913, and went to Helena to live, and that Long went to live with Janie Davidson. Cora Long paid the dues on the policy one time. It was the duty of the Secretary and Grand Keeper of Records and Seal to sign and issue policies to the members, and Long's request to the officers of the subordinate lodge of which he was a member, consisted of the following affidavits:

"I, Tom Long, being in my right mind and realizing that at some future time death will be my portion, as happens to all the human race, do hereby will all my personal effects and life insurance, after my burial expenses have been paid, and my body put away in a nice and respectable manner, to Janie Davidson, and I desire that if an administrator is necessary, that she be appointed without bond. Witness my hand and seal this the 5th day of November, 1912.

"Tom Long.

"Witness: C. J. Baker.
"Witness: Wm. Derrick.
"Sworn and subscribed to, etc.

"Appeared before me, a notary for said State and county, Tom Long, and under oath states that his policy for three hundred dollars in the T. W. Stringer Lodge has been lost, and can not be found, and he prays that you issue him a duplicate.

"Tom Long.

"Witness: Wm. Derrick.
"Sworn and subscribed to before me, C. J. Baker, on this day, the 5th of November, 1912.

"C. J. Baker, Notary Public."

A new policy was thereupon issued in lieu of the former policy naming Janie Davidson the beneficiary therein. This was done under authority of section 7 of the by-laws, which reads as follows:

"Any member of this order is hereby authorized to change his beneficiary named in his policy at any time, but no such change shall take effect or be in force until the beneficiary's name has been furnished the Grand Keeper of Records and Seal, and inserted by him on the face of the policy."

Frank Snodgrass testified that he took the request for a new policy and change of beneficiary that was brought to him by the Grand Commander, to Frank Young, the Grand Keeper of the Records, that it was put before the lodge at the regular meeting, which granted a new policy, payable to Janie Davidson.

J. T. Wiseman stated that he was Chancellor Commander of T. W. Stringer Lodge, of which Long was a member in 1912, that Long requested that his beneficiary be changed and the local lodge granted his request. After some discussion they voted that he be allowed to make the change to Janie Davidson as beneficiary. The matter came before the lodge in November, and Long had spoken to him before, saying he was going to make a change and stated also that he had lost his old policy, and wanted a new one, and made to a different party.

T. J. Price stated he was grand attorney for the lodge and a member of the committee of law supervision, and that he introduced the resolution providing for a change of beneficiary, said section 7 of the Constitution and by-laws, but did not know where the resolution was now. He produced a copy, which he identified positively and stated that he had compared it with the original, and that it was duly passed in July, 1910; that a certified copy thereof was on file with the officers in Garland County.

The court instructed the jury, and from the judgment against it, appellant brings this appeal.

Thomas J. Price, for appellant.

The jury should have been directed to find for defendant. The beneficiary in the policy was changed at the request of the insured in accordance with the rules and by-laws of the company and appellee had thereafter no interest in the policy. The court erred in its charge to the jury. The judgment should be reversed and the cause dismissed. Only the company can complain of any irregularities in the change of beneficiaries. 109 Mo. 560; 3 Tenn. Chy., Oct. T. 1875, *Weil* v. *Trafford,* 49 Mich. 429; 9 Mo. App. 412; 158 Ill. 353; *Ib.* 289; 16 S. W. 500.

J. F. Wills and *Fred McDonald,* for appellee.

Long had no right under the by-laws to change the beneficiary. He only asked for a *duplicate* of the policy. 97 Ark. 50; 96 *Id.* 154; 102 *Id.* 72; 94 *Id.* 499. When the policy was issued there was no rule or by-law authorizing or permitting a change of beneficiary. 197 Mo.

513; 37 App. Div. 614; 56 N. Y. Supp. 339; 63 Atl. 871. A by-law adopted after the issuance of a policy, giving members the right to change beneficiary, does not affect the right of the beneficiary in the original policy. 58 N. J. Eq. 189; 44 Atl. 199; 1 Bacon on Ben. Soc., etc., § 292. Appellee had a vested interest which could not be taken away by the order nor the assured. Cases *supra.*

KIRBY, J., (after stating the facts). It is contended by appellant that the undisputed testimony shows that appellant changed the beneficiary on Tom Long's policy at his request in accordance with its by-laws, and paid the same to the new beneficiary upon his death and that the court erred in not instructing a verdict in its behalf.

(1) The policy issued to Tom Long, in which appellee is named beneficiary, was issued before the adoption by appellant order of said section 7 of its Constitution, authorizing any member to change his beneficiary at any time as therein provided. When there is no authority in the by-laws and constitution of the order, permitting a change of beneficiary, nor any clause of the policy providing therefor, the beneficiary named in such policy has a vested interest, and the holder has no power to change such beneficiary. *Johnson* v. *Hall,* 55 Ark. 210; *Franklin Life Insurance Co.* v. *Galligan,* 71 Ark. 301.

In *Carruth* v. *Clawsen,* 97 Ark. 50, the court recognized that the weight of authority was against this doctrine, but adhered to it while declaring that it should not be extended. This policy provides, that the Grand Lodge "will pay to Cora Long, at the death of Brother Tom Long an endowment of $300, being the total amount due on this policy subject, however, to such modifications as may be made by the said Grand Lodge, provided that the said knight is in good standing, etc."

(2-3) It is contended by appellant that this clause of the policy authorizes the making of a by-law by the fraternal benefit association, permitting the change of beneficiary upon the request of the member, and we agree with this contention. The policy specifically provides for the payment of an endowment of $300 to the bene-

ficiary, subject to such modifications as may be made by the Grand Lodge. "Modification," is defined as "a change; an alteration which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact." Black's Law Dictionary. It was the purpose of the order to pay the benefits or endowments provided to the beneficiaries named by the members holding certificates, and it had no interest in such beneficiary further than to pay the benefit as directed by the member in accordance with the terms of its contract. Having agreed to pay the amount "subject to such modifications as may be made by the Grand Lodge," it could make by-laws, regulating the conduct of its affairs and providing for a change of beneficiary, a modification of its obligation in that regard, upon the member's request, and when such laws were made affecting the payment of the policies of insurance or benefit certificates of the order, they became a part thereof. *Beasley* v. *Mutual Aid Assn.,* 94 Ark. 502; *Supreme Lodge of Knights & Ladies of Honor* v. *Johnson,* 81 Ark. 512; *Woodmen of the World* v. *Jackson,* 80 Ark. 419.

It is undisputed that the appellant order did permit a change of beneficiary by Tom Long and issued a new policy to Janie Davidson, the beneficiary to whom it claimed he desired to change his insurance. There is contention, with evidence, tending to show that there was irregularity in the request for the change, or the making of it by the fraternal organization, but the fact remains that it did permit the change of the beneficiary by the member, as it had the right to do, and that it did issue its policy of insurance to such changed beneficiary and thereafter paid such certificate in full to the beneficiary named therein.

(4) Only the lodge or order would have the right to complain of the irregularity of such change of beneficiary, and it has not done so. The burden of proof is on the appellee to show that the certificate payable to Janie Davidson and paid to her, was obtained without authority, and there is no proof in this record, discharging

that burden. The testimony is in effect undisputed that the beneficiary was changed in accordance with the by-laws upon the member's request, to Janie Davidson, and the policy paid to her in accordance with its terms after the death of the member, Tom Long. The association or organization thereby, discharged its whole liability, and the court erred in not instructing a verdict for the appellant.

The judgment is reversed, and the cause dismissed.

JAMESON v. JAMESON.

Opinion delivered February 15, 1915.

ADMINISTRATION—WIDOW'S RIGHT TO RENOUNCE UNDER THE WILL.—Where a widow elects not to take under the will, but under the law, she takes as though no will had been executed, and the husband had died intestate, and she is accordingly entitled to dower, homestead and the other allowances, as provided in Kirby's Digest, § § 3, 72 and 74.

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

STATEMENT BY THE COURT.

T. N. Jameson died in August, 1912, leaving him surviving his widow, the appellee, but no children. He disposed of his estate by will, which was duly probated, naming the appellants herein as executors.

His estate consisted of household and kitchen furniture, other personal property, and a little over $3,000 in cash, a lot in the town of Magnolia, upon which he lived, as his homestead, and 401 acres of other lands.

He directed his executors to provide for the support and maintenance of his wife, the appellee, "out of the proceeds of any property I may own at the time of my death, and not otherwise bequeathed * * *," and also gave her for life the homestead, and disposed of all of his other estate to his heirs. No claims were probated against the estate.

The widow elected not to take under the will, and filed a petition in the probate court, setting out a description of the property of the estate, and asking that she be

allowed to take the portion thereof as provided in sections 3, 72 and 74 of Kirby's Digest, and that she be allotted dower and homestead therein.

The probate court had her dower and homestead interest assigned, but denied her the right to $150 and $300 under the provisions of sections 3 and 74 of Kirby's Digest.

She appealed from this order to the circuit court where, upon hearing, the court allowed her one-half of the money and personal property of the estate as dower, and a like one-half dower interest in the lands and the homestead, and also the entire homestead for life, and $300 and $150 out of the moneys on hand under the provisions of section 3 and 74 of Kirby's Digest. From this judgment, the executors bring this appeal.

C. W. McKay, for appellants.

The widow declined to take under the will; she should therefore be endowed in fee simple of one-half the real estate, and one-half of the personal estate absolutely in her own right, but she is not entitled to the homestead nor any personal property and money. Kirby's Digest, § 3901, 3, 72 and 74, 2699, 2700, 2712. She only has her *election* to accept under the will or take dower, homestead and other provisions made for her by statute. The provisions made for the widow under sections 3, 72 and 74 of Kirby's Digest, are not in lieu of dower, but are in addition thereto. 102 Ark. 233; 60 Ark. 461; 83 *Id.* 416; 58 *Id.* 298. She can not elect to accept homestead and other provisions, but must simply take dower. The testator then can devise his homestead and all personal property except the widow's dower. 86 Ark. 395; 31 Miss. 134; 59 *Id.* 140; 68 *Id.* 810; 65 Ark. 357. It was error to give the widow, in addition to dower, the specific personal property mentioned, $450 in money, and the homestead.

Stevens & Stevens, for appellee.

The widow is entitled to dower and to her homestead rights, and to those provided for her under sections 3, 72 and 74 of Kirby's Digest. Kirby's Digest, § § 2699, 2711,

3, 72, 74; 58 Ark. 301; 40 Cyc. 1968; 102 Ark. 233; 60 *Id.* 461; 83 *Id.* 416; 49 Cent. Dig., § 2018, (d), (e), (ee) and (f).

Kirby's Digest, § 7803, defines "personal property" to be, "money, etc.," and there was no error in setting aside money to the widow instead of personal property.

KIRBY, J., (after stating the facts). It is contended for appellants that when appellee elected not to take under her husband's will, that she was only entitled to dower in his estate, and not to any of the allowances made by statute to the widows of deceased persons. The statutes provide that if land be devised or a pecuniary or other provision made for a woman by will in lieu of dower in his estate, and not to any of the allowances made bequest or be endowed of the lands of her husband, and that if her husband shall devise any portion of his real estate to his wife, it shall be taken in lieu of dower unless the will declares otherwise. Sections 2699, 2711, Kirby's Digest.

There was no devise in this will to the wife of lands or bequest made expressly in lieu of dower, but only a direction that she should be provided for and maintained during her life, out of the proceeds of all the property of the testator's estate with the devise to her of the homestead for life. She had the election to accept the devise or bequest, whether made by the terms of the will in lieu of dower or not. Sections 2711 and 2712.

The provisions made for widows by sections 3, 72 and 74, are in addition to, and not in lieu of, dower. Ex parte *Grooms,* 102 Ark. 322; *Stull* v. *Graham,* 60 Ark. 461; *Lambert* v. *Tucker,* 83 Ark. 416.

The widow likewise is entitled to the homestead, not as dower in the estate of the decedent, but in addition thereto. Section 2706, Kirby's Digest; *Horton* v. *Hilliard,* 58 Ark. 301; Ex parte *Grooms, supra;* 40 Cyc. 1968.

The statutes only provide that in cases where provision is made by will for the widow in lieu of dower, that she shall have her election to accept the same or be endowed of the lands and personal property of which her husband died seized and there is no prohibition or inti-

mation thereof that she shall not in case of such election to take under the law and renunciation of the devise or bequest under the will, be entitled also to the provisions made for widows under said sections 3, 72 and 74 of the Digest, and the homestead law.

The devise herein was of the homestead to the widow for life and since the disposition was to her of the same estate or interest under the will as the law gives the widow therein, it relieves the court of the necessity of passing upon the question whether or not a husband can dispose of his homestead by will so as to affect the rights of the widow thereto under the homestead law. When the widow elects not to take under the will, but under the law, without regard thereto, she takes as though no will had been executed, and the husband had died intestate, and is accordingly entitled to dower, homestead and the other allowances as provided in said sections of the Digest. *Bell* v. *Altheimer,* 99 Ark. 529. When there is sufficient money on hand as in this instance, there is no reason why the widow can not take the special allowances provided in sections 3 and 72 in money, instead of other personal property, as it will not be a taking from any one class of property in order to make up the deficiency created in another by reason of her selection therefrom. Ex parte *Grooms, supra.*

The judgment is affirmed.

SUPREME TRIBE OF BEN HUR *v.* GAILEY.

Opinion delivered February 15, 1915.

1. BENEFIT INSURANCE—BENEFICIARY—LIMITATION UPON.—Where the charter and by-laws of a fraternal insurance order provide that insurance can be issued only upon certificates wherein the beneficiary bears a certain relationship to the member, or to his legal representatives in trust for his heirs, it will not be held that the issuance of a certificate was done *ultra vires,* where the legal representative was named as beneficiary, although it does not appear that there was living any one bearing the relationship to the insured required by the charter and by-laws of the order, it being possible that such person might appear after the insured's death.

2. BENEFIT INSURANCE—BENEFICIARY—RULES OF ORDER—BURDEN OF PROOF.—Where a fraternal insurance order seeks to avoid payment of a benefit certificate to the deceased member's executor, on the ground that the deceased died without heirs, the burden of establishing that fact is upon the fraternal order.

3. TRIAL—EFFECT OF BOTH PARTIES ASKING INSTRUCTED VERDICT.—Where both parties ask an instructed verdict, the finding of the court is as conclusive as the verdict of a jury would have been, and requires no more evidence to support it.

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

STATEMENT BY THE COURT.

Appellee, as administratrix of the estate of Isaac S. Adams, deceased, brought this suit to collect a benefit resentatives bearing relationship to said member of ad- the sum of $2,000, payable at his death "to his legal representatives bearing relationship to said member of administrator or executor."

The appellant denied liability, alleged it was a fraternal beneficiary association, chartered under the laws of the State of Indiana, and that notwithstanding said deceased may have become a member of said order, and paid his installments of dues, that his administrator is not entitled to recover upon his benefit certificate, because there is no person lawfully entitled to receive the benefit and beause under the constitution and laws of the order, and the laws of the State of Indiana, a policy of insurance upon the life of a member can only be paid to one of the following classes: "Families, heirs, blood relatives, affianced husband or affianced wife or persons dependent upon the member," and further that said Adams died unmarried without any known heirs or persons of the classes mentioned, and leaving no person dependent upon him. It also plead *ultra vires,* alleging the contract was void because issued in excess of the order's authority.

It appears from the testimony that Isaac S. Adams died on January 13, 1912, holding the benefit certificate or policy of insurance sued on in the Supreme Tribe of Ben Hur. In his application for membership, it was

stated that his father and mother were dead, had no sisters and only one brother, who was born dead, and "he has no relative known," this statement appearing at end of sentence directing payment to his executor or administrator.

Appellee testified she was appointed administratrix of deceased's estate; she had known the deceased for thirty-five years, who had resided in her family or with some member of it nearly all his life; that he came from Mississippi, and she did not know what relatives or heirs he had in that State or elsewhere. That he supported himself by his work and "during all the time I knew him, I never saw a letter from any of his family in Mississippi and no relation ever visited him while he lived in my family." He was a small boy when he came to our house, and was never married. I do not know that he has any blood relatives, and know of no woman to whom he was engaged to be married, and of no one dependent upon him for support at the time of his death. Have heard him say at different times, "if he had any relatives, he did not know who they were." No debts have been probated against his estate, nor any accounts presented to the administratrix.

The policy sued on provides:

"The Supreme Tribe of Ben Hur will from its benefit fund pay to his legal representatives bearing the relationship to said member of administrator or executor, the sum of $2,000 upon the required proof of his death while in good standing as a beneficial member of this association and on the surrender of this certificate."

The laws of the order provide:

"Sec. 10. Payment of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon the members, and to such other persons or classes or designations as may be authorized by the laws of this State" (meaning Indiana).

Also, that a member may designate as beneficiary any one belonging to the following classes, naming the same as in section 10, and "or legal representatives pro-

vided, where the certificate is payable to legal representatives, the benefits shall be payable to the executor or administrator of the deceased member in trust for such member's heirs."

The law of the State of Indiana, declaring the association a corporation, provides:

"Payment of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife, or to some persons dependent upon the member."

Each of the parties asked an instructed verdict, and the court directed the jury to find for the plaintiff, and from the judgment on the verdict, this appeal is prosecuted.

L. C. Going, for appellant.

The issuance of the certificate in this case was either void as an *ultra vires* act, or void because issued by the association under a misapprehension of the facts, which, as appears by the testimony, show conclusively that there was no one capable of receiving the benefit of the policy. 27 Am. & Eng. Enc. of L., 868 and note; 116 S. W. 1130; 101 Pac. 1; 27 Atl. 53; 148 S. W. 526.

In response to the contention that the amount of the certificate, should be paid to the administratrix and allow her to determine who the heirs might be for the purpose of distribution, there may not be any person entitled to this benefit fund, and if there is none, appellee would certainly not be entitled to recover.

The by-laws of the appellant specifically provide that if, on the death of a member, there is no person entitled to the benefit of the certificate, the amount of the certificate shall go back into the benefit fund for the benefit of the members. 7 N. W. 273; 10 Fed. 227; 56 Ia. 620; 13 Bush. 489.

Killough & Limes, for appellee.

1. The policy having been issued, the premiums paid, and the contract fully executed so far as deceased was concerned, appellant is estopped to plead *ultra vires.* 3 Thompson, Corp. (2 ed.), § 2787; 10 Cyc. 1156; 74 Ark. 190; 96 Ark. 594, and case cited.

2. The presumption is that all persons have heirs. The doubtful statement of the deceased that he had no relatives that he knew of, does not, under the circumstances, make a *prima facie* case. The burden was on the appellant to prove that he had no heirs capable of receiving this benefit, and that burden it has failed to meet. 1 Dembitz on Land Titles, 318; 108 Ark. 515.

KIRBY, J., (after stating the facts). It is contended that the issuing by appellant order of the benefit certificate was *ultra vires* and void, there being no one of any of the classes designated to whom the benefits could be paid without violation of the by-laws of the organization and the statute granting its charter.

"Where the statute under which a benevolent corporation is organized, and its charter adopted in pursuance to such act, designates certain classes of persons as those for whom the benefit fund is to be accumulated, a person not belonging to either or any such class is not entitled to take the fund. A corporation has no authority to create a fund for other persons than the classes specified in the law, nor can the order direct the fund to be paid to a person outside of such class." 27 Am. & Eng. Ann. Cas. 868.

There was no attempt here to issue a policy with the benefit payable to any person not belonging to one of the classes specified as entitled to receive it, nor direction to pay to one outside of such class.

(1) And although the member may have had no family, blood relatives, heirs or persons dependent upon him, or affianced wife, at the time of the issuance of the policy, a fact which the evidence does not show, he had the right, nevertheless, to take out such policy upon the contingency that there might be one of some of the classes designated entitled to receive the benefit at the time the liability to pay it became fixed upon the death of the member, and the order had authority likewise to issue such policy on such contingency and its action in doing so was not *ultra vires.*

There was no beneficiary named in this policy, which was made payable to the legal representatives "bearing

the relationship to the member of administrator or executor," and it is not questioned that plaintiff is the duly qualified administratrix of the estate of said deceased member. It is contended, however, that there is no person living bearing the relationship or belonging to any class who was entitled to become a beneficiary, under the rules of the order, and the law creating it, and therefore that the administrator can not recover upon the policy.

The by-laws provide that when the certificate is payable to the legal representatives, as in this case, the benefit shall be payable to the executor or administrator of the deceased member in trust for such member's heirs.

Appellant having denied that there is in existence any person of any of the classes to whom the benefit under the policy can be paid, the burden to prove such fact devolved upon it. *Longer* v. *Carter,* 102 Ark. 73; *Carrier* v. *Comstock,* 108 Ark. 521.

(2) We are of opinion that the burden was not discharged by the evidence introduced in this cause. It is true the administratrix testified that she had heard the deceased say frequently that if he had any relatives living he did not know them, that he was without a family or affianced wife, and that no relatives visited or wrote to him during the time she knew him. The testimony discloses, however, that he came from Fulton, Mississippi, an adjoining State, in his boyhood, and was illiterate, and could not write, and that no inquiry was made at the place of his birth, and where he was known to have lived to ascertain whether he had heirs or blood relatives living. The circumstances shown raise an inference that there were no heirs, family, blood relatives, or other persons belonging to any of the classes entitled to the payment of the benefit under the policy, but the place of deceased's birth being known, and no inquiry made there, the evidence is not *prima facie* sufficient to show that there are none such. *Carrier* v. *Comstock,* 108 Ark. 522.

Conceding the testimony was sufficient to sustain a verdict or finding that there were none living, bearing such relationship to the deceased member as would entitle them to the benefit under the policy, it is not con-

clusive of the fact, and a verdict against the proposition could not be set aside for want of evidence to support it. The finding of the court, each party having asked a directed verdict, is as conclusive as the verdict of a jury would have been, and requires no more evidence to support it. *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71.

The administrator of the estate of the deceased member was entitled to recover the amount of the benefit certificate as trustee of course for the benefit of those entitled thereto under the terms of the policy, the laws of the order and the State creating it, and the court did not err in directing a verdict for appellee. The judgment is affirmed.

GRAYSONIA-NASHVILLE LUMBER COMPANY *v.* WRIGHT.

Opinion delivered February 22, 1915.

1. TAX DEEDS—DISCRIPTION—SUFFICIENCY.—A tax deed, conveying lands as part of a particular division or subdivision of a section, is void for uncertainty.
2. DEEDS—"FRACTIONAL" DEFINED.—"Fractional," where used in connection with a subdivision of a section in describing it, means either that there is more or less land than is usually contained in such subdivison, and generally less, in the sectionizing of same by the Government.
3. TRESPASS—TITLE OR POSSESSION.—The plaintiff must have either title to or possession of lands to maintain an action for trespass thereon, and, having neither, can not rely upon the want of title in the trespasser.

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

STATEMENT BY THE COURT.

Appellee brought this suit for trespass against appellant company for cutting and removing timber from the fractional southwest quarter of the southwest quarter of section 29, township 10 south, range 28 west, situated in Howard and Sevier counties, alleging that he was the owner and in the actual possession thereof, and had been since the 2d day of October, 1911.

Appellant denied plaintiff was the owner or in possession of the lands claimed, and that it had cut the timber as charged therefrom. It admitted cutting a small amount of timber from the southwest quarter of the southwest quarter of said section, which it claimed to own.

Appellee bought the land from Smith in 1911 and enclosed and put three or four acres of the tract into cultivation. The appellants began cutting timber on the uninclosed land, and he complained to some of the men at work, and they stopped, but others, employees of appellant company, continued cutting the timber and removed same.

The Saline River, the boundary line between Howard and Sevier counties, runs through this forty-acre tract of land. Appellant exhibited the deeds from Milford to Smith his grantor, conveying the fractional southwest quarter of the southwest quarter of said section, containing thirty-eight acres, more or less, executed on the 12th day of December, 1910, and recorded in Sevier County. Smith conveyed the land to appellee describing it as "the fractional part of the southwest quarter of southwest quarter of said section, containing the same number of acres." The land was forfeited for taxes in 1906, and conveyed to Joe Winter in 1907, as "part of the southwest quarter of the southwest quarter," containing twenty-eight acres, and he sold the same to Geo. B. Milford as "the fractional southwest quarter of the southwest quarter of said section."

No timber was taken by appellant company from appellee's enclosure on the land. From the judgment against it, appellant brings this appeal.

W. P. Feazel, for appellant.

1. The description in the deeds is indefinite and insufficient and can not be aided or made definite and certain by parol evidence. 106 Ark. 83; 30 *Id.* 60; 30 *Id.* 640; 40 *Id.* 240; 41 *Id.* 495; 60 *Id.* 487; 85 *Id.* 4. A deed will not be held void if by any reasonable construction it can be made available. 68 Ark. 546.

2. The verdict is excessive. The verdict was a guess; there is no testimony to sustain it.

D. B. Sain, for appellee.

1. The description was cured by the surveyor's testimony that the Saline River was the boundary line between two counties. Courts take judicial notice of the number of acres in a tract in such cases. 106 Ark. 86; 34 *Id.* 224; 79 Ark. 442; 68 *Id.* 546. Appellee's title, coupled with possession and payment of taxes for more than two years makes a perfect title against a trespasser. 84 Ark. 614; 77 *Id.* 324; 79 *Id.* 442; 68 *Id.* 546.

2. The verdict is not excessive. Possession for two years under a tax title is sufficient to confer title. 92 Ark. 30; 79 *Id.* 442.

KIRBY, J., (after stating the facts). It is contended for reversal that appellee had neither title to nor possession of the lands from which the timber was claimed to have been taken, that the description in his deeds thereto was so indefinite as not to convey them nor constitute color of title.

(1) This court has often held tax deeds conveying lands as part of a particular division or subdivision of a section void for uncertainty, and such a deed containing a description of land so indefinite and uncertain as to be insufficient is not color of title that will extend the possession of one having an enclosure upon the land to the limit of the land attempted to be described in his deed, because none is sufficiently described therein. The tax deed to Winter and conveyances from his grantee on down to the appellee, attempted to convey the lands by a description which is insufficient and consequently failed to effect the purpose. If appellee was allowed to prove that a certain part of the land was beyond the Saline River in Sevier County, and the remaining portion of the forty-acre tract on the Howard County side thereof, it still would leave the uncertainty since the deed conveys the land as "part of the southwest quarter of the southwest quarter," as to what part thereof was intended to be conveyed. The deed from Milford to Smith describes

it as "the fractional southwest quarter of the southwest quarter," and from Smith to Jackson as the fractional part of the southwest quarter of the southwest quarter.

(2) "Fractional," when used in connection with a subdivision of a section in describing it, means either that there is more or less land than is usually contained in such subdivision and generally less, in the sectionizing of same by the government survey. It is not claimed here that this was a fractional forty-acre tract, and shown to be by the Government survey and the fractional southwest quarter, southwest quarter or the fractional part of the southwest quarter of the southwest quarter in Sevier County, Arkansas, would not be a sufficient description to convey the portion of the particular forty acres lying west of the Saline River in said county, according to the opinion of the majority of the court, and under the authority of *Scott* v. *Dunkle Box & Lumber Co.*, 106 Ark. 83.

(3) The plaintiff must have either title to or possession of the lands to maintain an action for trespass thereon, and not having either can not rely upon the want of title in the trespasser. *Price* v. *Greer*, 76 Ark. 426.

The court erred in instructing the jury that it should find for appellee the value of the timber shown to have been taken from said tract of land. The judgment is reversed and the cause dismissed.

McLAUGHLIN v. STATE.

Opinion delivered February 22, 1915.

1. RAPE—SUFFICIENCY OF INDICTMENT.—The indictment, in a prosecution for the crime of rape, held sufficient.
2. APPEAL AND ERROR—SUFFICIENCY OF EVIDENCE—BILL OF EXCEPTIONS.—The question of the sufficiency of the evidence to support the verdict of the jury, or the correctness of instructions given by the court, can only be presented by a bill of exceptions filed within the time allowed by law and fixed by the court.

Appeal from Franklin Circuit Court, Ozark District; *Jeptha H. Evans*, Judge; affirmed.

John D. Arbuckle and *J. V. Bourland,* for appellant.

The indictment charges no crime. The evidence is wholly insufficient to convict and the instructions are misleading.

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

1. The indictment sufficiently charges the crime. 60 Ark. 521; 79 *Id.* 293.

2. There is no bill of exceptions. It was not filed in time. 96 Ark. 175; 169 S. W. 790.

SMITH, J. Appellant was convicted of the crime of rape under the following indictment (omitting formal parts):

"The said Neal McLaughlin, on the 14th day of June, 1914, in the county and district aforesaid, in and upon one Martha Byford, a female person, forcibly, violently, and feloniously did rape and assault her, the said Martha Byford, then and there violently, forcibly and against her will and consent feloniously did ravish and carnally know, against the peace and dignity of the State of Arkansas."

It is insisted that the indictment is bad, and does not charge a crime, in that the "assault" is not charged to have been made until after the alleged "rape," and that the indictment is multifarious in alleging that the appellant "violently, forcibly and against her will and consent feloniously did ravish and carnally know."

(1) We think the indictment in this case is sufficient. It follows very closely the indictment set out in the case of *Downs* v. *State,* 60 Ark. 521, which was there held sufficient. This indictment meets all the requirements of the law. *Beard* v. *State,* 79 Ark. 293.

It is further insisted that the evidence is insufficient to support the charge, and that error was committed in the instructions given.

(2) These questions are not before us for review. Such questions can only be presented by a bill of exceptions filed within the time allowed by law and fixed by the court. The record shows that the bill of exceptions in

this case was not filed for more than a month after the expiration of the time allowed for that purpose. Appellant filed his motion for a new trial on the 2d of October, and was given thirty days within which to file his bill of exceptions, but no bill of exceptions was tendered to and signed by the judge until the 26th day of December, 1914, and it was not filed in the office of the clerk until the 28th day of December, 1914. There is, therefore, no bill of exceptions in this case, and we can not consider either the sufficiency of the evidence or the correctness of the instructions. *Green* v. *State,* 96 Ark. 175.

The judgment of the court below is, therefore, affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* SIMPSON.

Opinion delivered February 22, 1915.

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—MENTAL ANGUISH—INTERSTATE MESSAGE.—While there can be no recovery for mental anguish suffered by plaintiff by reason of a telegraph company's negligence in failing to deliver a message promptly, where the same was an interstate message, still, where the proof shows defendant to have been negligent, the rules of the company, approved by the Interstate Commerce Commission, provide for some liability depending upon the price paid for sending the message.

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

Geo. H. Fearons, J. M. Shinn and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. The address of the message was defective, and it was delivered as soon as possible. There is no proof of negligence.

2. This was an interstate message, and there can be no recovery. 234 U. S. 542; 169 S. W. 946; 171 *Id.* 859.

3. Conflicting instructions should not be given. 95 Ark. 506.

Troy Pace, for appellee.

1. Negligence was established upon the part of appellant in its failure to deliver as the law required. 55 Am. Dec. 678; 1 Whart. on Ev., § 367; 81 N. Y. 532; 91 Ark. 483; 82 Ark. 128; 100 *Id.* 301; 101 *Id.* 492.

2. Though the message was interstate, appellee is entitled to recover, and the Arkansas mental anguish statute is not a burden on interstate commerce. 114 Ark. 193; 234 U. S. 542.

SMITH, J. This was an action to recover damages for the mental anguish suffered by appellee occasioned by appellant's failure to promptly transmit and deliver the following message:

"Mr. S. S. Simpson, Frisco, Texas, care of Martin Epply. The baby is sick. Come at once. Mary Simpson."

Mr. and Mrs. Simpson lived in the country near Harrison, Arkansas, and Mr. Simpson had gone to Frisco, Texas, to arrange for the sale of some apples. The child mentioned in the telegram became very seriously ill on the 17th of October, 1912, and Mrs. Simpson caused the message above set out to be telephoned over to Harrison, where it was received by the telephone operator, and by her transmitted by telephone to the appellant's agent in that city. The message was delivered at appellant's office in Harrison at about 2 o'clock in the afternoon, and the baby died between 4 and 5 the same day. The message was promptly transmitted to Frisco, but was not promptly delivered, and as a result of this delay, appellee testified that he was prevented from being at home with his wife while preparations were being made for the funeral of their child, and that but for this delay he would have arrived at his home twenty-four hours earlier than he did. It is not contended that had the message been promptly delivered, appellee could have arrived at his home before the death of his child, but the proof shows that he could have arrived there sooner than he did, and in time to have made arrangements for the burial of his child in the family grave yard at Danville, in this State, near his old home, and as a result of this delay he is shown to have suffered mental anguish.

This message, as received at Frisco, Texas, was addressed in care of M. L. Etley, and the responsibility for this error in the address is one of the principal questions of fact in the case. Appellant undertook to show that the directions for the address of the message was received over the telephone by its agent at Harrison was, in fact, in care of M. L. Etley, and not in care of M. L. Epply. The proof on this question, however, is conflicting, and the jury might have found from it that the error occurred in the transmission of the message by appellant, and that it was one for which appellant's agents were responsible. However, the proof tends to show that this mistake was not the cause of the delay in the delivery of the message. The evidence is to the effect that the agent at Frisco was a new man at that place and unacquainted with Mr. Epply, and that he made but little, if any, effort to deliver the message. At the time of the receipt of the message at Frisco, appellee was in a neighboring town, but the proof is that Frisco is a small town of about 700 people, and that Mr. Epply had resided there for twelve years, and was personally acquainted with every resident of the town, and that had any real inquiry been made, the similarity of the names would have insured the delivery of the message to Mr. Epply, and that he could, and would, have promptly transmitted it to appellee.

Prior to the decision of the Supreme Court of the United States in the case of *Western Union Telegraph Company* v. *Brown,* 234 U. S. 542, 58 L. Ed. 1457, recoveries were permitted by this court where the sole cause of action was mental anguish, even though the message out of which the cause of action arose was an interstate one. But, as we have interpreted that decision, such recoveries can not now be sustained to the full extent of such damages. *Western Union Telegraph Co.* v. *Compton,* 114 Ark. 193, 169 S. W. 946; *Western Union Telegraph Co.* v. *Johnson,* 115 Ark. 564, 171 S. W. 859.

However, the telegraph company is not wholly absolved from liability where it fails to promptly deliver such messages. The rules of such companies, when approved by, and which have been approved by, the Inter-

state Commerce Commission, prescribe what this liability shall be, it depending upon the price paid for the message. A judgment can not now be rendered here for this amount because the proof does not show the amount paid for the transmission of the message, and the judgment must be reversed for the development of that feature of the case. This action was not taken in the case of *Western Union Telegraph Co.* v. *Johnson, supra,* for the reason that the point was not called to our attention. The sole question there considered was the application of the doctrine of *Western Union Telegraph Co.* v. *Brown, supra,* to the facts of that case.

We think the proof legally sufficient to support a finding that appellant negligently failed to deliver the telegram, and that no error was committed in the instructions given, except the submission of the question of the mental anguish sustained by appellee, under instructions which permitted a recovery of such sum as damages as would fully compensate that suffering. But, for this error, the judgment must be reversed and the cause remanded for further proceedings in accordance with this opinion.

STATE *v.* SIMMONS.

Opinion delivered February 22, 1915.

1. ELECTIONS—ELECTIONEERING NEAR POLLING PLACE—PRIMARY ELECTIONS.—Kirby's Digest, § 2823, making it unlawful for any judge of election to do any electioneering on an election day, or for any one to do so within one hundred feet of a polling place, is confined in its operation entirely to general elections and not to primary elections.
2. ELECTIONS—PRIMARY ELECTIONS—GENERAL ELECTIONS.—In the absence of a declaration to that effect, the general election laws have no application to legalized primary elections.
3. CRIMINAL LAW—INTERPRETATION OF STATUTES—IMPLICATION.—Criminal statutes are to be strictly construed, and an act will not be declared to come within the criminal laws of the State by implication.

Appeal from Craighead Circuit Court, Jonesboro District; *J. F. Gautney,* Judge; affirmed.

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

The court erred in sustaining the demurrer to the indictment. It is not necessary for the indictment to follow the language of the statute literally, but it is sufficient if it states the offense substantially in the language of the statute. Kirby's Dig., § 2823; 77 Ark. 321; 93 Ark. 406; 94 Ark. 65; 97 Ark. 6; Kirby's Dig., § § 2228, 2241-2-3; 102 Ark. 174; 100 Ark. 413, 414; 107 Ark. 36.

N. F. Lamb, for appellee.

1. If section 2823, Kirby's Digest, includes primary elections, we concede that it is sufficient to charge an offense; but a casual reference to the original act, of which this section is sectioned numbered 39, Act March 4, 1891, will disclose that primary elections were not within the legislative mind.

The first general primary election law was enacted in 1895, see Kirby's Dig., § § 2892, 2896. And while this act denounced certain conduct as criminal, it provided penalties entirely different from those provided in the Act of 1891, relating to general elections.

2. Laws can not be revived, amended or the provisions thereof extended, etc., by reference to the titles only. Art 5, § 22, Const.; 52 Ark. 290; 40 Ark. 131.

McCULLOCH, C. J. The circuit court sustained a demurrer to an indictment charging appellee with having violated the election laws of the State while acting as a judge of a primary election by electioneering with a voter. The State has appealed.

(1) The indictment was framed under a section of the general election law of the State which contains the following provisions: "No officer of election shall do any electioneering on election day. No person whomsoever shall do any electioneering in any polling room or within one hundred feet of any polling room on election day." Kirby's Digest, § 2823. The election at which appellant is alleged to have served, and during which service he is charged with offending against the statute,

was the primary election held by the Democratic party on March 25, 1914, for the purpose of nominating the candidates of that party for State and county offices. The trial court held that the statute quoted above was confined in its operations entirely to general elections, and not to primary elections. We think the court was right in that construction of the statute, for we find no statute of the State which makes electioneering at the polls of a primary election an offense. The general election law of the State (Ch. 57 of Kirby's Digest) was made applicable only to the regular biennial elections of the State and special elections held to fill vacancies. It had no application to primary elections, for they were unknown to our statutes at the time our last election law was passed by the General Assembly of 1891.

(2-3) The first law on the subject of primary elections was enacted by the General Assembly of 1895. The first section declared that whenever any political party in the State shall nominate candidates by primary election, "the said primary election shall be and is hereby made a legal election," but that the act should not apply or be in force unless the county central committee of the party should so declare and file a certificate thereof with the county clerk. Then the statute went on to provide for the selection of judges and clerks of the election, and prescribed penalties for certain misconduct on the part of those officers. The next primary election statute was passed by the General Assembly of 1909, and it repealed the first section of the Act of 1895, and substituted another section which omitted the provision leaving it optional with the county central committee about making the primary election a legal election and declares that whenever any political party shall nominate candidates by primary election, "the said primary election shall be and is hereby made a legal election." That act provides, however, that the judges and clerks of election shall be selected by the county central committee of the party, and provides penalties for certain acts or misconduct of the judges and clerks of election. It contains

however no provision against electioneering on the part of the election officers. It can not be successfully urged, we think, that the Legislature, in declaring primary elections to be legal elections, intended to bring them within the whole scope and operation of the election laws of the State. Other and more appropriate language would have been used if such had been the legislative intent. The mere declaration that a primary election "shall be and is hereby made a legal election" is not sufficient to show a legislative intent to bring the subject within the operation of the election laws. The fact that the Legislature went further and provided the method of selection of judges and clerks, their qualifications for office and duties, and named other provisions—some of them the same as those prescribed by the general election laws and others inconsistent therewith—shows that the lawmakers intended by that act to lay down all the rules that they deemed sufficient to control primary elections. However incomplete the statutes of the State are at this time with respect to the control of primary elections, they represent, at least in concrete form, all that the lawmakers intended to prescribe. We are unable to discover any language used which would warrant a stretch of the general election law of the State in all of its provisions to primary elections. Criminal statutes are strictly construed, and it would violate the accepted canons of interpretation to declare an act to come within the criminal laws of the State merely by implication.

Counsel for appellee contend that even if the language of the first section justified an inference that the Legislature intended to bring primary elections within the operation of the general election law, it would be violative of that part of the Constitution which contains an inhibition against extending laws by reference to title only; but we find it unnecessary to pass upon that question, for the reason that we have reached the conclusion, as above announced, that such was not the intention of the Legislature, and that the language was not suffi-

cient to indicate such a purpose on the part of the lawmakers.

Judgment affirmed.

KIRBY and SMITH, JJ., dissent.

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

Opinion delivered February 22, 1915.

1. CARRIERS—SHIPMENT OF FRUIT—ICED CAR—NEGLIGENCE.—In an action against a carrier for damages to a shipment of peaches, evidence held sufficient to show the defendant liable for not furnishing plaintiff a car, properly iced, in accordance with its agreement.
2. CARRIERS—SHIPMENT OF FRUIT—FAILURE TO FURNISH ICED CAR.—After notice a carrier agreed to furnish plaintiff a car properly iced, to be used for the shipment of peaches. *Held*, under the evidence, the carrier did not show a sufficient excuse for its failure to furnish the same, which would relieve it from liability for damages resulting from its failure to do so.
3. CARRIERS—SHIPMENT OF FRUIT—NEGLIGENCE—DUTY OF SHIPPER—DAMAGES.—A carrier agreed to furnish plaintiff a car, properly iced, to be used by plaintiff in the shipment of peaches. The carrier furnished the car, but it was not properly iced. *Held*, there being no market for peaches at the place of shipment, it was necessary for plaintiff to do all in his power to mitigate the damages, and that it was not negligence on his part to ship the peaches in the car that was improperly iced.
4. CARRIERS—SHIPMENT OF FRUIT—NEGLIGENCE—MEASURE OF DAMAGES.—A carrier failed to furnish a shipper with a car, properly iced, to transport peaches, from Camden, Ark., to Burlington, Iowa. By reason of the carrier's negligence the peaches were damaged when they reached Burlington, but there being no market for peaches there, they were, at the shipper's request, sent to Minneapolis. *Held*, in arriving at the amount of damages sustained by plaintiff shipper, plaintiff had a right to re-ship from Burlington, and the issue was whether the car would have reached the best available market if it had been properly iced at Camden, and whether the carrier, in failing to ice the car according to contract, deprived the plaintiff of that market, and the measure of damages is the difference between the market value of the fruit in the condition in which it would have been if it had been properly iced, and the market value in its damaged condition.

Appeal from Woodruff Circuit Court, Northern District; *J. M. Jackson,* Judge; affirmed.

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

1. Instruction No. 1, given at appellee's request, was too broad in making the carrier liable "for all damages which may accrue to the property shipped," even though such damages may be due to the inherent nature of the property. 6 Cyc. 381. It was also erroneous in imposing an absolute duty to ice the car. 41 Am. Rep. 696.

2. The only ground of negligence relied upon by appellee was the failure to furnish a car already iced. It was therefore error to refuse to instruct the jury as requested by appellant that their verdict should be for the defendant, in the event they found that the plaintiff, with full knowledge that said car was not properly iced, loaded his fruit into the car.

3. If the peaches were in such a heated condition as to cause them to ripen prematurely at the time they were loaded, the defendant would not be liable, and the court erred in refusing so to instruct the jury.

4. It was error to admit proof of diversion of the shipment, and to permit appellee to amend his complaint so as to show the diversion of the car and its final destination Appellant's *contract* with appellee contemplated Burlington as the destination. Testimony as to the diversion was prejudicial, since plaintiff's testimony shows that the market at Burlington was "too loaded" to justify him in stopping the car there.

5. The verdict is excessive. 73 Ark. 112; 88 Ark. 594; 101 Ark. 172; 54 Ark. 22; 74 Ark. 358; 44 Pac. (Kan.) 39.

E. M. CarlLee, for appellee.

1. Instruction 1, correctly states that the initial carrier is liable to the shipper for damages to an interstate shipment undertaken by it, whether the loss oc-

curred on its own line, or on the lines of connecting carriers. Act 270, Acts 1907; 89 Ark. 154; 91 Ark. 97.

There is no merit in the contention that the instruction is abstract as being without allegation or proof to sustain it. the uncontradicted proof shows that the fruit went into the car in first-class shipping condition, and arrived at its destination in an almost worthless condition.

The complaint in apt words charges inadequate refrigeration along appellants line and the line of connecting carriers. The language of the complaint will be given every fair and reasonable intendment. 91 Ark. 400, 121 S. W. 270; 96 Ark. 163, 131 S. W. 674.

2. The court properly refused to give instruction 8, stated in substance in appellant's argument No. 2, above. It ignores plaintiff's theory that it was necessary for him to load his peaches at the time he did, or wait until 12 o'clock the next day.

3. There was no testimony that the peaches were in a heated condition at the time they were loaded but on the contrary the proof shows that they were in a "sound, first-class shipping condition." Instruction 3 would have been abstract and misleading, and was correctly refused.

4. There was no error in admitting proof of diversion and permitting amendment of the complaint to conform to the proof. The proof was admitted without objection. Kirby's Dig., § 6145; 78 Ark. 346, 95 S. W. 778; 88 Ark. 181, 114 S. W. 221; 89 Ark. 300, 116 S. W. 676, 118 S. W. 1009.

5. The verdict is not excessive. There was no reshipment in this case, but the plaintiff preceded it and diverted it, of which diversion appellant had knowledge through its agent at Burlington. The entire shipment was, throughout, on a single bill of lading.

McCULLOCH, C. J. The plaintiff seeks in this case to recover from the defendant railway company damages sustained by reason of injury to a shipment of a carload of peaches from Camden, Arkansas, to Burlington, Iowa. Plaintiff owned a fruit farm a few miles out of Camden,

and in July, 1912, having a carload of peaches to ship, applied to defendant's agent for a car properly iced. That was on July the 17th or 18th, and the shipment was to be made on the 20th. The agent agreed to have the car ready for the peaches to be loaded into it on the morning of the 20th, and it was understood that plaintiff was to gather his peaches and have them ready for shipment on that date. He gathered his peaches on the 19th and hauled them to Camden and stored them in a hay barn ready to be loaded on the cars the next day; but when he got ready to load them on the morning of the 20th, he found that the car had not been iced according to the agreement made with him by the agent. He called upon the agent and a controversy arose between them concerning the failure to ice the car and as to whether he should load the peaches into the car without it being iced. There is a conflict in the testimony as to the substance of the conversation between the two—the plaintiff and the agent. The plaintiff testified that he loaded the peaches under protest and insisted that he should have an iced car, as it was very warm weather and he could not wait any longer for the car to be iced. The agent testified that he was about to have the car iced there at Camden and instructed the plaintiff not to put the peaches into the car until it could be iced. There is a further conflict in the testimony of the two men as to when the car was finally iced and the amount of ice put into the bunkers. The agent says it was iced about 1:30 o'clock on the 20th, and that the ice company reported to him that eight thousand pounds of ice was put in the bunkers, which was sufficient as the initial icing; but the plaintiff testified that the bunkers were not more than half full and that it was 3:30 or 4 o'clock in the afternoon before the ice was put in. The plaintiff went to Burlington ahead of the car and when he reached there he found that the market there for peaches was overstocked and in such condition as not to justify trying to sell them and he applied to the agent of the connecting carrier and had the shipment diverted through to St. Paul and

thence to Minneapolis. The car was found to be well iced when it reached Burlington, and also when it reached St. Paul and Minneapolis, but the peaches were so badly damaged when they reached Minneapolis that they had to be sold at a price that was scarcely sufficient to pay the freight bill. The undisputed evidence was that the peaches were in good condition when loaded into the car at Camden and that they were almost worthless for marketing purposes when they reached St. Paul. Peaches of that kind in good condition were worth sixty-five cents per basket at Minneapolis the day the shipment reached there, but plaintiff was compelled, on account of the damaged condition of the peaches to sell them at a greatly reduced price. The jury returned a verdict in his favor for damages in the sum of $655.65, which was the difference between what the peaches would have brought at the market price at Minneapolis if in condition and what the plaintiff got for them when sold there.

(1) It is contended that the evidence was not sufficient to sustain the verdict, but we think there was sufficient evidence to warrant a finding that the damage to the fruit was caused by defendant's failure to furnish a car properly iced. The undisputed evidence is that the peaches were in first-class condition for shipment at the time they were loaded in the car, and the jury were warranted in finding that if the car had been properly iced before the time for shipment, so as to enable the plaintiff to load the peaches into a cold car, they would have gone through to market without damage. The testimony is undisputed that two days before the shipment was to be made the plaintiff applied for a car to be furnished properly iced, and that the agent agreed to furnish the car and that this was not done. It was very hot weather in July, and when the car was delivered to the place where the peaches were to be loaded, and it was opened, plaintiff found that no ice had been put in it at all. It is true the agent testified that he was ready to have the car iced there at Camden, and that he tried to get the plaintiff to wait until it could be iced; but the

plaintiff, on the other hand, testified that there was nothing for him to do but to load the peaches into the car, which he did under protest, and that there was not sufficient ice put into the car to cool it. Out of this conflict the jury might have found that the failure to furnish the car already iced caused the damage and that the controversy between the plaintiff and the agent, as to whether the peaches should be put into the car first or delayed until after the ice was put into the bunkers, was unimportant.

Exceptions were saved to the following instruction, given at the instance of the plaintiff, which was a part of instruction No. 1, as follows: "Therefore, in this case, if you believe from the evidence that the defendant company accepted for transportation from the plaintiff at Camden, Arkansas, a carload of peaches for shipment to its destination, or diverted destination, and that the said fruit was damaged by the failure of the defendant company, or some succeeding or connecting carrier, to properly ice the car in which the peaches were transported, then you will find for the plaintiff." It is insisted, also, that in another sentence of the instruction there was an erroneous statement making the carrier liable for all damages, even though such damage might be due to the inherent nature of the property. If the language was erroneous, it was certainly not prejudicial in this case, for the undisputed evidence is, as before stated, that the peaches were in good condition for shipment when loaded in the car, and that there could have been no damage from the inherent nature of the property. It is contended that the instruction above quoted is erroneous because it placed an absolute obligation on the company to ice the car instead of merely holding it to reasonable care to furnish an iced car. This contention overlooks the undisputed fact that there was a contract on the part of the company to furnish an iced car on the date specified.

In the case of *Cumbie* v. *St. Louis, I. M. & S. Ry. Co.*, 105 Ark. 415, we held that "the difference between the

obligation to furnish cars imposed by law and that imposed by a contract to furnish them is that the contractual obligation is more onerous; for, while a railroad is not liable for nonperformance of its legal obligations where it has a reasonable excuse to furnish cars as such heavy and unprecedented traffic, it is not relieved from the obligation to perform its contracts by unexpected emergencies in its business."

(2) There is really no testimony in this case which would have justified the jury in finding that there was any excuse for not furnishing the car properly iced according to the agreement. The only excuse given by the agent was that the ice plant at Argenta was broken down at the time, but that is not sufficient to show that a car could not have been properly iced somewhere else. He merely states that because of the fact that the ice plant at Argenta was broken down he sent to El Dorado and got a car where there were no facilities for icing it. The car reached Camden the evening before the shipment was to be made and, for aught to contrary shown in the testimony, it could have been properly iced at Camden in time to have it ready. The law imposed upon the defendant the duty of furnishing a car properly iced and, in addition to that, there was a contractual obligation to furnish it at the time and place mentioned, and we think that there is no sufficient excuse shown even if that would relieve the company from responding in damages for its failure to do so.

(3) Error of the court is assigned in striking out from one of defendant's instructions the following: "Your verdict should be for the defendant in the event that you find that the plaintiff, with full knowledge that said car was not properly iced, loaded said fruit in the car not properly iced." There was no prejudice in striking out that statement from the instruction, for it was included in instruction No. 4 in almost the same language. We do not mean to say that the instruction was correct and ought to have been given. On the con-

trary, it was erroneous, for it ignored the duty of the defendant to furnish a car according to its agreement and defeated plaintiff's right to recover merely because he loaded the peaches into an un-iced car. The undisputed testimony is that there was no market at Camden, and that plaintiff was compelled to ship his fruit in order to find a market. It was incumbent on plaintiff, when he found that defendant had not complied with its contract, to do all that he could to mitigate his damages, and, notwithstanding the fact that the car was not properly iced, the jury had a right to find that he pursued the proper course in loading his peaches and in making all possible effort to get them to a market and dispose of them to the best advantage.

He stated in his testimony that he loaded the peaches under protest and it is fairly inferable that he realized that there was little, if any, prospect of getting the fruit to market in an un-iced car in condition to sell to advantage; still, it was his duty to make reasonable effort to mitigate the damages and, as before stated, the evidence warranted the conclusion that the proper thing for him to do was to continue his efforts to get the fruit to market. Besides, the sales in Minneapolis amounted to substantially enough to pay the freight, and defendant was not prejudiced by the ineffectual effort to get the fruit to market and dispose of it. If plaintiff had failed to make the effort he would be confronted with the contention, perhaps, that he had left undone something that he might have done to mitigate the damages.

Defendant also complains that the court refused to give an instruction submitting the question to the jury whether or not the peaches were in a heated condition such as to cause them to ripen prematurely, when they were loaded in the car, but the undisputed evidence is that the peaches were in good condition, and there was nothing to submit to the jury on that score.

The next contention is that the court erred in allowing the plaintiff to prove the diversion of the shipment from Burlington to St. Paul and Minneapolis. Now, the

testimony is that plaintiff's request for diversion of the car was promptly granted and that the car was in a properly iced condition and went on through to St. Paul and thence to Minneapolis without delay. There is, therefore, no question involved in this case of the right to divert the car, because the plaintiff's request for the diversion was promptly acceded to. He had the right, clearly, to have the car forwarded from Burlington, even though that was the destination named in the bill of lading. It is true the defendant was only bound to furnish facilities to carry the shipment through to the point of destination, but there are no circumstances in this case which would make that question a material one, as the same facilities would have been furnished for a shipment to Minneapolis as to Burlington; that is to say, a refrigerator car properly iced. Plaintiff was entitled to get his fruit to any available market, and since the carrier acceded to his request for a diversion of the car it is only important to consider that question in connection with the measure of damages.

(4) As to that, it is contended that the verdict is excessive for the reason that Burlington was the point of destination and the condition of the market there should be the sole test. Counsel for defendant cite decisions of this court which hold that the rule of damages for delay in transporting goods is the difference between the market price of the goods at the time and place when and where they should have been delivered and their value when they were delivered. *St. Louis, I. M. & S. Ry. Co.* v. *Coolidge,* 73 Ark. 112. There was no objection to the instruction of the court to the effect that "the measure of damages in this case will be the fair market value of the peaches at destination, less the amount he received for same." But the question of the excessiveness of the verdict, and the sufficiency of the evidence to sustain the amount awarded by the jury, raises the question about taking into consideration the Minneapolis market. The undisputed testimony is that at the time the peaches reached Burlington the market there was

overstocked, and that in order to find a satisfactory market it was necessary to divert the shipment or to forward the peaches to some other available market. Now, the breach of the contract and the negligence of the defendant which caused the injury occurred at Camden. There was no market for the peaches there, and the plaintiff was entitled to recover an amount which would compensate him for the difference between what he would have realized for the peaches at the point of destination if the car had been properly iced, less the market value in the damaged condition. Treating Burlington as the point of destination, it does not necessarily follow that the state of that market on the date the peaches reached there was the sole test, for if there was no satisfactory market there the plaintiff was entitled to carry his products to some other available market. *St. Louis S. W. Ry. Co.* v. *Kilberry,* 83 Ark. 87; *Kansas City So. Ry. Co.* v. *Mabry,* 112 Ark. 110. The mere fact that the Burlington market was in such condition that the fruit could not have been advantageously disposed of, even if it reached there in good condition, does not deprive the plaintiff of the privilege of taking the fruit to another market which would have been available to him if the car had been properly iced at Camden according to defendant's contract and its duty as a public carrier. It is unimportant whether there was a contract for the diversion of the car or not, for the reason that plaintiff had the right to reship his stuff from Burlington so as to reach a better market, and that privilege was in fact accorded to him without objection. So, after all, the real question in the case, so far as the amount of damages is concerned, is whether or not the car of fruit would have reached the best available market if it had been properly iced at Camden, and whether or not the failure of the carrier to ice the car according to the contract has deprived the plaintiff of that market. If it did, then he is entitled to the difference between the market value of the fruit in the condition in which it would have been in if it had been properly iced and the

market value in its damaged condition. There is some suggestion here that the fruit might have depreciated from the time it left Burlington until it reached Minneapolis, but we think that this was a question for the determination of the jury. The undisputed testimony is that the car was cold and had plenty of ice in the bunkers when it reached Burlington, and also when it reached St. Paul and Minneapolis, so the jury could have found, and doubtless did find, that there was no depreciation of the fruit after it left Burlington, and that plaintiff secured a better price for it when he sold it at Minneapolis than he could have done if he had stopped it at Burlington and attempted to dispose of it there.

So, upon the whole, we are of the opinion that the case was properly submitted to the jury, and that there was enough evidence to sustain the verdict.

Affirmed.

HART, J., dissents.

HADLEY MILLING COMPANY v. KELLEY.

Opinion delivered February 22, 1915.

1. PRINCIPAL AND AGENT—LIMITED AUTHORITY.—One who deals with an agent is put upon notice of the limitations of his authority, and must ascertain what that authority is, and, if he fails to do so, he deals with the agent at his peril.
2. PRINCIPAL AND AGENT—SCOPE OF AGENT'S AUTHORITY.—A principal is bound not only by the acts of his agent within the scope of his actual authority conferred, but also by those acts which are within the apparent scope of the agent's authority, even though they are beyond the actual scope of the authority.
3. PRINCIPAL AND AGENT—AUTHORITY TO SELL GOODS—COLOR OF RIGHT TO COLLECT.—The authority of an agent to sell goods does not necessarily imply authority to collect the purchase price, unless there are circumstances or appearances which give color to the belief in the purchaser that the authority exists.
4. PRINCIPAL AND AGENT—AUTHORITY TO COLLECT—CURRENT FUNDS.—The authority of an agent to collect for goods sold, does not include authority to collect in anything else except in current funds.
5. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—DEBT TO PRINCIPAL—COMMERCIAL PAPER.—Without express authority from the principal,

an agent can not accept any kind of commercial paper in satisfaction of a debt due to the principal.

6. PRINCIPAL AND AGENT—PAYMENT TO AGENT—AUTHORITY TO ACCEPT.—An agent authorized to collect debts due his principal in money, is without authority to accept a time-check, payable to himself, in payment of a debt due his principal, and such an acceptance by the agent, being beyond his authority, will not bind the principal.

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

Hawthorne & Hawthorne, for appellant.

Burke exceeded his authority in drawing the draft in the name of his principal, payable to himself. 18 L. R. A. 663; 199 Ill. 151; 59 L. R. A. 657; 194 Ill. 157, 56 L. R. A. 564; 53 Ark. 136; *Id.* 208; 105 Ark. 111; 92 Ark. 315; 70 Ark. 401; 62 Ark. 33; 52 Ark. 253; 124 N. W. 236; 76 N. W. 792; 77 N. E. 295; 31 Cyc. 1643.

J. N. Beakley, for appellee.

A traveling salesman of a wholesale house is a general agent, and his acts within the scope of his business, though in violation of instructions, will bind his principal, unless parties dealing with him have notice of limitations upon his authority. 48 Ark. 138. One who holds another out to the public as his agent is bound by his acts. 57 Ark. 203.

Burke did not exceed his apparent authority in this case. While declarations of an agent are not admissible to prove agency, yet, if the agency be otherwise *prima facie* proved, or admitted, as in this case, they become admissible in corroboration. This would admit the statement to appellee by Burke that he was required or permitted to take an acceptance as he did. 31 Cyc. 1656.

Persons dealing with an agent within the apparent scope of his real authority, will be protected. 52 Ark. 203; 49 Ark. 320.

McCULLOCH, C. J. The plaintiff, Hadley Milling Company, is a foreign corporation, domiciled at Olathe, Kansas, and is engaged there in milling and selling flour. On November 23, 1912, the plaintiff, through its sales-

man, one J. E. Burke, sold a carload of flour to the defendant, J. P. Kelley, who was engaged in the mercantile business at Minturn, Lawrence County, Arkansas, and this is an action to recover the sum of $746, the price of the carload of flour. Defendant admits the purchase of the flour at the price named, but pleads payment of the amount by acceptance of a check drawn by Burke, in the name of the plaintiff, and satisfaction thereof by the execution of a note to the Bank of Hoxie, the holder of the check. The case was tried before a jury and the trial resulted in a verdict in favor of the defendant.

It appears from the evidence that Burke lived at Hoxie, Arkansas, and had been selling flour for the plaintiff in that portion of the State for several years. The terms of his contract with plaintiff, as stated by all of the officers of the plaintiff company in their testimony, was that he was to receive ten cents per barrel as commission on all of his sales, and that he was to sell for cash, or on thirty days time, or not exceeding sixty days time by express permission of the manager. Each of them testified that Burke had authority to make collections of accounts for the sale of flour, but that he had no authority to take notes, drafts, or acceptances. On November 23, 1912, Burke sold the carload of flour in question to the defendant and drew a draft on the defendant in the name of the company, payable to himself (Burke), and this draft was accepted by defendant by written indorsement made thereon. A few days later Burke sold the draft to the Bank of Hoxie at a small discount and the proceeds were credited by the bank on Burke's individual indebtedness. When the draft fell due, the defendant satisfied the bank and took up the draft and gave his note to the bank for the amount. Burke disappeared about the middle of February, 1913, without having reported to the plaintiff the collection of the account, and had not been heard of up to the time of the trial. The undisputed testimony of plaintiff's officers and manager is that they did not authorize Burke to take acceptances or to collect otherwise than in money;

that they had never heard of his having done so in any instance, and that he had never paid the amount of this account or accounted to plaintiff in any way for it.

(1-2-3) "One who deals with an agent is put upon notice of the limitations of his authority, and must ascertain what that authority is, and, if he fails to do so, he deals with the agent at his peril." *United States Bedding Co.* v. *Andre,* 105 Ark. 111. A person is, however, bound not only by the acts of his agent within the scope of actual authority conferred, but also those acts which are within the apparent scope of the agent's authority, even though they are beyond the actual scope of the authority. *Queen of Arkansas Ins. Co.* v. *Malone,* 111 Ark. 229. The authority of an agent to sell goods does not necessarily imply authority to collect the proceeds unless there are circumstances or appearances "which give color to the belief in the purchaser that the authority exists." *Meyer* v. *Stone,* 46 Ark. 210.

(4) In the present case the goods were not delivered by Burke, and his authority to sell did not necessarily imply the authority to collect the proceeds, but the evidence is undisputed that the authority was in fact given to him to collect the accounts for sales. The real question presented is whether or not he had authority to accept defendant's time check in payment of the price of the flour, for if he had no such authority, or if it was not within the apparent scope of his authority, then the defendant's plea of payment is unfounded. The testimony is, as we have already shown, uncontradicted, that no express authority was given by the plaintiff to Burke to collect in anything except money, and it seems to be well settled by the authorities that the authority of an agent to collect does not include authority to collect in anything else except in current funds.

Mr. Mechem, in his work on the law of Agency, says (Sec. 375): "An agent authorized merely to collect a demand or to receive payment of a debt, can not bind his principal by any arrangement short of actual collection and receipt of the money. He can not, therefore, take

in payment the note of the debtor payable either to himself or to his principal." Precisely the same rule is laid down in 1 Clark & Skyles on Agency, p. 645, and 1 Am. & Eng. Ency. of Law, p. 1027. See also, *Blumberg* v. *Life Interests & R. S. Corporation* (1897), 1 Ch. Div. 171, 66 Law J. Ch. 127; *Pate* v. *Westacott,* 1 L. R. Queen's Bench (1894) 272; *Harlan* v. *Ely,* 68 Cal. 522; *Holt* v. *Schneider,* 57 Neb. 523; *Drain* v. *Doggett,* 41 Ia. 682; *Baldwin* v. *Tucker,* (Ky.) 23 Ky. Law Rep. 1538, 57 L. R. A. 451; *Broughton* v. *Sillawoy,* 114 Mass. 71; *Cooney* v. *U. S. Wringer, Co.,* 101 Ill. App. 468.

(5-6) The authorities seem to be quite unanimous in holding that without express authority from the principal an agent can not accept any kind of commercial paper in satisfaction of a debt due to the principal. Of course, if an ordinary check is given in accordance with business customs, and is for immediate presentation, it constitutes merely a vehicle for the collection, and if the check is in fact paid, it amounts to the same as if the money itself had been paid over; but such is not the case here. The paper taken by Burke was a time check payable to himself and was accepted by the defendant, being the same in effect as if he had accepted the defendant's negotiable promissory note payable to his own order. This kind of paper falls squarely within the cases which hold that the acceptance of such paper is not within the implied authority of an agent who is merely authorized to collect and who has no express authority to accept commercial paper. The acceptance of the paper was therefore neither within the actual nor the apparent scope of Burke's authority, and the plaintiff was not bound by it unless it consented to this method of its agent doing business or ratified the act.

The instructions given by the court are in accord with the law as herein announced, but instructions were given, over the objections of defendant, submitting to the jury the question whether or not the plaintiff permitted Burke to collect in that way, or whether the plaintiff ratified such collections made by Burke. One of the instructions

given was as follows: "You are instructed that if J. E. Burke, as agent for the Hadley Milling Company for a long period of time, had been making drafts upon the customers with whom he dealt, and that such drafts were in the name of the said J. E. Burke, and these customers were required to accept such drafts as evidences of the indebtedness due or owing by them, if the said Burke was in the habit of cashing said drafts or putting them up as collateral security before the date of the maturity thereof, and was remitting the proceeds thereof to the Hadley Milling Company, then as a matter of law the said Hadley Milling Company will be deemed to have had notice thereof and to have authorized such acts."

We think there was no testimony in this case which justified the giving of that instruction. The uncontradicted testimony of the president and the secretary and the manager (it appearing that they are the only ones with authority to make contracts for the company) is that they had never known of Burke accepting paper of this kind, and had no information whatever that he had accepted this paper from defendant. It is true, defendant attempted to prove that it was Burke's general custom to take paper of this kind, but the proof is not sufficient to warrant an inference that the custom was known to plaintiff or was general in its nature. In fact, it can scarcely be said that there was any competent proof at all, and that which defendant adduced was not competent, for the witnesses merely stated that there was such a custom, but their own testimony shows that their statements were based merely upon conclusions and not upon facts within their knowledge. There are only two instances (or perhaps one) pointed out where Burke had adopted this means of making collections, and there is no proof that the plaintiff had any information concerning those instances. The court erred in permitting the witnesses to make the statements concerning this custom without first showing some knowledge of the facts upon which the conclusion was based, and also erred in submitting the question to the jury of ratification on the

part of the plaintiff by acquiescence in this method of making collections.

We have not overlooked that feature of the case, pressed by counsel for defendant, that there was some proof showing that the contract between plaintiff and Burke embraced a stipulation that in the event payments were not made within sixty days on sales made through Burke's agency, he should be responsible for the price himself. That was brought into the case by the introduction of a complaint in an action instituted by the plaintiff against another party, and the court permitted it to be introduced on the theory that it was an admission that such were the terms of the contract. That feature of the contract, however, even if we hold that the complaint in the other case was sufficient to amount to proof of substantive character, does not alter the fact that there was no authority to collect otherwise than in money. If, as stated by plaintiff's witnesses, the authority of Burke under the contract was to make sales and collect the proceeds, without any express authority to collect otherwise than in money, then the additional feature of the contract making him liable personally for all sales where the collections were not made within sixty days, would not imply an authority to collect otherwise than in money. That additional contract was merely one imposing liability on the part of the agent himself in the event the purchaser did not pay, and does not of itself constitute authority to make collections otherwise than in money.

We find, therefore, no facts or circumstances in this case sufficient to sustain the verdict in defendant's favor. The judgment is therefore reversed and the cause is remanded for a new trial.

MALONEY, RECEIVER v. JONES-WISE COMMISSION COMPANY.

Opinion delivered February 22, 1915.

1. BILLS OF LADING—ENDORSEMENT AND DELIVERY—RIGHT TO POSSESSION.—The endorsement and delivery of bills of lading to one A. is sufficient at common law to transfer the possession of the goods covered by the bills of lading to A.
2. FACTORS AND BROKERS—ADVANCES—LIENS.—By the common law, a factor and commission merchant has a lien upon the goods of his principal in his hands as security for all advances made to such principal, in connection with the goods consigned.
3. BILLS OF LADING—TRANSFER—LIEN.—Under Kirby's Digest, chapter 15, page 295, one to whom a bill of lading has been transferred by endorsement and delivery is treated as the owner thereof, so far as to give validity to any pledge, lien, or transfer given, made or created thereby.
4. ATTACHMENTS—SALE—ORDER OF COURT.—Where attached property has been sold, under the orders of the court, and the proceeds are in the hands of the sheriff or the custodian in whose hands it was placed by the court's order, a judgment can not be rendered in favor of an interpleader against the plaintiff in the attachment for the value of the property.
5. ATTACHMENTS—JUDGMENT FOR COSTS.—A judgment for an intervener in an attachment suit should be for costs, and the proceeds of the property in the sheriff's hands, and not for the property or its value, where the attached property has been sold and the proceeds delivered to the sheriff.
6. SURETY BOND—LIABILITY—PROPERTY OF THIRD PARTY.—A surety on an attachment bond who undertakes to pay all damages which may be sustained by the defendant, is not liable for a trespass committed to the property of a third party.

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

STATEMENT BY THE COURT.

T. H. Bunch Commission Company (hereinafter called the Bunch Company) instituted this suit in the circuit court against John W. Sharpe, alleging that Sharpe was indebted to it in the sum of $600 damages growing out of sales of hay from Sharpe to it, the ground of the attachment being that Sharpe was a non-resident. The Bunch Company filed an attachment bond in the sum of

$1,260, with the Maryland Casualty Company (hereinafter called the Casualty Company) as surety, which bond recites: "We undertake and are bound to the defendant, John W. Sharpe, in the sum of $1,260 that the T. H. Bunch Commission Company shall pay to said defendant the damages which he may sustain by reason of the attachment in this action if the order therefor is wrongfully obtained."

An order of general attachment was issued on November 25, 1913, directing the sheriff to attach the property of Sharpe in Pulaski County. The sheriff levied on the four cars of hay in the yards of the railway companies. These cars of hay had been shipped under bills of lading to shipper's order, and with instructions to notify the Bunch Company. The Bunch Company was, by order of the court, appointed custodian of the property and the sheriff was directed to deliver the hay to it.

On January 14, 1914, the Jones-Wise Commission Company (hereinafter called the Jones-Wise Company) intervened, claiming the right to the possession of the hay by virtue of a factor's lien on the same, setting up that the original bills of lading had been endorsed and mailed to it on November 17, 1913, and that these bills of lading had been received by it on November 20, 1913, five days before the attachment was issued. The intervener alleged that it had loaned Sharpe $500 on the hay after he had shipped the same to Little Rock, and that to secure this $500 Sharpe had endorsed the bills of lading to intervener.

The Bunch Company denied that the intervener had a factor's lien, and denied that it was entitled to the hay.

No process was issued or served upon the Casualty Company and it did not appear in the case.

The defendant in the attachment did not appear and there was no issue on the attachment.

Upon the evidence adduced both parties asked a directed verdict, whereupon the case was withdrawn from the jury, and the court found on the issue between the intervener and the Bunch Company, that the defendant was

a non-resident of the State; that the four cars of hay in controversy had been shipped by Sharpe to shipper's order, with directions to notify Bunch Company, on November 7, 1913. The court found the value of the hay, under the facts, to be $631.42. The court further found the facts to be, as stated in the deposition of witness Wise, who was the vice-president of the Jones-Wise Company, intervener, that Sharpe was not the owner of the hay in controversy; that the hay was not purchased in the ordinary sense, but was shipped to the intervener company on consignment, the company having advanced money on account of the cars; that the agreement for the purchase of the cars was completed November 17, 1913, and the transaction closed and title passed to intervener company on that day; that on November 20, the intervener received through the mail from Sharpe shipper's order bills of lading for the cars of hay in question, endorsed to intervener under date of November 17, 1913; that on November 25, 1913, Sharpe owed the Jones-Wise Company $500 which it had advanced to him and which was to be reimbursed out of the proceeds of the four cars of hay in question. The Jones-Wise Company advanced Sharpe the $500 before the hay was shipped. It was to sell the four cars, collect for the same and remit to Sharpe any balance remaining after freight and other charges were paid, and after paying the amount of the advancement. After receiving the bills of lading on November 20, the Jones-Wise Company were called over the long-distance phone by Sharpe and were instructed to place the $500 advanced, above referred to, against the particular four cars of hay, which the company did, and which advance still stands charged to Sharpe on the company's books against these four.

The appellant Bunch Company asked the court to declare the law as follows: "The intervener did not have a factor's lien on the four cars of hay in question, and that the intervention should be dismissed." The court refused this declaration, to which appellant duly excepted.

The court declared the law as follows: "That the intervener did have a factor's lien on the four cars of hay in question and that the attachment should be dismissed;" to which the appellant duly excepted.

The court rendered judgment dismissing the attachment, and in favor of the appellee Jones-Wise Company, and against the Bunch Company, appellant, for the hay or its value. The judgment recites as follows: "It appearing that the hay has been sold and can not be delivered, and that the market value of the hay at the date of the seizure under said attachment was $631.42, the court further adjudges that the Jones-Wise Commission Company recover from the plaintiff and from the Maryland Casualty Company, its surety, $655.18, the market value of the hay, and interest at 6 per cent since its attachment, and its costs."

After the judgment was rendered and before the transcript was lodged, the Bunch Company was declared bankrupt and J. S. Maloney was appointed receiver, and after the appeal was perfected, under the order of court the appeal is prosecuted in the name of the receiver. The Casualty Company also appeals.

Wallace Townsend, for appellant.

1. Where there is no question as to whether the goods have been sold to the consignee, but an ordinary consignment for sale is admitted, the consignee does not part with his title to the consignment, but continues to be the true owner until the goods are sold. 40 Ark. 216; 108 N. Y. 439, 15 N. E. 701; 78 Mo. App. 28; 19 Cyc. 121.

The title, therefore, was still in Sharpe, and the hay was subject to attachment, unless appellee had a factor's lien; and in order to have such lien they must have made an advance upon this particular hay.

The $500 loan was not an advancement on these four cars, and can not be made the basis of a factor's lien. Such lien does not exist if the advance was made upon personal credit exclusively. 19 Cyc. 157. It can not be claimed that this loan was advanced on the faith of these

cars of hay or that they were shipped in accordance with a previous understanding to ship them in satisfaction of the advancement. 60 Ark. 357, 362; 12 Am. & Eng. Enc. of L. (2 ed.) 680; *Id.* 682; 49 Md. 59.

The facts of the case will not support a claim based on section 530, Kirby's Digest, because the facts show that there was no advance upon the faith of the bill of lading. 60 Ark. 357.

2. Even on the theory that there was a factor's lien, it was error to give judgment for the market value of the hay. The most appellee was entitled to was a refund of the alleged advance. 90 U. S. 35.

In no event was it entitled to judgment for more than its costs and the proceeds in the hands of the sheriff's custodian. 62 Ark. 210, 212.

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

1. Personal property subject to a lien can not be taken under attachment. Jones on Chattel Mortgages, § 555; 42 Ark. 236-240; 58 Ark. 289-291.

The endorsement and delivery to appellee of the bills of lading, both at the common law and under our statutes transferred possession of the hay to appellee. Kirby's Dig., § § 524-533; 44 Ark. 306; 64 Ark. 244-246; 31 Ark. 131. The fact that the hay was delivered to appellee after the advancement had been made, is immaterial. A pre-existing indebtedness can be secured by pledge. 31 Cyc. 795, 796; 73 Mo. 665, 39 Am. Rep. 537; 13 Ky. Law Rep. 267; In re *Wiley,* Fed. Cas. No. 17,655; 12 Mass. 300, 7 Am. Dec. 74.

2. Appellee was entitled to judgment for the hay or its value. An intervention in an attachment is, under our statute, but a summary substitute for replevin, and the replevin statute provides for judgment in the alternative for the property or its value. 58 Ark. 446; 47 Ark. 40; 4 Cyc. 727.

3. Judgment against the surety is correct. Being a party to the action, the surety can not *now* complain of

the judgment where it failed to file a motion for new trial. Kirby's Dig., § 1233.

Cockrill & Armistead, for the surety.

The interpleader can not recover a judgment against the surety on the plaintiff's attachment bond. The object of the bond is to protect the defendant, not an interpleader. Kirby's Dig., § 347; 3 Cyc. 765; 49 N. E. 282; 57 S. W. (Ky.) 459; 62 Ark. 171; *Id.* 209; 63 Ark. 451. In no event was the interpleader entitled to a summary judgment against the surety. 37 Ark. 206; 29 Ark. 208; 83 Ark. 205.

WOOD, J., (after stating the facts). The court found the facts, as requested by the appellant, to be "as stated in the deposition of Henry M. Wise." Therefore, if in any view of the facts as stated in the testimony of Wise the judgment of the court is correct appellant is in no attitude to complain, and the judgment in favor of the appellee as against appellant must be affirmed.

The testimony of Wise would warrant the court in finding that the hay in controversy was delivered to intervener on consignment; that it had advanced the money to Sharpe, the consignor, on account of these particular cars; that under the contract it was to sell the hay and out of the proceeds, after paying the amount of the advancement and the costs and commissions, the intervener was to account to Sharpe for the balance; that the consignor Sharpe held bills of lading which recited that it was to be delivered to his order, and that before the attachment was issued he had endorsed and mailed these bills of lading to the intervener.

(1) On the facts as thus stated, the court was correct in declaring as a matter of law that the intervener had a factor's lien on the cars of hay in question. The endorsement and delivery of the bills of lading was sufficient at the common law to transfer the possession of the hay to the intervener. *Durr, et al.* v. *Hervey,* 44 Ark. 306; *Turner* v. *Israel,* 64 Ark. 244. See also, *Puckett* v. *Reed,* 31 Ark. 131.

(2) The facts also, as they may have been found by the court, were sufficient to bring the case within the doctrine of *May* v. *McGaughey,* 60 Ark. 357, where we said: "By the common law, a factor and commission merchant has a lien upon the goods of his principal in his hands as security for all advances made to such principal, in connection with the goods consigned."

(3) Here the advancement made by the appellee to Sharpe, according to the testimony of Wise was not in the nature of a debt contracted without any reference to the business relations existing between them as principal and factor, but the advancement of $500 was made directly with reference to the relation between them as that of principal and factor. At least the testimony of Wise fully warranted the court in so finding. But our statute, Kirby's Digest, chap. 15, p. 295, still further enlarges the common law rule and makes the one to whom a bill of lading has been transferred by endorsement and delivery "the owner of such goods * * * so far as to give validity to any pledge, lien or transfer given, made or created thereby," etc. So under the facts of this record at the time of the issuance of the attachment there can be no doubt that the appellee had a factor's lien and title to the cars of hay in controversy and the same therefore were not subject to attachment. See *Jennings* v. *McIlroy,* 42 Ark. 236-241; *Buck* v. *Bransford,* 58 Ark. 289-291. See, also, *United States* v. *Villalonga,* Book 23, p. 64, L. C. P. Co. (ed.) U. S. Sup. Ct. Reports, and case note.

The judgment of the court, therefore, in favor of the intervener, dismissing the attachment, is affirmed.

(4-5) The intervener was entitled to a judgment against the Bunch Company, plaintiff in the attachment, only for costs and the proceeds of the property in its hands as custodian. The property, under the orders of the court had been taken from the sheriff and put in the hands of the Bunch Company as custodian and the property ordered to be sold. Where attached property has been sold under the orders of the court and the proceeds

are in the hands of the sheriff or the custodian, in whose hands it was placed by the court's order, a judgment can not be rendered in favor of an interpleader against plaintiff in the attachment for the value of the property. "A judgment for an intervener in an attachment suit should be for costs and the proceeds of the property in the sheriff's hands, and not for the property or its value, where the attached property has been sold and the proceeds delivered to the sheriff." *Fly* v. *Grieb's Administrator,* 62 Ark. 209. See also, *Smith* v. *Lee,* 73 Ark. 451.

The court erred in rendering judgment against the appellant for the value of the property, but there is no evidence that the value of the property exceeded the proceeds of the sale. No evidence as to what the value of the property was, therefore the error in this particular was not prejudicial, and the judgment is affirmed.

(6) But the court erred in rendering judgment against the Casualty Company, the surety on the attachment bond of the Bunch Company. That bond bound the Bunch Company and its surety, the Casualty Company, to pay "to said defendant the damages which he may sustain by reason of the attachment in this action if the order therefor is wrongfully obtained." The order for the attachment was not wrongfully obtained. Moreover, the express language of the bond was to pay the damages which the defendant in the attachment might sustain. The object of the bond was to protect the defendant and not the intervener. The law is correctly stated in 4 Cyc. 765, as follows: "It seems that a surety on an attachment bond who undertakes to pay all damages which may be sustained by defendant is not liable for a trespass committed to the property of a third party."

There was no breach of the bond as the attachment was not wrongfully obtained, and no damages to the defendant in the attachment. See *Rodde* v. *Hollweg,* 19 Ind. App. 222, 49 N. E. 282; *Martin* v. *Turpin,* 57 S. W. 459.

The court therefore erred in rendering judgment against the Casualty Company, and the judgment as to it is reversed and the cause dismissed.

NELMS v. STATE.

Opinion delivered February 22, 1915.

1. APPEAL AND ERROR—TIME OF FILING BILL OF EXCEPTIONS—CLERICAL MISPRISION.—On November 13, the circuit judge allowed appellant thirty days in which to file a bill of exceptions. Endorsed on the purported bill of exceptions, signed by the judge, was the statement that the same was presented and signed by the circuit judge on December 23, and endorsed on the back, "Filed December 12, 1914." *Held*, the bill of exceptions will not be held to have been filed on time, the recital in the certificate being conclusive, in the absence of a showing that the dates mentioned therein were due to a misprision on the part of the judge.
2. APPEAL AND ERROR—TIME OF FILING BILL OF EXCEPTIONS.—When time is allowed to prepare and file a bill of exceptions, the same must be signed by the judge and filed within the time allowed, in order to have the questions presented by such bill passed on by the Supreme Court.

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

S. A. Jones, for appellant.

Argues on the merits of the cause.

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

No bill of exceptions was filed in time. 96 Ark. 175; 169 S. W. 790. There is nothing for this court to decide.

WOOD, J. Appellant was convicted on a valid indictment of the crime of embezzlement and sentenced to imprisonment in the State penitentiary for one year, and he prosecutes this appeal.

The errors complained of do not appear upon the face of the record, but are only such as could be presented by a bill of exceptions. The record shows the following: "Friday November 13, 1914. This day comes the defendant by his attorney, S. A. Jones, and

prays an appeal to the Supreme Court, which is granted, and defendant is allowed thirty days to prepare and file his bill of exceptions herein."

The purported bill of exceptions contains the following: "Now on the 23d day of December, 1914, within the time allowed by the court, comes the defendant and files his said bill of exceptions and presents the same to the judge thereof, and asks that the same be by said judge examined, approved, signed and ordered filed as a part of the record in this cause, all of which is accordingly done. Witness my hand as judge of said court this 23d day of December, 1914." (Signed) "Robt. J. Lea, Judge 6th Jud. Cir." Endorsed on the back is the following: "Filed December 12, 1914."

(1) The recital made in the purported bill of exceptions by the circuit judge to the effect that the same was presented to him on the 23d day of December and by him signed on that day, will be controlling in the absence of an affirmative showing that this recital of the date on which the bill of exceptions was presented and signed, is misprision on the part of the judge. There is no such showing in this record. It must therefore be held that the bill of exceptions was not presented within the time allowed by the court for preparing and filing the same.

The time allowed by the order made November 13, 1914, allowing the appellant thirty days to prepare and file his bill of exceptions expired December 13, 1914. The recitals of the purported bill of exceptions showed that the same was not presented to nor signed by the judge until December 23, 1914, ten days after the time in which the same should be presented and filed had expired. The endorsement by the clerk that the bill of exceptions was filed December 12, 1914, in view of the other recitals, which are controlling, must be considered as a misprision on the part of the clerk, for obviously the bill of exceptions could not be filed with him until it had been signed by the judge presiding.

(2) When time is allowed to prepare and file a bill of exceptions the same must be signed by the judge

and filed within the time allowed in order to have the questions presented by such bill passed on by this court. *Green* v. *State,* 96 Ark. 175, and cases cited.

There being no error upon the face of the record proper, and no bill of exceptions presenting the errors of which appellant here complains, the judgment must be affirmed, and it is so ordered.

COTTEN v. CITY OF BENTON.

Opinion delivered February 22, 1915.

CONSTITUTIONAL LAW—CLASSIFICATION OF INCORPORATED TOWNS—SPECIAL LEGISLATION.—A special act of the Legislature, Act 113, Special Acts 1911, declared the city of Benton to be a city of the second class. *Held,* the special act was unconstitutional as being in violation of art. 12, § 3, Constitution 1874, which provides that the General Assembly shall provide by general laws for the organization of cities and incorporated towns, and restrict their powers of taxation, assessment, and contracting debts, so as to prevent an abuse of such power.

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

STATEMENT BY THE COURT.

The General Assembly of 1911 passed Special Act No. 113, which was an act to declare Benton, Arkansas, a city of the second class and for other purposes.

The city council of the city of Benton, proceeding upon the assumption that the act was valid, and constitutional, passed an ordinance requiring property owners to construct sidewalks and curbs.

M. M. Cotten failed to comply with the order and the city council caused a walk and curb to be constructed in front of his property and upon his refusal to pay for the same a complaint was filed in the chancery court of Saline County asking that the property be condemned and sold for the payment of the amount expended by the city for the construction of the walk and curb.

The chancellor found in favor of the city of Benton and from a decree entered in its favor Cotten has prosecuted an appeal to this court.

J. S. Abercrombie and *Hal L. Norwood,* for appellant.

The act was unconstitutional and void. Const., art. 5, § 24, art. 12, § 2; 36 Ark. 166.

W. V. Evans, for appellee.

The act is not unconstitutional. The Legislature is the supreme judge of the necessity or propriety of a special law. 61 Ark. 25; 59 *Id.* 530; 48 *Id.* 370; 53 *Id.* 494; Const. Ark., art. 5, § 24.

HART, J. The only contention made by counsel for the defendant for a reversal of the decree is that the special act above referred to making Benton a city of the second class is unconstitutional, and in this we think counsel are correct.

Article 12, section 3, of the Constitution of 1874, reads as follows:

"The General Assembly shall provide, by general laws, for the organization of cities (which may be classified) and incorporated towns, and restrict their power of taxation, assessment, borrowing money and contracting debts, so as to prevent the abuse of such power."

Counsel for the defendant insist that the special act in question violates this clause of the Constitution and cites the case of *Little Rock* v. *Parish,* 36 Ark. 166, in support of their contention. In that case the court held:

"1. Whether a municipal corporation has definite boundaries, and what they are, is for the courts, and not the Legislature, to determine.

"2. On the passage of the Act of April 20, 1873, for the addition of territory to municipal corporations, 'DuVal's addition' to the city of Little Rock became and continued a part of the city, and was not cut off, as was attempted, by the Act of March 9, 1877, 'to define the boundary of the city,' the act being unconstitutional."

On the other hand, it is contended by counsel for the city of Benton that while article 5, section 24, provides in effect that in all cases where a general law can be made applicable no special law shall be enacted, that the court has uniformly held that the Legislature must determine for itself whether a general law can be made applicable in any particular case.

We do not think, however, that the provisions of that section have any application whatever to the case before us, but are of the opinion that the issue raised by the appeal is determined by the provisions of article 12, section 3, above quoted.

That section in express terms states that the General Assembly shall provide by general laws for the organization of cities and incorporated towns, and contains also a provision for their classification. The Legislature, pursuant to the power given it by this provision of the Constitution, has enacted general laws for the organization of cities and towns and has granted to cities of the first and second class enlarged and additional powers to those granted municipal corporations. The act in question constituted the town of Benton a city of the second class and conferred upon it the additional powers granted to a city of the second class. It could not grant additional powers without being in violation of article 12, section 3, of our Constitution.

It follows that the special act declaring the town of Benton a city of the second class was unconstitutional.

Therefore the decree will be reversed and the cause dismissed.

STATE v. STOKES.

Opinion delivered February 22, 1915.

1. GAME AND FISH—RIGHT OF NONRESIDENT LAND OWNER.—A nonresident of the State of Arkansas may not hunt or fish in this State, except upon lands which he owns.

2. GAME AND FISH—NONRESIDENT—OWNERSHIP OF LAND.—A deed to appellants gave them the right to hunt and fish on the land, the land to be used as a "fish and game preserve only," with reservation of

the right in the grantor to cut timber, and for a reversion to him, if the land ceased to be used as a game preserve. *Held*, the deed conveyed to appellants, who were nonresidents of the State, no interest in the land, but granted to them only the right to use the land as a fish and game preserve.

3. GAME AND FISH—NONRESIDENT—GRANT OF RIGHT TO HUNT AND FISH.—The mere grant of the privilege of hunting and fishing does not make a nonresident, to whom such privilege is granted, an owner of the land, so that he may escape the provisions of the statute in regard to nonresidents hunting in this State.

Appeal from Mississippi Circuit Court, Chickasawba District; *J. T. Coston,* Special Judge; reversed.

STATEMENT BY THE COURT.

The defendants, Jordan Stokes and others, were indicted for unlawful hunting under section 3599 of Kirby's Digest, which provides that it shall be unlawful for any person who is a non-resident of the State of Arkansas to shoot, hunt, fish or trap at any season of the year.

Section 3601 imposes a fine for a violation of the statute.

The facts are undisputed and, so far as necessary for a determination of the cause, are substantially as follows:

On the 2d day of July, 1901, the Paepcke-Leicht Lumber Company and the Chicago Mill & Lumber Company executed to W. H. Jackson and J. H. Acklin, trustees for the Big Lake Shooting Club, a deed as follows:

"Know all men by these presents: that Paepcke-Leicht Lumber Company and Chicago Mill & Lumber Company, for and in consideration of $5 to them paid by W. H. Jackson president and J. H. Acklin, secretary, as trustees for Big Lake Shooting Club, the following lands and waters lying in the County of Mississippi and State of Arkansas, towit:

"First: Beginning at point ten feet east of where the original survey of the United States Government made about the year 1834, defining the shore line of Big Lake intersects with the line between the States of Missouri and Arkansas, and near the center of section 19, township 16 north, range 10 east, running thence southwardly and always ten feet east of and parallel with the

shore line of said original survey as it meanders through sections 19, 20, 29 and 32, in said township, also through sections 5, 8, 17, 18, 19 and 30, of township 15 north, range 10 east; also through sections 25 and 36, in township 15 north, range 9 east, together with all accretions to each of said sections and fractional sections westward to the thread of Little River in Big Lake.

"Second: Beginning at a point ten feet west of where the half section line running east and west of sections 33, of township 15 north, range 9 east, intersects the shore line of Big Lake in the original survey of the United States Government, running thence southwardly and always ten feet west of and parallel with the shore line of the said survey as it meanders through said section 33, and also through sections 4 and 9, of township 14 north, range 9 east, together with all accretions to each of said sections and fractional sections, eastward to the thread of Little River in Big Lake.

"It is understood that said property is to be used as a game and fish preserve only and the conveyors herein reserve to themselves the right to cut and remove all the timber on said land; and it is a condition of this conveyance that should the Big Lake Shooting Club abandon the property or said club cease to exist, then and in that event said land shall revert to and the title thereto revest in the Paepcke-Leicht Lumber Company, or its successors.

"Witness our hands and seals this 2d day of July, 1901."

Jordan Stokes and the other defendants are nonresidents of the State of Arkansas but are members of the Big Lake Shooting Club, an incorporated association of individuals, which owns a clubhouse near Big Lake in the Chickasawba District of Mississippi County, Arkansas.

Big Lake is a non-navigable inland body of water situated within said county and district, and it is conceded that within twelve months before the finding of

the indictments the defendants hunted on the lands embraced within the above-mentioned deed.

The case was tried before the court sitting as a jury, and from the judgment in favor of the defendants the State has duly prosecuted an appeal to this court.

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

The effect of the decisions in this State is that a nonresident may not hunt in the State, except upon lands which he owns. 73 Ark. 236; 110 Ark. 204. The right to hunt is merely incident to the ownership of lands. The deeds introduced convey no interest in lands. 88 Ark. 571.

L. P. Biggs, for appellee.

1. Appellees owned the land and had the right to hunt. Section 3599 Kirby's Dig., is unconstitutional insofar as it curtails and abridges property rights. Const. U. S., Fourteenth Amendment; 73 Ark. 244. The right to hunt is a property right under the Constitution. 11 H. of L. Cas. 621; 160 U. S. 452; 110 Ark. 206.

2. 88 Ark. 571, is not in point. The question of a "private pond" is not involved.

HART, J., (after stating the facts). In the case of the *State* v. *Mallory,* 73 Ark. 236, it was held that a State can not forbid a nonresident land owner taking fish and game on his own property within the State while according such privileges to resident land owners, in view of the provision of the Federal Constitution forbidding the denial of equal protection of the law and the taking of property without due process of law. In that case the court said:

"The fullest latitude of power in the State to regulate and preserve the game for the common enjoyment is conceded, and no such private property rights therein which we hold to exist can retard or obstruct the exercise of that undoubted power. But we have another and altogether different question to deal with in this case,

that of finding whether land owners have a right to hunt and fish upon their own lands, which is a property right, they are entitled to equal protection in the enjoyment of that right with other land owners, or whether it be destroyed by a statute passed under the guise of a police regulation to preserve the fish and game, and the right of enjoyment prohibited for the sole reason that they are non-residents of the State. It is not of the fact that appellee is excluded from enjoyment of the common right of the citizen to fish and hunt, because of his non-residence, that he may complain, but of the exclusion, by reason of his nonresidence, from such special right which he should enjoy in common with other land owners."

Again in the case of *Lewis* v. *State,* 110 Ark. 204, the court said:

"In *State* v. *Mallory,* 73 Ark. 236, the court had under review the act approved April 24, 1903, making it unlawful for any person who is a nonresident of the State of Arkansas to hunt or fish in the State at any season of the year. We held under that act that nonresidents of the State who owned land within the State could hunt and fish on their own lands during the open season. But the act, of course, as to nonresidents of the State who are not owners of land within the State, is still in force, and they are prohibited from hunting and fishing at any season of the year. That act involves a discrimination in favor of residents of the State as against nonresidents who are not owners of land in the State. Such discrimination is a valid exercise of governmental power which the sovereign State has over the fish and game, *ferae naturae,* within its borders to protect and preserve same for the benefit of its inhabitants."

(1-2) The effect of these decisions is that a nonresident of the State of Arkansas may not hunt in this State except upon lands which he owns. The right to hunt is merely an incident to his ownership of the lands, and we are of the opinion that the deed copied into the statement of facts does not convey any interest in the lands

to the defendants, but only grants them the right to use them as a fish and game preserve.

When the deed is construed from its four corners and especially in reference to language used in the latter part of it, it is evident that there was only an intention to grant the defendants the right to hunt and fish on the land. The deed recites that the property is to be used as a "fish and game preserve only," and that the grantors reserve to themselves the right to cut and remove all the timber on the land and that it is a condition of the conveyance that should the Big Lake Shooting Club abandon the property or the club cease to exist the land should revert to and the title thereto be revested in the grantors. We do not think the deed conveyed any interest in the land separate and apart from the right to use it as a fish and game preserve.

Under the statute above referred to, the defendants being nonresidents would not be allowed to fish and hunt on the land unless they owned it and had an interest in the land itself.

(3) In short, we hold that the mere grant of the privileges of hunting and fishing does not make a nonresident, to whom such privilege is granted, an owner of the land so that he may escape the provisions of the statute in regard to nonresidents hunting in this State.

We expressly held in the case of the *State* v. *Mallory, supra,* that the nonresident could hunt on his own land because of the fact that he owned it and it was a right he might enjoy in common with other land owners.

Deeds from other persons and corporations are set out in the transcript and other reasons assigned by the Attorney General why the judgment should be reversed, but we do not deem it necessary to consider and determine them because the record shows that the defendants hunted on the land embraced in the above described conveyance, and having held that that conveyance did not give them any title to or interest in the land, it necessarily follows that they violated the section of the statute under which they were indicted when they hunted upon the lands.

Therefore the judgment will be reversed and the cause remanded for a new trial.

THE RAILWAYS ICE COMPANY *v.* HOWELL.

Opinion delivered February 22, 1915.

1. MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE TO WORK—DEGREE OF CARE.—A master is bound to exercise ordinary care to furnish his servants a safe place in which to work, and to make reasonable inspection from time to time to see that such place is kept safe; the degree of care required of the master, being tested by the circumstances surrounding the character of the employment and the particular facts of the case.
2. MASTER AND SERVANT—INJURY TO SERVANT—UNSAFE PLACE TO WORK—QUESTION FOR JURY.—Where defendant's servant was sent on to an elevated platform to remove some condenser pipes therefrom, and fell, and was killed by reason of a defective railing; *held*, when defendant's foreman knew of the defect, and failed to warn deceased of the danger, the issues of defendant's negligence, of assumption of risk and contributory negligence of the deceased, were questions of fact to be submitted to the jury for determination.
3. MASTER AND SERVANT—INJURY TO SERVANT—CONCURRENT CAUSES—NEGLIGENCE.—Deceased was killed by falling from a defective platform, to which he was sent by the foreman, who knew of the defect, but failed to warn the deceased. *Held*, under the facts, the jury might find the injury to be caused by the defective condition of the platform, together with the concurring negligence of the foreman in failing to notify deceased of the defect, and an instruction held correct which told the jury, that if they found that the defective condition of the platform was one of the causes which, concurring with another, produced the injury, that the defendant master would be liable in damages.
4. MASTER AND SERVANT—INJURY TO SERVANT—AUTHORITY OF FOREMAN—APPOINTMENT.—Deceased was killed by the falling of a defective platform to which he had been sent to work by one H., who testified that he was defendant's foreman. One F., who had charge of the work being done, testified that he had not appointed H. foreman. *Held*, whether H. had been appointed was a question for the jury.
5. APPEAL AND ERROR—MOTION FOR NEW TRIAL—ASSIGNMENT OF ERRORS.—Errors not set out in the motion for a new trial, will not be considered on appeal.

6. DAMAGES—DEATH—AMOUNT.—Deceased was killed in an accident resulting from defendant's negligence; he was rendered unconscious and suffered no pain, therefore the damages recoverable were limited to the amount of contribution to his family. *Held*, under the facts, a verdict of $14,355.75 was excessive. and the same will be reduced to $12,000, being the amount that would purchase an annuity equal to the amount of his contribution to his family, with interest from the date of death.

Appeal from Crittenden Circuit Court; *W. J. Driver*, Judge; modified and affirmed.

STATEMENT BY THE COURT.

This is an action brought by Verney V. Howell, as a widow, in behalf of herself and the next of kin of W. M. Howell, against appellant to recover damages for the death of her husband, which occurred on the 11th day of December, 1911. The facts as shown by the appellant, so far as necessary to determine the issue raised by the appeal, are substantially as follows:

T. Howell testified: My brother, W. M. Howell, was killed by falling from a platform twenty-six feet high while engaged in the work of tearing down and dismantling an ice plant belonging to the appellant. The ice plant was situated right on the right-of-way of the railway company at the town of Marion, in Crittenden County, Arkansas, and had formerly belonged to the Frisco Ice Company, of which corporation I was a member. That corporation had sold the plant to the appellant, the Railways Ice Company, and that company desiring to erect a larger plant employed my brother, myself and others to engage in the work of dismantling it and tearing it down.

I. E. Freeman was in general charge of the work for appellant and designated me as foreman. On the morning the injury occurred we were engaged in taking down the condensers. As foreman I told my brother to tear down all the pipes in that building. The building was twenty-six feet high, and after taking down some of the pipes in the rear part of the building, he went up to the top platform to take down the pipes there. The

platform was about two feet wide and there was a banister around it of planks two inches thick by three inches wide. These two-by-fours were nailed down on upright posts of the same dimensions and had been placed there to keep anyone from falling while at work on the platform. My brother had not been at work there more than twenty minutes before he fell from the platform and was injured so severely that he died twelve hours thereafter.

The railing which gave way and caused him to fall from the platform was made of green gum timber and had been there about a year. There was an old crack in the timber and it ran angling from one end of it a distance of about three feet. I knew the crack was there and had known it for some time but did not think to tell my brother about it when I told him to go up there and take down the pipes. Before the corporation of which I was a member sold the plant to the appellant I had been day engineer, and my duties required me to go up to the top of the tower frequently to inspect the condenser pipes and in that way I learned that the railing had a crack in it.

My brother worked for the old company before it sold out to the appellant, but he worked at night and did not have occasion to go up to the top platform where he was injured.

Pink McMillan, the only eye witness to the injury, testified: I was helping Mr. Howell take the pipes down the day he was killed. He had been working down in the engine room, but in the afternoon we went up to the top of the tower to take down some condenser pipe. We had taken down a pipe and had commenced to shove it off the banister. I placed one end on the banister and was letting it down and Mr. Howell was pushing the pipe from him and in doing so he either stepped to the banister or leaned against it, I don't know exactly which, and it gave way and broke. This caused him to fall to the ground. I afterward examined the railing where it broke and found an old seasoned sun-crack in it, beginning at the end and angling crossways about two feet or

maybe three feet. I didn't notice the crack in it when I went up there to work. When Mr. Howell fell the banister broke and the middle post was partly torn loose from the platform. I noticed it hanging there afterward by some nails. After Mr. Howell was taken away I continued working up there until the pipes were all down and the tower dismantled.

Other evidence for the plaintiff tended to show that Howell was twenty-six years of age, that he was in good health at the time he received his injuries, and that his life expectancy was thirty-eight years. He had a wife and three small children, and was making $75 per month at the time of his death. He had been engaged in farming and was also a good engineer, and had worked at that occupation for some time before he was killed.

I. E. Freeman, for the appellant, testified:

I have been in the employment of the Railways Ice Company for about two years. At the time of the accident to Mr. Howell I was at the plant and was local manager and foreman. I had the employment of the hands and directed their work. I did not see the accident. I never appointed or authorized T. Howell to act as foreman. He did not have any authority whatever to direct his brother about the work.

Other evidence for the defendant tended to show that Freeman had full charge of the work of tearing down the old ice plant and that he was not authorized to employ any man as foreman to assume charge or control of the plant. It was also shown that Freeman's duties were general and that he had entire charge and control of the work of dismantling the plant, and was empowered to hire such labor as was necessary and was to use his own judgment in dismantling the plant and taking care of the material preparatory to the erection of the new structure.

It was also shown that neither Freeman nor any of the higher officers of the company knew about the defect in the railing.

Other testimony will be referred to in the opinion.

The jury returned a verdict for $14,355.75, and from the judgment rendered appellant has duly prosecuted an appeal to this court.

A. B. Shafer, for appellant.

1. Under the facts in evidence appellant is not liable, and it should have been so declared as a matter of law. The rule making it the duty of the master to furnish a safe place does not apply where the servant is employed for the express purpose of assisting in the demolition of the plant, to the same degree as it would apply if the plant was being operated for manufacturing purposes. Where the work of the servant necessarily changes the character of the place as the work progresses, the duty of care for the safety of the place rests upon the servant, and he assumes the risks incident to the progress of the work of demolition.

Moreover, in this case, the deceased, being left entirely to pursue his own course and select his own methods in the work, was under the duty to examine the rail for his own protection before subjecting it to an unintended extra-hazardous use. 76 Ark. 69; 79 Ark. 76; 97 Ark. 486; 90 Ark. 387; 69 S. E. 416; 4 Thompson, Negligence, § 3979; White's Supp. § 3979; 3 Labatt, Master & Servant (2 ed.), § 924; 94 S. W. 304; 124 S. W. 608; 54 Ill. App. 578.

2. The court erred in adding to the verdict interest from the date of the death of Howell. Interest should run only from the date of the judgment. 13 Cyc. 83; *Id.* 86, 87; 17 S. W. 882; 100 S. W. 76; 197 Fed. 1016.

3. The court erred in modifying and giving as modified instruction 11, requested by appellant. It is a well settled rule in this State that the alleged negligence must be the proximate and efficient cause of the injury. 48 S. W. (Ark.) 898; 133 *Id.* 816; 113 *Id.* 647; 115 *Id.* 396; 96 *Id.* 152; 110 *Id.* 1037; 120 *Id.* 984; 147 *Id.* 473; 134 *Id.* 1189; 151 *Id.* 262. See, also, 155 S. W. (Mo.) 1070, 1078; 77 S. E. (N. C.) 417; 86 Atl. 292; 51 So. 959; 24 L. E. (U. S.) 256; 53 *Id.* 671; 26 Cyc. 1092, par. 5; *Id.* 1097, B-1; 65 Fed. 48; 105 Ark. 161.

Instruction 7 given by the court is erroneous in that it does not charge the jury that the burden was on appellee to show that the deceased did not know or have reason to believe that Freeman did not have authority to appoint T. Howell as foreman.

4. The verdict is excessive. At the time of his death deceased was earning $75 per month. If he contributed one-half to the support of his family other than himself, this would amount to about $450 per annum, the present value of which, at 6 per cent, on the basis of his expectancy would amount to about $6,000.

J. T. Coston, for appellee.

1. This court will not consider alleged errors in instructions which were not set out as grounds for a new trial in the motion for new trial. 170 S. W. (Ark.) 483; 34 Ark. 423.

Instruction 7 was the only instruction, the giving of which appellant assigned as error in its motion for new trial, and as to that, appellant in effect concedes that it is correct so far as it goes. If it did not go far enough as to the burden of proof, appellant is at fault in not presenting a specific objection, and can not complain. 97 S. W. 287; 56 Ark. 602; 60 Ark. 619; 94 Fed. 781.

Instruction 11 requested by appellant was properly amended by the court by inserting the words "or was contributed to." 113 Ark. 45; 3 Labatt, Master & Servant, 813; 54 Ark. 299; 67 Ark. 8; 113 S. W. (Ark.) 359; 203 U. S. 473; 90 Ark. 326.

2. It was not a part of the duty of deceased to dismantle the platform. He lost his life on account of a defect in the railing around the platform, and not on account of any defect in the condensing tower, where he was set to work; and the defect in the platform or railing did not arise in the progress of dismantling the tower. Yet, if he had been engaged in dismantling the platform, it was, nevertheless, the duty of appellant to warn him. 141 App. Div. 776; 56 Ark. 213; 114 S. W. (Ark.) 699; 3 Labatt, Master & Servant, § 2475; 158 Fed. 780; 86 Pac. 647; 117 Pac. 753; 82 N. E. 241; 81

Pac. 478; 88 U. S. 984; 90 N. E. 542; 133 S. W. 1132; 94 S. W. 305.

3. Where the court amends a verdict, and the jury adopts it as its verdict while still in the box, there is no irregularity, but the proceeding is entirely proper. 140 S. W. (Ark.) 263. And interest, in this case, was properly added to run from the date of the injury. 88 S. W. (Ark.) 999.

4. The verdict was not excessive. He left a wife and three children at his death, and his expectancy was thirty-eight years. He was earning and contributing to the support of his family about $910 per annum. 167 S. W. 93; 171 S. W. 99; 88 S. W. 999.

HART, J., (after stating the facts). It is earnestly insisted by counsel for appellant that there is not sufficient evidence to warrant the verdict.

(1) It is well settled that a master is bound to exercise ordinary care to furnish his servants a safe place in which to work, and to make reasonable inspection from time to time to see that such place is kept safe; the degree of care being tested by the circumstances surrounding the character of the employment and the particular facts of the case. *Ozan Lumber Company* v. *Bryan,* 90 Ark. 223.

There is an exception to this rule in some instances where a servant is employed in tearing down a building since the work of removal is one in which each part of the structure in turn is rendered insecure. This every workman understands.

In recognition of this principle, this court, in the case of *Grayson-McLeod Lumber Company* v. *Carter,* 76 Ark. 69, held that the rule that a master is required to furnish his servant a safe place in which to work is not applicable where the servant is employed to erect or tear down a structure as a servant assumes the hazards of such employment. In that case the servant was engaged in tearing down a bridge. His place of work continually changed, and the work of tearing down the bridge sometimes rendered his place of work more insecure. Speak-

ing with reference to the master's duties to him, the court said:

"There was no duty to furnish him a safe place in which to work, since his employment made it his duty to tear down and to change and destroy his places for work, and to make them safe or unsafe, as his work rendered them; and was such as to place it out of the power of his employer to perform such duty."

According to the testimony adduced in favor of appellee, this is not a case where the servant was engaged in dismantling a building, and the unsafe conditions from which the injury resulted arose from or were incidental to the work thus undertaken. The testimony adduced in favor of appellee tends to show that his place of work was not rendered insecure by any act of his. The master owed him the duty to exercise ordinary care to provide him a safe place to work at the start. He was directed to go to the top of the tower for the purpose of taking down the condenser pipes. There was a platform there about two feet wide with a banister around it upon which it was necessary for him to stand, while engaged in performing his work. The banister had a sun crack in it which rendered it unsafe. This fact was known to the foreman of appellant, and was unknown to decedent, or, at least, the jury might legitimately have drawn that inference from the testimony. The brother of the decedent testified that he was the foreman of the plant and that he knew of the defective condition of the banisters. He said that he ordered his brother to go up there to work, but did not notify him of the defect in the banister because he did not think of it at the time. It is true the decedent had worked for the company which sold the plant to appellant, but he worked in the night time, and according to the testimony of his brother, his duties did not require him to go up on the platform in question.

The only eye-witness to the accident, the man who went up to work with him, says that he had not been up there more than twenty minutes when the decedent fell

from the platform. He also stated that he himself did not notice the suncrack in the banister when he went up there to work, or before the injury occurred. He stated that at the time the injury occurred, they were engaged in pushing off over the platform a condenser pipe which weighed about fifty pounds, and that decedent, in pushing it off, either stepped or leaned against the banister, and that on account of the defect in the banister, it broke and precipitated him to the ground, thereby causing the injuries which resulted in his death.

(2) Under these circumstances, we think that the question of the negligence of the appellant, the assumption of risk and the contributory negligence of the decedent were questions of fact to be submitted to the jury for its determination.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Corman,* 92 Ark. 102, the court held that a servant is entitled to recover for the negligence of the master, even though the negligence of a fellow-servant concurred therein if the injury would not have occurred but for the master's negligence.

It is next insisted by counsel for appellant that the court erred in modifying instruction No. 11, asked by it. That instruction is as follows: "You are instructed that the law presumed that the master did his duty, and did not know of any defects, if any existed, in the guide rail around the platform. It is incumbent upon the plaintiff to show by a preponderance of the evidence that the death of Howell was caused solely or was contributed to by reason of a defect in the guide rail, and that this defect in such guide rail was known to the defendant, or that such defect could have been known to the defendant by the exercise of ordinary care, and that such defect was not known to Howell."

The modification consisted in adding the words, "or was contributed to," after the words, "was caused solely."

The instruction, as asked by appellant, was erroneous. It made the liability of appellant to appellee de-

pend upon whether the death of Howell was caused solely by reason of the defect in the guide rail or banister.

In the case of *Chicago Mill & Lbr. Co.* v. *Cooper,* 90 Ark. 326, the court held that where several proximate causes contributed to a casualty, and each is an efficient cause without which the casualty would not have happened, it may be attributed to all of the causes; but it can not be attributed to a cause without whose co-operation the accident would not have happened.

(3) As we have already seen, the testimony on the part of appellee tended to show that the guide rail or banister was in a defective condition at the time Howell went up there to work, and that he went there to work at the direction of the foreman of appellant without any warning that the defective condition of the banister existed. It will be remembered that the defective condition of the banister had existed for some time prior to the happening of the accident, and that this fact was known to the foreman of appellant, but was not known to the deceased, Howell. Under this state of facts, the jury might have found that the proximate cause of the injury was the defective condition of the guide rail, together with the concurring negligence of the foreman in failing to inform Howell of its defective condition. It is evident that the court intended to remedy this defect in the instruction by the use of the words, "or was contribued to," immediately following the words, "was caused solely by." We think it manifest that the court, by the use of the added words, intended to instruct the jury that if it found that a defective condition of the guide rail was one of the causes which, concurring with another, produced the injury, the appellant would be liable in damages to appellee. See *Fourche River Valley & I. T. Ry. Co.* v. *Tippett,* 101 Ark. 376.

It is next insisted that the court erred in giving instruction No. 7, which is as follows:

"If you find from a preponderance of the evidence, that Freeman appointed T. Howell as foreman, he was for the purpose of this case the foreman, whether he had

authority to appoint Howell foreman or not, unless you further find that the deceased knew or had reason to believe that Freeman had no such authority, and the burden of establishing that T. Howell was the foreman, devolved upon plaintiff."

(4) We do not think there was any error in giving this instruction. Under the facts in this case it was not necessary that the court should use the words "whether he had authority to appoint Howell foreman or not," for the undisputed evidence shows that Freeman was the local manager of appellant, and had the sole and exclusive charge of dismantling the ice plant. As such, he had authority to appoint T. Howell as foreman, and the only disputed issue of fact was as to whether or not he did appoint Howell as such foreman. T. Howell affirmed that Freeman had appointed him foreman and Freeman denied that he did so. This question of fact was properly submitted to the jury in this and other instructions given by the court, and no prejudice could have resulted to the appellant from the use of the words which we have just quoted, because under the law if Freeman had sole charge of tearing down the ice plant and full authority to employ servants necessary for that purpose, with authority to discharge them at will, this authority carried with it the power to appoint T. Howell as foreman; at least in the absence of notice to Howell, that he did not have such authority.

(5) Next it is insisted by counsel for appellant that the court erred in other instructions given to the jury at the request of appellee, or of its own motion. We do not deem it necessary to set out or discuss these assignments of error. The record shows that appellant did not make them grounds of its motion for a new trial and, not having done so, under the settled rules of the court, it will be deemed to have waived them. This is so well settled by the repeated and uniform decisions of this court that it is not necessary to cite any cases in support of it.

Finally it is insisted by counsel for appellant that the verdict is excessive, and in this claim we think they

are correct. The decedent was rendered unconscious by his fall. He lived twelve hours thereafter, but never regained consciousness. The only element of damages claimed was the amount of contribution to be made by him to his family. The record shows that he was twenty-six years of age at the time of the accident, and that his wife was about the same age, and that he had three little children.

(6) He earned a salary of $75 per month, was a good engineer and was of sober and industrious habits. It it not shown that he possessed any means outside of his $75 per month earned by him at the time of his accident. In the very nature of things he could not have contributed the whole amount to his family as contended by counsel for appellees, but we think the jury might have fairly inferred from the testimony that he did contribute three-fourths of this amount to the support of his family. His life expectancy was thirty-eight years, as shown by the mortality tables and the present value of an annuity at his age would be worth something like $8,000. He was an active and energetic young man. His chances of earning a greater salary in the near future were good. He was killed three years before the trial, and under the rule in *St. Louis, I. M. & S. Ry. Co.* v. *Cleere,* 76 Ark. 377, the jury might have allowed interest at 6 per cent on the estimated damages. When we consider these facts it is fair to say that $4,000 additional might have been awarded by the jury. The utmost amount, then, which the jury should have awarded would have been the sum of $12,000.

Therefore, the judgment will be remitted down to $12,000, and for that amount it will be affirmed.

WESTERN UNION TELEGRAPH COMPANY v. HOLDER.

Opinion delivered February 22, 1915.

1. TELEGRAPH COMPANIES—MENTAL ANGUISH—INTERSTATE MESSAGE.—There may not be a recovery in this State for damages sustained by reason of mental anguish, caused by the negligent delay of a telegraph company to deliver promptly an interstate message in this State sent from Texas, although a recovery is allowed in this State for mental anguish.
2. TELEGRAPH COMPANIES—RIGHT TO CLASSIFY MESSAGES.—Under the rulings of the Interstate Commerce Commission, in an action for damages resulting from the negligent delay of the company in delivering an interstate message to the addressee, the defendant company had the right to classify its messages and charge different rates therefor, and was entitled to have the jury told of this classification, the same being a part of the contract with the sender, and having been approved by the Interstate Commerce Commission.
3. TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE PROMPTLY—ELEMENTS OF DAMAGE.—Where a telegraph company negligently failed to deliver, promptly, a message to plaintiff, apprising him of the illness of his daughter, so that he missed a train and was required to take a later one, any physical discomfort suffered by plaintiff in waiting for a train is not an element of damage to be considered by the jury.

Appeal from Carroll Circuit Court, Western District; *J. S. Maples,* Judge; modified and affirmed.

George H. Fearons, J. M. Shinn and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. Recoveries for mental anguish *solely* are not allowable under the interstate act. 234 U. S. 542; 114 Ark. 193; 171 *Id.* 859. The authority of Congress is supreme. 122 U. S. 347; 105 *Id.* 460; 203 Fed. 140.

2. The mental anguish sued for is not such as is recoverable under the Arkansas statute. 83 Ark. 39.

Wade H. James, for appellee.

There is no error in the instructions, and the verdict is not excessive. 38 Cyc. 1612; 82 Ark. 164; 151 S. W. (Tex.) 904; 85 Ark. 263; 91 *Id.* 475.

KIRBY, J. This is a suit for damages for mental anguish, alleged to have been caused by the negligence of the telegraph company, in failing to promptly transmit and

deliver the following message from Dallas, Texas, to appellee at his home in Eureka Springs, Arkansas, relative to the condition of his daughter:

"Dallas, Texas, July 16, 1913.

"J. W. Holder, care Mrs. Bettie Burkey, 60 Paxton Street, Eureka Springs, Ark.

"Lula grew worse at 8 A. M. Is unconscious. Don't be alarmed, but if you want to see her alive, I would not take chances, but I would come at once. Ed and I are with her. Wire me if you are coming, or not. Edith at home. 'Phone her.

"Joseph W. Allen."

The daughter was quite ill, as the result of childbirth, at a sanatorium in Dallas, and the message was filed for transmission by her brother-in-law with the company, at about 2 P. M. It did not reach the appellee until 7:35 o'clock of that evening, although it was received at 4:40, too late for him to catch the 8:30 train out that night, and make the best connection to Dallas, thus causing a delay in reaching the bedside of his daughter of thirteen hours. The daughter remained unconscious for two or three days and recovered.

The telegraph company denied the allegations of the complaint, and set up in paragraph 2 of its answer that the message was delivered and accepted by it, subject to certain terms and conditions in writing; that the defendant should not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeated message beyond the amount received for sending the same; that this was an unrepeated message for the sending of which it was only paid fifty cents, that the message was interstate, and as such, was interstate commerce, that by its rules it was authorized to classify messages and to limit its liability when so classified, and that according to the contract and classification of messages, could not be held responsible for damages in a greater sum than $50 under its reasonable rules; that the classification was known to and approved by the Interstate Commerce Com-

mission and under the stipulations of the contract, its liability should not exceed the sum of fifty cents, and in any event the sum of $50, with interest.

(1) The testimony is sufficient to show that there was negligent delay at the point of destination in the delivery of the message, which delayed appellee thirteen hours in reaching the bedside of his unconscious daughter, and that he suffered great mental anguish on account thereof. The message was an interstate one from a point in Texas, where the laws of the State allow mental anguish as an element of damage for the failure to deliver messages of the kind, to appellee in this State where the law likewise permits the recovery of damages for mental anguish. The contract was made for the benefit of the sendee or addressee of the message, who was a party thereto, and entitled to sue for damages arising from the negligent delay in delivering same. *Western Union Tel. Co.* v. *Compton,* 169 S. W. (Ark.) 946, 114 Ark. 193.

The court sustained a demurrer to the paragraph of appellant's answer, setting out its rule limiting its liability for unrepeated messages, such as this was, to not exceeding fifty times the amount charged for sending same, and in any event, to not more than $50, which it is contended was error.

It is insisted further that the message being an interstate one, our statute allowing the recovery of damages for mental anguish for the negligent failure to transmit and deliver same, is a burden upon interstate commerce, beyond the power of the State to impose.

In *Western Union Tel. Co.* v. *Compton, supra,* this court, after affirming a judgment for damages for mental anguish, on rehearing reversed same and reduced the judgment to $50, following the authority of the Supreme Court of the United States in *Western Union Tel. Co.* v. *Brown,* 234 U. S. 542, 58 L. Ed. 1457.

In a later case of *Western Union Tel. Co.* v. *Johnson,* 115 Ark. 564, 171 S. W. (Ark.) 859, a suit for damages for mental anguish for the failure to deliver a telegram sent from Arkansas to Mississippi, the court followed

the doctrine of the *Compton* case, and held that damages for mental anguish occasioned by the failure of a telegraph company to transmit or deliver a message, an interstate one, could not be recovered, following the Supreme Court of the United States in its determination that a statute providing for the recovery of mental anguish in such cases was an attempt to regulate the conduct of telegraph companies in transmitting messages from one State to another in interstate commerce.

The majority of the court is of opinion that this case is not distinguishable from that of *Western Union Tel. Co.* v. *Brown,* notwithstanding the fact that each State, the one from which the message was sent as well as the one where it was delivered, provide by statute for the recovery of damages for mental anguish for the negligent failure to transmit and deliver such messages.

(2) The telegraph company was entitled therefore to have its defense of a limited liability because of its rules, which were part of the contract, heard, the interstate commerce act, providing that the Commerce Commission has authority to regulate the rates and practices of telegraph companies. The telegraph company had the right to classify its messages and charge different rates therefor, and was entitled to have the jury told that its rule making such classification and giving day messages a preference in transmission and delivery over day letters, was a reasonable one. There is enough negligence shown in the failure to deliver the telegram to the sendee, who had been a resident of the city for more than thirty years, and was in business within 200 yards of its office, to justify the awarding of any damage that could be recovered under the company's rules, which became a part of the contract, and the agent having testified that the price of transmission of the message was seventy-five cents, appellee could recover fifty times the amount thereof, if it did not exceed the sum of $50. The appellant only claimed in its pleading, the demurrer to which should have been overruled, the right to the limitation of its liability as prescribed by its rules, and the judgment

should not have been for more than fifty times the price of the message, or $37.50.

(3) We do not agree with appellee's contention that any physical discomfort and suffering from a cold, claimed to have been contracted while waiting for the train at Fort Smith, was a proper element of damage, as resulting proximately from the delay in the delivery of the message in the first instance, and causing said appellee to take another train that required the stop-over at Fort Smith. There was no notice to the company that would apprise it that any such injury might result from the delay in the delivery of the telegram. The judgment is reduced to said amount that could be recovered under the terms of the contract—$37.50—and as modified, will be affirmed. It is so ordered.

ARMOUR v. CITY OF FORT SMITH.

Opinion delivered February 22, 1915.

WATER IMPROVEMENT DISTRICT—SUPPLY OF WATER TO ANOTHER WATER IMPROVEMENT DISTRICT.—A city took over the control of the water supply and system of Water District No. 1. Later, District No. 2 was organized, covering other territory in the city not covered by District No. 1. *Held*, the city had authority to permit District No. 2 to connect with the mains of District No. 1, and to sell water to the said District No. 2, where there was an ample water supply and the city made money by the transaction.

Appeal from Sebastian Chancery Court, Fort Smith District; *W. A. Falconer*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This cause was heard upon an agreed statement of facts, from which it appears that a private corporation had for some years operated the waterworks plant which supplied the city of Fort Smith with water, and this plant was acquired, under the authority of a special act of the General Assembly, by a district known as Water District No. 1, which had been organized for the purpose of acquiring this plant. Water District No. 1, at the time of its formation, embraced the then area of the city of Fort

Smith, but before the conveyance of the plant to it the limits of the city had been greatly extended. The city of Fort Smith, immediately upon the conveyance of said plant to Water District No. 1, commenced to operate and maintain said plant with the consent of the Board of Improvement of Water District No. 1, and under the provisions of section 5675 of Kirby's Digest. When the city first began the operation of the plant, there were several mains of said plant which had been constructed by the private corporation, and which extended beyond the limits of Water District No. 1, which mains supplied residents living within the limits of Fort Smith, but beyond the limits of the water district, and the income, both gross and net, of the district, was materially augmented by furnishing water to these persons living without the limits of said district. And since the city began the operation of said plant, it has permitted a number of mains to be constructed outside of Water District No. 1, and to be connected with the mains lying within that district, and these mains were conveyed to the city by the persons who constructed them, and it is agreed that they are now the property of the city unless, by operation of law, they became the property of Water District No. 1 by virtue of their physical connection to the mains of that district. It was further agreed that these mains were not only constructed without cost to Water District No. 1, but that the water rents from consumers outside of the district, who were thus supplied, have increased the gross and net revenue of said plant, and these revenues thus augmented have been sufficient, not only to maintain said plant, but also to pay the second, third and fourth installments of benefits assessed against the property of Water District No. 1, and the property owners living within Water District No. 1 have only been required to pay the first installment of benefits. That another improvement district, known as Water District No. 2, has been duly organized for the purpose of furnishing water to the property lying therein, and that the law in reference to the establishment of such districts has been fully complied with by

District No. 2, except that its plans provide for securing water through the mains of District No. 1 from the pumping plant of this last-named district. It was further agreed that the water supply, reservoirs and pumping machinery, and other equipment, of Water District No. 1 is ample and sufficiently large and complete to supply said new district with water without in any way impairing the efficiency of said plant or the service to owners of property in Water District No. 1, and that, after deducting the cost of operation and of any additional wear and tear, there will be an additional large net income coming into the hands of the city to be applied to the maintenance and equipment of said water plant. Under Act No. 13, of the Acts of 1913, giving Fort Smith a commission form of government, it is provided that the commissioners of that city shall be commissioners of all the improvement districts of that city, and, insofar as the city can do so, it has consented and agreed that District No. 2 might lay its mains and connect same with District No. 1, which district has the only available water supply in or around Fort Smith. It was further agreed that District No. 2 is a thickly settled community, and a failure to secure water for said district constitutes a menace to the health of the people of the whole city.

Appellant is a large owner of property in both districts 1 and 2, and instituted this proceeding for the purpose of testing the validity of the organization of Water District No. 2 and to restrain and enjoin the commissioners of the city of Fort Smith from laying any pipes in said Water District No. 2, and from connecting the same with the mains now operated by the city of Fort Smith, and for the purpose of having the assessment which had been made of the property in Water District No. 2 declared void, and the collector of said district enjoined and restrained from collecting said assessment.

Various exhibits were attached to the complaint, but the agreed statement of facts contains the substance of their recitals.

Upon the final hearing of the cause, the court below dismissed the complaint for the want of equity, and this appeal has been duly prosecuted from that judgment.

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

The board of commissioners have no authority to supply water to individual consumers residing in District No. 2, or permit said district to connect its proposed system with the water system owned by District No. 1. Kirby's Dig., § 5675; *Id.,* § 5664; 58 Ark. 270; 109 Ark. 90.

Kimpel & Daily, for appellee.

The power to operate a water plant, once it is constructed, is vested in the city by virtue of section 5675, Kirby's Digest. This statute authorizes the city to supply water to private consumers, but it contains no such limitation as is urged by appellant, viz., that it can supply water to such private consumers only as live within the limits of the district that constructed the plant.

Cities have broader powers than improvement districts, and in carrying out their work are vested with a large discretion. *Nakdimen* v. *Bridge District,* 115 Ark. 194; 94 Ark. 80; 53 Ark. 300.

The *Sembler* case, 109 Ark. 90, has no application here, the question there involved being merely the taking over of one district by another.

SMITH, J., (after stating the facts). It is insisted that the statute confers no authority for the organization of an improvement district for the purpose of laying a system of pipes, mains and hydrants where the plans of such district contain no provision for a supply of water, except to obtain this supply through an entirely independent district. It is said that the decision of this court in the case of *Sembler* v. *Water & Light Improvement District,* 109 Ark. 90, gives support to that position. We quote from the decision in that case as follows:

"Now, it will be observed that the new district was organized solely for the purpose of taking over and reconstructing and extending the water and light systems owned by the old district, and, since we find no authority

for taking over the old property, the project must fail because the organization is to do a thing which the statute does not authorize. If the new organization should proceed with the reconstruction and extension of the old water and light systems, there would necessarily arise a conflict in the question of ownership and control between the two districts, the old district not being extinguished, nor its rights to the property lost by the organization of the new district."

In holding that the authority had not been conferred by the statute for one improvement district to take over the property of another, it was there said:

"But we are unable to find any authority in the statute for such a proceeding as the cession of the property of the old district to the new. The city council has no authority to cede the property or to transfer the title from the old district to the new."

In the instant case, however, no attempt is being made to cede the property of one district to another nor to give one district any control or authority over the property of the other. Districts 1 and 2 are separate entities, and it is only proposed to permit District No. 1 to furnish the supply of water to District No. 2.

Upon the acquisition of the waterworks by the improvement district, it became the duty of the city to operate the plant, and the city immediately assumed this duty, and has since been discharging it. Section 5675, of Kirby's Digest. In speaking of the duty of the cities under this section, 5675, in the case of *Browne* v. *Bentonville,* 94 Ark. 80, it was said:

"The maintenance and operation of the waterworks under the above section are governmental functions, in the performance of which the city council must necessarily be invested with judgment and discretion. Conceding that they have the power, by implication, to make additions and extensions to the system as it was constructed by the commissioners, it is a power to be exercised at the discretion of the council. The council, for instance, in each case must determine whether the necessity exists for

the extension of a main to a particular territory, and what size main is needed, and whether the financial condition of the city will warrant the expenditure. The city fathers in these matters act in a legislative or governmental capacity for the city, and their discretion, exercised in good faith, can not be controlled by mandatory injunction."

It is argued that the city has neither the power nor the authority to permit District No. 2 to make physical connection with the mains of District No. 1, thereby securing from that district the necessary supply of water. It is argued that this is so because the power conferred upon cities in the operation of the improvements constructed by improvement districts must be strictly construed, and that no authority for this action is conferred by any statute. Section 5675 of Kirby's Digest, reads as follows:

"Sec. 5675. In case of the construction of waterworks, or gas or electric light works, by any improvement district or districts, the city or town council, after such works are constructed, shall have full power and authority to operate and maintain the same instead of the improvement district commissioners, and said city or town council may supply water and light to private consumers and make and collect uniform charges for such service, and apply the income therefrom to the payment of operating expenses and maintenance of such works."

This section expressly authorizes the sale of water to private consumers, but does not contain any limitation that such sales shall be only to consumers residing within the limits of the district. The operation of a water plant necessarily involves more or less expense, and the city, not the improvement district, is responsible for these operating expenses. *Improvement District No.* 1 *of Wynne* v. *Brown,* 86 Ark. 61. The responsibility for the successful operation of the plant of this District No. 1 depends upon the city, and as the property of the district can not be assessed to pay operating expenses, these expenses must be derived from consumers, whether lying within or without the improvement district. The agreed statement of facts shows that District No. 1 has water in ex-

cess of its own requirements, and this excess is a commodity, therefore, which it may sell, and the proceeds of this sale be applied to the maintenance and operation of the plant. Indeed, more than that has been accomplished, as appears from the agreed statement of facts, as the proceeds of the sale of the water have been sufficient, not only to operate the plant, but to relieve the owners of the property within Improvement District No. 1 of the burden of paying assessments levied against such property.

When the improvement contemplated under the plans of District No. 2 shall have been completed, it will then be as much the duty of the city of Fort Smith to operate that plant as it is to operate the waterworks owned by District No. 1, and as was said in the cases from which we have quoted, these are governmental functions which involve questions of policy to be decided by the administrative officers of the city. Necessarily there are limitations upon the authority of these officers. For instance, no such use of the property of District No. 1 could be made, in the operation of another district, as would impair the utility of the first district, and there would be no right to pursue any policy which would require the property owners in District No. 1 to incur any expense in connection with their own plant made necessary by the construction of another system. However, no such question has arisen here, for the physical connection of the mains of District No. 2 with those of District No. 1, not only will not add to the burdens of the property owners of District No. 1, but it is shown that the effect of this action is to lighten their burdens.

It is also insisted that the construction of Improvement District No. 2 is not authorized because its source of supply of water may not always be assured, inasmuch as some future administration in the city of Fort Smith may decide not to permit District No 2 to obtain its water from the mains of District No. 1. That, too, is a question which need not now be considered, as no such condition has arisen, and the probability of its arising is merely speculative. This same question was raised in the case of

Sembler v. *Water District, supra.* In that case it was urged that an ordinance creating a sewerage district was void for the reason that no provision was made for the necessary water, but upon that question it was there said:

"Now, as to suit No. 3, relating to the sewer improvement district, we discover no reason why that district should be invalidated and further proceedings thereunder enjoined.

"The only ground urged is that it covers territory not now covered by the old water system, and that sewers without water would be no benefit.

"The theory is correct, but it does not follow that the owners may not provide for sewers in anticipation of getting a supply of water, and the fact that the present scheme for supplying water in the additional territory failed, affords no reason why the property owners, if they desire to improve their property by constructing sewers, should not be allowed to proceed in that direction. Other means may be provided, either by the city or by the formation of an independent and separate improvement district, to furnish water in that locality, and in anticipation of that property owners have the right to organize a district to construct sewers. The city council had no authority to abolish this sewer district. *Morrilton Waterworks Imp. Dist.* v. *Earl,* 71 Ark. 4."

It follows from what we have said that the decree of the court below should be affirmed, and it is so ordered.

PHILLIPS *v.* JOKISCHE.

Opinion delivered March 1, 1915.

APPEAL AND ERROR—ORAL TESTIMONY—HOW PRESERVED—CHANCERY APPEAL.—Oral testimony in a chancery case can only be preserved by a recital of the original record, or by bill of exceptions, signed by the chancellor, or by reducing the testimony to writing at the time and, by permission of the court, filing it as a part of the record in the case.

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

Appellant, pro se.

Lehman Kay, for appellee.

Appellant's failure to bring into the record the oral testimony heard at the trial, calls for an affirmance. 38 Ark. 481; 45 Ark. 242; *Id.* 313; 35 Ark. 230; 58 Ark. 134; 83 Ark. 426; *Id.* 77; 80 Ark. 74; 81 Ark. 427; 100 Ark. 266.

McCULLOCH, C. J. The appellee, Katherine Jokische, instituted an action in the chancery court of Fulton County against one Jefferies and others to recover a sum of money and the possession of other personal property, or to assert a lien on the property. The exact nature of her claim is not brought into the record on this appeal, but it appears that a receiver was appointed to take charge of the property, and appellant, I. F. Phillips, intervened in the action and asserted a claim to a portion of the property in the hands of the receiver. The property claimed by appellant is two horses and a wagon and set of harness. The chancery court heard the case upon testimony adduced and decided against appellant, dismissing his intervention for want of equity. The decree recites that the cause was heard upon depositions and the oral testimony of witnesses adduced before the court, but the oral testimony has not been brought into the record.

In the condition of this record, we must indulge the presumption that the findings of the chancellor are correct and supported by the preponderance of the evidence.

Appellant contended that the record of the decree was erroneous in reciting that oral testimony was heard, and we postponed the submission of the cause to give him an opportunity to apply to the chancery court to have the record amended. The application was made and the court heard the motion, but refused to make any correction, holding that the record as originally sent up here was correct. An appeal has been prosecuted from that order and the record of that hearing is before us. The chancellor heard the motion for correction of the record upon oral testimony which is conflicting, and his finding that the original record was correct is not against the preponderance of the evidence. There was also an effort made to have the chancellor certify as a part of the record

the oral testimony which was adduced at the original hearing, and the chancellor refused to do that. He decided that his investigation should be limited to a determination of the question whether or not the record, as formerly made was erroneous, and that when he decided that question, the inquiry was at an end. We think the chancellor was entirely correct, for it is too late now to supply the omitted record. Oral testimony can only be preserved by a recital in the original record, or by bill of exceptions signed by the chancellor, or by reducing the testimony to writing at the time, and, by permission of the court, filing it as a part of the record in the case. *Meeks* v. *State,* 80 Ark. 579.

The decree is therefore affirmed.

SURRIDGE v. ELLIS.

Opinion delivered March 1, 1915.

1. APPEAL AND ERROR—EVIDENCE—QUESTION FOR JURY—PREPONDERANCE.—Where there is substantial evidence to warrant the verdict of the jury, the same will not be set aside, although it appears to be against the preponderance of the evidence.
2. OVERFLOW—DAMAGE TO LAND.—In an action for damages caused by the overflow of plaintiff's land, due to the digging of a ditch by defendant, it is not necessary for plaintiff to show that the water flowed directly on to his land; if the flow of water was diverted and caused to overflow plaintiff's land, it is immaterial whether or not it first overflowed other lands, or flowed through some other waterway, before reaching plaintiff's land.
3. OVERFLOW—VALUE OF LAND—DAMAGES.—In an action for damages due to overflow, the measure of damages is the difference between the value of the land at and before the time the ditch, which caused the overflow, was completed, and its value after the alleged overflow.
4. DAMAGES—ERROR—HOW CURED.—In an action for damages for the overflow of land, an error committed in submitting to the jury the issue of damages to plaintiff's crop, may be cured by requiring plaintiff, after verdict, to remit an amount equal to the damage to the crop, according to the highest estimate of its value given in evidence.
5. APPEAL AND ERROR—SPECIAL FINDING—DISCRETION OF COURT.—The trial court has a discretion in the matter of requiring the jury

to make a special finding, which will not be disturbed in the absence of an abuse of that discretion.

6. TRIAL—SPECIAL FINDING—SINGLE ISSUE.—The jury will not be required to bring in a special finding where there is only one issue to be found by them.

7. TRIAL—MISCONDUCT OF JUROR.—The ruling of the trial court, on the issue of the misconduct of a juror, will not be disturbed, in the absence of a showing of an abuse of the court's discretion.

Appeal from Randolph Circuit Court; *W. A. Cunningham,* Special Judge; affirmed.

T. W. Campbell, for appellants.

1. Instruction 5 is erroneous. There is no evidence tending to show that the ditch discharged any water upon appellee's land.

2. There is no evidence on which to base instruction 7.

3. Instruction 8 errs in allowing an award of full damages based upon a permanent injury to the lands, and also damages sustained to the crop of 1912 on the same lands. This error was not cured by requiring a remittitur. It was prejudicial error to refuse to require the jury to make special findings as to damages sustained, if any, upon the various items set out in the complaint. Kirby's Dig., § § 6207, 6208; 65 Ark. 241.

4. The judgment should be reversed because of the misconduct of the juror, Reney, in his partisan championship of appellee's interest in the jury room, and also, while the trial was in progress in permitting one of the witnesses to discuss the merits of the case with another party, in the juror's hearing, during an intermission of the trial. Kirby's Dig., § 6215.

S. A. D. Eaton, for appellee.

1. Instruction 5 is correct. Whether the waters of the ditch overflow appellee's land, directly or indirectly, the effect upon the land is the same, and he is entitled to compensation for the damage. 72 S. W. 225.

2. Instruction 7 correctly states the law relative to the measure of damages. 86 Ark. 91-96; 93 Ark. 46-55; 44 Ark. 103-106; 51 Ark. 324-328.

3. If there was any error in instruction 8 in allowing an award of damages to the crop of 1912, that error was cured by the remittitur. There was no error in refusing to require the jury to bring in special findings. 36 Ark. 371.

4. The alleged misconduct of the juror Reney was inquired into by the court on the hearing of the motion for new trial, and testimony heard. The court's finding and judgment thereon should not be disturbed.

McCULLOCH, C. J. The plaintiff, E. L. Ellis, owns a small farm near Black River in Randolph County, and the defendants own adjoining lands. Plaintiff sues to recover compensation for injuries alleged to have been done to his land by reason of digging a ditch by defendants. There was a verdict in plaintiff's favor assessing damages at $550, but on hearing the motion for new trial, the court required plaintiff to enter a remittitur of $150 on account of the error in submitting the question of damages done to crop for the year 1912. The remittitur was entered by plaintiff and judgment rendered accordingly, from which defendants have prosecuted an appeal.

It is claimed by plaintiff that the ditch cut by defendants gathered up waters from a certain area and diverted them from their natural course and caused them to flow through another water course, which overtaxed the capacity of the latter and overflowed on plaintiff's land. There is no conflict in the testimony about the digging of the ditch, and the course and dimensions thereof, but there is a conflict in the evidence as to its effect upon the flow of water. The east end of the ditch was cut through a ridge, and the evidence adduced by plaintiff tends to show that this amounted to a diversion of the water from its natural course and emptied it into another course which was overflowed and caused the injury to his land. There is a cypress brake or slough running through plaintiff's land, which some of the witnesses speak of as a lake, and that is the natural drainway into which the ditch emptied its waters, which, according to plaintiff's evidence, were diverted from their natural flow.

(1) It is earnestly insisted that the evidence does not show that the flow of water thus diverted was sufficient to overflow the natural drainway, which was much larger, but the testimony of several of the witnesses tends to show that the additional flow of water gathered up by this ditch and diverted, did in fact cause the waterway to be overflowed. It is insisted that the evidence is not sufficient to sustain a finding that digging this ditch and cutting it through the ridge, thus diverting the flow of the water, caused the injury to plaintiff's land, but after careful consideration of it, we are of the opinion that there was evidence of a substantial character which warranted the finding. We will not stop to consider where the preponderance of the testimony is on this subject, but content ourselves with the statement of the conclusion that there is evidence legally sufficient to sustain the verdict. Counsel for defendants argues very plausibly that from the evidence it is highly improbable that enough water would flow through the ditch to cause the cypress brake to overflow, and we are not insensible to the force of his argument; but, after all, we do not feel at liberty to invade the province of the jury and set aside the verdict because it appears to be against the preponderance of the evidence.

(2) Several errors are assigned with respect to the court's charge to the jury. The first assignment relates to instruction No. 5, which counsel contends is erroneous in telling the jury that if they found from the evidence that defendants' ditch gathered the waters and discharged them upon plaintiff's land so as to cause damage to his land or crop, the verdict should be for plaintiff. It is argued that the evidence does not show that the waters were discharged from the ditch on plaintiff's land. It is true that the evidence shows that the ditch did not reach to plaintiff's land, and that the waters discharged from its mouth did not flow directly over plaintiff's land, but the evidence is that they flowed into this brake or lake, as it is called by some of the witnesses, and overflowed that so as to cause the injury to plaintiff's land. We are of

the opinion that that evidence was sufficient to justify the instruction given by the court. It was not essential, in order to make out a case, to show that the waters flowed directly on plaintiff's land from the ditch. If the flow of water was diverted and caused to overflow plaintiff's land, it is immaterial whether or not it first overflowed other lands, or flowed through some other waterway, before reaching plaintiff's land.

(3) Another instruction (No. 7) was objected to, which relates to the measure of damages. This instruction told the jury that in estimating the damages they should take into consideration the difference between the value of the plaintiff's land at and before the time the ditch was completed, and its value after the alleged overflow of waters. It is urged that there is no testimony showing what the value was either before or after the ditch was completed. We think counsel is mistaken in his contention, for a number of witnesses testified concerning the value. It is true they arrived at their conclusions indirectly, but, after all, the effect of their testimony had a tendency to establish the value of the land and the consequent depreciation of the value. *St. Louis, I. M. & S. Ry. Co.* v. *Brooksher,* 86 Ark. 91; *St. Louis, I. M. & S. Ry. Co.* v. *Magness,* 93 Ark. 46.

(3) Another instruction (No. 7) was objected to, court in submitting the item of damage for crop of the year 1912. It is sufficient, however, to say in reply to that contention that the court cured that error by requiring plaintiff to remit an amount equal to the damage to the crop for the year 1912, according to the highest estimate placed on it by any witness.

(5-6) The court gave all of its charge to the jury before the argument, except at the conclusion of the argument an instruction was given as to the form of the verdict. Thereupon counsel for defendant requested the court to make special findings as to the different items of damages sustained by the plaintiff. The court refused to give the instruction on the ground that the request came too late. The court eliminated from the verdict the

erroneous assessment of damage to the crop for the year 1912, and that left only the damage for permanent injury to the land. There was nothing to call for special findings of fact, and there was no abuse of the court's discretion in refusing to instruct the jury to make separate findings. This court held in *Little Rock & Fort Smith Ry. Co.* v. *Pankhurst, Admx.*, 36 Ark. 371, that the matter of requiring the jury to find specially on particular questions is one of discretion, which will not be controlled unless there is an abuse of the discretion. In disposing of that question, the court after adopting the statute on the subject, said: "Such requirement may be very proper in some cases, but wholly useless and unnecessary in others, and only the court trying the case, can judge of the expediency of it."

(7) There is one other assignment of error, and that relates to the refusal of the court to grant a new trial on account of alleged misconduct of one of the jurors in talking to a witness about the case while it was under consideration by the jury. The court heard testimony on this assignment of error, and found that the charge of misconduct was not sustained. There is abundant testimony in support of the court's finding on that issue, and we are not disposed to disturb it.

Upon the whole, we find no error in the record, and the judgment is affirmed.

BLACK v. HILL.

Opinion delivered March 1, 1915.

WILLS—DEVISE OF REAL PROPERTY—VESTED INTEREST OF DEVISEE—SALE BY TESTATOR.—One C. made a will devising certain land to appellant, the will providing that appellant was to take care of the testator during the remainder of her life; appellant entered upon the land and began to fulfill the conditions of the will. Thereafter C. deeded the property to appellees, and appellant did nothing further toward her support. *Held*, under the evidence, the finding of the chancellor, dismissing appellant's bill, seeking to quiet his title in the lands, would not be disturbed.

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

W. P. Strait, for appellant.

1. Irrespective of the will as such, or of its revocation, a valid and consummated contract existed between the testator and appellant, whereby he was to have her estate at her death conditioned upon his paying her debts and supporting her during the rest of her natural life, in the fulfillment of which contract she executed the will in question. This case falls within the exception to the rule that where property is willed or conveyed with vestiture of title conditioned upon performance of acts precedent, actual performance of such conditions precedent is necessary to vesting the title. Since appellant's failure to continue in the discharge of the obligations resting upon him was due to the testator's refusal to permit him to do so, the law will treat the conditions precedent as waived by the grantor and vest the title free of conditions. 6 N. Y. 203; 14 W. Va. 514; 102 Am. St. Rep. 370, note; 102 Ark. 41, and cases cited.

2. The deeds relied on by appellees are void and should be cancelled for the reason that they were fraudulently obtained through undue influence and without consideration, while the grantor was insane. They are not *bona fide* purchasers. 95 Ark. 586; 2 Pomeroy, Eq. Jur. (3 ed.), 745; White & Tudor's Leading Cases in Equity, 49, 99, 105.

Sellers & Sellers, for appellees.

Appellant does not bring himself within the rule that a plaintiff in a court of equity must come with clean hands "conscience, good faith and reasonable diligence." The court will not lend its aid to relieve one from the consequences of his own fault or negligence, but will leave him to his remedy at law, if he has one. 33 Ark. 304; 23 Ark. 493; 53 Ark. 150; 67 Ark. 238; 74 Ark. 252; 113 Am. St. Rep. 507; 38 S. E. 182; 66 S. W. 161; 76 N. W. 890.

The case was heard by the chancellor upon the evidence and the complaint dismissed for want of equity.

All presumptions are in favor of the decree, and it will be affirmed, unless clearly contrary to the evidence. 84 Ark. 430; 114 Ark. 170.

SMITH, J. Appellant brought this suit to recover eighty acres of land described in his complaint, and to quiet his title thereto, and for rents and profits, basing his right to recover on a certain contract evidenced by a will executed by one Nancy Champion, who in her lifetime owned the land in question. The instrument under which he claimed title is as follows:

"Plumerville, Ark., January 2, 1906.

"I, Nancy Champion, being well of body and sound of mind does hereby make and declare this to be my last will and testament. I bequeath to Taylor Black all my property both real and personal of whatever kind, subject to the following conditions. Taylor Black is to faithfully look after my health and comfort, see that I am provided with fire, food and clothing. He is to work my farm, look after the repairs of my farm and house. This he is to perform during my natural life, and at my death he is to take all my property as mentioned above. I hereby take my hand and seal this the 2d day of January, 1906.

"Nancy Champion.

"Witnesses: W. L. Vance, I. L. Walsh."

All the parties to this litigation are colored people.

Appellant alleged, and offered proof tending to show, that upon the delivery of this instrument to him he entered into the possession of the land there described, and proceeded to execute his undertaking. That he paid certain taxes and made some repairs and was otherwise performing his agreement to take care of the said Nancy Champion, when he was prevented from the further performance of his contract by the interference of appellees, who induced the said Nancy Champion to repudiate her said contract and to execute to appellees deeds to the land in controversy. The deeds to appellees were executed for substantially the same consideration as that recited in the will or contract set out above. Appellant

also alleged, and offered proof tending to show, that the said Nancy Champion became in poor health and sustained such loss of mentality that at the time of the execution of the deeds to appellees she was mentally incapacitated to execute such instruments, and that they were void on that account.

Appellees answered and alleged their ownership of the land in question under the deeds above mentioned. They further alleged, and offered proof to show, that appellant did not comply with his contract to care for the said Nancy Champion, but that he took possession of her property and required her to labor in the field and perform other services of value to him, and that the portion of the proceeds of the crops grown by him which he gave to and expended on the said Nancy Champion did not equal the fair rental value of the land. There was also proof tending to show that if the mental faculties of said Nancy Champion were in fact impaired, that this condition antedated the execution of the will as well as the deeds. There was also proof to the effect that appellant did not bestow that care and attention upon Nancy Champion, which the contract contemplated, and it was shown that his wife was unkind to her and on one occasion whipped her, and that she was arrested, tried and fined for committing this assault.

Appellant contends that the deeds to appellees could have worked no rescission of the will above set out, for the reason that she had no sufficient capacity to execute these deeds, and for the further reason that they were fraudulently obtained through undue influence exerted by appellees upon the said Nancy Champion, and that they were without consideration. And he further contends that, whatever construction may be given the instrument above set out, he had so far performed and offered to perform his obligations thereunder that his rights to the property became vested and could not be defeated by any subsequent act of the said testator.

The law of this case is fully discussed and clearly stated in the opinion of this court in the case of *Naylor*

v. *Shelton* 102 Ark. 30. A number of authorities were there reviewed and this court quoted with approval the following language from the case of *Johnson* v. *Hubbell,* 10 N. J. Eq. 332: "There can be no doubt but that a person may make a valid agreement, binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he can not make a legal agreement to dispose of his property, to a particular individual, or for a particular purpose, as well by will as by a conveyance to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man in this way to embarrass himself as to the final disposition of his property, but he is the disposer, by law, of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement, upon the recognized principles by which it is governed, in the exercise of this branch of its jurisdiction."

The court below did not make any finding of fact, but did make a general finding in favor of appellees and dismissed the complaint for the want of equity.

We can not say that this finding was contrary to the clear preponderance of the evidence. Appellant is in no position to complain of any insufficiency of consideration to support the deeds to appellees, although the proof on their part is to the effect that they complied with their contract by caring for Nancy Champion until her death. Nor do we think the proof sufficient to show that lack of mentality which would render the deeds void on that account, but, even though such was the case, that fact would not profit appellant anything. Nancy Champion did not die until in February, 1912, and during the last four years of her life, when the necessity for the care and attention which was evidently contemplated at the time of the execution of the instrument sued on was

greatest, appellant did nothing under this contract. Nothing could excuse the conduct of appellant's wife in assaulting this poor old colored woman, and such conduct gave her the right to treat her obligation to devise the land at an end. If this was a suit on this contract for the value of appellant's services rendered under it, different legal principles would be involved from those which control our decision.

Upon a consideration of all the evidence in this case, we are of the opinion that the chancellor's finding was not contrary to the preponderance of the evidence and the decree of the court below is therefore affirmed.

CANTRELL v. STATE.

Opinion delivered March 1, 1915.

1. CRIMINAL LAW—HOMICIDE—EVIDENCE.—Evidence that after deceased was shot, and taken into his house, that his wife, at his request, brought him his pistol, is admissible as showing that he was not armed when he was shot; but statements by him that he was afraid appellant would come in and kill him, are inadmissible.
2. EVIDENCE—HOMICIDE—DYING DECLARATIONS.—Evidence of a dying declaration is admissible when it appears deceased did not have any hope of recovery, although he introduced his statement by saying, "If I am going to die, I might as well die first as last." In passing upon the admissibility of evidence of a dying declaration, the court should take into account all the circumstances, including everything that was said on the subject.
3. EVIDENCE—DYING DECLARATIONS—QUESTION FOR JURY.—The weight to be given dying declarations as evidence, is a question of fact for the jury, and not one of law for the court.
4. CRIMINAL LAW—CONSPIRACY—EVIDENCE.—Admissibility of proof of a conspiracy to commit murder is a preliminary question to be passed upon by the court, and when evidence is offered which is sufficient to make a *prima facie* showing of the existence of such conspiracy, then evidence of all the acts and declarations of a conspirator during the progress of the conspiracy is admissible against a co-conspirator.
5. HOMICIDE—INSTRUCTIONS.—In a prosecution for homicide, the instructions given by the court held to sufficiently present the law to the jury to enable the jury to apply the law to the facts and circumstances in proof.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant was indicted at the November, 1914, term of the Crawford circuit court, charged with the crime of murder in the first degree, alleged to have been committed by shooting one Bose Mullens with a gun. The shooting occurred on August 18, 1914. Upon his trial appellant was convicted of murder in the second degree, and his punishment fixed at imprisonment in the penitentiary for a period of six years and this appeal has been prosecuted from the judgment of the court sentencing appellant in accordance therewith.

The evidence on the part of the State is to the effect that appellant and deceased had had a previous difficulty, and there was bad blood between them, and that deceased, with his wife, mother and baby, were at church on the night of the shooting, where they remained until the services were over, shortly before midnight. That deceased, with his family, lived about three-quarters of a mile from the church, and they had gotten to within thirty or forty yards of his home, when they turned into a trail which led from the road to his home, and that just as they left the road appellant and his brother, Jeff Cantrell, came in ahead of them, singing and whistling vulgar songs. Deceased had been carrying his baby, but gave it to his wife, to whom he remarked, "I am going to get them to hush." Deceased spoke to appellant, who said, "I wasn't talking to you, I was talking to Jeff," whereupon deceased said, "If you were not talking to me, all right, I will go into the house," and, as he started to do so, Jeff Cantrell said, "Shoot him, Melvin," after which three shots were fired in rapid succession, followed by others to the total number of about ten.

It is insisted on the part of the State that the shooting was preconcerted and that appellant and his brother overtook deceased and brought on the difficulty, and shot deceased, without cause or provocation.

The evidence on the part of appellant is to the effect that he, too, had been at church on the night of the shooting and that he and his brother went by the deceased's home, because it was the nearest way to their own home, and that they had passed deceased and his family, when deceased ran after them and, upon overtaking them, demanded that they "Hit a run," and threatened to shoot them upon their failure to run away and brought on the difficulty by striking appellant with his pistol, and by shooting at him and his brother, and that appellant was finally compelled to shoot deceased to save himself. Appellant insists that his brother fired none of the shots; while the evidence on the part of the State is to the effect that all of the shots were fired by appellant and his brother, and that deceased was unarmed. The State's evidence was further to the effect that deceased's wife and mother assisted him into his house, where he requested them to make him a pallet and to get his pistol and place it by his side for the reason, as stated by him, that he was afraid appellant and his brother would return and kill him. Upon appellant's motion the court excluded the evidence that deceased said he was afraid appellant and his brother would return, and that he wanted to protect himself; but refused to exclude the evidence that deceased's wife got the pistol and placed it by him on the floor.

A statement, alleged to be a dying declaration, was made on the night of the 1st of September by the deceased, but his death did not occur until the morning of the 4th thereafter. The admission of this statement is assigned as error. The deceased was shot three times, but two of his wounds were not serious. The third shot entered the body between the ninth and tenth ribs, and the deceased physician advised him that gangrene had set up and that his case was hopeless. The physician made this statement shortly before the alleged dying declaration was made, whereupon deceased said, "Doctor, you ought to know; I will take your word for it." This alleged dying declaration was reduced to writing by a wit-

ness named Hobbs, and there was proof that, when he approached deceased to write down his statement, deceased said, "If I am going to die, I might as well die first as last." The witness Hobbs, who wrote the dying declaration, was a justice of the peace, and testified that, before deceased made this statement, he asked his physician if there was really no hope for him and, being told there was none, he said that, if he was going to die, "the quicker the better; it didn't matter how soon," as he appeared to be suffering. The dying declaration was reduced to writing, is in narrative form, and the deceased speaks in the first person, and the declaration is prefaced by the recital of the doctor's statement and the declarant's reliance upon it.

Over the objection of appellant the State was permitted to prove, by a witness named Collier, that he had a conversation with Jeff Cantrell at the church the night Mullens was shot, in which conversation Jeff Cantrell told him he had a pistol hid on the road home and that, if he would listen, he would hear it pop after the services were over.

The court, upon its own motion, gave an elaborate charge, consisting of thirty instructions, which covered every question involved in the case. No question is made about the correctness of any of these instructions. Indeed, they declare the law as it has been announced in many decisions of this court, and it is only urged that they were too general in their nature and that certain concrete instructions asked by appellant should have been given.

Sam R. Chew, for appellant.

The court erred in admitting the paper, purporting to be the dying declaration of the deceased, over the objections of the defendant. 2 Ark. 229; 68 Ark. 355; 81 Ark. 417; 104 Ark. 161; 99 Ark. 208; 58 Ark. 47; 1 Greenleaf on Evidence, vol. 1, (14 ed.), § 158, and authorities cited.

The dying declaration was reduced to writing, but was *not* signed by deceased, hence it was not competent and should not have been admitted. 103 Ark. 21.

The court erred in admitting the evidence of Mrs. Pollock, Wilbur Collier and I. M. Covington, it being no part of the *res gestae,* and was incompetent, inadmissible and prejudicial. 32 Ark. 220; 92 Ark. 586; 59 Ark. 422; 77 Ark. 444; 87 Ark. 34; 37 Ark. 67; 73 Ark. 152; 76 Ark. 487.

Instructions Nos. 10 and 11, requested by defendant, should have been given. 69 Ark. 134; 96 Ark. 206; 82 Ark. 499; 100 Ark. 132. Instruction No. 14, requested by defendant, should have been given. 62 Ark. 286; 95 Ark. 428; 58 Ark. 57; 58 Ark. 544.

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

The evidence was sufficient to warrant the court in admitting the dying declaration of the deceased, which was read to the jury. 109 Ark. 510; 113 Ark. 142; 172 S. W. (Ark.) 876.

The court did not err in admitting the testimony of Mrs. Pollock, Wilbur Collier and I. M. Covington.

The instructions given by the court covered every phase of the case. 109 Ark. 474, 479; Jacobson's Criminal Digest, p. 608, and authorities cited; 172 S. W. 876.

SMITH, J., (after stating the facts). (1) The court properly excluded the evidence of the statement of deceased that he was afraid appellant and his brother would return and finish him. But we think no error was committed, under the circumstances, in admitting the evidence that deceased's wife brought his pistol and laid it by his side. The proof on the part of the State was to the effect that deceased, not only did not fire any of the shots, but that he was unarmed, and the evidence that his pistol was brought to him after the shooting was over was competent to show that he was not armed during the difficulty.

We think the court committed no error in admitting the proof of the dying declaration. The admissibility

of such evidence is a preliminary question to be determined by the court, after a consideration of the proof of the conditions which make such evidence admissible. The case of *Rhea* v. *State,* 104 Ark. 176, reviewed a number of the decisions of this court on this subject and quoted with approval the following language from *Dunn* v. *State,* 2 Ark. 229.

"The only satisfactory principle upon which the dying declaration of a person deceased can be admitted to establish the circumstances of his death appears to us to be that they were made at a time when, in the mind of the deceased, all expectation of recovery was yielded up and supplanted by the conviction that he would certainly die by reason of the injury received and under which he then languished; * * * and, therefore, to warrant their admission, it must be shown, in the first place, that the declaration was made under an apprehension of impending death. This may be collected from the nature and circumstances of the case, although the declarant did not express such an apprehension, nor is it essential that the party should apprehend immediate dissolution."

(2) As has been said, no question would be made as to the competency of this evidence but for the fact that deceased, in speaking of his death, said: "If I am going to die, I might as well die first as last." The conjunction "if" is frequently employed where doubt is entertained, but its use is not conclusive of the existence of doubt. Its dictionary meaning is: "In case that; granting, allowing or supposing that; on condition that; used in introducing a conditional sentence or clause; as I will go if you do; if he is there, I shall see him." Century Dictionary.

(3) Proof of other statements by deceased, contemporaneously with the above, tend to show that deceased did not entertain the hope of recovery. In passing upon this question it was proper for the court not to limit its consideration to the single sentence but to take into account all of the circumstances, including

everything that was said on that subject. It would not be improper, if the court was requested so to do, to instruct the jury upon what theory such evidence was admissible and to tell the jury, if they did not believe the statement was made in view of impending death, that such statement should not be considered. Under any circumstances the weight to be given such evidence is a question of fact for the jury, and not one of law for the court. It is the duty of the court to require proof of the conditions which make such evidence admissible and to pass upon the *prima facie* sufficiency of such proof, but the jury must determine what weight, if any, to give to such declaration.

(4) We think no error was committed in admitting proof of the statements made by Jeff Cantrell, at the church, before the shooting occurred. This evidence, of course, is admissible against appellant only upon the theory that the brothers had conspired together to do an unlawful act. The rule in such cases is well defined and has been announced in a number of the decisions of this court. The proof of such conspiracy is another of those preliminary questions to be passed upon by the court, and where evidence is offered which is sufficient to make a *prima facie* showing of the existence of such conspiracy, then all the acts and declarations of each conspirator, during the progress of the conspiracy, are admissible against his coconspirator. It is not often that these conspiracies can be shown by express agreement. Their existence is more often shown by the proof of circumstances, the concurrence of which leads one to believe that the parties are acting from a common unlawful motive. The proof upon the part of the State would support the finding that appellant and his brother, overtook deceased for the purpose of bringing on a difficulty, and that, without cause or provocation, Jeff Cantrell called upon appellant to shoot deceased. And this direction was obeyed and the shooting followed, in which both of the brothers participated. It was not an unfair inference that this shooting was the thing meant by Jeff

Cantrell when he stated at the church that his gun would be heard to pop after the services. *Chapline* v. *State,* 77 Ark. 444; *Cumnock* v. *State,* 87 Ark. 34.

(5) Appellant very earnestly insists that the court erred in refusing to give instructions numbered 10 and 11 requested by him, and he says this is true because these were concrete instructions and undertook to apply the law specifically to the facts in issue. It is proper always to give concrete instructions, and such instructions are always to be preferred to those which only declare the law in general terms. Indeed, the failure to give a concrete instruction is not cured by the giving of a general instruction, unless the general instruction declares in unambiguous terms the principles of law which the jury should apply to the concrete facts. The purpose of all instructions is to enable the jury to apply the law to the facts and circumstances in proof, and the test of the sufficiency of any instruction is, Does it accomplish this purpose? If it does not, the failure to give a correct concrete instruction would be error calling for the reversal of the case, even though the general instruction contained a correct statement of an abstract proposition of law. But, in the application of this rule to the facts of any case, the jury must be credited with ordinary intelligence and with the purpose of administering the law. And we think under the facts of this case the jury had only to pass upon the question of the veracity of witnesses to discharge their duty under the law. Among other instructions given by the court was one numbered 15, which reads as follows:

"No one in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, is justified in taking the life of the assailant, unless he is so endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, con-

sistent with his safety, to avoid the danger and avert the necessity of killing. The danger must apparently be imminent, irremediable and actual, and he must exhaust all the means within his power, consistent with his safety, to protect himself, and the killing must be necessary to avoid the danger. If, however, the assault is so fierce as to make it, apparently, as dangerous for him to retreat as to stand, it is not his duty to retreat, but may stand his ground, and if necessary to save his own life, or to prevent a great bodily injury, slay his assailant."

Another instruction, numbered 14, was a very clear and full declaration of the right of a person assaulted to act upon the circumstances as they appeared to him. Under the evidence upon the part of the State, appellant was guilty of a higher grade of homicide than that for which he was convicted; while under that of himself and his brother he fired the fatal shot in his necessary self-defense; and we think the fifteenth instruction above set out sufficiently declared the law to enable the jury to pass upon those questions of veracity. Of course, cases might arise where the orderly administration of justice would require the court to declare the law of self-defense in a more concrete form than that contained in this fifteenth instruction; but we think there was no such necessity under the evidence in the present case, and that no prejudicial error resulted from the court's failure to give appellant's instructions numbered 10 and 11, even though they were held to be correct declarations of the law.

Other questions are raised in the brief, but we find it unnecessary to discuss them here. Finding no prejudicial error in the record the judgment of the court below is affirmed.

CHAMBERS v. OGLE.

Opinion delivered March 1, 1915.

1. REWARD—ARREST AND CONVICTION OF A CRIMINAL.—Where a reward is offered for the arrest or capture and conviction of a fugitive criminal, in order for one to come within the terms of the contract so as to bring about an acceptance and performance, the reward will be payable to the one who performs these conditions and not merely to one who gives information which leads to the capture and conviction.
2. REWARD—CAPTURE OF CRIMINAL—FURNISHING INFORMATION.—Where a reward is offered for the arrest and conviction of a criminal, and one O. merely gave information as to the criminal's identity, without entering jointly into the enterprise, and others, proceeding independently upon that information, performed the acts which come within the terms of the offer of reward, O. will not be held entitled to receive any part of the reward, simply because she furnished information.
3. REWARD—OFFICER DISCHARGING OFFICIAL DUTY.—The policy of the law forbids an officer, or one called to aid him in the performance of an official duty, to receive for his services any reward or compensation not allowed by law.
4. REWARD—PUBLIC OFFICER—EXCEPTION TO RULE.—The rule just stated is subject to the exception that where the officer has no duty to perform in regard to the arrest, there is no public policy which forbids that he should share in the reward for services performed, which do not constitute a part of his official duties.
5. REWARD—ARREST BY COUNTY OFFICERS OUTSIDE THE STATE.—County officers may share in a reward offered for the arrest and conviction of a fugitive criminal, where the arrest was made in another State, and the officers had no warrant for an arrest, and acted in an entirely private capacity.
6. REWARD—ARREST OF FUGITIVE—JOINT ENTERPRISE.—Several persons acted together in accomplishing the arrest of a futitive criminal. *Held*, under the facts, they were acting in a joint enterprise and were all entitled to share in the reward.
7. REWARD—CAPTURE OF CRIMINAL—EXPENSES.—Where a number of persons engage in the joint enterprise of procuring the arrest of a certain fugitive criminal, each will be entitled out of the reward to have refunded his individual expenses, incurred in the prosecution of the enterprise.
8. APPEAL—COSTS.—Appellant appealed from a decree in chancery pro rating a reward offered for the arrest and conviction of certain fugitive criminals. The decree was reversed for certain errors of the chancellor in apportioning the reward. *Held*, appellant, who

was successful on the appeal, is entitled to judgment against all the appellees for the costs of the appeal.

Appeal from Madison Chancery Court, *T. H. Humphreys,* Chancellor; reversed.

J. W. Grabiel, for appellant.

1. Appellee, Flora Ogle, is not entitled to any part of the reward. Where a reward is offered for the capture and conviction, or for the capture, of an offender, the mere giving of information which enables others, acting independently of the informer, to make the arrest, is not sufficient to entitle the informer to share in the reward. 28 N. E. 1022; 122 Pa. St. 115. See, also, 50 Cal. 218; 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; 24 Wis. 278.

2. The intervener, Seaton, in what he did was acting as the agent of appellant in the capture of Moore, and is not entitled to share in the reward. 92 U. S. 73, 76; 85 Ill. 174; 78 S. W. 194.

3. Berry, Vaughan and Shuster, are not entitled to share in the reward, because (1) their participation in the events preceding the capture, etc., was inadequate and insufficient as concerns the capture, and was the exercise of only the ordinary duties which devolved upon them as officers of Madison County, as concerns the conviction. (2) They are precluded by considerations of public policy from receiving the reward.

As to the capture, these parties did nothing that would entitle them to any part of the reward. Chambers was acting alone and independently and for the reward.

The reward was offered for the capture and conviction. A substantial compliance was all that was required. 88 Kan. 538, 129 Pac. 168, 43 L. R. A. (N. S.) 133; 86 Kan. 305, 120 Pac. 542. The burglars entered a plea of guilty. There was no trial resulting in a conviction although appellant was ready with the evidence he had gathered together. The capture was the proximate cause of the conviction, entitling appellant to the reward. 24 Am. & Eng. of L. 956.

The sheriff and deputies are not entitled under the law, to receive any reward other than that provided by law for the performance of their duty. 34 Cyc. 1753; 11 L. R. A. (N. S.) 1170; 81 N. E. 641; 66 Misc. 85, 120 N. Y. Supp. 686; 173 U. S. 381; 112 Va. 28, 70 S. E. 515; 51 Ark. 504.

The decisions are conflicting on the question here presented, but we think that the decision in *Gregg* v. *Pierce,* 63 Barb. 387, holding that a sheriff pursuing a fugitive into another State and causing his arrest there and return, was entitled to the reward offered, and the line of decisions following that, are in conflict with the better reasoning on the subject. See, also, Sergeant Hawkins, P. C. Ch. 68, § 4; 188 Mo. 501; 87 S. W. 949; 107 Am. St. Rep. 324; 150 Ky. 805; 150 S. W. 1020; 43 L. R. A. (N. S.) 131; 23 Am. & Eng. Enc. of L. 455; 32 Cyc. 1251, and notes; 164 Pa. St. 266-271; 81 Ark. 599; 95 Ark. 552; 85 Ark. 106; 155 Pa. St. 514.

4. Appellant is not excluded on the grounds of public policy from participation in the reward. No consideration of public policy operates to disqualify a police officer of a State foreign to the jurisdiction where the offense was committed from accepting a reward offered for the capture of the offender. 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324; 88 Kan. 538, 129 Pac. 168, 43 L. R. A. 133; 35 Ala. 544; 24 Am. & Eng. Enc. of L. 953; 130 N. W. 1025, 34 L. R. A. (N. S.) 924.

Wade H. James, for appellee, Ogle.

The rule of law applicable here is stated as follows: "When the reward is offered for the arrest or apprehension of a criminal, most cases hold that the person who causes the arrest to be made by an officer, or other person, or who furnishes the information which leads directly to the arrest, has complied with the terms of the offer and is entitled to the reward." 34 Cyc. 1745.

It is not necessary that an informer, in order to entitle him to a reward, should act as a prosecutor, or be called as a witness. It is enough that the result is

in fact reached primarily through his instrumentality. I Low 284, and cases cited; 42 L. R. A. 155; 91 Me. 488.

McCulloch, C. J. This action is one to recover the amount of a reward offered for the arrest and conviction of certain criminals. It was instituted by Mrs. Flora Ogle, one of the appellees, against the First National Bank of Huntsville, Arkansas, and certain parties to whom the bank had paid the reward. Appellant, who was a police officer in the State of Oklahoma, and G. W. Seaton, a police officer in the State of Missouri, separately intervened claiming the amount of the reward or a portion thereof.

The bank was burglarized on the night of June 13, 1912, and a large sum of money was taken. The bank published an offer of payment of a reward of the sum of $500 for the capture and conviction of each of the parties who committed the crime, and also a reward of 25 per cent of all of the stolen money recovered. Two of the criminals were arrested, brought back to Arkansas, and convicted, both of them entering pleas of guilty. One was arrested in Oklahoma by appellant Chambers, and the other in the State of Missouri by appellee Seaton: A small amount of money was returned, and the reward for the two men and for the amount of money recovered aggregated the sum of $1,047.93, which was paid over by the bank to appellees Shuster, Berry and Vaughan, who were officers of Madison County, where the crime was committed, and who brought the prisoners back and put them in jail. Shuster was sheriff of the county and Berry and Vaughan were his deputies.

They got a trace of the criminals and followed it to Fairland, Oklahoma, where one of them named Monroe was arrested; and a telegram was sent to appellee Seaton, by an officer in Oklahoma acting at the instance of appellant and the Arkansas officers and Seaton arrested the other one of the criminals named Moore. The first trace of the criminals discovered by the Madison County officers was through Mrs. Ogle, who kept a boarding house at Eureka Springs. Three men stayed at her house about

the time of the bank robbery, and after they left she found in a cuspidor a mutilated envelope bearing the name of one Brock Moore of Fairland, Oklahoma. She gave the torn envelope to the Madison County officers, who concluded that it would lead to the arrest of the criminals, and when they got to Fairland they called in consultation appellant Chambers, who was the marshal of the town. Appellant knew Brock Moore, but informed them that he did not answer the description of either of the three men as given, but he expressed the view that other parties, particularly the man who went by the name of Monroe, were implicated in the commission of the crime. He based his suspicion on the fact that Monroe appeared to be associated in some way with Brock Moore, and that he had been absent about the time the bank robbery was committed. They found that the two suspected men, Monroe and Moore, had left town that day in vehicles hired from local livery stables. They went around to one of the livery stables, where Monroe got his team, and watched the place until Monroe's return; and when he drove back to the barn, appellant arrested him. Shuster and Vaughan were present at the time, but Berry had left the stable a short time before. Monroe was turned over to the three Madison County officers and they brought him back to Arkansas. It was found on inquiry that the other man, Moore, had driven over to Afton, a neighboring town, and appellant and Berry got a team and drove over there the same day. When they got there, they found that Moore had driven another team over to Vinita, another neighboring town. Appellant called over the phone one Ridenhour, a deputy U. S. marshal, and got him to hire a team and drive over to the railroad and attempt to intercept Moore. Ridenhour did this at the request of appellant, and when he found that Moore had probably taken a train which carried him through Nevada, Mo., he telegraphed to Seaton, the police officer at that place, requesting him to board the train and arrest Moore. Seaton, upon receipt of the telegram, complied with the request and made the

arrest and held Moore until the Arkansas officers could go up and get him, which they did, in company with appellant Chambers.

This, in brief, is a statement of the facts of the case as established by a preponderance of the testimony. There is some conflict as to the method of the arrest of these men, but the chancellor found the facts, as we understand, about as stated above.

The chancellor found that the efforts of all of the parties contributed equally to the arrest of the criminals, and that they were entitled to share equally in the amount of the reward, after deducting the expenses. The net amount paid over by the bank to the Madison County officers, after deducting expenses paid out by them, was $853.32, and the chancellor found that appellant also expended $10.45 and that Seaton had expended $2.40. The chancellor deducted these amounts, and also the sum of $38.20, the costs of this action, leaving a net amount of $802.27. He divided this and apportioned half as the net amount realized of the reward for the arrest of Monroe, and the other half as the amount of the reward for the arrest of Moore. The first half was divided equally between appellant and Mrs. Ogle, Shuster, Berry and Vaughan, giving them the sum of $80.22 each; and the other half was equally divided between appellant and Mrs. Ogle, Shuster, Berry, Vaughan and Seaton, giving them $66.85 each.

Appellant Chambers is the only one who appealed from the decree. Appellant contends that he is entitled to the whole of the reward for the arrest of both of the criminals. His contention is that Seaton, in making the arrest of Moore, acted merely as his (appellant's) agent, and for that reason is not entitled to the reward; and that he is entitled to the whole of the reward for the arrest of Monroe for the reason that the Madison County officers did not in fact make the arrest, and for the further reason that it is against public policy to allow them to receive the reward because they were officers charged

with the duty of arresting criminals. His contention is that Mrs. Ogle is not entitled to any of the reward for the reason that she, at most, only furnished information which eventually led to the arrest of the criminals, and did not perform acts which amounted to an acceptance and performance of the contract set forth in the offer made by the bank. The nature of the contract must be considered in determining the rights of the respective parties to claim the proffered reward. "The offer of a reward," said this court in *Amis* v. *Conner,* 43 Ark. 337, "is a promise conditional upon the rendition of some proposed service. He who offers it has the right to prescribe any terms he may see fit and these terms must be complied with before any contract arises between him and a claimant." Now, the offer in this case on the part of the bank was to pay "a reward of $500 each for the capture and conviction of the robbers, and * * * 25 per cent of whatever part of the money recovered." Those who seek to recover the amount of the reward from the offerer must show that they have performed acts which come within the terms of the contract. For that purpose a contract is not to be literally construed, but it must appear before a party can recover the reward that his acts come substantially within the stipulated terms. In the case of *McClaughry* v. *King,* 147 Fed. 463, 7 L. R. A. (N. S.) 216, the United States Circuit Court of Appeals for the Eighth Circuit had under consideration the question of liability for a reward which had been offered for the "capture and conviction" of a certain murderer, and the claimant sought to recover the reward on the ground that he had furnished information which led to the arrest and conviction. The court held that under the terms offered the reward was not earned by the giving of information which merely led to the arrest and conviction of the criminal, and that the offer was to pay only to the one who actually captured the criminal. In the opinion the court said: "A reward offered for the arrest of an offender is an offer or conditional promise to pay the person performing the required service

a certain sum of money. The performance of the service is the acceptance of the offer, or performance of the condition on which the promise is made, and, when done, concludes a binding contract. The matter rests exclusively in the domain of contract, involving an offer and its acceptance. One desiring to offer a reward may fix his own terms and conditions. If they are satisfactory they must, like other propositions, be accepted as made. If unsatisfactory no one need accept them." Numerous authorities are cited in that case sustaining the proposition that under an offer similar to the terms stated in that case there can be no recovery by one who merely furnishes information which leads to the arrest and does not actually capture the criminal.

(1-2) The authorities are not entirely in accord, but we are of the opinion that the view above stated is in line with the great weight of authority and is correct on principle. The decisions seem to agree that the terms of the offer are not to be literally interpreted for the reason that it would be impossible for the person seeking the reward to actually bring about a conviction, inasmuch as that must be accomplished through other agencies established by the law. But where the reward is dependent upon the arrest or capture and conviction of a fugitive, in order to come within the terms of the contract so as to amount to an acceptance and performance, the reward is payable to the one who performs those conditions, and not merely to one who gives information which leads to the conviction. This does not mean that in all cases a person who merely gives information should be excluded from sharing in the reward, for persons often engage in a joint enterprise of this sort where one is to furnish the information and the other is to make the arrest, and they thus share jointly in the fruits of the enterprise. The present case, however, so far as Mrs. Ogle is concerned, presents a state of facts where one person has merely given information without entering jointly into the enterprise, and others, proceeding independently upon that information, have performed the

acts which come within the terms of the contract. That being true, it follows that Mrs Ogle is not entitled to receive any part of the reward simply because she furnished information. Any other view might bring within the terms of the contract numerous persons who had brought to light circumstances, however slight, which amounted to information which led in some degree to the arrest. It is not contended that Mrs. Ogle did anything more than furnish this bit of information about the torn envelope containing the name of Brock Moore. She turned this over to the officers and they proceeded independently in the further steps of apprehending the criminals. If she can recover at all, it must be upon an independent contract made with the officers to whom she furnished the information, and, according to the preponderance of the testimony, there was no such contract entered into with her. We are of the opinion, therefore, that she is not entitled to share in the reward. It is true neither the Madison County officers nor the bank have appealed from that part of the decree which awarded a portion of the amount to Mrs. Ogle, but it is necessary to determine her rights in order to decide whether or not the amount awarded to her should have been deducted from the proportion of the amount decreed to appellant, if we decide that he is entitled at all to share in the reward.

(3-4) Now, the next question for consideration is whether or not the Madison County officers are entitled to share in the reward. According to the testimony, they traced the criminals to Oklahoma and caused their arrest, one in Oklahoma and the other in Missouri. The arrest was actually made by the two officers in those States, and if the Madison County officers are, for any reason of public policy, forbidden from receiving the reward, then it follows that the officers who made the arrest are entitled to the whole of the reward. This court has decided that "the policy of the law forbids an officer, or one called to aid him in the performance of an official duty, to receive for his services any reward or compen-

sation not allowed by law." *St. Louis, I. M. & S. Ry. Co.* v. *Grafton,* 51 Ark. 504. That was a case where the railway company offered a reward in this State for the apprehension of persons found interfering with switches, side tracks, and other railroad property during a strike. Certain parties were arrested by the sheriff, and others composing the *posse comitatus* of the sheriff, and suit was brought to recover the amount. This court denied recovery on the ground of public policy, as above stated. That decision is undoubtedly sound and is in accord with the weight of authority, being cited in many subsequent cases. *United States* v. *Matthews,* 173 U. S. 381; *Somerset Bank* v. *Edmund,* 11 L. R. A. (N. S.) 1170; *Burkee* v. *Matson,* 34 L. R. A. (N. S.) 924; *Mason* v. *Manning,* 150 Ky. 805, 43 L. R. A. 131. The rule, however, has its exceptions, and one is that where the officer has no duty to perform in regard to the arrests there is no public policy which forbids that he should share in the reward for services performed which do not constitute a part of his official duties. There are many cases holding that where officers make arrests outside of their own jurisdiction, especially where they follow criminals to other States and make arrests, they are entitled to the reward. *Morrell* v. *Quarles,* 35 Ala. 544; *Gregg* v. *Pierce,* 53 Barb. 387; *Davis* v. *Munson,* 43 Vt. 676; *Forsythe* v. *Murnane,* 113 Minn. 181; *Bronnenberg* v. *Coburn,* 110 Ind. 169; *Kinn* v. *First National Bank,* 118 Wis. 537, 99 Am. St. Rep. 1012; *Smith* v. *Vernon County,* 188 Mo. 501, 70 L. R. A. 59; *Marsh* v. *Wells Fargo & Co. Express,* 88 Kan. 538, 43 L. R. A. (N. S.) 133; *Harris* v. *More,* 70 Cal. 502.

(5) The case of the Madison County officers falls, we think, within the exception. The criminals fled from the county and State before they were discovered or their identity was known by any one. There were no warrants in the hands of these officers, and in an entirely private capacity they followed the clew discovered at Eureka Springs to Oklahoma, and by their efforts brought about the arrest of the two criminals. There was nothing of

official duty involved in what they did, and they acted only as individuals. Our conclusion therefore is that there is no rule of public policy which forbids allowing them to share in the reward, nor does the case either of appellant Chambers or of Seaton, the Missouri officer, fall within the rule of public policy which excludes them from participation. Appellant was the marshal of a small town in Oklahoma, and there is no statute of that State imposing upon him the duty of arresting fugitives from other States. We have examined the statutes of that State and find none which imposes such duty. Nor is there such statute in Missouri, so far as we can discover, in the revised statutes of that State. Section 9782, of the Revised Statutes of Missouri, provides that in cities with 150,000 to 300,000 inhabitants, members of the police force "shall have power to arrest and hold without warrant, for a period of time not exceeding twenty-four hours, persons found within the city charged with having committed felonies in other States and who are reported to be fugitives from justice." We find no similar provision with reference to the police officers of smaller cities and towns, and appellee Seaton was not an officer of a city of the size to which the above quoted statute is applicable.

(6) We think that the appellant's contention with reference to the claim of appellee Seaton is unsound. It is true Seaton made the arrest upon the request communicated in the telegram from the deputy U. S. marshal in Oklahoma, and without any knowledge of the nature of the accusation against Moore, but he states that he was told by the conductor or auditor on the train that there was a reward for the man wanted, and that he made the arrest in order to secure the reward. He testified further that when appellant and the Madison County officers came there to get Moore, they told him that there was a reward. At any rate, we think that he was not acting entirely as agent of appellant in making the arrest, nor was he acting independently of appellant and the other officers. The arrest of the criminal was the

joint enterprise of the Madison County officers and appellant, and Seaton joined with them to that extent in effecting the arrest. The same may be said of the arrest made by appellant in Oklahoma. While he actually made the arrest, two of the Madison County officers were present at the time, and the other was in the town assisting in carrying out the plan of making the arrest. That, too, was a joint enterprise in which we think the efforts of all of them contributed to the results accomplished. They acted together in securing the arrest and conviction of Monroe, and the four persons who participated are entitled to share equally in the reward. After that arrest was made, they acted jointly in securing the arrest of Moore in Missouri, and Seaton acted with them, and they are entitled to share equally in that reward.

So we are of the opinion that the chancellor erred in decreeing any part of the reward to Mrs. Ogle, but in other respects he was correct in prorating the reward.

(7) It is contended by appellant that the Madison County officers were not entitled to reimbursement for their expenses in pursuing the criminals to Oklahoma, but we think that as it was a joint enterprise the individual expenses of each of the parties should be repaid out of the reward before it is divided. The court was correct in that, but erred in deducting the costs of the litigation. There was an effort on the part of the bank and the Madison County officers to exclude appellant and Seaton from participation in the reward, and there is no reason why the latter should have to pay any of the cost of the litigation. That should fall upon the parties who caused the litigation.

(8) Taking the figures of the chancellor as correct, we find that the net sum of the two rewards is $840.47. Apportioning one half of that sum to the reward for each of the criminals, appellant is entitled to one-fourth of the reward for the arrest of Monroe, making $105.06, and the sum of $84.05 as his part of the reward for the arrest of Moore. He is also entitled to judgment for $10.45, his expenses, as found by the chancellor, in se-

curing the arrest of Moore. Appellant is therefore entitled to a decree for $199.56. The decree is reversed with directions to enter a decree in favor of appellant against the First National Bank and Shuster, Berry and Vaughan for the sum indicated above, and all costs expended by him in the action. Appellant will, of course, be entitled to judgment against all of the appellees for the costs of this appeal.

It is so ordered.

COLE v. SCHOONOVER.

Opinion delivered March 1, 1915.

1. COUNTY WARRANTS—MAY BE CALLED IN FOR REGISTRATION, WHEN—COUNTY COURT.—Kirby's Digest, § 1175, authorizes the county court, where it deems it expedient, to call in the outstanding warrants of the county, in order to redeem, cancel, reissue or classify same, or for any legal purpose whatever, and the ascertainment of the actual financial condition of the county is a sufficient legal purpose within the meaning of the statute.
2. COUNTY WARRANTS—CALLING ORDER—FAILURE TO BRING IN.—Upon the failure of any holder of a county warrant to present the same, in obedience to a proper call therefor by order of the county court, under Kirby's Digest, § § 1175 and 1177, he is barred from the collection of the warrant thereafter, without any further declaration of that fact by judgment of said court.

Appeal from Randolph Circuit Court; *W. E. Beloate,* Special Judge; reversed.

STATEMENT BY THE COURT.

This is an application to compel the collector, by mandamus to accept in payment for taxes, certain county warrants which had been refused by him because they had not been presented and registered at the calling in of the warrants of the county by the county court.

On the 5th day of January, 1912, the county court of said county made and entered of record a judgment reciting: In the matter of calling in for registration the outstanding county warrants of Randolph County,

"It appearing to the court expedient, in order to ascertain the actual financial condition of Randolph County, that all the outstanding county warrants drawn on the county treasurer of said county, should be called in and registered as provided by section 1175 of Kirby's Digest, of the laws of Arkansas * * * It is therefore considered and adjudged that all persons owning or holding warrants issued between the 7th day of January, 1905 and the 5th day of January, 1912, including said dates and all outstanding county warrants registered and numbered under the order of the court, made at its January term, 1905, calling in the outstanding warrants of Randolph County issued prior to January 5, 1905, are hereby required to present the same to the county court at its regular July term, 1912, on or before 12 o'clock noon, of the 5th day of said July for the purpose of having the same registered and numbered."

It was further ordered that all legal warrants so presented should be endorsed on the back "registered and numbered" with the date thereof and signed by the clerk, who was required to keep a record of all warrants so presented and, "that all warrants or orders on the county treasurer of said county not presented and registered at said July, 1912, term of this court, as required in this order, hereinbefore set out, shall be forever barred, as provided by section 1177 of Kirby's Digest of the laws of Arkansas."

The clerk was directed to furnish the sheriff a certified copy of the order calling in the warrants, within the time prescribed by law, and the sheriff was directed to give due and legal notice as prescribed by law and make a full and complete report of his proceedings to the court, on or before the 1st day of the next July term.

The record also contains proof of publication of the notice and order in two newspapers, one in Randolph County and one in Lawrence County, with the certificate of the clerk showing he furnished the sheriff a true copy of the order in the time prescribed, and of the sheriff showing that the copies of the order had been duly posted

at the courthouse door and various election precincts in each township in Randolph County, in the manner prescribed by law, and published in the Pocahontas Star-Herald and Times-Dispatch, said newspapers being edited and printed in the State of Arkansas. This was all the testimony in the case.

The court held that the law did not authorize the calling in of the warrants for registration for the purpose of ascertaining the indebtedness of the county and that it required the county court to pass upon the sufficiency of the notice given and proceedings had under the original order, calling in the warrants and make a final judgment barring all warrants not presented and registered at the time designated therefor, and held the warrants were not barred and granted the mandamus requiring the collector to accept them in payment for taxes, and from this judgment he prosecutes an appeal.

S. A. D. Eaton, for appellant.

1. The court erred in holding that the statute is not broad enough to authorize the county court to call in outstanding warrants to register and number for the purpose of ascertaining the financial condition of the county. The statute authorizes the proceeding "for any lawful purpose whatever." Kirby's Dig., § 1175; 25 Ark. 265.

2. The court was also in error in holding as necessary an order or judgment of the county court adjudging to be debarred all warrants not presented within the time limited in the order calling in the warrants. They are debarred perforce of the statute. Kirby's Dig., § 1177; 37 Ark. 649-661.

Witt & Schoonover, for appellee.

1. The court's finding that the statute is not broad enough to authorize this proceeding is correct. The provisions of the statute must be strictly complied with, and they must be strictly construed.

2. The absence of an order of the county court barring the warrants not presented, and finding and adjudg-

ing that all necessary steps had been taken, vitiates the proceedings. 53 Ark. 476; 87 Ark. 406; 51 Ark. 34; 72 Ark. 394; 66 Ark. 180; 68 Ark. 561.

KIRBY, J., (after stating the facts). It is conceded that the warrants described in the complaint are barred and worthless if the judgment of the county court calling in the warrants for registration on the 5th day of July, 1912, is valid. Section 1175, Kirby's Digest, provides:

"Whenever the county court of any county may deem it expedient to call in the outstanding warrants of said county in order to redeem, cancel, reissue or classify the same, or for any lawful purpose whatever, it shall be the duty of said court to make an order for that purpose, fixing the time for the presentation of said warrants which shall be at least three months from the date of such order."

(1) This authorizes the county court when it deems it expedient, to call in the outstanding warrants, "In order to redeem, cancel, reissue or classify the same, or for any legal purpose whatever," and certainly the ascertaining of the actual financial condition of the county is such legal purpose within the meaning of the statute.

It is often necessary to determine the amount of outstanding county scrip that the court and the citizens of the county may be fully advised what amount of revenue is necessary to be raised, and in *Parcel* v. *Barnes & Bro.*, 25 Ark. 265, the court said: "The intention of the Legislature is too clear to admit of any doubt * * * and there can be no question but the Legislature intended to give the county courts such control over the warrants or scrip of the county as would enable them to take such action as would be most advantageous to the public, and fully intended that all county scrip issued thereafter should be subject to such conditions and restrictions."

It is next contended that there was no final judgment of the county court rendered, barring the warrants not presented for registration at the time the court order required they should be presented. Section 1177, Kirby's Digest, provides: "All persons who shall hold any

warrants of said county and neglect or refuse to present same as required by the order of the court and the notice aforesaid shall thereafter be forever debarred from deriving any benefits from their claims."

The court held the statute mandatory in *Cope* v. *Collins, Admr.*, 37 Ark. 649, and said, "If the calling order was made, and the notice given * * * the statute declares the consequence of a failure to present the warrants—that is, that the delinquent holders shall thereafter be forever debarred from deriving any benefits from their claims."

(2) Upon the failure of any holder of a county warrant to present the same in obedience to a proper call therefor by order of the county court, he is barred by the statute, from the collection of the warrant thereafter without any further declaration of that fact by judgment of said court.

In *C., R. I. & P. Ry. Co.* v. *Perry County,* 87 Ark. 406, the court said: "It has often been held by this court that the statute authorizing such proceedings must be strictly complied with and that all facts necessary to give the court jurisdiction must affirmatively appear in the record of the proceedings." *Gibney* v. *Crawford,* 51 Ark. 34; *Nevada Co.* v. *Williams,* 72 Ark. 394.

No presumption as to the existence of facts can be indulged in aid of the record nor on the other hand can any be indulged to defeat the validity of the proceedings.

In *Nevada Co.* v. *Williams,* 72 Ark. 397, the court said: "In special statutory proceedings of this kind, the recital of due notice must be read in connection with that part of the record which gives the official evidence prescribed by the statute. No presumption will be allowed that other or different evidence was produced, and if the evidence in the record will not justify the recital, it will be disregarded."

It will be seen from these decisions that the recital of due notice given in the judgment is not only not conclusive of that fact, but that no presumption will be indulged that other or different evidence was produced

showing such transaction, than that disclosed by the record and therefore another judgment or order of the county court after the warrants are called in and registered, reciting that due notice of the call therefor had been given would add nothing to the validity of such order or judgment, the fact being allowed to be questioned in any proceeding concerning the validity of such warrants thereafter.

The testimony in the record shows that due notice was given as required by law of the calling in of the warrants of the county and the judgment having already been made debarring all warrants that were not properly presented upon the day fixed therefor was sufficient to prevent the holders thereof from thereafter deriving any benefit therefrom.

The affidavits in proof of publication of the order were made by the editors of the papers in which it was published, and showed that one, the Times-Dispatch, was a weekly newspaper, having a *bona fide* circulation in Lawrence County, State of Arkansas, and that the order was published on certain days, the last insertion being on a date more than thirty days before the time fixed by the court for the presentation of the warrants; and the other, the Pocahontas Star-Herald, a newspaper published weekly in the town of Pocahontas, Randolph County, State of Arkansas, and having a *bona fide* circulation in said county and State and that the order was published for eight weeks in succession, the last date being more than thirty days before the time fixed for the presentation of the warrants.

Neither of the affidavits state that the papers were regularly published in the county for one month before the date of the first publication of the order, but this is no longer required and the proof of publication was sufficient.

It follows that these warrants not having been presented for registration at the time fixed by the order of the county court requiring it, are barred and no longer valid subsisting claims against the county, and the court

erred in not so finding. Its judgment is reversed and the cause remanded with directions to enter a judgment denying the mandamus.

HARRISON v. FIRST NATIONAL BANK OF HUNTSVILLE.

Opinion delivered March 1, 1915.

1. DEBT—APPROPRIATION OF PAYMENTS.—A debtor paying money to his creditor has the right to direct the application of his money to such items or demands as he chooses.
2. DEBT—APPROPRIATION OF PAYMENTS—CHANGE.—A direction by the debtor as to the application of payments may be changed by an express agreement between the debtor and creditor, or by the express declaration of the debtor, or it may be implied by circumstances showing the debtor's intention.
3. DEBT—PAYMENT—DISCHARGE OF SURETY.—N. was surety on a note on which H. was primarily liable. H. sent to the bank, which held the note, a sum of money, directing it to credit the same "upon my note." H. had several other notes due at the same bank. *Held*, under the evidence, there could be no mistake that H. meant the note on which N. was surety, and that his directions to the bank constituted such an appropriation and application of the payment as discharged the note for the full amount sent to the bank, so far as N., the surety, was concerned, and it could not afterward be changed, even by the consent of the debtor, to N.'s prejudice.

Appeal from Madison Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

STATEMENT BY THE COURT.

Appellants borrowed $2,000 from the First National Bank of Huntsville, with which to purchase a stock of merchandise for their partnership of Harrison & Neal Bros., and executed the following note therefor;

"$2,000.00 Huntsville, Ark., Nov. 30, 1912.

Date	
Nov. 27-13	
	$2,000.00
	1,016.55
	$ 983.45

"July 1, 1913, we promise to pay to the order of

THE FIRST NATIONAL BANK

Two thousand & no/100.....Dollars for value received, negotiable and payable at its office

in Huntsville, Ark., without defalcation or discount, and with interest from date until paid at the rate of 10 per cent per annum. If the interest be not paid annually it shall become a part of the principal and bear the same rate of interest.

"The sureties and endorsers on this note severally agree to and do hereby waive demand of presentation of this note for payment to the makers hereof and waive protest and notice of nonpayment and do hereby grant to any holder of this note the right to grant extension without notifying them, or either of them, hereby ratifying such extension and remaining bound on this note as if no extension had been obtained.

"No. 1932. S. C. Harrison.
"Due July 30, 1913. Noah Neal,
"Post Office Roxton. Conrad Neal."

After the execution of the note, Noah and Conrad Neal sold their interest in the partnership to S. C. Harrison, who assumed the payment of said note as consideration therefor. The bank was advised of this arrangement and consented thereto with the understanding that said Noah and Conrad Neal remain bound on the note as sureties until a new note was executed, or until the stock of merchandise was sold.

Harrison sold the stock of goods to Ray Hanson about the 10th of November, 1913, for the sum of $1,906.32, Hanson having made arrangements with appellee bank before the purchase thereof for the sum with which to pay therefor, gave a check for said sum payable to the order of S. C. Harrison, who forwarded it to appellee bank with a letter directing that it be credited upon his note as follows:

"S. C. Harrison,
"Dealer in General Merchandise,
"Roxton, Ark., 11/10/1913.

"First National Bank,

"Dear Sir: Enclosed you will find check for $1,904.50, nineteen hundred four and 50/100, for which please credit my note. I will be out there soon.

"Yours, S. C. Harrison."

The bank claimed Harrison owed four other notes besides the one upon which the Neals were security, the largest being for $400. It received the check and claiming not to understand upon which note it was directed to be applied, placed it to the credit of S. C. Harrison and thereafter charged the amount of his overdraft and the amount of the other four notes against it and credited the note sued on with the balance $1,016.55. It claimed that Harrison came to the bank within a few days after the check was received in the letter and placed to his credit and agreed to the payment of the overdraft and the other notes out of the proceeds thereof which was then done.

Harrison denied having made any such agreement or application of the money and also that he had given any check against the amount as credited to his account.

The bank brought suit on the original note and appellants set up the fact that the note was paid by the check for the amount thereof virtually with the direction to so apply it. They alleged that the money for which the note was executed was originally borrowed with which to purchase the stock of goods, that the interest of the Neals in the stock of goods purchased was sold to Harrison for the amount due by them upon the note, who agreed to pay the note in consideration thereof; that later the bank loaned the money to Hanson with which to buy this same stock of goods all the while knowing that the note given for its purchase in the first instance had not been paid, and that the sureties were to continue bound only until Harrison could dispose of the stock of goods and pay same off. That they were discharged as sureties by the appropriation of the payment of the check given by Hanson as made by the direction in Harrison's letter to the bank, and that Harrison was insolvent.

The cashier of the bank admitted lending Hanson the money with which to buy the Harrison stock of goods and that it also knew that the Neals had sold out their interest in the stock of goods to Harrison in consideration

that he would pay the note sued on and agreed to stand security until it was paid or satisfied.

It appears that the bank had also loaned Harrison some other small amounts of money with which to purchase other goods that were added to the stock.

The chancellor found that Harrison directed the application of the payment of the proceeds of the check to his smaller notes and overdraft in the bank and that appellants were not entitled to have same appropriated to the payment of the note sued on and rendered judgment for the balance due after crediting same with the remainder of the proceeds of the check from which the smaller notes and overdraft were paid, and from this judgment the appeal is prosecuted.

W. N. Ivie, for appellants.

The rules of law as to application of payments which are applicable to the facts here, are thus stated: "Where the payment, with the knowledge of the creditor, is derived from a third person, or from a fund connected with the secured debt, it must be applied thereto."

"Where once apropriated by either party, or both, to the secured debt, the application can not be changed as against the surety." 30 Cyc. 1252.

The debtor has the primary and paramount right to direct the application of payments. *Id.* 1228, 1230, 1231; 98 Ark. 459; 54 Ark. 446.

When appellee received and accepted the check, with the directions how to apply the same, it became a credit on the note to which appellee was directed to apply it, as a matter of law. If it did not intend to apply the check as directed, it was appellee's duty to have refused to accept and cash it. 94 Ark. 158; 98 Ark. 269. The parties can not, even by mutual agreement, change an application to the prejudice of a third person without his consent. 73 Pac. 94; 31 Ill. 350; 4 Mich. 192; 28 Me. 81; 56 S. C. 435.

Appellee, pro se.

The fund was not derived from a third person, neither was the check connected with the secured debt

within the meaning of the law. See, 98 Ark. 459, cited by appellants.

The right to make application is confined to the debtor and creditor, and no third person can insist on any appropriation or application which has not been made by either party. 18 Am. & Eng. Enc. of L. (1 ed.) 244. Neither a surety nor a guarantor can insist that an appropriation shall be made for his benefit. 5 Mon. (Ky.) 253; 18 Mo. App. 583; 26 *Id.* 634; 75 N. Y. 461.

In this case it is admitted that the principal debtor, Harrison, made the application of the payment, but differ as to when the payment was made. Owing to the discrepancy in the amount of the check and the amount mentioned in Harrison's letter of transmission, appellee received the check and credited it to his checking account, and waited for him to come in. During this time, the money was at his disposal, and he was notified of that fact by letter.

There is no application of money as long as it is in the possession or control of the debtor. 7 Cal. 81. Conceding that Harrison first intended to apply the amount of the check on the note sued on, he had the right, so long as the fund was in his control, to change his mind, and make a different application, which he, of his own volition did, in this case. 30 Cyc. 1232, note 71; 2 Pa. 534.

KIRBY, J., (after stating the facts). The undisputed testimony shows that the appellants borrowed the money from the bank with which to purchase the stock of goods and executed the note in controversy therefor. That the Neals afterward sold their interest to Harrison, who agreed to pay the note as the consideration for the sale, and the bank was fully informed of these facts and agreed that the Neals should stand security upon the note until it was paid. Neither is there any dispute that the bank afterward loaned Hanson the money with which to purchase from Harrison the stock of merchandise after he had been six weeks in business and that Harrison took the check for $1,906.32, endorsed it and enclosed it in a letter to the bank with the directions to "credit same

upon my note" and this note was the only one he owed to the bank as large in amount as the sum of the check.

The direction for the application of the payment to the note in controversy was so plain that it could not have been misunderstood. The bank officials it is true, claimed that since there was no note for the exact amount, they could not understand the direction and credited the amount to the account of Harrison and afterward induced him to agree to the application of the payment to the other notes first.

(1) A debtor has the right in the first instance to appropriate the payment made to any debt which he may owe.

"A debtor paying money to his creditor has the primary and paramount right to direct the application of his money to such items or demands as he chooses." 30 Cyc. 1228.

(2) "A direction by the debtor as to the application of payments may be changed by an express agreement between the debtor and creditor or by the express declaration of the debtor or it may be implied by circumstances showing the debtor's intention." 30 Cyc. 1230.

In *Atkinson* v. *Cox*, 54 Ark. 444, this court said:

"There was uncontradicted proof that the defendant had delivered to the plaintiff cotton to be sold with directions that its proceeds be applied to the rent note. It was therefore the plaintiff's duty to have applied such proceeds to the extinguishment of the note, and a failure to do so could not be excused upon the ground that such application had been made to an account against the defendant."

(3) The debtor Harrison sent the check which was accepted by the bank with the direction to credit same "upon my note," meaning obviously the note sued on, executed jointly by all the appellants, and it was such an appropriation and application of the payment as discharged the note for the full amount of the check so far as the Neals, the sureties, are concerned, and it could not afterward be changed even by the consent of the

debtor to their prejudice. *Pinney* v. *French,* 73 Pac. (Kan.) 94; *Miller* v. *Montgomery,* 31 Ill. 350; *Codman* v. *Armstrong,* 28 Me. 91; *Reid* v. *Wells,* 56 S. C. 435.

The money paid to the bank was derived from the sale of a stock of goods originally bought by the parties with the money borrowed from the bank for the payment of which this note was executed, and it was known to the bank upon the sale of the interest of the Neals to Harrison that he assumed the payment of this note in consideration therefor, that Harrison was insolvent and the check given by Hanson to him was the consideration for the sale of the same stock of goods with such additions as had ben made thereto, and the bank will not be allowed to misunderstand the direction of the debtor, Harrison, to appropriate the proceeds of the sale of the stock of goods and change the application or appropriation from the payment of this note as directed to the payment of other notes owing it by the debtor, the law regarding the payment made as directed to the note, regardless of where the creditor in fact applied it. *Reid* v. *Wells, supra.*

It follows that the Neals were entitled to credit for the full amount of the check in payment of the note sued on and only liable for the balance due after allowing such credit. The decree is therefore reversed as to them, but affirmed as to S. C. Harrison and judgment will be rendered here in accordance with this opinion. It is so ordered.

HODGES, SECRETARY OF STATE *v.* BOARD OF IMPROVEMENT OF WATERWORKS IMPROVEMENT DISTRICT NO. 22 OF TEXARKANA.

Opinion delivered March 1, 1915.

INITIATIVE AND REFERENDUM—CITY ORDINANCES—LOCAL IMPROVEMENTS.—Act 135, Acts 1913, which provides for the reference of city ordinances to a vote of the people, and prescribes a method of referring the same, *held* to apply only to matters of general legislation by a city council, in which all electors, without distinction, may take

part, and not to a city ordinance with reference to a local improvement district, wherein only property owners within the district were interested.

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

STATEMENT BY THE COURT.

Appellee instituted this action in the chancery court against appellant to restrain him, as Secretary of State, from certifying out to be voted upon by the electors of the city of Texarkana, Ordinance B-191, being an ordinance levying the assessments of benefits against the real property in Waterworks Improvement District No. 22, in the city of Texarkana, Arkansas.

On March 14, 1914, the city of Texarkana duly created Waterworks Improvement District No. 22, which included the whole area of the city of Texarkana, Arkansas, for the purpose of obtaining, constructing, and equipping an adequate system of waterworks. The majority in value of the property owners in the said district filed a petition with the city council praying that said improvement be made. The petition designated the nature of the improvement to be undertaken and asked that the costs thereof be assessed and charged upon the real property within the district. The city council appointed John P. Cline, Q. O. Turner and A. B. Little, owners of real property within the district, to compose a board of improvement for the district. The board of assessors was duly appointed and on November 13, 1914, filed with the city clerk the assessment of the benefits against the real property in said district. On November 24, 1914, pursuant to the prayer of the petitioners, the city council by Ordinance B-191, duly levied the assessment of benefits against the real property within said district. On December 14, 1914, certain electors of the city of Texarkana filed their petition with the Secretary of State praying that said Ordinance B-191 be referred to the voters of the city of Texarkana to be voted upon at the general city election on the first Tuesday of April, 1915. The Secretary of State was preparing to refer said ordi-

nance to the electors at said election when a temporary injunction was granted against him, when the board of improvement commissioners first instituted this action. When the case came on for final hearing the court found that the ordinance in question was not a proper ordinance to be referred to the electors of the city of Texarkana for approval or rejection, and a permanent injunction was issued against the Secretary of State as prayed for in the complaint. The case is here on appeal.

Wm. L. Moose, Attorney General, *W. H. Arnold* and *James D. Head,* for appellant.

1. In passing the ordinance in question, the city council was not exercising a police power, for this is a levy of a special tax for the purpose of constructing waterworks in the city. 5 McQuillin on Mun. Corp., § 2717, pars. 4326-7.

The act itself having specified the only exceptions to the grant of this power to order a referendum, it exists in all other cases save those falling within the exceptions. Acts 1913, pp. 563, 565.

2. No exception is reserved by the act from the power of the people to order a referendum on matters involving the taxing power, unless the ordinance be for the maintenance of the municipal government in some of its branches. An improvement tax, this court has held, is not "taxes" within the meaning of the law, and that while "they are laid under the taxing power, and are, in a certain sense, taxes, yet, they are a peculiar class of taxes, and are not within the meaning of that term as it is usually employed in our Constitution and statutes." 59 Ark. 513-531; 89 Ark. 513.

As there is no exception in the act itself, from the power of reference given to the people, in favor of special assessments, the court can not engraft on the act by way of amendment exceptions not found within its terms. 144 N. W. 730; 5 L. R. A. 115; 104 Ark. 583, 596.

3. The referendum act is not in violation of the Constitution. Art 19, § 27.

When an improvement district is organized for the purpose of providing waterworks, gas or electric lights, all of the electors of the city become at once interested in said improvement. Kirby's Dig., § 5675; 56 Ark. 205; *Id.* 365.

A reference of the ordinance to the voters would not violate the constitutional requisite of a consent of a majority in value, of those owning real property in the district, for that consent has already been obtained; but in addition to this consent the electors of the city are, by the act of 1913, given power to determine the expediency of the district, even though a majority of the owners of real property may have petitioned for it. And there is no merit in the contention that a reference of the ordinance might still leave the improvement district organized, and the city council with power to pass another ordinance levying the assessment. 139 Kan. 1191.

The specification in the act of certain matters which may not be referred, excludes the idea that any other matters may not be referred. The naming of certain exceptions excludes the idea that other exceptions exist which the Legislature did not mention in the act. 104 Ark. 510; 110 Ark. 528.

4. Amendment No. 10, to the Constitution, is worded quite differently from the language used in the municipal referendum measure of 1913. The former does not confer power, but reserves it. 104 Ark. 583, 595. The latter confers upon the voters of municipalities power which they did not have before.

If it should be held that a city council, by merely attaching an emergency clause declaring an ordinance pertaining to taxation to be an exercise of police power, it would be tantamount to conferring upon the city council the right to repeal any act of the Legislature.

5. The city council by stating in the ordinance that it was for immediate relief of "persons in distress," merely sought to evade the fourth subdivision or class of legislation which the statute withholds from reference.

This fourth subdivision pertains to individuals, as such, in contra-distinction to the community in general.

R. M. Mann and *Frank S. Quinn,* for appellee.

1. Improvement district ordinances are not within the meaning and intention of the Referendum Act. Hunt on Special Assessments, § 196; 109 Ark. 556; *Id.* 90; 55 Ark. 148; 42 Ark. 152.

2. The Referendum Act, if applied to improvement districts would be in conflict with section 27, article 19, of the Constitution. 84 Ark. 390.

3. Special assessments for local improvements are levied under the police power. They are not taxes. 86 Ark. 109; 59 Ark. 513, 532; 3 McQuillin, Mun. Corp., 1882, § 889; 96 U. S. 113-125; 2 Cooley, Taxation, (3 ed.), 1127, 1128 1130; 5 McQuillin, Mun. Corp., 4328, and authorities cited.

4. There is no great difference between the Referendum Act of 1911, and the act of 1913, the principal difference apparently being that the Legislature must declare an emergency, otherwise none exists, whereas, in the municipal referendum act it appears that an ordinance may be an emergency ordinance although no emergency clause is attached.

There is no provision in the latter act giving to the Secretary of State authority to determine whether an emergency exists, neither does it vest that authority in the courts.

The rule is that an act of a city council, in the exercise of its delegated powers, has all the presumptions indulged in its favor that an act of the Legislature has. In the formation of improvement districts and levying assessments, the action of a city council is conclusive, unless attacked for fraud or demonstrable mistake. 81 Ark. 208; 101 Ark. 227; 98 Ark. 543; 105 Wis. 651, 81 N. W. 1046.

The evident intent of the act of 1913, is to grant to municipal corporations the right to say that ordinances for certain excepted purposes shall not be submitted to a

vote. This court has held that the existence of an emergency is a question of fact. 109 Ark. 479; 74 Pac. 710.

HART, J., (after stating the facts). In the case of *Tomlinson Brothers* v. *Hodges,* 110 Ark. 528, the court held that Acts of 1911, page 582, providing for carrying into effect the initiative and referendum powers, reserved to the people in Constitutional Amendment No. 10, was only intended to carry out and put into effect the constitutional amendment and did not confer on the people of a municipal corporation referendum power over an ordinance passed by the city council which granted to appellants in that case a franchise to furnish light to the city of Mena. The court, however, further held that the Legislature may provide for direct legislation in cities and towns through the initiative and referendum.

The Legislature of 1913, passed Act No. 135, entitled, "An Act to grant to the people of municipal corporations the right to refer ordinances passed by the council of said municipal corporation, to prescribe the method of referring the same, and to punish violations of this act." See Acts of 1913, page 563.

The first sentence of section 1, of the act provides that within ninety days after the passage of any ordinance of any city or town council, 20 per cent of the legal voters of said municipality may by petition order the referendum upon any such ordinance.

The section further provides that when the referendum is ordered the ordinance shall not be effective until a majority of the voters shall approve it.

It was under this section that the electors of the city of Texarkana were attempting to have the ordinance levying assessments of benefits against the real property situated within the improvement district submitted to the electors of the city of Texarkana.

We are of the opinion that Act No. 135, of the Acts of 1913, above referred to, was intended to apply only to matters of general legislation by the city council in which all electors without distinction may take part.

Section 27, article 19, of our Constitution provides: "Nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of the majority in value of the property holders owning property adjoining the locality to be affected."

Pursuant to this clause of the Constitution the Legislature has enacted general laws for the organization of local improvement districts and the mode of levying assessments upon real property situated within such districts. Under the clause above referred to of our Constitution and the general statutes relating to the subject passed in conformity with the power given the Legislature, only property owners may take part in the organization of local improvement districts. The electors of the city who are not property owners within the proposed district have no interest in the organization of such local improvement districts and are in no wise concerned in them.

When Act No. 135, of the Acts of 1913, is construed with reference to this provision of the Constitution, it is manifest that the special act in terms applies and was intended by the Legislature to apply only to matters of general legislation in which all of the electors of the city may participate.

It follows that the decision of the chancellor was correct and the decree will be affirmed.

LITTLE v. HUDGINS.

Opinion delivered March 1, 1915.

1. LANDLORD AND TENANT—POSSESSION OF PREMISES.—A landlord, under a lease, is not required to deliver manual possession of the premises to the tenant; the implied covenant is satisfied if there is no impediment to the tenant taking possession of the premises.
2. LANDLORD AND TENANT—LEASE—POSSESSION—RENT.—A landlord is not required to hunt up his tenant and ask him to go into posses-

sion of the premises, before he can collect the rent, which the tenant has agreed to pay; and the tenant is not excused from paying rent, when, at the beginning of the term, a third party was occupying the premises, where it appeared that the third party was ready to move, and that the tenant made no demand for the premises.

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

J. I. Alley, for appellant.

The contract stipulated that the premises were to be *delivered* to appellant on August 1, 1913. It is well settled that where there is a lease or rental contract, there is an implied covenant that the premises shall be open to entry to the lessee at the time fixed for the beginning of the lease; yet this case is even stronger, since there is not only the implied covenant but also the written agreement. 102 Ark. 103; 42 Ark. 257; 96 Ark. 78; 71 Ark. 251; 74 Ark. 227; 9 L. R. A. (N. S.) 127; 11 L. R. A. 498; 21 L. R. A. (N. S.) 239.

W. Prickett, for appellee.

Cases cited by appellant to sustain his contention do not aid him. He was not "prevented from obtaining possession by some one holding the premises." He admits that he made no demand for possession. If he had demanded possession and it had been refused, then there would have been a breach of the contract, and a different case would be presented, making the authorities relied upon by him applicable.

HART, J. Appellees instituted this action against appellant in the circuit court to recover $175 alleged to be due under a written contract of lease. The facts are undisputed and are substantially as follows:

On the 25th day of September, 1912, appellees by a contract in writing leased to appellant a house in the city of Mena, for a period of seventeen months from the first day of August, 1913. Under the lease appellant agreed to pay as rent the sum of $40 per month in the case the building was used for the purpose of selling liquor; otherwise the rent was to be $25 per month.

Appellant opened up a saloon in the city of Mena on the 13th day of June, 1913, but in a different portion of the town from that in which the leased premises are situated. On the 1st day of August, 1913, some one else was in possession of the premises and appellant made no attempt whatever to occupy the premises. The person who occupied the premises at that date had been a former tenant of appellee's and stated that he would have given up possession of the premises on the 1st day of August, 1913, if possession had been demanded of him, that he simply stayed on in the building for a while because no one asked him to give up possession. Appellant never did move into the building and refused to pay appellees any rent. This suit was brought to recover rent for seven months. The court directed a verdict for appellees and the case is here on appeal.

Appellant relies for a reversal of the judgment upon the cases of *Thomas* v. *Croom,* 102 Ark. 108, and *Rose* v. *Wynn,* 42 Ark. 257. We do not think either of these cases is an authority for the position assumed by appellant. In each of them the lessee endeavored to take possession of the leased premises and was prevented from doing so by a former tenant asserting a right to hold over under a prior lease from the landlord. In the case of *Thomas* v. *Croom,* the court said that by virtue of a lease contract there is an implied covenant that the demised premises shall be open to entry to the lessee at the time fixed in the lease for the beginning of the term and that if the lessee is prevented from obtaining possession by some one holding the premises, then such covenant is violated.

(1) The law does not contemplate that a landlord shall hunt up his tenant and ask him to go into possession of the premises before he can claim the rent which his tenant has agreed to pay. It is the duty of the tenant to take possession of the premises, if possession thereof is not withheld from him. If he does not do so he is liable for the rent from the beginning of the term for which he has leased the premises. The landlord is not

required to deliver manual possession of the premises to the tenant. The implied covenant is satisfied if there is no impediment to the tenant taking possession of the premises.

(2) In the case before us the undisputed evidence shows that the former tenant was not wrongfully holding possession of the premises but, on the other hand, states that he was willing to vacate them when notified to do so. Appellant made no attempt whatever to occupy the premises but simply states that he did not move into them because at the beginning of the term of his lease the former tenant had not moved out. Under these circumstances we think the court was correct in directing a verdict for appellees and the judgment will be affirmed.

OLIVER v. SCOTT.

Opinion delivered March 1, 1915.

1. CONTRACTS—FORFEITURE FOR BREACH OF CONTRACT—FAILURE TO PAY TAXES.—A contract for the sale of land provided for the payment, regularly and seasonably, of all taxes, by the purchaser, and for a forfeiture for nonpayment. *Held*, the contract will not be declared forfeited when the purchaser paid the taxes thereon on the 16th day of April, or on any day up until the second Monday in June. The owner's right to prevent a forfeiture of his land for nonpayment of taxes continues, under the law of the State, until the second Monday in June, and a contract will not be declared forfeited, where the purchaser pays the taxes with the statutory penalty, at any time before forfeiture to the State.
2. CONTRACTS—PURCHASE MONEY NOTE—PAYMENT.—A. purchased land from B., giving notes for the purchase money. Before a certain note fell due, A. notified the cashier of a bank, where he kept his money, the bank being B.'s agent to collect the notes, to credit B.'s account with the amount of the note, and to charge his, A.'s, account with the same. This was done. *Held*, the transaction constituted a payment of the note, and the failure of the cashier to make proper entries on the note and his books as to the date of the transaction, will not affect its validity and binding effect.

Appeal from Logan Chancery Court, Southern District; *W. A. Falconer*, Chancellor; reversed.

STATEMENT BY THE COURT.

On the 12th day of January, 1911, one C. C. Holland entered into a contract with Emma Scott and Ella Bradley for the purchase of certain lots in the town of Booneville. The contract provided, among other things, that Emma Scott and Ella Bradley agreed to sell to Holland the lots designated for the sum of $1,500, of which Holland paid $75 in cash, and executed nineteen notes for the sum of $75 each, one note falling due each successive four months after date until all of the notes were due and paid.

The contract also provided, that the purchaser "will regularly and seasonably pay all such taxes and assessments as shall be lawfully imposed upon said premises; and further provided as follows:

"In case the said second party" (C. C. Holland) "legal representatives, or her assigns shall pay the several sums of money aforesaid, punctually, and at the several times above limited, and shall strictly and literally perform all and singular, the stipulations and agreements aforesaid, after their true tenor and intent, then and thereupon the first parties will make unto the said second party, her heirs and assigns, a warranty deed," etc. "But in case the said second party shall fail to make the payments aforesaid, or any of them, punctually, and upon the strict terms and at the times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, time being the essence of this contract, then this contract shall, from the date of such failure, be null and void, and all rights and interests thereby created or then existing in favor of said second party, or heirs or assigns, or derived under this contract, shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in the said first parties, heirs or assigns, (without any declaration of forfeiture or act of re-entry, or without any other act by said first parties to be performed, and without any right in said second party of reclamation or compensa-

tion, for moneys paid or improvements made), as absolutely and perfectly as if this contract had never been made.

"And it is hereby further covenanted and agreed by and between the parties hereto, that immediately upon the failure to pay any of the notes above described, all previous payments shall be forfeited to the party of the first part, and the relation of landlord and tenant shall arise between the parties hereto, for one year from January 1, immediately preceding the date of default," etc.

Mrs. Holland died in February, 1912, and on the first of May, 1912, the contract was assigned by her heirs to the appellant. He instituted this suit against the appellees, setting up the contract and the assignment thereof, and alleged that all payments that had matured prior to the assignment had been paid; that the next payment after the assignment was due May 12, 1912; that the notes had been placed by the appellees in the Citizens Bank at Booneville for collection as they fell due; that on May 12, 1912, when the next note became due appellant had the money on deposit in the bank to make the payment and had directed the cashier of the bank to credit the account of appellees with the amount of the payment out of this deposit; that the cashier notified the appellees that he had credited their account with the amount of the payment and that appellees disclaimed the payment of the note and claimed that the contract had been forfeited for nonpayment of taxes, which appellees claimed that they themselves had paid on April 16, 1912; that appellant afterward tendered to appellees the amount of the taxes and the amount of the note and all accrued interest, which appellees refused to accept, claiming that the contract had been forfeited.

Appellant further alleged that when the assignment was made to him he was told that the taxes had been paid. Appellant offered, in his complaint, to pay into court all remaining due under the contract for the lots whenever the appellees made him a warranty deed, and he asked for specific performance.

The appellees denied the assignment, admitted that all the notes that fell due prior to the alleged assignment to appellant had been paid; but they denied that any payment had been made since the death of Mrs. Holland, and alleged that time was of the essence of the contract; alleged that the taxes on the lots fell due April 10, 1912, and that the appellees paid the taxes. They denied that the notes had been put in the Citizens Bank for collection, and denied that they had ever directed the cashier of the Citizens Bank to enter credit on the note that fell due on May 12, 1912, and denied that appellant had the money in the bank to pay the note that fell due on that day. They asked that the plaintiff's complaint be dismissed for want of equity.

Appellant testified that the contract was assigned to him by the heirs of Mrs. Holland on May 1, 1912, and that he at once notified the appellees of that fact; that he had a general deposit account with the Citizens Bank of Booneville at the time and immediately after the contract had been assigned he notified the cashier of the bank of that fact and directed him to credit the account of appellees out of his deposit account with the amount of the next deferred payment note due May 12, 1912; that it was his understanding at the time the contract was assigned that the deferred payment notes were held by the Citizens Bank for collection; that at the time the next note became due he had a sufficient amount of money on deposit to make the payment; that the cashier of the bank informed him that the appellees refused to accept payment of the note falling due May 12, 1912, claiming that the contract had been forfeited for the nonpayment of taxes; that thereupon he made a personal tender to the appellees of the amount of the taxes, with interest, and that appellees refused to accept the same; that he was informed when the assignment was made that the taxes payable in 1912 had been paid; that after the appellees refused to accept the payment of the note due May 12, 1912, and the taxes, he offered to pay the entire amount

of all unpaid notes and appellees refused to treat with him any further about it.

The cashier of the bank corroborated the testimony of the appellant to the effect that the notes had been placed in the bank by the appellees for collection, and that the bank was acting as agent for the appellees in the matter; that the bank had collected all the preceding notes under the contract, being in all four notes. The bank had collected these notes and credited them to the general deposit account of the appellees. The cashier also testified that the appellant had a sufficient amount to his credit on the 12th of May, 1912, to pay the note falling due on that date, and that appellant had spoken to him before that time, requesting that the next note falling due be paid out of appellant's deposit account; that the witness accordingly stamped the note falling due May 12, as paid and credited the account of the appellees with the amount and charged the same against the account of the appellant; that he notified appellees that the note had been paid in this way; that the appellees thereupon refused to accept the payment of the note, claiming that the contract had been forfeited for the nonpayment of taxes.

On cross-examination he testified that, according to his usual custom of doing business, the endorsement of the note as paid on the 17th of May, 1912, would indicate that was the date of its payment.

The appellee, Mrs. Scott, testified that she acted as the agent of her daughter, Ella Bradley, the other appellee; and further testified as follows: "I saw in the Gazette a notice of the death of Mrs. C. C. Holland, and when the taxes in 1912 fell due and the note which also fell due on the 12th of May and she failed to pay the taxes and note, I supposed this was the Mrs. C. C. Holland, and from the terms of the contract I considered it breached and forfeited and I paid the taxes myself," etc. She denied that since the payment of the taxes by her that there had been any tender of the taxes or the amount of the note, but further testified that the appellant came to her house and tendered to her "something that looked like

money," and she replied that he did not owe her anything. She denied that the cashier of the Citizens Bank was her agent. She admitted that the cashier of the bank had collected the previous notes for her, but stated that he was not her agent for any purpose; that the notes were in the bank for safe-keeping. She stated that the cashier of the bank informed her that he had credited her account with the payment of the note due May 12, 1912, and she told him at that time that the contract had been forfeited and she would not receive the payment of it. She considered the contract forfeited because the taxes had not been paid. She paid the taxes before the 16th of April; had authorized the cashier of the bank to pay them on the 10th or 11th. She paid them because she considered the contract at that time forfeited for the nonpayment of taxes.

The above are substantially the facts upon which the court found that the contract "was breached by the plaintiff" (appellant) "by his failure to pay the taxes due upon the said lots and premises for the year 1911 within the time prescribed by law;" and, further, "by his failure to pay the note due and payable on the 12th of May, 1912, according to the conditions and provisions of said contract," and upon these findings the court entered a decree dismissing the appellant's complaint for want of equity, and entered a judgment in favor of the appellees that they retain possession of the lots in controversy and for costs, etc. This appeal has been duly prosecuted.

W. B. Rutherford, for appellant.

1. Under our statutes the time for paying taxes runs from the first of January to the second Monday in June in each year, and the payment of taxes on the property in question at any time within said limits, would be "regular and seasonable" within the meaning of the contract. Kirby's Dig., § § 7083-7087; 37 Cyc. 1158; 121 N. C. 569.

2. There was no failure to pay the note due on May 12, at its maturity The evidence shows that the notes

were placed in the bank for collection, that it was the agent of appellees in the matter, that it had collected the preceding notes and placed the amounts thereof to the credit of appellees and that by authority of appellant, who had money on deposit in the same bank for the purpose, it charged his account with the amount of this note and placed the same to the credit of appellees, when it fell due. The actual time of the stamping of the note as paid, is not material.

W. A. Ratterree, for appellees.

1. Taxes are due and payable at any time from the first Monday in January to and including the 10th day of April in each year, after which latter date the tax books are closed and the penalty attaches. Acts 1911, pp. 361-2, § 1; Kirby's Dig., § § 7083, 7084. If the taxes were not paid by appellant by the 10th day of April, they were not paid "regularly and seasonably," within the meaning of the contract, time being of the essence of the contract.

2. The court properly held that the contract was forfeited for failure to pay at its maturity the note due May 12, 1912. Time was of the essence of the contract, yet appellant, who obtained the assignment of the contract in time to have paid the note due on May 12, made no tender of the amount until "a day or two after he was notified by Charles X. Williams on the 17th of May." 48 Ark. 413; 54 Ark. 16; 61 Ark. 266; 7 Ves. 270; 9 Am. Law Reg. 146; 1 Johns, Ch. 369; 2 Story's Eq. Jur., § 76; 69 Am. St. Rep. 17; 134 U. S. 68; 91 Ark. 133; 76 Ark. 578; 95 Ark. 529.

WOOD, J., (after stating the facts). The court erred in finding that the appellant had violated the contract "by his failure to pay the taxes due upon said lots for the year 1911, within the time prescribed by law," and erred in holding that appellant had forfeited his rights under the contract by reason of such alleged failure.

(1) Under our revenue laws taxes are due and payable at any time from the first Monday in January to and including the 10th day of April in each year, and all taxes remaining unpaid after the 10th day of April are

delinquent, but the property is not forfeited to the State for the nonpayment of taxes until the second Monday in June next after the taxes are due and payable. If the taxes are not paid by the 10th of April in each year the party whose duty it is to pay the taxes is assessed a penalty of 10 per cent by reason of his failure to pay on that day, but he can pay the taxes and this penalty at any time before the second Monday in June and thus relieve his property from a forfeiture to the State. Act 415, Acts of 1911, p. 361; Kirby's Digest, § § 7083 to 7087 inc.

The owner's right to prevent a forfeiture of his land for the nonpayment of taxes continues, under our law, until the second Monday in June. If he fails to pay by that time his land is forfeited to the State and his right to discharge the taxes by payment is lost, and after that time he has a right of redemption which must be obtained under the procedure provided by law. See, 37 Cyc. p. 1158; Kirby's Digest, § § *supra,* and section 7095.

The contract did not specify any day on which the purchaser or his assignee should pay the taxes. That was left open, and therefore, as we construe the contract, the appellant had not failed to "regularly and seasonably" pay the taxes "lawfully imposed" upon said premises, provided he paid the same, or offered to pay the same, before the time fixed by law when the property should be forfeited to the State in case of a failure to pay the taxes. The contract did not contemplate a forfeiture of appellant's rights of property under the contract so long as appellant was able and ready to pay the taxes and penalties within the time prescribed by law when such taxes should be paid to prevent a forfeiture to the State.

(2) The court also erred in finding that appellant had forfeited his right under the contract "by his failure to pay the note due and payable on the 12th of May, 1912."

The facts set forth in the statement show that this note was paid. The notes were held by the Citizens Bank for collection. The appellant notified the cashier of the

bank before the day when the note became due to pay the same out of his general deposit with the bank. At the time the note was due appellant had on deposit with the bank a sum sufficient to make the payment. The cashier of the bank was the agent of the appellees to collect the note and was also the agent of the appellant to appropriate his funds on deposit with the bank to the payment of the note when same was due. The cashier of the bank, in pursuance of the directions of the appellant, endorsed the note as paid and credited appellees' account with the amount of the note. It was the duty of the cashier having the funds of the appellant on deposit and with instructions to appropriate the same to the payment of the note when the same became due, and with instructions from the appellees to collect the note when the same became due, to appropriate the money of appellant to the payment of the note on May 12, 1912, when the same was due. Although the endorsement on the note shows that the same was paid on May 17, yet equity treats that as done which should have been done, and, under the uncontroverted evidence, it is clear that under the provisions of the contract this note, in contemplation of the parties to the contract, was paid on May 12, 1912, and the failure of the cashier to make the proper entries on his books and the note showing such payment was but a clerical mistake and did not alter the fact of the actual payment of the note on the day it was due.

The decree of the chancellor, for the errors indicated, is therefore reversed and the cause is remanded with directions to enter a decree for appellant and for further proceedings not inconsistent with this opinion.

RAYWINKLE v. THE SOUTHERN COAL COMPANY.

Opinion delivered March 1, 1915.

PARTNERSHIP—LIABILITY OF RETIRING PARTNER.—A retiring partner is not required to give notice so as to relieve himself from liability to those, who for the first time deal with the firm after the dissolution takes place, unless he permits his name to be used in the

transaction of business, or so conducts himself with reference to the firm's transactions as to induce the belief in those dealing with the firm, that he is still a member.

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

STATEMENT BY THE COURT.

The Southern Coal Company, a corporation doing business at Memphis, Tenn., sued C. C. Edwards, H. E. Watson, J. M. Devlin, T. E. Devlin and W. D. Raywinkle to recover $358.37, for three cars of coal sold by plaintiff to Kensett Ice and Gin Company, a partnership alleged to be composed of the defendants as members. H. E. Watson, C. C. Edwards, J. M. Devlin and T. E. Devlin failed to answer and judgment by default was rendered against them. W. D. Raywinkle filed an answer denying that he was a member of the firm or was indebted to the plaintiff in any sum whatever. The facts are substantially as follows:

The Kensett Ice and Gin Company is a partnership formed in March, 1911, and at the time of its organization W. D. Raywinkle was a member of the partnership. Raywinkle lived in Cleburne County and the partnership was formed for the purpose of erecting an ice plant at Kensett, White County, Arkansas. After the partnership was formed the members proceeded with the erection of the plant but before the erection of the building was completed or the machinery installed the defendant, Raywinkle, on June 9, 1911, disposed of his interest in the firm to his son for $500. No notice that Raywinkle had retired from the firm was published in the papers but it was a matter of common knowledge in the locality where the partnership was formed. After that time Raywinkle had no connection whatever with the business and took no part in the conduct of its affairs. On June 15, 1913, an order was sent to the plaintiff for a car of coal. The order was signed "Kensett Ice and Gin Company, by J. M. Devlin, Manager." Subsequently orders for two more cars of coal were sent to the plaintiff and plaintiff shipped, in all, three cars of coal to the Kensett Ice

and Gin Company. One was shipped in July, another in August, and the last in October, 1913. No other dealings were had between the plaintiff and the Kensett Ice and Gin Company.

The secretary of the coal company testified that he had no acquaintance whatever with the members of the partnership but left it entirely with the plaintiff's attorneys as to who should be sued. In response to the question, "State any other facts about which you have any information which might be of benefit to either party to this suit," he answered, "Our traveling salesman reported to us that the members of this firm, the defendant herein, were all good and solvent and that the firm was worthy of credit, and the order was accepted."

The circuit court directed a verdict in favor of the plaintiff and the defendant Raywinkle has appealed.

Rachels & Miller, for appellant.

The court erred in not giving a peremptory instruction for the defendant.

A retiring partner is not required to give notice so as to relieve himself from liability to those who for the first time deal with the firm after dissolution of the partnership business, unless he permits his name to be used in the transaction of the business or so conducts himself as to induce the belief in those dealing with the firm that he is still a member. 88 Ga. 54; 72 Ind. 425; 37 Am. Rep. 168; 75 Ky. (Bush.) 259; 10 Mich. 319; 52 Minn. 565; 54 N. W. 738; 24 Mo. App. 14; 180 Mass. 510; 62 N. E. 970; 95 Ark. 6; 30 Cyc. 652; 30 Cyc. 671; 22 Am. & Eng. Ency. of Law, 178.

S. Brundidge, Jr., for appellee.

Notice of the dissolution of the partnership was necessary to relieve the defendant of liability. Gilmore on Partnerships, Hornbook Series, pages 265 and 266; Meechem's Elements of Partnership, § 220; 3 Cyc. 608; 95 Ark. 1.

The court was correct in instructing a verdict for the plaintiff.

HART, J., (after stating the facts). In the case of *Gaar* v. *Huggins & Bro.,* 12 Bush. (Ky.) 259, the court said:

"A retiring partner is not required to give notice so as to relieve himself from liability to those who for the first time deal with the firm after the dissolution takes place, unless he permits his name to be used in the transaction of the business, or so conducts himself with reference to the firm transactions as to induce the belief in those dealing with the firm that he is still a member."

To the same effect see: *Austin* v. *Appling,* 88 Ga. 54; *Puritan Trust Co.* v. *Coffey,* (Mass.) 62 N. E. 970; *Swigert* v. *Aspden,* (Minn.) 54 N. W. 738; *Bloch* v. *Price,* 24 Mo. App. 14.

The testimony in this case shows that the defendant Raywinkle retired from the firm in June, 1911, before it had completed the erection of the buildings designed for the use of the partnership and before the machinery had been installed therein. This fact was common knowledge in the locality where the business of the firm was to be transacted although no public notice was given. More than two years elapsed between the date of his retirement from the firm and the period at which the coal was sold by the plaintiff to the firm. The plaintiff during this time had had no dealings whatever with the firm and can not be said to have contracted with the firm on the credit of Raywinkle. Raywinkle's name never appeared in the firm and it is not shown that the firm in conducting its business ever used his name. Under these circumstances we do not think he was responsible for the debt of the plaintiff and the court erred in directing a verdict for the plaintiff.

Counsel for plaintiff relies on the case of *Bluff City Lumber Co.* v. *Bank of Clarksville,* 95 Ark. 1, but in that case the facts were essentially different. There the creditors had dealings with the old firm and had no notice of the dissolution before the indebtedness sued for was incurred. Therefore the creditors were not affected by the dissolution. But as we have already seen, in this case

the style of the firm did not disclose the name of any individual partner and the defendant had retired from the firm before it began to transact the business for which it was organized, and a period of two years had elapsed before the plaintiff transacted any business whatever with the firm. During this time the defendant Raywinkle resided in an adjoining county and took no part whatever in the transaction of the business of the firm and it was a matter of common knowledge in the locality where the firm did business that he was not interested in the business. Under these circumstances the court should have directed a verdict for the defendant, and, inasmuch as the facts have been fully developed the judgment will be reversed and the cause of action of the plaintiff will be dismissed.

It is so ordered.

WILSON v. CHANEY.

Opinion delivered March 1, 1915.

1. SHERIFF—DUTY TO COLLECT FINE FROM PRISONER.—Where the sheriff has in his custody a prisoner, against whom a fine has been adjudged, it is his duty to collect the fine, and he is chargeable with and liable therefor, or it is his duty to require the prisoner to pay the same by work, as provided in the statutes.
2. CRIMINAL LAW—LIABILITY OF DEFENDANT TO PAY FINE.—Where a fine has been adjudged against a defendant, he is not relieved of his duty to pay the same, where the sheriff released him without exacting payment from him.
3. SHERIFF—DUTY TO COLLECT FINES.—It is the duty of a sheriff to collect all fines, imposed during the incumbency of his predecessor in office, and which have not been paid.
4. CRIMINAL LAW—FINES—NOTE OF DEFENDANT—LIABILITY OF SURETY THEREON.—A fine in a criminal prosecution was adjudged against one W. W. was released by the sheriff, without payment of the fine. Appellee, who succeeded the sheriff in that office, then secured a note from the defendant W. for the amount of the fine and costs. *Held*, the appellee could maintain an action on the said note, and that the defendant and sureties with him on the said note would be liable thereon.

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

STATEMENT BY THE COURT.

In September, 1912, Joe Wilson was convicted of a misdemeanor and fined by the judge of the Pike Circuit Court. T. P. Rogers, at that time, was the sheriff of the county. He permitted Wilson to return to his home in Montgomery County without having paid the fine and costs, and without giving any security for the payment of same. The then sheriff, Rogers, failed to comply with the statutes in regard to the collection of the fine and costs, and at the time his term of office expired the fine and costs had not been paid by Wilson.

J. E. Chaney succeeded Rogers as sheriff of Pike County and after Chaney had been in office about fourteen months Tom Parsons, a deputy of Chaney, was sent to collect the fine and costs. He went to Montgomery County and arrested Wilson, and then took a note from Wilson in settlement of the fine and costs, which is as follows:

"$114.20. January 1, 1914.

"Sixty days after date we promise to pay to the order of J. E. Chaney the sum of one hundred fourteen and 20/100 dollars. Value received.

"Joe Wilson,
"J. R. O'Neal,
"J. S. Wilson,
"Austin Wilson,

"Due March 1, 1914."

The appellee brought this suit against the appellants in the justice court on March 13, 1914. Appellants answered, setting up that the court had no jurisdiction, and defended on the grounds that the note sued on did not conform to the statute in such cases, and that there was therefore no consideration for it.

The appellee testified that he was not sheriff of Pike County at the time the fine was assessed against the appellant Joe Wilson, but that his successor turned over to

him an account showing the fines that were due the county, and that among these was the fine against Joe Wilson; that said fine had never been paid. His testimony and the testimony of Parsons further shows that the appellant Joe Wilson executed the note in suit in payment of the fine and costs that had been adjudged against him in the Pike Circuit Court, and that the other appellants signed as his sureties, and that the appellant, Joe Wilson, who was under arrest at the time the note was executed, was released from custody after the execution of the note.

The testimony showed that there had never been any judgment rendered against appellee Chaney in the Pike County Court for the amount of the fine and costs that had been adjudged by the circuit court against Wilson.

Appellant Wilson testified that he was due the State of Arkansas a fine that had been adjudged against him by the Pike Circuit Court. The fine had been due about a year; that he was in the custody of the officer at the time he executed the note in suit, and after executing the note he was released.

The other appellants testified that they signed the note as sureties for Joe Wilson, and the testimony tended to prove that they did so for the purpose of securing his release.

The court, over the objections of the appellants, instructed the jury to return a verdict in favor of the appellee in the sum of $114.20, with 6 per cent interest from March 1, 1914. The verdict was in accord with the directions, and judgment was entered in favor of the appellee against the appellants for the amount of the verdict, and this appeal has been duly prosecuted.

Gibson Witt, for appellants.

It was the duty of the former sheriff, Rogers, to collect the fine, and of the county clerk to charge him with the amount thereof. Kirby's Dig., § § 7191-7193. It was Rogers' duty to settle with the county at the next quarterly term for the amount of the fine, or, at the furthest, at the expiration of his term. *Id.,* § 1356.

The note sued on is not in form or substance such as is provided by law, and did not have the force and effect of a judgment under the statute. *Id.*, § § 1091, 2475; 82 Ark. 407; 78 Ark. 237; 54 Ark. 18; 4 Am. & Eng. Enc. of L. 667.

It is not valid as a common law obligation. The evidence clearly shows that the county court had never charged the former sheriff with the amount of the fine and costs. He could not have collected the note had it been given to him, because his liability had never been adjudicated, he had never paid the fine to the county treasurer, and was, therefore, not subrogated to the rights of the county.

There is no statute making a sheriff responsible for fines adjudged against offenders during the term of office of his predecessor.

Appellee, pro se.

Rogers' term having expired and the fine not having been paid, it was appellee's duty to attempt to collect it; and he was the proper person to whom to make the note payable. The time had passed in which to make it payable to the State. Kirby's Dig., § 6002. The defendant was not acquitted of liability by the failure of the former sheriff to take the bond contemplated by the statute.

WOOD, J., (after stating the facts). (1-2-3) It was the duty of Rogers, who was the sheriff of Pike County at the time the fine was adjudged against appellant Joe Wilson, to collect such fine, and it was the duty of the clerk of the county court to charge him up with such fine, and, under the law, Rogers was liable for such fine and could not be relieved of the same except upon certain conditions. See, Kirby's Digest, § § 7191 to 7193 inc. It was the duty of Rogers, the then sheriff to have secured the payment of the fine or to have had the prisoner pay the same by work in the manner provided in the statute. Kirby's Dig., § 1091. But the failure of the county officers to comply with the statutes concerning the collection of fines and costs at the time the appellant was convicted in the Pike Circuit Court did not operate to relieve ap-

pellant of the debt due the State on account of such fine and costs. So far as he was concerned that debt or obligation to the State remained against him so long as the judgment was unsatisfied by immediate payment of the same in money or otherwise in the manner prescribed by the statute. Appellant not having paid off or satisfied the judgment against him at the time the appellee became sheriff of the county, it was the duty of the appellee as sheriff and collector of fines, penalties and forfeitures adjudged against defendants in circuit courts of the State to endeavor to collect such fines and costs. Kirby's Dig., section 7191.

(4) While appellee and his bondsmen could not have been made liable for the fine, since the same was adjudged against the appellant during the term of appellee's predecessor in office, still it was his duty, as we have seen, to collect such fines and costs from the appellant Joe Wilson, and to this end he could have had execution issued, or a warrant, and could proceed to arrest the appellant and to confine him to pay the fine and costs, which, so far as appellant Joe Wilson was concerned, had not, up to that time, been paid. And when the appellee, as the sheriff whose duty it was to collect the fine and costs, proceeded to arrest the appellant the obligation that appellant was under to pay the fine and costs that had been adjudged against him was sufficient consideration for the note which he executed to the appellee in settlement of the fine and costs and when the appellee effected the arrest of the appellant and released him upon the excution of the note not in the manner provided by the statute, and in this manner allowed appellant to settle the fine and costs, appellee and his bondsmen became primarily liable to the State for the amount of the fine and costs as represented by the note.

In *Wilson* v. *White,* 82 Ark. 407-411, speaking of a note that was taken by a sheriff in payment of a fine and costs which did not conform to the statutory requirements, we said: "Now the note in controversy failed

in two respects to conform to the statute. It is not payable to the State of Arkansas, and the same was not payable within thirty days. It did not, therefore, have the force and effect of a judgment under the statute, but it is valid as a common law obligation and binds the principal and his sureties for the payment of the amount named therein."

It follows that the appellee had the right to maintain this suit and that the appellants are liable to him for the amount of the note, and that the jugdment of the court to that effect is correct. The same is therefore affirmed.

CHICAGO MILL & LUMBER COMPANY v. DRAINAGE DISTRICT No. 15.

Opinion delivered March 8, 1915.

1. APPEALS—ORDER GRANTING APPEAL—ORDER NUNC PRO TUNC.—A court can not enter an order granting an appeal *nunc pro tunc*, when no such order was in fact made by such court.
2. DRAINAGE DISTRICTS—ORGANIZATION—ORDER OF COUNTY COURT—APPEAL.—A remonstrant against the formation of a drainage district loses his right of appeal to the circuit court, from an order of the county court, where the county court made no order granting an appeal, and the remonstrant failed to file an affidavit praying an appeal, with the clerk of the circuit court, until more than six months after the rendition of the order of the county court.

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

STATEMENT BY THE COURT.

Appellant was a remonstrant against the establishment of a drainage district in Mississippi County and from the order of February 3, 1913, of the county court establishing the district, attempted to take an appeal. It filed on February 17, 1913, an affidavit and prayer for appeal with the clerk of the Mississippi county court, requesting that he have the judge who was not present at that time, make an order of court granting the appeal. No order granting an appeal was ever made by the court. A transcript of the proceedings was made by the clerk,

however, and presented to the clerk of the circuit court and by him filed on May 8, 1913, and the case docketed.

At the June, 1913, term of the circuit court for the Chickasawba district, the attorney for the appellee district, stated in open court that he would file a motion to dismiss the appeal and had it set for argument at an adjourned day of the Osceola district court in July, 1913. No further proceedings were had until January 19, 1914, when the case was called and appellant's attorney stated he understood the attorney for appellee was ill and unable to appear and asked that the case be passed, which was done. On the next morning the court of it's own motion dismissed the appeal for want of prosecution and on the same day appellee filed a motion to dismiss. A motion to reinstate was then filed by appellant and argued, but was not ruled on. After notice given on January 3, 1914, a petition was filed praying for a writ of mandamus, requiring the county judge to enter an order *nunc pro tunc* granting the appeal and that same be certified to the circuit court.

The court heard testimony on the petition and made an order overruling the motion to reinstate the case and denied the prayer of the petition for mandamus, and from this judgment, appellants prayed an appeal.

Coleman, Lewis & Cunningham, for appellant.

1. There being no procedure outlined in the act, Acts 1909, p. 833, § 3, for taking appeals, they are governed by the general law. 107 Ark. 329; Kirby's Dig., § 1487.

The record shows that the affidavit and prayer for appeal was filed with the county clerk within twenty days of the order organizing the district, and that a transcript, containing the affidavit and prayer, was filed in the office of the circuit clerk in due time and that he placed his filing mark on the transcript and docketed the case. This was all that was necessary. It was the duty of the circuit clerk to enter an order granting an appeal.

It appears that no written order was entered, but in lieu thereof the clerk filed the transcript and gave the case place on the circuit court docket. The purpose of the order granting an appeal had been accomplished. Nothing more could have been done, if a formal order of appeal had been entered both in the county court and in the circuit court. 51 Ark. 347-8; 57 Ark. 185, 187.

2. The court erred in denying the petition for mandamus. 35 Ark. 298; 43 Ark. 40.

W. D. Gravette, for appellees.

It is immaterial whether the appeal from the county court is governed by section 1428 or section 1487 of Kirby's Digest, neither statute was complied with. *Wulff* v *Claibourne,* 107 Ark. 329, does not aid appellant. There the affidavit had been filed and the order allowing the appeal had actually been made, within the proper time, but the clerk had failed to enter it of record.

It has so often been held that it is necessary, in order for the circuit court to acquire jurisdiction on appeal from an inferior court, that the order be made granting the appeal, that it is not necessary to cite cases; but, see, 110 Ark. 374, and cases cited; 104 Ark. 113.

KIRBY, J., (after stating the facts). The appellant filed an affidavit and prayer for appeal for itself and such other owners of land within the district as desired to join in the appeal.

The motion to dismiss in the circuit court was on the ground that no order was made by the county court granting the appeal. The testimony shows that no order was ever made by the county court granting an appeal from its judgment establishing the drainage district, nor was there any order of appeal to the circuit court made by the circuit clerk, after the filing of the transcript with him.

In *Wulff* v. *Claibourne,* 107 Ark. 329, this court said of the law under which this district was established: "Although this is a special act, the terms of which must be fully complied with in proceedings under it, it is neither cumulative nor amendatory of the drainage laws

in force at the time of its passage, but is expressly declared to be an alternative system, and its provisions relative to procedure on appeal from judgments of the county court are different from those of section 1428 of Kirby's Digest, which are not required to be complied with in the taking of an appeal under the provisions of the act."

Under the general statute, section 1487, Kirby's Digest, appeals are "granted as a matter of right to the circuit court from all final orders and judgments of the county court at any time within six months after the rendition of same, either by the court rendering the order or judgment, or by the clerk of the circuit court, * * * by the party aggrieved filing an affidavit and prayer for an appeal with the clerk of the court in which the appeal is taken; and upon the filing of such affidavit and prayer the court rendering the judgment or order appealed from, or the clerk of the circuit court, shall forthwith order an appeal to the circuit court at any time within six months after the rendition of the judgment or order appealed from and not thereafter, etc."

The statute under which this district was formed provides: "* * * Any owner of real property within the district may appeal from such judgment within twenty days after same has been made, but if no appeal is taken within that time, such finding shall be deemed conclusive and binding upon all the real property within the boundary of the district that a majority in number or acreage or value have petitioned for the improvement. * * *" Section 3, Act May 27, 1909.

Conceding that the general statute providing for appeals from the county court is applicable to appeals from judgments relative to the establishment of drainage districts under said Act 279, of the Acts of 1909, the time in which they may be taken is shortened to within twenty days after the date of rendition of the judgment appealed from. Notwithstanding therefore appellant was entitled, as a matter of right, to an order granting the appeal upon the filing of the affidavit and prayer therefor, it is nevertheless a fact that no order was made by said

court granting such appeal within that time, or at all, and it is also true that no affidavit and prayer for appeal was ever filed with the circuit clerk, and that the transcript of the proceedings in the county court containing such affidavit and prayer was not filed before the circuit clerk until May 8, 1913, more than twenty days after the making of the order establishing the district.

(1-2) A court can not enter an order granting an appeal *nunc pro tunc,* when no such order was in fact made by such court and although appellant had the right to have an order granting his appeal made upon the filing of the affidavit and prayer therefor, he could not, more than six months thereafter, nor after the expiration of the twenty days from the date of rendition of the judgment compel the entry of such order by mandamus.

No order granting an appeal having been made by the county court, the circuit court was without jurisdiction to hear the cause and committed no error in dismissing it and in denying the prayer of the petition for relief by mandamus.

Affirmed.

HART and SMITH, JJ., dissent.

DAVIS AND THOMAS v. STATE.

Opinion delivered March 8, 1915.

1. BURGLARY—SUFFICIENCY OF INDICTMENT.—In an indictment for burglary, the specific felony intended to be committed by the accused must be set out or specified, but the allegation of the ulterior felony intended need not be set out as specifically as would be necessary in an indictment for the actual commission of that felony, and it is sufficient, ordinarily, to state the intended offense, generally.
2. BURGLARY—INDICTMENT—PROOF—NAMES—VARIANCE.—A variance between the indictment charging the burglarious entering of a store belonging to a partnership composed of O. J. & R. L. Harkey, and the proof which showed that the partnership was composed of J. N. & O. L. Harkey, is immaterial.
3. BURGLARY—SUFFICIENCY OF EVIDENCE.—Several burglaries were committed or attempted one night in a small town. *Held,* the evidence was sufficient to show defendants guilty of the burglary charged in the indictment.

4. EVIDENCE—CRIMINAL LAW—OTHER CRIMES—MOTIVE.—The rule that one crime can not be proved as a circumstance from which to infer guilt of the commission of another, does not exclude evidence which tends to show motive.
5. EVIDENCE—PROOF OF CRIME—OTHER CRIMES.—Evidence is not to be excluded because it tends to show the commission of a crime in addition to the one for which a defendant is upon trial, if such evidence also tends to prove guilt of the crime charged in the indictment.
6. CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE.—Where the State relies solely upon circumstantial evidence for a conviction, the chain of circumstances must be wholly inconsistent with defendant's innonence, and must be so convincing of defendant's guilt as to exclude every other reasonable hypothesis, and it must establish in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge.
7. TRIAL—ARGUMENT OF COUNSEL—CONDUCT OF ACCUSED.—In a prosecution for burglary, when the evidence showed that accused was found with burglar's tools on him, shortly after the commission of the crime, argument of the prosecuting attorney, referring to those facts, is not improper.

Appeal from Yell Circuit Court, Dardanelle District; *A. B. Priddy,* Special Judge; affirmed.

W. P. Strait, for appellants.

1. The court should have sustained the demurrer. No value of the money is alleged. When grand larceny is charged as the crime intended to be committed, an allegation of the value of the property becomes material, and a failure to allege it to be of value sufficient to constitute grand larceny makes the indictment fatally defective. 66 Ark. 110.

2. The evidence does not sustain the verdict. Mere grounds for suspicion will not justify a conviction, but there must be substantial proof of guilt. 85 Ark. 360; 68 Ark. 528.

There is a fatal variance between the allegation as to ownership of the building, and the proof. 66 Ark. 110; 6 Cyc. 227; Bishop's New Criminal Procedure, § 137; 88 Ala. 113; 16 Am. St. Rep. 23; 78 *Id.* 527; 77 Miss. 370; 40 Am. Rep. 548.

4. The admission by the court of testimony tending to prove the commission of separate and independent

offenses, was prejudicial error. 91 Ark. 559; 37 Ark. 261; 39 Ark. 278; 73 Ark. 262; 68 Ark. 577.

Neither of the appellants testified in his own behalf, and the State had no right to attack their character or reputation, either directly or indirectly. 91 Ark. 558; 1 Greenleaf on Ev., (8 ed.), § 14; Wigmore on Evidence, § 57.

5. The argument of the prosecuting attorney was unfair and prejudicial. 68 Ark. 481; 72 Ark. 469; 75 Ark. 577; 70 Ark. 307; 65 Ark. 619; 74 Ark. 279.

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

1. The demurrer was properly overruled. The allegation "twenty dollars, lawful gold, silver and paper money of the United States," was amply sufficient to state the value of the money alleged to have been taken. Kirby's Dig., § 1844.

The indictment is good in that it charges that the building was entered and broken into with the intent to commit a felony, etc. 105 Ark. 13; *Id.* 82.

2. The testimony establishes the building and ownership, beyond question, in J. M. Harkey's Sons, and the variance as to the initials of the parties is immaterial. 105 Ark. 82.

3. There was no error in permitting testimony of certain witnesses with reference to other stores having been robbed on the same night. It was admissible for the purpose of showing the intent of the parties. 110 Ark. 251.

4. The remarks of the prosecuting attorney were in the line of legitimate argument and were not prejudicial.

SMITH, J. Appellants were tried under an indictment containing two counts, the first charging them with burglary, and the second charging them with grand larceny. They were convicted on the first count, and have appealed from the judgment pronounced upon the verdict of the jury.

It is first insisted that the demurrer to the indictment should have been sustained for the reason that it did not sufficiently describe the larceny which appellants intended to commit; and it is also alleged that there is a variance between the allegation of the indictment, reciting the names of the members composing the partnership whose store was burglarized, and the proof on that subject. The indictment alleges that appellants "did wilfully, unlawfully, feloniously and burglariously break and enter the store building and house of J. M. Harkey's Sons, a partnership composed of O. J. Harkey and R. L. Harkey, with the wilful, unlawful, felonious, and burglarious intent to commit a known felony, towit: grand larceny, by unlawfully, wilfully, burglariously and feloniously stealing, taking and carrying away twenty dollars, lawful gold, silver and paper money of the United States, the personal property of the J. M. Harkey's Sons, a partnership aforesaid and composed as aforesaid, with the unlawful, felonious and burglarious intent to deprive the said owners of their said property as aforesaid."

(1) The indictment sufficiently describes the felony which appellants intended to commit. "The rule is well established that although in burglary and statutory housebreaking the intent, as defined by the law, is simply to commit a felony, it is not sufficient in the indictment to follow these general words, but the particular felony intended must be specified. The allegation of the ulterior felony intended need not, however, be set out as fully and specifically as would be required in an indictment for the actual commission of the felony. It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to steal, or commit the crime of larceny, rape or arson. The word 'felony' is a generic term employed to distinguish certain high crimes, as murder, robbery, and larceny, from other minor offenses known as misdemeanors. The averment that the accused has broken and entered a dwelling house for the purpose of committing a felony, fails wholly to

apprise him of the specific offense which it is claimed he intended to commit. The defendant is not to be oppressed by the introduction of evidence which he can not be prepared to meet. By statute in some States, however, it is provided that a general allegation of felonious intent, without describing the particular felony intended to be committed, will be sufficient. And in indictments for burglary with intent to commit larceny it is not necessary to specify the particular goods and chattels the defendant intended to steal; and such want of specification does not prevent the plea of former acquittal or conviction, for the plea is available if the same burglarious breaking and entering is the essential ingredient in both charges. When no property of any value is discovered by the accused after he has forcibly broken and entered the building with felonious intent, the better rule is that he is guilty of burglary, since the guilty purpose is the essence of the offense." 4 R. C. L., § 29, p. 436.

(2) It will be observed the indictment alleges that the partnership of J. M. Harkey's Sons was composed of O. J. Harkey and R. L. Harkey. The proof shows the store broken into was the property of the partnership known as J. M. Harkey's Sons, but the proof also shows that the correct names of the members of this firm are J. N. Harkey and O. L. Harkey. This variance is immaterial. *Andrews* v. *State,* 100 Ark. 184; *Hughes* v. *State,* 109 Ark. 403; *Ivy* v. *State,* 109 Ark. 446.

It is also insisted that the evidence is not sufficient to support the verdict, and that the court erred in admitting proof of the commission of other felonies on the night the Harkey's Sons store was burglarized in the town of Ola, where that store was located. Appellants, with another companion, arrived in Ola about 10 p. m. and were seen on the streets about midnight. Five stores were burglarized that night, but only a small sum of money was secured, and nothing else was missing in any of the stores, as the burglars seem to have been in quest only of money. Appellants walked out of Ola, and one

of them explained that they did this because they were afraid a bottle of nitroglycerine which was found in their possession would explode. When appellants were overtaken by the officers, and accosted by one of them, they undertook to escape, but did not succeed in doing so, but threw away two pistols, which were found by the officers. When appellants were searched by the officers, caps and fuses for use with explosives, were found on their persons, and also three skeleton keys, some one of which would unlock the door of almost any room, and other skeleton keys were found on them, which were designed to unlock the small drawers inside of combination safes. A blacksmith shop in the town was also broken into on the night in question and a hammer and cold chisel stolen therefrom. This chisel had a gap in it, and all the stores were entered either by the use of skeleton keys or by prying open windows with the cold chisel. The indentation made by the chisel indicated that the same chisel had been used in each case. The skeleton keys found in appellants' possession unlocked, but would not lock, the doors which were found open. Certain cash drawers had also been pried open by the use of a chisel. Among the other stores broken into was that of a Mr. Ellis, who testified that after supper he received a bright new penny, which he placed in his cash drawer, and such a penny was found the next day in the possession of one of the appellants. When appellants were arrested they gave fictitious names and, upon being interrogated about their purpose in coming to Ola; and in a conversation about the burglaries, appellant Davis stated that fellows of his kind were not always as bad as they appeared to be, and that they would never hurt women and children.

(3) We think this proof sufficient to sustain the jury's verdict and that it was all admissible in evidence. Ola is not a large city; in fact, it is only an incorporated town, and the number of burglaries and the manner of their commission strongly indicate that they were all committed by the same parties by the use of the same

instrumentalities in effecting an entrance into the buildings burglarized.

(4-5) It has been many times said that one crime can not be proved as a circumstance from which to infer guilt of the commission of another; but this rule does not include evidence which tends to show motive, design or intent. *Setzer* v. *State,* 110 Ark. 226, and cases there cited. Evidence is not to be excluded because it tends to show the commission of a crime in addition to the one for which a defendant is upon trial, if such evidence also tends to prove guilt of the crime charged in the indictment. The proof here was circumstantial, and we think each of the circumstances detailed had a relevant bearing upon the question of the burglarizing of the Harkey store. The jury alone could pass upon the weight of each of these circumstances in determining that question, and should, of course, have limited their consideration of those circumstances to that question. *State* v. *DuLaney,* 87 Ark. 17.

(6) It is also insisted that the court erred in refusing to give an instruction which elaborated the duty of a jury in weighing circumstantial evidence. Without passing upon the correctness of the instruction which was refused, it is sufficient to say that this feature of the case was fully covered by instruction numbered 5, given at appellant's request. That instruction reads as follows:

"You are further instructed that when the State relies wholly upon circumstantial evidence, as in this case, to justify the conviction of a person charged with a crime, then such chain of circumstances, as a matter of law, must not only be inconsistent with defendants' innocence, but must be so convincing of their guilt as to exclude every other reasonable hypothesis, and must establish in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, and unless this is done in this case then it is your duty to acquit the defendants."

(7) It is finally insisted that the cause should be reversed because of improper argument of the prosecuting attorney. The following excerpts are set out in the record: "That was the last time they were seen, and five robberies were committed that night in the town, Harkey's store was robbed." And the prosecuting attorney referred to the fact that appellants threw away their pistols and had nitroglycerine and caps and fuses in their possession, and further said: "Are they the character of men that would do that? I will leave it to you, gentlemen, to say, with caps and fuses—" (Here counsel for appellants' objected on the ground that the prosecuting attorney can not attack appellants' character in that way). The prosecuting attorney continued: "I am not trying to attack their character; that has already been established." Proper exceptions were saved to this argument. Appellants did not testify and did not put their reputation in issue.

Having said that the proof about the caps and fuses was proper, it follows that the reference made to this proof in the argument was not improper. Nor do we think it was error for counsel to argue the purpose one has in carrying around with him the implements of a burglar. The effect of such argument and of the admission of the proof upon which it is based is, of course, to blacken the character of appellants. But this does not offend against the rule that the State may not show a defendant's bad reputation, where he has not put his reputation in issue. This proof does not go to the general reputation; on the other hand, it tends to establish appellants' occupation and purpose at the time and place of the commission of the burglary set out in the indictment, and tends further to show their connection with the commission of that crime, and it was not, therefore, prejudicial.

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

DICKEN v. SIMPSON.

Opinion delivered March 8, 1915.

1. DEEDS—DEED AS MORTGAGE—INTENTION OF THE PARTIES.—A. deeded land to B. for a certain consideration. At the same time the parties entered into a written contract whereby it was agreed that A. might buy back the property within a year, for the consideration named in the deed and certain fixed interest. *Held*, the two instruments being contemporaneous will be construed together, and that when so construed the deed will be regarded as a mortgage with a right to A. to redeem within one year.
2. DEEDS—DEED AS MORTGAGE—EQUITY RULE.—Courts of equity will be inclined to construe contracts as mortgages rather than as sales, whenever the real character of the contract may be doubtful.
3. DEEDS—DEED AS MORTGAGE—PROOF.—When a deed not absolute on its face and a contract, drawn contemporaneously, when construed together, do not show a sale, the proof, in order to show that a mortgage was intended, need not be as clear and unequivocal, as when the deed is absolute on its face.
4. APPEAL AND ERROR—AFFIRMANCE OF DECREE—REASONS OF CHANCELLOR.—The decree of a chancery court will be affirmed if correct upon the whole case, though the decree may be based upon erroneous conclusions of fact, and, when the decree is correct, the judgment will be affirmed, though the reasons given by the court therefor are unsound.
5. MORTGAGES—MORTGAGEE IN POSSESSION—RENTS.—Where a mortgagee in possession collects rents on the mortgaged premises, he must account for the same to the mortgagor, or to the purchaser of the mortgagor's equity of redemption.

Appeal from Drew Chancery Court; *Zachariah T. Wood,* Chancellor; affirmed.

STATEMENT BY THE COURT.

F. H. Boyd owned a certain tract of land in Ashley County upon which he had placed a mortgage to the New England Security Co., for five thousand ($5,000) dollars. Boyd entered into a contract with appellants by which he executed to appellants a warranty deed to the land in consideration, that appellants would assume the payment of the mortgage indebtedness, and pay in addition, to Boyd, the sum of one thousand, five hundred ($1,500) dollars. The appellants at the same time, exe-

cuted a written contract with Boyd, which, after reciting the sale of the land contained the following:

"That the said Frank H. Boyd shall have the right, at any time within one year from the date of this instrument, to redeem said lands by paying the amount of the purchase price hereinafter above recited, with interest thereon at the rate of 10 per cent per annum. It is further understood and agreed that neither party to this contract shall have the right to sell any of the above property for the full period of one year from date of this contract; and further stated that parties of the first part shall have the option during that time to take it at such price, and in the event that they shall decline to take it at such price then that they will convey to the party offering to purchase, upon payment of the purchase price, with warranty against all persons claiming under or through them; it being understood that they are to be first reimbursed out of the proceeds, for all money expended by them on account of this purchase. It is further especially understood and agreed, that this option to redeem, shall continue only for the space of one year from the date of this contract, unless, the said Frank Boyd shall have exercised such right before that date, then this contract shall be and become void and of no effect, and thereafter parties of the first part shall hold said property free from any equities or right of redemption on the part of the party of the second part, or his wife."

After the execution of the deed and the written contract, appellants took charge of the land and rented same for the year 1913, for the sum of seven hundred ($700) dollars.

The appellee, claiming to have succeeded to all of the rights of Boyd, under the contract of October 24, 1912, brought this suit against appellants, alleging, among other things, that he had complied with the contract by tendering all the amounts due thereunder, and set up that he was entitled to a deed from the appellants, and alleging that appellants were in possession of the land as mortgagees and had collected the rents for the year

1913, amounting to seven hundred ($700) dollars, and praying that he be awarded these rents. The answer of the appellants, after conceding that appellee had acquired the rights of Boyd, under his contract with appellants, and that appellee had complied with the terms of the contract so far as entitling him to the equity of redemption and to a deed from the appellants, denied that Boyd, or that appellee, as successor to the rights of Boyd under the contract, was entitled to the rents for the year 1913. They set up that under their deed from Boyd, and under the written contract, that they were the owners of the legal title of the land involved, and were entitled, as such holders of the legal title, to collect the rents for the year. They denied that they were holding the land as mortgagees.

The cause was heard by the court upon an agreed statement of facts, in which the deed from Boyd to appellants and the separate written contract between Boyd and appellants, of October 14, 1912, were exhibited and in which it was stated that the only issue between the parties was to determine who owned the rents for the year 1913.

In addition to the deed and contract, certain other documentary evidence was set forth as agreed evidence in the record upon which the chancellor's finding and decree were based, and we shall refer to such of these as may be necessary in the opinion.

The decree recites that, "Upon the agreed statement of facts and agreed evidence thereto attached the court finds for the plaintiff, C. M. Simpson, as to the rents involved, amounting to the sum of seven hundred ($700) dollars." The court rendered a decree in favor of the appellee for that sum.

This appeal followed.

Robert C. Knox, for appellant.

The transaction between Boyd and appellants was not in the nature of a mortgage, but a conditional sale, and the legal title was vested in appellants. 88 Ark. 299; *Id.* 369; 75 Ark. 551; 38 Ark. 264. A contract for

resale at the same price does not destroy the character of a deed as an absolute conveyance. 3 Ark. 364; 5 Ark. 321.

The rents follow the legal title. Appellants, therefore, having the legal title, and being in possession of the property, were entitled to the rents. 10 Ark. 9; 31 Ark. 429; 10 Ark. 602; 92 Ark. 315; Jones, Landlord & Tenant, par. 658; 104 Ill. 349.

Boyd could not convey the rents by the deed to Simpson. His only interest in the land was an option to repurchase, hence, having no interest in the rents, he could convey none.

Williamson & Williamson, for appellee.

1. The contract in this case constitutes a mortgage in equity rather than a conditional sale. 1 Jones on Mortgages, § 257; 7 Ark. 505; 13 Ark. 112; 18 Ark. 34; 38 Ark. 207; 88 Ark. 336; *Id.* 363; 95 Ark. 501; 106 Ark. 170.

The extrinsic facts and circumstances, especially when taken with the presumption existing in favor of the Chancellor's decree, take this case out of the line of cases cited and relied on by appellants, and at least raise that doubt which courts of equity resolve in favor of "the mortgage, and not a conditional sale."

The contract being construed by the court to be a mortgage, it follows that appellants were accountable to appellee for the rents. 27 Cyc. 1838, c; 40 Ark. 276, 282; 95 Ark. 501; 75 Ark. 59; 55 Ark. 1.

2. Appellee would be entitled to the rents, even if the contract be held to be a conditional sale. 10 Ark. 9; 92 Ark. 319; 39 Ark. 304; 41 Ark. 282; 33 Ark. 237; 4 Crawford's Dig., 309-C.

WOOD, J., (after stating the facts). (1). The Chancellor was correct in holding that the appellants were liable to the appellee for the rents of the year 1913. The deed and written contract were contemporaneous writings, relating to the same subject-matter, and between the same parties. They must therefore be construed together as evidencing the contract that was en-

tered into between appellants and Boyd concerning the land. When thus construed, it clearly appears that the deed and written contract constituted a mortgage of the land by Boyd to appellants and not a conditional sale. The deed although absolute in form should be construed as if the right of redemption granted by the written contract, executed at the same time, were read into it and made a part of it. One of the inseparable incidents of a mortgage is the right of redemption; and in cases involving the distinction between a mortgage and an absolute sale the right or equity of redemption, being reserved to the grantor in the instrument, is a strong circumstance tending to show that same was intended as security, if the other incidents, evidencing a debt and an obligation to pay can be gathered from the instrument.

It will be noted that the defeasance contract provides: "That the said Frank H. Boyd shall have the right at any time within one year from the date of this instrument to redeem said land by paying the amount of the purchase price herein above recited with interest thereon at the rate of 10 per cent per annum." This language was sufficient of itself to show that the parties intended that the amount named in the deed, towit: $6,-500, should be an advancement or loan by the appellants to Boyd, and to be paid by him with interest thereon at 10 per cent per annum, in one year.

The contract of defeasance further provides "that neither party to this contract shall have the right to sell any of the above property for the full period of one year from the date of this contract;" and further, "that party of the first part shall have the option during that time to take the property if they so desire at any price which may be offered by the second party." This clause indicates clearly that the appellants recognized that Boyd was the holder of the legal title to the land. It indicated that appellants considered that they only held the title to the land as security for the amount they had advanced to Boyd and had assumed to pay for him. It shows that they conceded that the title really continued

in Boyd. Therefore, we are of the opinion that the deed and written contract of defeasance when considered together constituted nothing more nor less than a mortgage given for the purpose of securing the appellants the amount of $6,500 with 10 per cent interest thereon.

(2) So much for the instruments themselves, aside from any extraneous facts in connection with their execution. But even if we were mistaken in this being the proper construction of the instruments upon their face, when the extraneous facts and circumstances under which they were executed are taken into consideration, there can be no doubt that the transaction was intended as a mortgage. These extraneous facts are shown in the agreed statement and the exhibits attached thereto. In considering these facts and circumstances, the principle must be kept in mind that "courts of equity will be inclined to construe contracts as mortgages rather than sales, whenever their real character may be doubtful." *Scott, et al.* v. *Henry, et al.,* 13 Ark. 112; *Gibson* v. *Martin,* 38 Ark. 207.

It appears that Boyd sold his equity of redemption to appellee for eleven thousand ($11,000) dollars, thus showing that the land was of far greater value than the purchase price named in the deed to appellants, which tends to prove that he did not intend that deed to be a sale of the property.

On September 29, 1913, the appellants entered into a contract with Boyd in which it is recited: "That in consideration of fourteen hundred ($1,400) dollars paid to first party by second party and the surrender by first party to second parties of any right or claim for the year 1913, which he might have or hold under his equity of redemption, etc." In this contract, the appellants recognized that Boyd had an equity of redemption in the land, and that he also might have a right to the rents for the year 1913. If appellants under their deed were entitled to the rents, why would they have recognized that Boyd might have a right to claim these rents? While

it is true that Boyd in an affidavit stated at the time he contacted to sell the land to Simpson nothing was said about the rents and that he did not understand that he was conveying the rents, yet, the affidavit of the appellee, Simpson, was to the effect that it was expressly understood and agreed between himself and Boyd at the time the latter conveyed the land to him that appellee should have the rents for the year 1913. In this statement appellee is corroborated by a letter from Boyd, received at the time they were conducting the negotiations, but before the sale was actually consummated, showing that Boyd, at that time, considered that he was entitled to the rents for the year 1913, and that he expected appellee to get these rents by virtue of his purchase of the equity of redemption, if the contract for such purchase was consummated. Thus this contract of the parties (of September 29, 1913) concerning the rents for the year 1913 indicates that they did not consider that appellants had acquired the right to the rents for the year 1913 by virtue of the deed from Boyd to them.

But, it is unnecessary to go further into detail in discussing the facts and circumstances. The extraneous facts clearly show that the deed and contract of writing under review should be construed as a mortgage and not a conditional sale.

(3) As we have stated, the deed and written contract of defeasance on their face when construed together do not show a sale to the appellants. Therefore, in order to show that these instruments constitute a mortgage and not a sale, it is not necessary that the proofs be clear, unequivocal and convincing as it is in those cases where the instrument to be construed is absolute upon its face. But, even if such rule were applicable here, the facts of this record would meet every requirement of that rle, and show a mortgage. *Crismon* v. *Kingman Plow Co.*, 106 Ark. 166, and cases cited; 1 Jones on Mortgages, page 192, section 257.

(4) Counsel for appellants states in his brief that the chancery court found that the deed and written contract of October 24, 1913, constituted a conditional sale and not a mortgage. There is nothing in the record to show that the chancery court so found. But the decree of the chancery court will be affirmed if correct upon the whole case, though it may be based upon erroneous conclusions of fact, and where the conclusions are correct, the judgment will be affirmed though the reasons which the court gave for its conclusions may be unsound. *Fordyce Lumber Co.* v. *Wallace,* 85 Ark. 1; *State* v. *Dowdy,* 86 Ark. 140.

Under the pleadings and the agreed statement, appellee has performed the contract on his part and is entitled to a deed, provided the contract between appellants and Boyd was a mortgage. Having so determined, the time of performance on the part of appellee is no longer an issue in the case.

(5) The appellants, mortgagees in possession, having collected the rents for the year 1913, must account for same to appellee who acquired the right to the same by reason of his purchase of the equity of redemption from the mortgagor, Boyd. *Banks* v. *Walters,* 95 Ark. 501; *Crebbin* v. *Deloney,* 75 Ark. 59.

The decree is therefore correct, and it is affirmed.

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

Opinion delivered March 8, 1915.

RAILROADS—EJECTING PASSENGER FROM TRAIN—ACT OF CONDUCTOR.—Defendant railway's conductor ejected plaintiff from a train on the ground that he was drunk. Under the law of Illinois, where the act was done, railway conductors were given authority to cause the arrest of drunken persons on trains. *Held,* when the conductor merely ejected plaintiff, without arresting him, he was not acting under the statute, but was acting in his capacity as a conductor, and that the railway company would be liable for his negligent acts, and it was error to direct a verdict for the defendant railway company.

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

STATEMENT BY THE COURT.

This suit was instituted in favor of Charles Hager, a minor, by his next friend, A. P. Hager, against the St. Louis, Iron Mountain & Southern Railway Company for injuries alleged to have been sustained by reason of said railway company's conductor unlawfully ejecting him from one of its trains at Dupo, Illinois. The facts are as follows:

In June, 1913, A. P. Hager shipped some cattle over the defendant's line of railway from Walnut Ridge, Arkansas, to East St. Louis, Illinois. Hager and his son Charles, then twenty years of age, accompanied the cattle, and were furnished transportation by the railway company. At Dupo, Illinois, a switch engine takes the train and carries it into East St. Louis. When the train arrived at Dupo the Hagers and other stockmen riding on the train went into a restaurant there where there was a saloon to get breakfast. Charles Hager had two drinks of whiskey while there and after breakfast, together with the other stockmen, attempted to board the train for East St. Louis, Illinois. The conductor refused to allow him to get on the train on the ground that he was drunk and boisterous.

The testimony on the part of the plaintiff tended to show that Charles Hager was lame and approached the steps of the coach leaning on the shoulder of a friend; that as he went to step up into the coach the conductor ordered him to get off; that the conductor told him that he was drunk and that he could not and would not permit him to ride on the train; that both Charles Hager and his father told the conductor that Charles was not drunk and that the conductor cursed him and shoved him off the steps of the coach.

Several witnesses testified in behalf of the plaintiff and said that Charles Hager was not drunk.

The testimony on the part of the defendant tended to show that Charles Hager was drunk and boisterous

and that on this account the conductor refused him permission to enter the coach.

At the conclusion of the testimony the court directed a verdict for the defendant and the plaintiff has appealed.

W. P. Smith, for appellant.

1. The proof does not show that the conductor ever arrested the appellant, or attempted to arrest him or to exercise any authority over him, acting under any State law.

The verdict having been directed against the appellant, the court, in testing the verdict, will give the evidence its strongest probative force in his favor; but even if the rule were reversed, it is still a very close question of fact whether the appellant was drunk or intoxicated in any degree, and it should have been left to the jury to say whether or not the conductor was acting in good faith when he ejected appellant. 83 Ark. 6; 95 Ark. 506.

Drunkenness has been variously defined, but the better rule seems to be that it is a question solely for the jury and that it should be left to them to determine from all the facts in evidence, without an attempt at definition. 84 Ark. 81.

At the most the testimony might lead to the conclusion that appellant was slightly intoxicated; but slight intoxication, such as would not be likely to seriously affect the conduct of the person intoxicated, would not be sufficient ground to refuse him passage in a public car, although his behavior might not be in all respects becoming. 57 Ind. 576; 26 Am. Rep. 68; 18 Am. Ry. Rep. 454. The mere fact of intoxication does not of itself deprive a person of the right to passage on a railway car, nor does it relieve the company from its duty to render to him due care as a passenger. 66 N. Y. 642; 4 Hun. 409; 6 Thomp. & C., N. Y. 586; 14 Am. Rep. 190.

2. In response to the contention that the conductor in ejecting a drunken passenger is, under the Illinois statute, an officer of the State and not of the railway company in so doing, and that the statute expressly

exempts the company from liability, it is sufficient to say it is still a question of fact for the jury to determine whether or not the conditions existed at the time of the expulsion to justify that act.

If it is urged that the conductor is the sole judge as to whether or not these conditions existed, even in that case he must have been acting in good faith, and if he was not, the company can not invoke the benefits of such a rule. 105 Ark. 619.

E. B. Kinsworthy, Troy Pace, Campbell & Suits and *T. D. Crawford,* for appellee.

The court properly directed the verdict. The Illinois law expressly declares the conductor in such cases to be acting for the State and not as an employee of the company. Laws of Illinois, 1911, p. 462; Acts North Dakota, 1911, p. 345, a similar act; 141 N. D. 944; 128 Pac. 98.

HART, J., (after stating the facts). The defendant seeks to uphold the judgment under the Acts of Illinois of May 25, 1911. The first two sections of the act read as follows:

"Section 1. That any person who shall drink any intoxicating liquor, or who shall be intoxicated, in or upon any railroad smoking car, parlor car, day coach, interurban car or caboose car, in use for the transportation of passengers, or in or about any railroad station or platform, upon conviction thereof, shall be fined not less than twenty-five dollars, nor more than one hundred dollars, or imprisoned in the county jail for not less than thirty days, nor more than one hundred days, or both such fine and imprisonment.

"Section 2. Every railroad conductor, while on duty, is hereby authorized and empowered to exercise in any county of this State, for the purpose of enforcing the provisions of this act, all the common law and statutory powers conferred upon sheriffs, and it is hereby made the duty of all such conductors to enforce the preceding section of this act and to arrest without process any person who violates any provision thereof, and in so

doing they shall be held to act for the State and not as employees of the company. Any person or persons so arrested shall be delivered by such conductor to some judge, justice of the peace, sheriff, constable or police officer at some station or place within the county in which the offense was committed, for trial according to law. Provided, that if the car on which such arrest is made does not stop within the county within which such offense was committed, then such conductor shall deliver the person so arrested to some sheriff, constable or police officer of the county wherein such car shall first stop after such arrest, who shall deliver the person so arrested to some judge or justice of the peace of the county in which the offense was committed for trial." See Laws of Illinois, 1911, page 462.

In the case of *Tarantina* v. *Louisville & N. R. Co.*, 98 N. E. 999, the Supreme Court of Illinois held that the act in question was constitutional. The court in discussing the act said:

"The subject-matter of this act is the use of intoxicating liquor upon railroads. The object to be accomplished was the preservation of good order in railroad trains and about railroad stations. All the provisions of the act concern this subject-matter, and tend to accomplish this result. The prohibition of intoxicated persons on certain cars and at stations and platforms, and the provisions for the prompt arrest of offenders by conferring certain powers on conductors, are certainly reasonably calculated to prevent the drinking of intoxicating liquors at such places, and therefore come within the title of the act whether they are subject to any other constitutional objection or not."

The Supreme Court of North Dakota in the case of *Houston* v. *Minneapolis, St. Paul & S. S. M. Ry. Co.*, 141 N. W. 994, held that an act in all essential respects similar to the one under consideration was constitutional.

We do not think the statute of Illinois above quoted has any application under the facts in this case. As was said in the last mentioned case, the statute confers

police powers upon the conductor and imposes a specific duty upon him with reference to the enforcement of the law. In discharging his duty under the statute the conductor acts, not in order to protect the other passengers and carry out the railroad company's implied contract to protect such passengers, but at the command of the State in compliance with a duty imposed upon him by it. Under the express terms of the statute he is made to act for the State and not for the railroad company. Therefore, under the terms of the statute, when the conductor in the discharge of his duties imposed upon him by statute, arrests a person who is intoxicated upon any railroad car or in or about any railroad station or platform, and delivers the offender to a justice of the peace to be dealt with according to the terms of the statute he is acting for the State, and not for the railroad company, and in such cases the railroad company can not be made liable for false imprisonment because, under the very terms of the statute the conductor is held to be acting for the State, and not as an employee of the railroad company.

In the case before us, the conductor did not arrest Charles Hager, and did not deliver him to an officer to be dealt with according to the terms of the statute. He acted solely in the line of his duty as conductor of the train of the defendant, and, exercising the duties imposed upon him as such conductor, ejected Charles Hager from the train because he was boisterously drunk, and his presence on the train might be hurtful to or offend other passengers. See *Price* v. *St. Louis, I. M. & S. Ry. Co.*, 75 Ark. 479.

There is no connection whatever between his authority to put a drunken passenger off the car when acting in the line of his duty as conductor of the train and thus preventing annoyance and harm to other passengers on the train, and the duty imposed upon him by law to arrest a drunken passenger and deliver him to an officer to be dealt with according to the terms of the statute above quoted. In the former case, he is acting for the railroad

company; in the latter for the State. In order to relieve the railroad company of liability for his acts, the conductor must act strictly within and according to the powers expressly conferred upon him by the statute. As we have already seen the conductor did not arrest Charles Hager and deliver him to a justice of the peace or other officer to be dealt with according to law, and, because he was not acting under the statute, the railroad company can not escape responsibility for his acts done in the performance of a duty while acting in the direct line of authority given him by the railroad company.

The testimony on the part of the plaintiff shows that Charles Hager was not drunk at the time the conductor ejected him from the train. It follows that the court erred in directing a verdict for the defendant company, and for that error the judgment will be reversed and the cause remanded for a new trial.

JONESBORO, LAKE CITY & EASTERN RAILROAD COMPANY v. ASHABRANNER.

Opinion delivered March 8, 1915.

1. DAMAGES—DAMAGE TO LAND—EVIDENCE OF AN OFFER TO PURCHASE.—In an action for damages to land caused by an act of defendant, an isolated statement of a witness as to an offer made for the same, without showing under what circumstances the offer was made, is not of itself competent testimony to establish value.
2. APPEAL AND ERROR—INCOMPETENT TESTIMONY—VALUE OF LAND—HARMLESS ERROR.—The error of the trial court, in permitting plaintiff, in an action for damages to his land, to state what he had been offered for the same, will be held harmless, when the verdict of the jury, assessing damages, was below what the preponderance of the evidence in the whole case showed the damages to be.
3. EVIDENCE—DAMAGES TO LAND—OPINION OF OWNER.—In an action for damages to land caused by overflow, the opinion of the owner, who resided on the land damaged, as to the amount of the damage, is admissible.

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

Coleman, Lewis & Cunningham, for appellant.

The court erred in permitting appellee to testify that she had been offered a certain price for her land, and in refusing to strike that part of her testimony from the record. 15 L. R. A. 591, and cases cited; 27 Mich. 386; 15 Enc. Ev. 451-H and note. The testimony was hearsay and incompetent.

A witness is not permitted to estimate the amount of damages; that is the province of the jury. 67 Ark. 375; 59 Ark. 105, and cases cited; 62 Ark. 218; 68 Ark. 222; 70 Ark. 406.

Additional elements of damages not contemplated in the original suit were introduced, which was error calling for reversal. 70 Ark. 319; 59 N. Y. 267; 75 Ark. 183; 75 Ark. 468, and cases cited; 85 Ark. 322.

The measure of damages caused by the destruction of appellee's road crossing would be the cost of constructing a new one. 3 Elliott on Railroads, art. 1141; and for damages occasioned by stagnation of water, the depreciation of the usable value of the land. 92 Ark. 545; 95 Ark. 302.

The verdict is contrary to law and excessive.

Appellee, pro se.

The court properly instructed the jury that they were only to consider the "fair and reasonable market value of the land," and the testimony of appellee as to the offer made her for the land, under the circumstances, was not prejudicial.

There was no error in refusing to strike appellee's testimony as to the amount she was damaged, as it was based on facts described. The same is true of her other witnesses. As to who are competent to give opinions on matters of such damages large discretion is allowed the trial court. 103 Ark. 403; 160 S. W. 855; 101 Ark. 47; 44 Ark. 106; 91 Ark. 128; 39 Ark. 172; 42 Ark. 381.

Damages were assessed at the lowest estimate of any witness, and the improper evidence of appellee was not prejudicial. 95 Ark. 209; 97 Ark. 226; 95 Ark. 123.

The testimony as to the damage to the land caused by appellant's act was not prejudicial, the jury having

been instructed as to the proper measure of damages. 13 L. R. A. (N. S.) 237; 71 Ark. 189; 16 Pac. 75; 44 Ark. 258; 45 Ark. 252.

Instruction No. 1, requested by appellant, is not the law. Other refused instructions were covered by those already given by the court. The verdict is not excessive.

McCULLOCH, C. J. The plaintiff, Caroline Ashabranner, owns a tract of land in Mississippi County, containing eighty acres, and in the year 1901 she conveyed to the defendant railroad company a right-of-way one hundred feet wide through the land. She instituted this action against the company, alleging that in the year 1912 the company dug a pond or ditch along the right-of-way which interfered with the use of a roadway over her farm, and also caused stagnant water to stand in the pond or ditch, which inflicted serious damage and depreciated the value of her land. The case was tried before a jury, and numerous witnesses were introduced, who testified, showing a familiarity with the plaintiff's land and the condition of the ditch or pond, and they fixed the damage to the land at various sums running from five hundred to a thousand dollars. The jury awarded damages in the sum of $500. It is claimed that this is excessive, but upon consideration of the evidence we are of the opinion that there was enough to justify that estimate of the damages.

(1-2) The evidence shows that the ditch or pond was about 300 feet long, and an average width of about fifty feet, and about six feet deep. The evidence shows that water stood in the excavation and became stagnant, and that the plaintiff's land was injured on account of the destruction of the roadway and the proximity to the houses on her farm. Upon consideration of the whole evidence, we are not able to say that the jury should have rejected the testimony of the witnesses and adopted a lower estimate of the damages. The plaintiff herself testified, and upon being asked the value of her land, stated that she did not know what it was worth, but that she had been offered $125 per acre for it. Objection was made to that testimony, and the court, after admonishing the plaintiff that she must confine herself to a statement of

what the reasonable market value of the land was, overruled the objection of the defendant, and held that the jury might consider the testimony in estimating the market value of the land. Other witnesses fixed the value of the land at from $75 to $100 per acre. It is unnecessary for us to enter into any discussion of the law as to when or under what circumstances proof of offers to purchase land at stated prices may, if at all, be considered in estimating value, but it must be conceded that an isolated statement of a witness as to an offer, without showing under what circumstances the offer made, is not of itself competent testimony to establish value. That was all this statement of the plaintiff amounted to, and we think the court was in error in letting it go to the jury; but we are unable to discover any possible prejudice arising from the error. The amount of the damage was so small, in proportion to the value of the land, as shown by the undisputed evidence, that we can not see how any prejudice could have resulted in allowing the plaintiff to make a statement concerning an offer for the purchase of the land. The lowest price placed upon the land by any of the witnesses was $75 an acre, or $6,000 for the eighty-acre tract, and some of them put it as high as $100 an acre. The statement of the plaintiff as to the value could have had very little weight with the jury in view of the testimony of other witnesses who testified on the subject. We think the verdict should not be disturbed simply because the court made an error in allowing the plaintiff to make the statement about the offer she had had for the land.

(3) The plaintiff also testified, giving her opinion as to the extent of the injury to the land, and there was a motion made to exclude that testimony from the consideration of the jury. Much latitude and discretion is allowed in the trial court in permitting witness to give opinion as to value of land and the extent of the depreciation thereof, for, after all, it is but the opinion of the witness. Plaintiff resided on the land and was familiar with the conditions, and we think the court was justified in allowing her to state her opinion of the extent of the injury

to the land and the depreciation in the value thereof. The verdict was much less than it would have been if the jury had accepted the estimates of several other witnesses, and doubtless little weight was given to the testimony of the plaintiff herself, but we think there was no error in allowing her to state her opinion as to the extent of the damage, coupled with her description of the manner in which the injury was inflicted.

It is contended that plaintiff was allowed to prove elements of damage not set forth in the complaint, but we think the allegations of the complaint were sufficient to let in all the proof tending to show damage.

There are assignments in regard to instructions given, but we think there was no error in that respect.

Judgment affirmed.

POLK v. BROWN.

Opinion delivered March 8, 1915.

1. ACKNOWLEDGMENTS—FALSE CERTIFICATE OF OFFICER—BURDEN OF PROOF—DEED.—The burden of proof rests upon the person denying that he signed a deed or acknowledged it, to show the falsity of the certificate, which certificate carries with it the presumption that the officer making it has certified to the truth, and has not been guilty of a wrongful or criminal action.
2. ACKNOWLEDGMENT—DEED—FALSE CERTIFICATE OF OFFICER—SUFFICIENCY OF THE EVIDENCE.—Plaintiff, sought to have her dower set aside in lands formerly belonging to her deceased husband. The record showed a deed to defendant's grantors from plaintiff's husband, with her own relinquishment of dower and homestead duly acknowledged. *Held*, that for plaintiff to show that the certificate of acknowledgment was false, the burden was upon her to show that fact by evidence, clear, cogent and convincing, and that under the proof in the case she had failed to discharge that burden.

Appeal from Clay Chancery Court; *Charles D. Frierson,* Chancellor; reversed.

STATEMENT BY THE COURT.

This action was instituted in the chancery court by Malissa Brown against W. D. Polk for allotment of dower in a certain tract of land which she alleged was owned by

her husband in his lifetime, and sold by him during coverture without relinquishment of her dower rights. The facts are as follows:

There is in the record a deed from Henry Brown and Malissa C. Brown, his wife, to John T. Miller and H. C. Redwine. The deed is a warranty deed in common form and was executed on the 30th day of December, 1898. There is a certificate of acknowledgment showing that Henry Brown appeared before a notary public on the 30th day of November, 1898, and acknowledged the deed in accordance with the statute. There is also a certificate of acknowledgment dated December 1, 1898, which shows that Malissa Brown appeared before a justice of the peace and acknowledged her relinquishment of dower to the lands described in the deed. The certificate was signed by J. C. Wells, a justice of the peace, and is in the form prescribed by the statute. This deed was filed for record on the 5th day of December, 1898, and duly recorded.

On the 2d day of August, 1906, J. T. Miller and H. C. Redwine conveyed the lands in question to W. D. Polk. This deed was duly acknowledged and filed for record.

Redwine and Miller went into possession of the land immediately after the execution of the deed to them, and remained in possession of it until they conveyed it to the defendant Polk. Polk then took possession of it and has continued in possession ever since. It is admitted that he had no knowledge or information at the time he purchased the land that it was claimed by the plaintiff that she had not signed the deed or released her dower to Miller and Redwine. Polk testified that he had not heard that the plaintiff claimed that she had not signed the deed until after the institution of this suit, which was on the 18th day of March, 1913.

Malissa Brown testified: I am fifty-six years old; during the fall of 1898 my husband came home from town one evening and told me I had to sign away my dower in the land to J. T. Miller and H. C. Redwine because Miller and Redwine claimed some money against him as guar-

dian or administrator of an estate; I reminded him that we had agreed never to sign our place away to any one, and told him that I would not sign it; he told me the parties would be there the next day to get me to sign the deed and the next day Miller and Redwine, in company with J. C. Wells, came to our house about 10 o'clock and stayed till after dinner; after dinner the men in company with my husband went into the front room and I remained in the kitchen with my son to wash the dishes; J. C. Wells came back into the kitchen where I was and, producing the deed, asked me to sign it; I told him that I would not sign it and that we intended to keep the land for our boy; he asked me why I wouldn't sign it and I just told him I wouldn't sign it at all. He then sat down at the table and wrote on the deed a few minutes and said to me, "Touch the pen now, Mrs. Brown," and I said, "No, I will never do that either;" the door between the front room and kitchen was closed during all this time; Wells then got up, folded the deed, and stuck it in his pocket and went into the front room and handed it to John Miller; Miller, Redwine and Wells then left the house; after they left my husband came into the kitchen and said to me, "I thought you said you would never sign that deed," and I replied that I never signed it and never would; that was all he ever said about it, and I never said any more about it; Wells told me when I refused to sign the deed that the land would be mine if I outlived my husband.

On cross-examination Mrs. Brown stated that the door between the kitchen and front room was closed, and that she did not know that Wells handed the deed to Miller, but that her husband told her that he did; that Wells at the time lived about four miles from them; that her husband did not say anything to her when she told him that she had not signed the deed; and that she never spoke to him about it afterward. She also stated that her son, Herman, was about twenty-four years of age, and stated that she could not write.

Herman Brown testified: I am the son of the plaintiff, and was born October 26, 1883; on November 30, 1898, I was living with my parents in Clay County, Ark-

ansas; and I was present in the kitchen when J. C. Wells, a justice of the peace, asked my mother to sign a deed conveying the lands in question to Redwine and Miller.

When asked to state in his own way what was said and done, he answered, "Well, Jim Wells come into the kitchen and asked my mother to sign the deed, and said, 'Come here and sign this deed,' and my mother said, no, she wouldn't sign it; then he wrote a little there—I don't know what he wrote—he was writing setting at the eating table, and me and her were standing at the cook stove, and he asked her then to come and touch the pen, and she said, 'I will not do that, either,' and he got up and opened the middle door between the kitchen and front room, where my father and Miller and Redwine were settin', and he went back in there; as he went in the door, though, he said something in regard to that she could get the land back if she outlived Henry—meaning my father—and that was all that was said and done."

On cross-examination Herman Brown stated that after the men left, his father asked his mother if she signed the deed and that she replied that she did not, and said that he heard them talk on the subject three or four different times and that on each occasion his mother claimed that she did not sign the deed. He also stated that his mother knew that Miller and Redwine thought she had signed the deed. He was asked this question: "What did your father say when your mother told him afterward that Redwine and Miller thought she had signed the deed?" and answered, "Well, at one time I heard him say, "Just let it go and not say anything about it; it will cause Jim Wells (referring to the justice of the peace) to get into it.' " This, he stated, was six months or a year after they signed the deed.

J. C. Wells died about two years before the institution of this suit.

Henry Brown, husband of the plaintiff, took the acknowledgment of Miller and Redwine when they conveyed the land to the defendant Polk. Brown was at that time a justice of the peace.

The chancellor entered a decree alloting dower to the plaintiff in the lands in question and the defendant has appealed.

G. B. Oliver, for appellant.

Appellant unquestionably signed the deed, as appears from the certificate of the justice of the peace, as it is not to be presumed that the officer wilfully certified to a false fact. His purpose in going to appellee's house was to take her acknowledgment, and he did so, and delivered the deed to the vendees in the presence of appellee's husband.

Appellee's claim of dower is barred because she permitted the vendees to hold the land eight years without asserting her claim or intimating that she had a claim to the land, knowing that they were relying on her relinquishment as contained in the deed, and ignorant of the falsity of the facts. 69 Ark. 350; 37 Ark. 145.

The certificate of acknowledgment is conclusive of every fact appearing therein and evidence of what passed at the time is not admissible to impeach the certificate, except in cases of fraud. 53 Miss. 331; 38 Ark. 377; 41 Ark. 421.

Appellant is an innocent purchaser. Weight is given to this conclusion by the further fact that appellee's husband took the acknowledgment of one of his vendees, when they conveyed to Polk, and he did not inform Polk of the irregularity in the deed, and he never had any notice of same.

Appellee is guilty of laches.

F. G. Taylor and *J. S. Jordan,* for appellee.

Although appellant may have been an innocent purchaser for value, yet if appellee's claim to dower in the land was established, her title can not be impaired by the fact that appellant purchased without notice of her claim. 14 Cyc. 980; 1 Harr. (Del.) 385; 10 Ga. 321; 41 Ind. 586; 69 Ia. 397, 28 N. W. 657; 4 Green 453; 69 Me. 235; 14 Atl. 712; 55 N. C. 357; 28 S. C. 580, 68 S. E. 818; 17 Cent. Dig. title Dower, § 253.

Appellee was not guilty of laches, as she necessarily had to wait until her husband's death before her dower interest attached, and she thereafter filed her suit in less than fifteen months.

Appellee's testimony that she did not sign the deed was corroborated by her son's. The alleged signature being by mark and not witnessed by the person writing it, it is not to be taken *prima facie* as genuine without other proof of signing. 49 Ark. 18; 51 Ark. 48; 70 Ark. 449; 38 Ark. 238.

HART, J., (after stating the facts). In the case of *Donahue* v. *Mills,* 41 Ark. 421, the court said that it was the settled doctrine of this court that though a wife may show against all the world that she never made any acknowledgment at all, and that the certificate is either a forgery or an entire fabrication of the officer, yet if she has actually made some kind of acknowledgment before an officer qualified to take it, his certificate will be conclusive as to the terms of the concomitant circumstances, in favor of all persons, who, themselves, innocent of fraud or of collusion to deceive or influence her, have taken the instrument on the faith of the certificate. See, also, *Petty* v. *Grisard,* 45 Ark. 117.

In the case of *Bell* v. *Castleberry,* 96 Ark. 564, the court held that the burden of showing that the certificate of acknowledgment of a deed was procured by fraud or duress rests upon him who attacks such certificate, and that the evidence to sustain such charge of fraud or duress must be clear, cogent and convincing.

(1) In the case before us, it is admitted that the defendant was an innocent purchaser for value of the land, but, notwithstanding this, the plaintiff, under the authorities above cited, might show that she never signed or acknowledged the deed. This brings us to the question of how far the certificate of acknowledgment of the justice of the peace was conclusive. The certificate of acknowledgment was regular on its face, and was made out in accordance with the terms of the statute. In the case note to *Ford* v. *Ford,* 7 Am. & Eng. Cases, p. 249, it is said that the authorities are unanimous in holding that in or-

der to impeach a certificate of acknowledgment, the evidence must be clear, cogent and convincing beyond reasonable controversy. In 1 Cyc., at page 623, it is also said that the testimony to impeach a certificate of acknowledgment must be clear and convincing. Many cases are cited, but an examination of the cases will show that the courts frequently fail to distinguish between those cases where the married woman actually appeared before an officer and made some sort of acknowledgment, defective though it may have been, and claims that the fact stated in the certificate are false and fraudulent, and those cases where the contention is made that the officer never acquired jurisdiction, power or authority because the married woman did not sign the instrument, and did not make any acknowledgment whatever before the officer. In our opinion, the weight of the evidence should not be affected by any particular rule peculiar to the subject, but rather, the court should be left to determine from all the circumstances disclosed whether the certificate of acknowledgment is true or false. This much may be said, however, under chapter 29 of Kirby's Digest, a proper acknowledgment is an essential part of the execution of a conveyance. The acknowledgment is an official act done under an official oath and is protected under the presumption the law necessarily indulges in favor of the acts of its own officers. Under our statute one of the means of evidence upon which a deed can be admitted to record is a certificate of proof or acknowledgment of an officer authorized by our statute to take such proof or acknowledgment. The burden of proof undoubtedly rests upon the person denying that one signed a deed or acknowledged it to show the falsity of the certificate which carries with it the usual presumption that the officer making it has certified to the truth, and has not been guilty of a wrongful or criminal action. Tested by this rule, we think the decision of the chancellor was erroneous.

(2) The deed in question was executed by Henry Brown, husband of the plaintiff, on November 30, 1898. On the next day the grantees went to his house and car-

ried with them a justice of the peace for the avowed purpose of taking the plaintiff's acknowledgment of her relinquishment of dower to the lands in question. The plaintiff testifies that she had on the previous day told her husband that she would not sign the deed. She denies that she ever had any other conversation with her husband in regard to the deed than the one just after the parties left the house. Her son attempts to corroborate her testimony, but his testimony contradicts hers in several respects, and especially in the point we have just mentioned. The record shows that the testimony of the plaintiff and her son was taken on the 13th day of September, 1913. The son testified that he was born on the 26th day of October, 1883. This would make him thirty years of age at the time he gave his deposition. The deed in question, was executed on the 30th day of November, 1898. His testimony, then, made him fifteen years of age at the time the deed was executed. At that age he might be capable of recalling what then occurred. It will be noted that both he and his mother testified that the land was to be preserved for him. He had a direct interest in the lawsuit. His mother testified that he was twenty-four years of age, and her testimony makes him nine years of age at the time of the execution of the deed. Her testimony as to his age is entitled to more probative force than his, and this is especially true, because her testimony may be considered as a declaration against her own interest. It is apparent that a child nine years of age would not be likely to remember fifteen years afterward matters which occurred at so early an age, and this is especially true in view of the fact that they never lived on the land thereafter.

Another cogent circumstance is that afterward, Henry Brown became a justice of the peace, and as such took the acknowledgment of Redwine and Miller, in 1906, when they conveyed the land to Polk. The record shows that the plaintiff knew that Redwine and Miller thought she had signed the deed, and that she never made any attempt to disabuse their minds of this fact. She knew the land was sold in 1906 to Polk, and that the deed exe-

cuted to Redwine and Miller, and that executed by them to Polk had been placed on record. Her husband died in 1912, and Wells, the justice of the peace who certified to her acknowledgment, died about two years before this proceeding was instituted. When we consider all of these facts and the contradictions between the testimony of the plaintiff, and that of her son, we are of the opinion that the plaintiff did not discharge the burden of proof which rested upon her, and that the finding of the chancellor was clearly against the preponderance of the evidence. In short, we are of the opinion that the testimony in this case is of too loose and unsatisfactory a character to overcome the presumption of verity which attaches to the certificate of an officer properly certified in accordance with the statute. Therefore, the decree will be reversed with directions to the chancellor to dismiss plaintiff's complaint for want of equity.

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

Opinion delivered March 8, 1915.

RAILROADS—INJURY TO PASSENGER ENTERING TRAIN.—A carrier must exercise proper care not to move its train, which has stopped at a station to receive passengers, until the passenger has had a reasonable time to enter the coach; and when the train is negligently moved while the passenger, acting with reasonable diligence and ordinary care, is attempting to enter the coach from the platform, the carrier is responsible for the injury.

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

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

A railroad company is not guilty of negligence in starting its train as soon as a passenger gets on board, and before he has reached his seat. 6 Cyc. 613; 212 Pa. 29; 17 Col. App. 410; 50 S. W. 843; 102 Ky. 600. Where there was no evidence that the jerk or jar was other than

is usual in starting up a train, defendant was entitled to an instruction withdrawing the question of negligence as to such jerk of the train, from the jury. 72 S. W. 717.

A carrier is not responsible for injuries to passengers from dangers which are incident to railway travel, and which proper care and skill could not avoid. 49 S. W. 687; 37 Mo. 240; 2 L. R. A. 252; 2 Hutch., Car., § 900.

It was error to refuse defendant's tenth instruction. Risks of injury from jolts and jerks ordinarily incident to the movement of trains, are risks which the passenger assumes. 4 Elliott, Rds., § 1589; 74 S. W. 671; 76 S. W. 167; 14 S. W. 368; 68 S. W. 88.

The damages are excessive. The injury to plaintiff could not have been produced by an external bruise, such as she received, and if she was infected in the manner claimed by her, it is such an unusual occurrence that it could not be anticipated. 69 Ark. 402; *St. Louis, I. M. & S. Ry. Co.* v. *Copeland.* Defendant is not liable for consequences of its negligence which could not be anticipated or foreseen.

Jones & Campbell, for appellee.

Appellant was negligent in not holding its train long enough to give appellee reasonable time to enter the car. 73 Ark. 551; 101 Ark. 183; 105 Ark. 269; 99 Ark. 420; 95 Ark. 220. The question of appellant's negligence in starting the train and plaintiff's contributory negligence was properly submitted to the jury. 76 Ark. 520; 90 Ark. 494; 89 Ark. 82; 87 Ark. 109; 83 Ark. 82. A *prima facie* case of negligence on the part of the railway was established. 90 Ark. 485, and cases cited; 88 Ark. 12; 87 Ark. 581; *Id.* 308; 60 Ark. 550; 56 Ark. 594; 83 Ark. 217; 82 Ark. 393; 81 Ark. 579.

The testimony establishes the fact that plaintiff's injuries are serious and permanent. The judgment is not excessive.

McCULLOCH, C. J. This is an action against the railway company to recover compensation for injuries alleged to have been received by plaintiff while she was boarding defendant's train at Olyphant, Arkansas. It is alleged in

the complaint that the servants of the company in charge of the train negligently caused it to start while plaintiff was boarding it and before she had time to enter the coach, and that on account of said negligence she was thrown against the hand rail and received serious injuries. Defendant entered a denial of the charge of negligence and contended that the plaintiff's physical condition at the time of the trial was due to disease which existed prior to the alleged time of the injury. There was a verdict in plaintiff's favor assessing damages in the sum of $5,000, and defendant appeals.

Plaintiff boarded the train at Olyphant on September 24, 1911, and rode to Newport. She testifies that when the train reached the station, it ran by a short distance, and that as soon as it came to a stop, she hurriedly approached the platform, and, with the assistance of the train porter, attempted to board the car. She states that the porter took her by the arm and lifted her up to the step, and about the time she reached the top step of the coach, the train was suddenly put in motion, which caused her to grab the hand-rail for support, and that the porter then signaled the train to stop, and that the movement threw her against the hand rail, injuring her side. She states that she did not discover the extent of her injuries until some time later, but when she reached Newport she went to a physician, and was treated by him for the injury. The case has been here once before on appeal, and was reversed on account of error of the court in permitting certain testimony to be introduced (108 Ark. 387).

The last trial of the case occurred in September, 1914, about three years after the injury is said to have occurred, and the physicians who examined her at the time of the trial testified that her present physical condition resulted from some kind of a violent blow, and that her condition was a serious one and was permanent. The physicians found serious injury to her womb and ovaries, and one of them testified that the only relief she could obtain would be through an operation in the removal of both the womb and the ovaries, and that this was a very serious operation which is only resorted to in extreme

cases. There is much testimony adduced by defendant tending to show that plaintiff's present condition resulted from disease of the genital organs which existed before the time of the alleged injury. In fact, the proof adduced by the defendant tends to show that the plaintiff did not receive any injuries at all, and that the incident she relates did not occur. These issues were, however, settled by the verdict of the jury, and all we are called upon to decide is whether or not the evidence was legally sufficient to sustain the finding of the jury. We think there was evidence sufficient upon every issue, and that the verdict should not be disturbed. If the injury occurred as related by plaintiff, it constituted negligence on the part of the servants of the railroad company; and if her testimony, and that of the physicians introduced by her as witnesses concerning the extent of her injuries, is true, the verdict for $5,000 damages is not excessive.

There are several assignments of error with respect to the rulings of the court in giving and refusing instructions. It is contended that the court erred in giving instruction No. 3 at the request of plaintiff, which reads as follows: "It is also the duty of the defendant company to stop its train at the station long enough to allow passengers to board and enter the car of the train, and it is the duty of the passenger to board and enter said train with reasonable dispatch, and it is negligence for the defendant company to start the train after it stops before the passenger has had a reasonable time to board and enter the train." The contention is that this instruction is in conflict with the principle laid down by the authorities that the servants of a carrier are not guilty of negligence in starting a train after a passenger has entered the coach, and before he has had time to reach a seat, "unless there is some reason to apprehend danger in so doing, or the movement is in a negligent manner." 6 Cyc. 613. We do not think the third instruction is in conflict with that principle, for it is evident that the court used the words "board" and "enter" as synonymous terms, meaning the same thing. There is nothing in the testi-

mony in this case which involves a duty to the plaintiff after she entered the coach and was seeking a seat. There is no contention that the plaintiff was inside of the coach when she received her injuries, but all that her testimony tends to establish is that she was injured while she was on the platform, and before she had time to enter the coach. Now, it is undoubtedly the law that a carrier must exercise proper care not to move the train until the passenger has had a reasonable time to enter the coach; and where the train is negligently moved while the passenger, acting with reasonable diligence and ordinary care, is attempting to enter the coach from the platform, the carrier is responsible for the injury. There is no testimony which would have warranted a submission of the question of negligence in moving the coach after the plaintiff entered the car, and it would have been error for the court to give any instruction on that subject, but the jury could not have understood this instruction otherwise than as relating to the charge of negligence in moving the train while the plaintiff was boarding it, and before she had had time to enter the coach. The issue was squarely presented whether or not the train was moved at all, and whether plaintiff received any injuries, and there was nothing in the language of this instruction which could possibly have misled the jury about what the real issue was.

The refusal of the court to give defendant's tenth instruction is also assigned as error. It reads as follows: "The employees, in operating the train, are not bound to stop the train at any particular place, and are not bound to start same without a jar or jerk, but are required only to exercise due care in this regard; and you are further instructed that the engineer had the right to move the engine and train forward; and if he did this in the usual way and with proper care and caution, the defendant would not be liable for plaintiff's injury, if she was in fact injured thereby, and your verdict will be for the defendant." This instruction was not applicable to the issue presented by the testimony, which was whether or not the train was prematurely moved before plaintiff

had time to board it, and while she was attempting to do so. That part of the instruction which stated to the jury broadly "that the engineer had the right to move the engine and train forward" is erroneous, inasmuch as the jury might have understood it to mean that the engineer had the unqualified right to move the train notwithstanding his duty to leave it stationary long enough to permit passengers to board the train. That part of the instruction is directly in conflict with other correct instructions on the subject, and for that reason, if no other, the court was right in refusing to give it. We find no error, therefore, in regard to the refusal of the court to give that instruction.

There are several other refused instructions which are urged as grounds for reversal, but upon an examination of those that were given, we find that the substance of these instructions was embraced in others which the court gave. Therefore, there was no prejudice in the court's refusal to repeat them.

The record is free from the errors which caused the former reversal, and we find that the case went to the jury upon correct instructions, and the evidence was sufficient to sustain the verdict.

Affirmed.

WESTERN CLAY DRAINAGE DISTRICT v. CLAY COUNTY

Opinion delivered March 8, 1915.

BRIDGES—DRAINAGE DISTRICT—JURISDICTION OF COUNTY COURT.—Where a drainage district erected bridges, made necessary by its construction of a ditch through a public road, the district can not require the county to pay for the bridges.

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

STATEMENT BY THE COURT.

The appellant drainage district was created by Special Act No. 368 of the Legislature of the session of 1907. It was made a body corporate, authorized to construct

such drains and levees as were found to be necessary in the prescribed territory, given the right of eminent domain and the power to levy and collect assessments for the purpose of construction of the improvements.

No authority was expressly given in the act to expend money for the erection of bridges.

The directors of the district caused a survey to be made and proceeded with the construction of the ditches, which at different places crossed the public roads of the county. The county judge was notified and refused to build bridges across the ditch, and demanded that they be constructed by the drainage district. The district built the bridges and filed an itemized verified claim against the county for the expense of their construction.

The county court refused to allow the claim, and from the judgment the district appealed to the circuit court, where there was a trial without a jury.

The testimony shows that the bridges on the public roads across the drains or ditches constructed through the road were built and paid for by the district in accordance with the itemized claim therefor. The president of the district testified that it was necessary to cut the ditches through or across the roads, that the public were then unable to use the roads without the construction of bridges which the county judge refused to build, saying that the drainage district should build them. He stated further that the district had never been paid by the county for the bridges and that the construction of the drains had been of great benefit to the public roads.

The engineer testified that the bridges over the drains across the public roads constructed by the district had been used by the traveling public since their erection, and that the ditches were beneficial to the roads, and that some of the bridges were constructed where there were no bridges before the ditches or drains were made.

The court rendered judgment against the district, from which it appealed.

G. B. Oliver, for appellant.

1. The drainage district had no authority to expend money for the building of bridges. 94 Ark. 380; 110 Ark. 416.

2. The doctrine of voluntary payments does not apply to public corporations. 114 Ark. 289; 70 Ark. 88; 83 Ark. 275; Thompson on Corporations, § 5984; 10 Cyc. 1150-1151 (I).

3. The county has received the bridges, the public has used them, and the county is estopped to deny liability. 38 Ark. 557-563; 72 Ark. 330-334; 87 Ark. 389; 77 U. S. 676; 107 U. S. 378; Thompson on Corp., § § 6022, 6024, 6026; 102 U. S. 299; 10 Cyc. 1156 *et seq.;* Bishop on Contracts, § § 217-238; Lawson on Contracts, § 47; 77 N. Y. 144.

Appellee, pro se.

1. Having created the necessity for the bridges, it was the duty of appellant to construct them. 31 N. Y. App. Div. 354; 52 N. Y. Supp. 327; 164 Ill. App. 621; 36 Cyc. 1136; 90 S. W. 319.

2. The payment made by the appellant was voluntary and without authority from the county, and it does not appear that the bridges were ever accepted by the county. 72 Ark. 330; Kirby's Dig., § § 553-560; 54 Ark. 524.

KIRBY, J., (after stating the facts). Appellant's first contention is that the drainage district was without authority to expend money for the construction of the bridges. But if this be true, the unauthorized expenditure of money by the drainage district in the erection of bridges across the ditches constructed by it through the public road, would not fix a liability against the county for the repayment of such money, neither would the fact that the money was voluntarily expended in the construction of the bridges prevent the recovery of same by the district, if the county was liable therefor, the rule preventing the recovery of money voluntarily paid not applying to officers and servants of a public agency of the kind. *Seitz* v. *Meriwether,* 114 Ark. 289, 169 S. W. (Ark.) 1175.

The county court has exclusive original jurisdiction in all matters relating to roads and bridges of the county, and the law prescribes the procedure for the exercise of this power. Section 28, article 7, Constitution 1874; Kirby's Digest, § § 553-560; *Fones Hardware Co.* v. *Erb,* 54 Ark. 645.

The undisputed testimony shows that the county judge refused to build the bridges after the construction of the drains through the public roads made their erection necessary for the accommodation of the public in using the roads, and that the district then built the bridges.

Compelling the county to pay for the bridges erected under such circumstances would deprive the county court of its jurisdiction in effect, which can not be done. *Howard County* v. *Lambright,* 72 Ark. 330.

There is no question here of the ratification of an unauthorized contract made by the county judge for the erection of the bridges nor of the acceptance, by the use of the public, of a bridge erected under a contract properly made with the county court, but only the question whether a drainage district may erect a bridge made necessary by its construction of a ditch through a public road after demand of the district that the bridge be built by the county and the judge's refusal to construct it, and require the county to pay therefor. It is not necessary to determine the question of the liability of the district to build the bridges nor whether the district would have the right to remove the bridges so constructed by it upon the refusal of the county court to pay therefor, within the doctrine of *Howard County* v. *Lambright, supra.*

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

PANKEY *v.* LITTLE ROCK RAILWAY & ELECTRIC COMPANY.

Opinion delivered March 15, 1915.

1. CITY ORDINANCES—SPEED OF VEHICLE—REGULATION—STREET RAILWAYS.—Section 914, Campbell & Stevenson's Digest of the City Or-

dinances of Little Rock, limiting the speed of certain horseless vehicles within the limits of said city, *held* not to apply to street railways.

2. STREET RAILWAYS—PUBLIC CROSSINGS—RINGING GONG—CITY ORDINANCE.—Section 1859, Campbell & Stevenson's Digest of the City Ordinances of Little Rock, requiring that street car companies place suitable bells or gongs on its cars and that the same be rung or sounded upon approaching or passing any street crossing or other regular crossing, applies to a place where one street comes into another, as well as where there is a complete crossing.

3. EVIDENCE—CITY ORDINANCE—ADMISSIBILITY—STREET RAILWAYS—QUESTION FOR JURY.—In an action for damages, where plaintiff was run into at a street crossing by a street car operated by defendant street railway company, an ordinance of the city, requiring that street cars sound their gongs upon approaching public crossings, is admissible in evidence, and it is a question for the jury to determine what relation the failure to comply with the ordinance had with the plaintiff's injury, and it is error to exclude the ordinance.

4. STREET RAILWAYS—RIGHT TO USE OF STREETS—RIGHTS OF OTHERS.—A street car company has the paramount or preferential right-of-way along the place occupied by its tracks, whenever the point arises that one must yield, either the company in the operation of its cars, or the traveler along or across the street; but the duties of all who use the streets are reciprocal, and the paramount right of the street railway company is subject to the reciprocal rights and duties of others, and no one user of the street has a right to pursue his course without anticipating the possibility of danger to others.

5. STREET RAILWAYS—INJURY TO PERSON ON TRACK—DUTY OF MOTORMAN.—The motorman of a street car has the right to assume that a pedestrian or other traveler on the car track, who is apprised of the approach of a car, will act under the impulse of self-preservation and get off the track in time to save himself from injury, yet the motorman is not entitled to indulge that presumption after he reaches the point of danger, but he must keep his car under control so that if it turns out that the traveler is insensible to his danger, or unable to extricate himself from danger, he can still give warning or stop the car in time to avoid injury.

6. STREET RAILWAYS—INJURY TO PERSON ON TRACK—DUTY TO GIVE SIGNAL AND STOP.—Plaintiff was injured by being struck by a street car. The evidence was conflicting as to how the accident occurred. *Held*, it was reversible error to charge the jury that until he saw that the plaintiff could not get off the track, the motorman had a right to continue without checking the speed of his car, and that he owed the plaintiff no duty to check the car, until after an extra alarm was given, and he saw that plaintiff would be unable to get off the track.

7. STREET RAILWAYS—USE OF ROAD BY TRAVELERS—PRESUMPTION—INJURY.—Where plaintiff was injured by being struck by a street car, *held* there is no presumption of negligence on plaintiff's part because the plaintiff was driving on the left-hand side of the street, in the absence of proof of a traffic ordinance governing the use of streets by travelers.

8. STREET RAILWAYS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.—Plaintiff was injured by being struck by a street car. *Held*, the issue of plaintiff's contributory negligence was for the jury, and it was error to charge the jury that he assumed the risk, or was guilty of contributory negligence, if he undertook to cross the track in front of an approaching car.

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

Manning, Emerson & Morris, for appellant.

1. It was error to exclude the city ordinances sought to be introduced by the appellant. It was in proof that the car was running at the rate of twenty miles per hour, and that the place of the injury was within the city limits. The speed ordinance was admissible. Running a vehicle at a rate of speed in excess of that prohibited by an ordinance or statute is negligence.

Section 1859 of the ordinances was clearly relevant and material. Appellant had testified that he was listening for the street car, and another witness had stated that the gong had not been sounded when the car approached Prospect Avenue, nor had the motorman continued to sound the same until the crossing had been passed.

2. The court erred in refusing to instruct the jury as requested by appellant that a person, in driving his vehicle on the street railway track is not a trespasser. 70 Ark. 572; 69 Ark. 289-294.

Instruction 3, given at appellee's request, errs in telling the jury that one operating a street car and seeing another in danger upon the track has a right to presume that the other would leave the track in time to avoid being injured. It is a question for the jury to decide whether the person operating the car acted prudently or negligently in assuming under the circumstances that the

party on the track would leave in time to avoid injury. 102 Ark. 417; 99 Ark. 422.

It was clearly erroneous to charge the jury that unless appellant was driving upon the right-hand side of the street, he was presumed to be guilty of negligence.

Instruction No. 9, given at appellee's request, errs (1) in saying that appellant assumed the risk, a doctrine which applies only in cases between master and servant, and (2) in saying that if he saw the car approaching and attempted to cross the track, he could not recover.

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

1. The court's action in excluding the ordinances offered in evidence was justified, in that these ordinances were not applicable to the case.

While in a broad sense street cars would come within the language of the speed ordinance, yet it is plain from the difference in their construction and method of operation from automobiles, etc., that they were not intended to be included in the ordinance.

Section 1859 of the ordinances does not apply, because there was no crossing at the junction between Fairfax Avenue and Prospect Avenue, and for the further reason that the collision was not at the junction point between the two avenues, but, according to appellant's own testimony, the distance of a city block from it.

2. The court correctly modified the first instruction requested by appellant. As asked, it embodied a statement of facts which, if found, constituted negligence, making no mention of the effect of finding contributory negligence. There was no contention that appellant was a trespasser, and for the court to have instructed the jury that he was not a trespasser would have been abstract and misleading. Instruction 3, given on behalf of the appellee, is a correct statement of the law as approved by this court. 64 Ark. 420; 108 Ark. 95-103. There was no error in the instruction with reference to the duty of appellant to keep to the right side of the street, etc. 143 Pac. 458. The ninth instruction, given for appellee,

was justified by the facts and circumstances shown in evidence. 80 Ark. 169; 88 Ark. 524-530.

McCULLOCH, C. J. This is an action to recover damages from the street car company for personal injuries inflicted in the operation of a car. The plaintiff, S. H. Pankey, was a mail carrier on December 24, 1909, when he received the injuries specified in the complaint, and claimed that the servants of the defendant, in operating a car, caused it to collide with the mail cart in which plaintiff was riding, and to overturn the cart and throw him out and injure him. The defendant denied the allegations of negligence and the trial before the jury resulted in a verdict in favor of the defendant.

The plaintiff's narrative of the facts is as follows: He was driving west on Prospect Avenue, in the city of Little Rock, late in the afternoon—about 5 or 5:30—on December 24, 1909, and was standing on the step of the mail cart, where the mail carrier is accustomed to ride, when the street car struck the cart and overturned it. There is a double track of the street railway at that place. On the north side the space between the north rail and the curb is about three and one-half feet, and the space between the south rail and the south curb is about thirteen and three-fourths feet, thus giving space for other vehicles to travel only on the south side of the street car rails. The car which inflicted the injury was coming from the west, and there was a down-grade around a curve. The evidence shows that from the point where plaintiff was struck, an approaching car could be seen something less than a block. Just around the curve, Fairfax Avenue runs into Prospect Avenue from the south side, but does not cross it. The plaintiff testified that he stopped his cart at a mail box on the south side of the track to deliver a package at a residence across the avenue, and that after returning to his cart, he found that he had a registered package for a lady who lived a short distance farther west on the north side of the track. He says that he got in his cart and started diagonally across the street to reach the residence of this lady, Mrs. Witherspoon, and when he had crossed the south rail of the

track his registered mail pouch slipped from the top of the pile, that his attention was diverted in trying to catch hold of the pouch and restore it to its place, and that in this way he slackened his hold on the lines and lost control, for the moment, over the movements of his horse. His mail was piled very high, so as to obstruct his view to some extent, and when he got the pouch replaced, he saw the street car coming rapidly about three-fourths of a block away, and he whipped up his horse and drew him over to the left in an attempt to get the horse and cart off of the track, but that before he could succeed in doing so, the car struck the cart and overturned it. He states that he whipped up his horse and drew him over to the left, and made outcries to attract the attention of the motorman. His testimony is that the car was running at a speed of about twenty miles an hour, and in this he is corroborated by other witnesses. His testimony, and that of other witnesses, tends to establish the fact that the gong was not sounded as the car approached Fairfax Avenue, and the evidence is sufficient to justify the conclusion that if the gong had been sounded, the plaintiff might have noted the approach of the car in time to have started about getting his horse and cart off of the track at an earlier moment.

On the other hand, the testimony adduced by the defendant tends to show that plaintiff got his horse and cart off of the track before the collision occurred, and then backed into the car, and that he stepped off of the cart before the collision. In other words, the testimony of the defendant completely exonerates its employees from the charge of negligence, and supports the verdict in favor of the defendant.

It is contended in the first place that the court erred in excluding from the consideration of the jury two ordinances of the city of Little Rock, one relating to the speed of vehicles propelled along the streets, and the other imposing a duty on the street car company of sounding the gong at street crossings. The ordinances excluded by the court read as follows:

"That no automobile, locomobile or horseless vehicle propelled by the use of electricity, gasoline or steam, by whatever name such vehicle may be known, whether used for purposes of pleasure or business, shall be moved or propelled along, over or upon any public street, avenue, boulevard or other public place in that part of the city bounded on the north by the Arkansas River, on the east by Commerce Street, on the south by Tenth Street, and on the west by the west side of Broadway, and also the city park and free bridge across the Arkansas River, at a rate of speed exceeding eight miles per hour and elsewhere in the city exceeding fifteen miles per hour. Any person violating any of the provisions of this ordinance shall, upon conviction, be subject to a fine of not less than five, nor more than twenty-five dollars (section 914 Campbell & Stevenson's Digest of the City Ordinances of Little Rock)."

"Sec. 1859. Same—Bells or Gongs on Cars.—That every street railway company operating its cars in the streets or other public places of the city of Little Rock shall place a suitable bell or gong on each of such cars, and cause the same to be rung or sounded on each car approaching or passing another car, or approaching or passing any street crossing or other regular crossing, such ringing or sounding to be commenced at a distance of not less than fifty feet from the car or crossing approached, and continued until such car or crossing has been passed."

(1) The circuit court ruled that the first of the ordinances copied above did not apply to street railways, and we are of the opinion that that conclusion is correct. The language of the ordinance does not leave the question entirely free from doubt, but street cars rather stand in a class to themselves, so far as concerns the mode of operation, and we think that the language used shows with reasonable certainty that the framers of the ordinance meant only to regulate the speed of other vehicles. It is true that the designating words "automobile, locomobile or horseless vehicle propelled by the use of electricity, gasoline or steam," are broad enough to include

street cars propelled by electricity, but the mode of operation of that kind of cars is entirely different from the other kind named, and we think that the city council did not mean by this ordinance to classify them with the other kinds of vehicles designated. Of course, it is a question of fact in each case for the jury to determine, notwithstanding the absence of an ordinance specifically regulating the speed, whether those operating the cars were guilty of negligence in running at excessive speed under given circumstances, but as this ordinance had no reference to street cars, the court was correct in excluding it from the consideration of the jury.

(2-3) The other ordinance is clearly applicable, and we think the court erred in excluding it from the jury. It applies to street railway companies and provides that the bell or gong shall be sounded when the car is approaching or passing another car, or approaching or passing any street-crossing or other regular crossing. The contention on the part of the defendant is that the place where Fairfax Avenue runs into Prospect Avenue is not a street crossing within the meaning of the ordinance. That would be a very narrow construction of the language of the ordinance, for it is easy to see that the danger to be avoided is just about as great where one street runs into another as it is where there is a complete crossing. Vehicles coming in from another street necessarily cross from one side to the other, and danger is to be apprehended from approaching cars just as much as if the vehicles crossed the street entirely. We think the place where Fairfax Avenue comes into the other street is a crossing within the meaning of the ordinance, and that the court should have allowed the ordinance to go to the jury for consideration. The evidence tends to show that the ordinance was not complied with, and it is a question for the jury to determine what relation the failure to comply with the ordinance had with the plaintiff's injury, and it was error to exclude it. *Bain* v. *Fort Smith L. & T. Co.*, 116 Ark. 125, 172 S. W. 843. The evidence tends to show that the plaintiff was absorbed in the work of replacing the mail sack which had been jos-

tled off of the pile of mail, and that if the gong had been sounded, he would have taken notice of the approach of the car in time to get off of the track. His testimony shows that when he first became aware of the approach of the car, after it rounded the curve, he made every possible effort to rescue himself from the danger, but the car was coming at a high rate of speed and ran into the cart before he could drive off the track.

There are numerous assignments of error in regard to rulings of the court in giving and refusing instructions. Some of the adverse rulings of the court are not pressed in the argument, and we need not notice them. The first objection relates to a modification of plaintiff's first instruction, which submits the question of contributory negligence, and we think there was no error in that regard. Another instruction, which the court refused, told the jury that the plaintiff was not a trespasser in going on the track, and not necessarily negligent in doing so. We think there was no prejudicial error in refusing that instruction, in view of others which were given by the court, because in none of the instructions could the jury have understood that they were at liberty to regard the plaintiff as a trespasser on the track.

Objection was made to the following instruction, given at the instance of the defendant: "The street car had, and from the necessities of the case should have, a right-of-way upon that portion of the street upon which alone it could travel, paramount to that of other vehicles. If the motorman in charge of the car saw a person driving upon or near its track at a distance ahead sufficient to enable him to get out of the way before the car reaches him, and is not aware that he is insensible of the danger or unable to get out of the way, he has a right to rely upon human experience, and presume that the driver will act upon principles of common sense and the motive of self-preservation common to mankind in general, and will get out of the way, and to go on without checking the speed of his car until he sees that the driver of the car is not likely to get out of the way, when it would then become his duty to give extra alarm by bell or gong, and

if that is not heeded, and it becomes apparent that he will not get out of the way, then, as a last resort, to check the speed of his car or stop the car, if possible, in time to avoid the accident."

(4) That instruction is not a correct announcement of the law. It is true that a street car company has the paramount or preferential right-of-way along the place occupied by its tracks whenever the point arises that one must yield, either the company in the operation of its cars, or the traveler along or across the street. But, subject to that paramount right on the part of the car company under those circumstances, the duties of all who use the street are reciprocal and it is a mistake to say that one user of the street has a right to pursue his course without anticipating the possibility of danger to others. There is no disagreement on that score among the text-writers. After laying down the rule as to the superior right of the street railroad, it is said: "Subject to this qualification, the rights of the company and of the traveler on the street to use that part of the street occupied by the street railroad tracks are equal and reciprocal, a traveler on the street having as much right, if in the exercise of due care, to go across or along such part of the street, when not occupied by cars, as across or along any other part of the street, and is not a trespasser in doing so. * * * In the exercise of these reciprocal rights, the company and a traveler on the street are also under reciprocal duties, to the extent that the rights of each must be exercised with due regard to the rights of the other, and in such a careful and reasonable manner as not unreasonably to abridge or interfere with those rights, and so as to avoid injury, the one to avoid inflicting injury, the other to avoid being injured, proper consideration being given to the difference in motive power, and to the fact that the cars must run on a fixed track and rapidly acquire a greater momentum than another vehicle." 36 Cyc. 1492, 1493.

This court has announced the same rule. In *Little Rock Traction & Electric Co.* v. *Morrison,* 69 Ark. 289, it was said: "Every one has a right to go on the streets

and on any part of them. In a sense, it is said that street cars have the right-of-way; but that is because of the weight, speed and momentum of the cars, the great number of persons carried on them, their necessity to run on schedule time, and their strict confinement to the appropriate track, and other like circumstances. Except to accommodate these peculiarities, the street cars have no real right-of-way over all travelers on the streets, and it can not therefore be said there are any trespassers. * * * The street car company owes a duty to all persons on the streets, perfectly commensurate with the relative situation between it and them. One of those duties is to exercise reasonable care not to injure, for the privileges of both are such as call forth such care at all times."

(5) There is nothing in the case of *Hot Springs Street Ry. Co.* v. *Johnson,* 64 Ark. 420, nor in *Little Rock Ry. & Elec. Co.* v. *Sledge,* 108 Ark. 95, which militates against that rule. It is founded on reason and common justice, and in recognition of the nature of the occupancy of public streets by pedestrians, and travelers by any other mode, and street railway companies. The street is a public place which everybody has the right to make use of, and no one kind of traveler has the right to use it to the exclusion of others, or to make use of it in a way that will deny the same privilege to all others. The street car company has the right to occupy its own tracks, but every moment of such occupancy must be in recognition of the rights of others and in the exercise of ordinary care to prevent injury to others. A trial jury should, of course, take into consideration the fact that all persons are presumed, until the contrary appears, to be prompted by the feeling of self-preservation, and the motorman of a street car may, to some extent, assume that a traveler, who is aware of the approach of the car, will get off before it strikes him; but it will not do to say that until the motorman is apprised of the fact that the traveler is insensible to his danger that he is not bound to exercise any care to avoid inflicting an injury. That is the rule that is applied to the operation of trains moved by steam locomotives, but

the same rule can not be applied to street cars operated on the public streets. A railroad track is a place of constant danger, and train operatives have a right to assume that those who come upon the tracks are sensible of the danger of the place, and will take the ordinary precautions to avoid injury; but such is not the case with a street railway which occupies streets which are used in common with other travelers and which is not a place of constant danger. There are many cases which announce the rule stated in the instruction in this case, but they entirely lose sight of the distinction between the two characters of the railroads and the places which they occupy in the operation of trains, and are founded upon wrong principle. The sound rule is, we think, stated by the Supreme Court of Alabama in the case of *Schneider* v. *Mobile L. & R. R. Co.,* 146 Ala. 344, as follows: "Seeing a man driving along the track, the motorman may assume that he will turn aside and out of the way of the car; but he can not rest on the assumption so long as to allow his car to reach a point where it will be impossible for him to control his car or give warning in time to prevent injury to the man or vehicle." Stating the rule in other language, the motorman has the right to assume that a pedestrian or other traveler on the track who is apprised of the approach of a car will act under the impulse of self-preservation and get off in time to save himself from injury, yet the motorman is not entitled to indulge that presumption after he reaches the point of danger, but he must keep his car under control so that if, perchance, it turns out that the traveler is insensible to his danger, or be unable to extricate himself from danger, he can still give warning or stop the car in time to avoid injury.

The California Supreme Court said concerning the duty of the operatives of a street car company: "The standard by which ordinary care is to be measured is not absolute; and in the case of the operation of street cars, it must vary with circumstances attending their operation—the character of cars, the agency of propulsion, the locality in which they are operated,

whether in the country or in a city, whether over much-traveled or unfrequented streets, and the possibility or probability of danger attending their operation." *Henderson* v. *Los Angeles Traction Co.*, 150 Cal. 689.

The Supreme Court of Texas had this to say on the same subject: "It may be assumed, as matter of law, that it is the duty of a street railway company to know that the track in advance of its car is clear, and that it will be liable for any injury resulting from the want of this knowledge, unless its liability is defeated by the contributory negligence of the injured person, or unless it appears that the person injured went upon its track at a place so near the approaching car that the driver, by the exercise of care, could not avoid the injury after the person was seen or might have been seen. This involves the proposition that such a railway company is bound to use such diligence as will enable it to know whether the track in front of its car is clear, and if to this end the exercise of the highest degree of diligence is necessary, it must be used." *Galveston City Rd. Co.* v. *Hewitt,* 67 Tex. 473, 60 Am. Rep. 32.

(6) Now, this instruction is also erroneous in saying that the motorman in acting upon this assumption may "go on without checking the speed of his car until he sees that the driver of the car is not likely to get out of the way, when it would then become his duty to give extra alarm by bell or gong, and if that is not heeded, and it becomes apparent that he will not get out of the way, then, as a last resort, to check the speed of his car or stop the car, if possible, in time to avoid the accident." According to the testimony of the plaintiff, the car came into full view about three-quarters of a block away, and was going at a speed of twenty miles an hour, yet under this instruction the jury might have concluded that the motorman was not guilty of negligence in continuing that rate of speed. There is a sharp conflict in the testimony. The plaintiff testified that as soon as he saw the car coming down grade around the curve, he commenced a frantic effort to attract the attention of the motorman and to get his horse and cart off the track, but failed to do so in

time to avoid the car, which was coming at a high rate of speed. On the other hand, the motorman testified that the plaintiff got off the track and backed his cart into the car. If the plaintiff's statement of the facts is true, there is no escape from the conclusion that the negligence of the motorman caused the injury; and on the other hand, if the statement of the motorman is true, there is no liability in the case, for the injury was brought about by the plaintiff's own act. It was therefore misleading to tell the jury that the motorman had a right, until he saw that the plaintiff couldn't get off of the track, to continue unchecked the speed of his car, and owed the plaintiff no duty until after extra alarm was given, he saw that plaintiff was not going to be able to get off the track. We think the instruction was erroneous and calls for a reversal of the judgment.

Instruction No. 5 was also objected to, and reads as follows: "You are instructed that it is the duty of the person driving a private vehicle to keep to the right of the street on which he is driving, but this does not prevent him from crossing the street at such times or places as it may be necessary for him to do. If you find from the evidence that plaintiff was driving his wagon west on the south track of the defendant company, and that he had ample room to have driven to the right and to have kept clear of the track on which the car would approach when coming east, or if you find that he could have driven on the south side of the street on that portion on which there are no car tracks, yet he failed to do either one, then the presumption of law is that he was guilty of negligence, and the burden of proof is upon him to explain his position on the south track, and to clear himself of the presumption of negligence."

(7) The instruction was erroneous in saying that the fact that plaintiff was driving his wagon on the south track of the company raised a presumption of negligence against him. There is no proof of any traffic ordinance which compelled travelers to keep on the right-hand side of the road. It is an undisputed fact that the driveway is on the south side of the road, and that there is not

room for vehicles between the car track and the curb on the north side. Learned counsel for the defendant defend this instruction on what they term the "law of the road," but we think there is no inflexible rule of action which the courts can lay down to control juries in determining what is and what is not negligence on the part of a traveler under such circumstances. It was a question of fact for the jury to determine, under all of the circumstances, whether or not plaintiff was guilty of negligence, and it was incorrect to tell the jury that there was a presumption of negligence because he was driving on the south track. That track was in the middle of the street, and plaintiff had a right to occupy that place so long as he was exercising such care as a man of ordinary prudence would have exercised; and it can not be said as a matter of law that he was guilty of any negligence in being there, or that there was any presumption of negligence raised against him because he was there.

(8) Another instruction objected to reads as follows: "9. You are instructed that the street car company has a paramount right-of-way upon its tracks, and if the plaintiff saw or heard the car approaching, and yet undertook to cross the track in front of it, he assumed the risk of being struck by the car, and you will find for the defendant, unless you further find that the car could have been stopped in time to have avoided the accident after the motorman perceived the plaintiff's danger." That instruction is incorrect in stating that the plaintiff assumed the risk of being struck by the car merely because he undertook to cross the track in front of it. There is no question of assumed risk in the case, and can not be. If the plaintiff's own negligence contributed directly to his injury, then he can not recover; but that was a question for the jury, and it was improper to tell the jury that because he attempted to cross in front of an approaching car, that he assumed the risk or was guilty of contributory negligence. This instruction entirely ignored the duty of the operatives of the street car to exercise ordinary care to prevent injury to travelers, and only made the company liable for negligence after

discovering their perilous position. It excluded from the jury all consideration of negligence in failing to sound the gong or in failing to look for travelers on the track. In short, it excluded from the jury everything that would tend to place liability on the company except the fact of liability for discovered peril.

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

BELOTE v. COFFMAN.

Opinion delivered March 15, 1915.

1. LEGISLATIVE APPROPRIATIONS—EXPENSES OF GOVERNMENT—QUESTION FOR JUDICIAL DETERMINATION.—The restriction contained in art. 5, § 30, Const. 1874, requiring that appropriations made by the Legislature, not made to pay necessary expenses of government, shall be passed by a two-thirds majority in each house of the Legislature, makes it a question of law for the courts to determine whether the appropriation under consideration comes within the meaning of the Constitution; that is, whether it is an appropriation for defraying the necessary expenses of government.
2. LEGISLATIVE APPROPRIATIONS—EXPENSES OF GOVERNMENT—JUDICIAL QUESTION.—The action of the Legislature in making an appropriation, is not conclusive that the same was to defray a necessary expense of government, and is not binding on the courts.
3. LEGISLATIVE APPROPRIATIONS—DEPARTMENTS OF GOVERNMENT—NECESSARY EXPENSES.—The Legislature has the power to create temporary departments of government, and, when it has done so, appropriations for their support will be treated as appropriations for the ordinary expenses of government.
4. LEGISLATIVE APPROPRIATIONS—EXPENSES OF GOVERNMENT.—An act of the Legislature appropriating money for an exhibit of the resources of the State of Arkansas at the Panama-Pacific Exposition, *held* to provide for such an appropriation which, under art. 5, § 31, Const. 1874, is not a necessary expense of government, and required a two-thirds vote of each house of the Legislature in its favor to render it valid.
5. LEGISLATIVE APPROPRIATIONS—TWO-THIRDS VOTE.—The expression in sec. 30, art. 5, Const. 1874, which provides that no appropriation of money except for certain causes shall be passed "except by a majority of two-thirds of both houses of the General Assembly," *held* to provide for a two-thirds majority vote in each house of the Legislature separately.

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

Hal L. Norwood, for appellant.

The real question to be determined in this case is whether or not the appropriation is for the purpose of "defraying the necessary expenses of government," within the meaning of the Constitution. If it is not a necessary expense of the government of the State, it is obviously the duty of the court to declare the act void as having failed to receive two-thirds vote of each house of the General Assembly. Art. 5, § 31, Const. 1874; 76 Ark. 199; 2 Law Ed., (U. S.) 60; 123 U. S. 623; 66 Ark. 575.

Appropriations for exhibiting the State's resources at expositions have never been recognized as being necessary expenses of government either by the judicial or by the executive departments of the State, neither have they been so construed by the legislative department, until this act was passed, as witness the printed journals of the Senate and House. Columbian Exposition Appropriation 1893, S. B. No. 179, S. J. 366; H. J., pp. 564, 595; Louisiana Purchase Exposition Appropriation, 1901, S. B. No. 95, S. J. 200; H. J. 494 and 507; Supplemental Louisiana Purchase Exposition Appropriation, 1903, S. B. No. 42, S. J. 107, H. J. 382 and 391, and same bill on its return to the Senate for concurrence in amendments, S. J. 277, and 291.

The legislative determination in this case that the appropriation is for a necessary expense of the government, is not conclusive upon the courts. 78 Ark. 432; 106 Ark. 506; 27 Ark. 266; 105 Ark. 380; *Cotton* v. *City of Benton,* 117 Ark. 190, *infra;* 77 S. E. 264; 139 Pac. 685.

W. L. Moose, Attorney General, and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for appellee.

1. The Legislature has done everything possible to declare that this bill has been duly passed, and consequently that it is for necessary expenses of the State government. The legislative finding is conclusive. This court has wisely reserved the right to control arbitrary abuses of the legislative power, but it can not be said that the Legislature has abused its power in this instance.

The Constitution has entrusted to that body the determination of the question whether an expense is necessary, and it should, as this court has said, require a very plain abuse of power to justify an interference by the judicial department. 66 Ark. 575, 579; 76 Ark. 197, 202; 169 S. W. 802; 114 Ark. 212.

It is plainly apparent that the word "necessary" as used in this connection, does not mean "indispensable," but only that it is appropriate to the end sought. See Words & Phrases, and cases there cited.

If it be conceded that the Legislature may, by a bare majority, vote money for advertising the resourses of the State in one way, as for instance for the Commissioner of Mines, Manufactures and Agriculture, a mere advertising bureau it is not apparent on what principle it could be held that an appropriation for advertising in a different way would be beyond the power of that body. See 113 Ark. 493, 168 S. W. 1066; *Id.* 849. The cases hold that an appropriation for any reasonable municipal purpose, such as to install electric light plants, water and sewer systems, to improve streets, etc., are necessary expenses. 45 S. E. 948, 950, 133 N. C. 587; 45 S. E. 1029, 1030, 134 N. C. 125; 63 S. E. 167, 150 N. C. 35; 72 S. E. 460, 156 N. C. 402; 53 S. E. 229, 140 N. C. 429; 3 Cushing, 530, 533; 29 S. E. 368, 142 N. C. 420. Yet in the case of municipal corporations there is no such presumption in favor of their law-making bodies as is indulged in the case of a co-ordinate branch of government like the Legislature, to which the Constitution has entrusted in the first instance the determination of the question of a necessity, and whose discretion can be overruled only in case of palpable abuse.

2. The act was passed by two-thirds majority of both houses. The word "house" as used in article 5, section 30 of the Constitution, refers to the membership present at the time the vote is taken. Note the distinction made by the Constitution itself on this point in section 26 of the same article, where, in dealing with appropriations to pay for services after they have been rendered, it provides that it is necessary that the bill

be passed by "two-thirds of the members elected to *each* branch of the General Assembly." See, also, section 21, same article. 144 U. S. 6; 35 Atl. 932-934, 84 Md. 304; 21 La. Ann. 79-103; 46 So. 268, 20, 154 Ala. 249; 26 Fla. 281, 8 So. 429.

HART, J. During the session of the Legislature just ended, (session of 1915), an act was passed entitled, "An Act to Appropriate Money for an Exhibit of the Resources of the State of Arkansas at the Panama-Pacific International Exposition of 1915, and for other purposes." The act appropriated $40,000 for the purpose of exhibiting the resources of the State at that exposition. The bill received a two-thirds majority of those voting thereon in the Senate but did not receive a two-thirds majority of those voting thereon in the House of Representatives.

Joel C. Belote, a citizen and taxpayer of this State, instituted this action in the chancery court against L. L. Coffman as Auditor and R. G. McDaniel as Treasurer of the State of Arkansas. The plaintiff prayed that Coffman be enjoined and restrained from issuing warrants upon the appropriation provided in the act, and that R. G. McDaniel as treasurer be enjoined from paying any warrants under the provisions of the act, and that said act be declared void.

The chancellor found the issues in favor of the defendants and the complaint was dismissed for want of equity. The plaintiff has appealed.

As shown by the statement of facts, the bill received a two-thirds majority of those voting thereon in the Senate but did not receive a two-thirds majority of those voting thereon in the House of Representatives. Therefore counsel for the plaintiff contends that the bill failed to receive the necessary affirmative vote required by article 5, section 31, of the Constitution, and never became a law.

On the other hand, it is contended by counsel for the defendant that the action of the Senate and House of Representatives constituted a declaration that the appropriation was for a necessary expense of the State

government as contemplated by the clause of the Constitution just referred to and that on this account a majority vote was all that was necessary for the passage of the act.

Article 5, section 31, of the Constitution, reads as follows:

"No State tax shall be allowed, or appropriation of money made, except to raise means for the payment of the just debts of the State, for defraying the necessary expenses of government, to sustain common schools, to repel invasion and suppress insurrection, except by a majority of two-thirds of both houses of the General Assembly."

This clause of the Constitution has been construed in the cases of *State* v. *Sloan,* 66 Ark. 575, and *State* v. *Moore,* 76 Ark. 197, and counsel for the defendants rely upon these cases to uphold the decree of the chancellor.

In the case of *State* v. *Sloan, supra,* the court held: "Where a bill making appropriation for building a new capitol received a majority merely of the votes of both houses of the General Assembly, and the presiding officers of both houses decided that the bill received the majority necessary for it passage, from which decision no appeal was taken, it will be inferred that the Legislature ratified the acts of its officers, and thereby declared that the act was constitutionally passed, and therefore that the building of a new capitol was a necessary expense of government."

In the case of *State* v. *Moore, supra,* the court held that an appropriation to promote the efficiency of the Arkansas State Guard is an appropriation to meet the necessary expenses of the government within the meaning of the Constitution of 1874, article 5, section 31, which may be passed by a majority vote simply.

In that case the court, after quoting some of the language of the decisions in the case of the *State* v. *Sloan, supra,* used this language:

"The court in the *Sloan* case did not mean to lay down the doctrine, nor do we now, that the power of the Legislature to determine what is a necessary expense of

government is arbitrary, bounded by no limitations, and absolutely beyond control by the judicial department. We can readily call to mind subjects for appropriations so obviously beyond the scope of what may be deemed necessary expenses of government that the courts could, and in duty should, ignore a legislative determination, and declare as a matter of law that the same do not fall within that class. The words 'necessary expenses of government,' as employed in the Constitution, do not refer to the necessity, expediency, or propriety for the amount of the appropriation, but are intended as a classification of a character of expenses which may be provided for by appropriations without the concurrence of more than a majority of both houses of the Legislature; and when the expense is such as may fall within that classification, and the Legislature has made appropriation to defray the same, the courts must accept as final the legislative determination that they are necessary expenses of government. The preceding section of the Constitution regulating appropriations to defray the ordinary expenses of government, when read with the section now under consideration, makes a distinction between the 'ordinary expense of government' and other necessary expenses, and is a distinct recognition by the framers of the Constitution of the fact that there may be necessary expenses of government which are not ordinary expenses, and that the Legislature may, by a bare majority vote, make appropriations to defray the same. If they be necessary expenses of government—that is to say, proper and necessary expenses incurred in the administration of government—appropriations therefor may be made by a majority vote only, though they be extraordinary, and not incurred as ordinary expenses in the administration of government.''

We do not think the principles as announced in these cases sustain the position assumed by counsel for the defendants.

Obviously the decision in the *Sloan* case was correct. It is necessary that the State provide buildings in which its officers may have rooms in which to transact

the business of the State and discharge the duties of their respective offices. If the present statehouse should be destroyed by a tornado, or by any other means, it would be the duty of the Legislature to provide a new statehouse and its action in doing so would be a necessary expense of the government within the meaning of the clause of the Constitution quoted.

Article 11, of our Constitution, provides for the establishment of militia and states the contingencies under which the Governor may have power to call them out to execute the laws of the State, repel invasion, etc. Therefore, the establishment and maintenance of the State militia is essentially a State institution, or rather an arm of the government resort to which can only be had upon the failure of all other governmental authority. This was recognized in the *Moore* case and the court distinctly held that under the Constitution an organized militia is provided for and is recognized as a part of the executive branch of the State government.

It is not necessary in this case that we should attempt to draw an exact line of demarcation between what are and what are not necessary expenses of government. There are some things that are clearly within the line of the power and there are others that are outside of the line of necessary expenses of government. We are of the opinion that the appropriation in question is clearly outside of the line.

(1-2) The power of the Legislature to determine what is a necessary expense of government must stop somewhere. The restriction contained in the Constitution was not intended to be meaningless. It is a question of law for the court to determine whether the appropriation under consideration comes within the meaning of the Constitution—that is, whether it is an appropriation for defraying the necessary expenses of government. The action of the Legislature in making the appropriation was not the ascertainment of a fact but was a conclusion of law merely; and therefore not binding on us.

(3) It is insisted by counsel for the defendant that the appropriation in question was made for the

purpose of exhibiting the State's resources at the Panama-Pacific exposition and that it is just as much an appropriation for defraying the necessary expenses of government as are appropriations for the maintenance and support of the bureau of agriculture, mining and manufacturing. It will be noted, however, that article 10, of our Constitution, provides that the General Assembly may create a bureau to be known as the mining, manufacturing and agricultural bureau. Pursuant to this article of the Constitution the Legislature has created that department and appropriations for its support and maintenance clearly fall within the ordinary expenses of government contemplated under section 30, of article 5, of our Constitution. The Legislature has also the power to create temporary departments of government, and when it has done so, appropriations for their support are also for the ordinary expenses of government.

If we should hold that the appropriation in question is an appropriation for defraying the necessary expenses of government, it is difficult to see what appropriations would fall outside the limitations imposed by the clause of the Constitution under consideration in this case. It is plain from the principles of law announced in the case of *State* v. *Moore, supra,* that the Legislature can not make an arbitrary conclusion of what is necessary for defraying the necessary expenses of the State government. If so the court would not have based the decision in that case on the ground that the establishment and maintenance of militia was an arm of the executive branch of the government and provided for in the Constitution. It would simply have held that the Legislature was the judge of what constituted a necessary expense of the State government and its determination of that fact would be binding upon the courts.

(4) For the reasons already stated, we are of the opinion that the appropriation in question does not fall within the classification of expenses which may be provided for by appropriation without the concurrence of more than a majority of both houses of the Legislature

and we believe that the appropriation is obviously beyond the scope of what may be deemed necessary expenses of government.

It is urged that the appropriation in question is for a purpose that would greatly benefit the people of the State of Arkansas; but that is a consideration which addressed itself to the Legislature and can not be considered by us. Our plain and paramount duty is to obey and enforce the Constitution, in the face of which all other considerations must give way.

(5) It is contended by counsel that the phrase "except by a majority of two-thirds of both houses of the General Assembly," in the clause of the Constitution in question means two-thirds of the aggregate vote on the bill in both the House and the Senate. The aggregate vote in favor of the bill in the House and Senate constituted more than two-thirds of those voting on the bill in the House and Senate combined. Therefore it is insisted by counsel for the defendant that the bill passed by a majority of two-thirds of both houses of the General Assembly, as contemplated in the Constitution. Upon this contention but little need be said. Under our system of government the Senate and the House are separate and independent bodies and vote separately upon every bill presented to them.

It follows that the decree must be reversed and the cause remanded with directions to the chancellor to enter a decree in accordance with the prayer of the plaintiff in his complaint.

HARLOW v. MASON.

Opinion delivered March 15, 1915.

1. APPEAL AND ERROR—FINAL JUDGMENT—ORDER QUASHING SERVICE.—An order of a court quashing the service of summons, is not a final order from which an appeal will lie, where the summons was not quashed, nor an order of dismissal made, nor any judgment for costs rendered.
2. APPEAL AND ERROR—MOTION TO QUASH SERVICE—PRACTICE.—Where defendant moved the court to quash the service, and the court granted

the motion, the plaintiff may be required to stand upon the service and permit a final order to be entered, or to have the return amended to conform to the rulings of the court.

Appeal from Fulton Circuit Court; *R. E. Jeffrey,* Judge on exchange; appeal dismissed.

Emerson & Smith, and *C. E. Elmore,* for appellant.

James M. Mason, pro se, and *Geo. T. Black,* for appellee.

The mere quashing of a summons is not a final order or judgment, and is not appealable. 34 Neb. 5, 51 N. W. 299; 109 N. W. 752; 31 Kan. 218; 43 S. W. 436; 102 Ky. 370; 77 Ill. App. 203; 406 N. E. 1073; 166 Ill. 451; 103 S. W. 1134, 83 Ark. 371; 138 S. W. 876; 144 S. W. 522; 14 Ark. 424; 85 Pac. 626, 30 Utah 449; 52 S. E. 64, 139 N. C. 446; 149 Fed. 406; 42 So. 610; 132 Fed. 414; 164 Fed. 492; 59 S. E. 1055; 60 S. E. 136; 53 So. 503; 72 S. E. 189; *Id.* 515.

SMITH, J. Appellant was the plaintiff below and sued for damages on acount of an alleged libel. The parties to the litigation are both residents of the State of Kansas, and a suit was brought by appellee in that State to restrain appellant from prosecuting his suit in this State. A decision adverse to the contention of appellee was rendered by the Supreme Court of Kansas. *Mason* v. *Harlow,* 91 Kan. 807, 139 Pac. 384. Upon the conclusion of the litigation in that State, appellee filed a motion in the court below to quash the service of summons, for the reason, among others, that the person who served the summons was not authorized so to do. Upon the hearing of this motion the court entered the following order: "And the court after hearing the evidence adduced and being fully advised in the law arising herein, doth find the issues in favor of the defendant, J. M. Mason, and quash the service of the summons herein for the reason that said service so made by the sheriff was false and irregular and doth quash the same." This was the only order made by the court except to note appellant's exception to its action. The cause was not dis-

missed nor was any judgment rendered for costs. This appeal has been duly prosecuted from the above order.

A number of questions are discussed in the briefs and, among others, the question of the finality of the judgment appealed from, and we find it necessary to consider only that question.

"A judgment to be final must dismiss the parties from the court, discharge them from the action or conclude their rights to the subject-matter in controversy." *Bank of the State* v. *Bates,* 10 Ark. 631; *Campbell* v. *Sneed,* 5 Ark. 399.

Section 1188, Kirby's Digest, provides that the Supreme Court shall have appellate jurisdiction over the final orders, judgments and determinations of all inferior courts of the State, and the subdivisions of that section undertake to define the conditions under which an appeal may be prosecuted. There are a multitude of cases among our own decisions discussing the question of the finality of judgments, and the right to appeal therefrom.

There is a conflict in the authorities as to whether an order of a court quashing a summons is such a final order as that an appeal will lie, and there is some apparent conflict in the early decisions of this court upon that question. Some cases bearing upon that question are *Bank of the State* v. *Bates,* 10 Ark. 634; *Hatheway* v. *Jones,* 20 Ark. 113; *State* v. *Vaughan,* 14 Ark. 424.

In the case of *Bank of the State* v. *Bates, supra,* the syllabus is: "Motion to quash the writ of summons for want of a seal; judgment that the writ be quashed, and defendants recover of plaintiff their costs, etc.; *held,* that this was a final judgment to which a writ of error would lie." The opinion in that case reviewed certain opinions of this court bearing upon that subject and concluded the discussion of the effect of those cases with the following statement: "In both of these cases, however, as well as in that of the *State, use etc.,* v. *Adams et al.,* it was decided that the legal effect of the judgment quashing the writ was a dismissal of the case. This being the effect of the judgment, the parties are necessarily dismissed from the court, and unless the decision of the cir-

cuit court is reversed, or set aside, there is no remedy afforded them.

"We must not be understood as deciding that, in every instance where the writ is irregular or merely voidable, and the defect is pointed out, the judgment must necessarily have the effect to dismiss the action. There are very many defects which are amendable and others which amount only to temporary disabilities. Thus it is held in 1 Chit. Pl. 466, 'That the judgment for the defendant on a plea in abatement, whether it be on an issue of fact or law, is that the writ be quashed; or if a temporary disability be pleaded, that the plaint remain without day until,' etc."

The same judge who delivered that opinion delivered the opinion of the court in the case of *State* v. *Vaughan,* in which case the syllabus is as follows: "A judgment quashing a writ of *scire facias* upon a forfeited recognizance, it not a final judgment, from which an appeal lies to this court. The plaintiff having the right to sue out an *alias,* the case was not out of court by the quashal of the writ; and unless she would elect to proceed no further, but resting upon her exception, suffer a judgment dismissing the suit, the decision quashing the writ is merely interlocutory."

The case of *Hatheway* v. *Jones, supra,* refers to the cases last mentioned and, without undertaking to overrule either of them, treats them as if there was no conflict between them. The syllabus in the case of *Hatheway* v. *Jones,* is as follows: "An appeal will lie from the judgment of the circuit court quashing the writ and giving the defendant costs." And in the opinion in that case it was said: "When the writ is quashed on motion, or on plea in abatement of the writ, the effect of the judgment is to dismiss the defendant from the court, and, for the time, discharge him from the action. The plaintiff can proceed no further in the cause until he brings the defendant again into court by the issuance and service of an *alias* writ. *Adams et al.* v. *State,* 4 Eng. 33. The declaration remains in court, it is true,

but a declaration without a writ, is no suit, unless the defendant enter his appearance.

"On the quashing of the writ, the plaintiff may take an *alias,* if he chooses, and thereby waive objection to the judgment of the court. But it will not do to say that he must take an *alias*—that he can not rest upon the quashal of the writ, and appeal from, or take a writ of error to the judgment of the court. Because the court might, in many cases, by erroneously quashing the writ, prejudice the rights of the plaintiff. As, for example, where property is attached under a writ, it would be released upon the quashal of the writ, and the sheriff might not be able, under an *alias* writ, to find it again.

"We think, upon the quashing of the writ, the plaintiff may elect to take an *alias,* or rest, and take an appeal or writ of error. If the judgment is reversed, he is restored to his rights under the writ; if it is affirmed, he can then take out an *alias,* and proceed with the cause, if he thinks proper."

It thus appears that the action of the trial court in quashing the writ was regarded by the Supreme Court as in effect dismissing the defendant from the court, and this idea seems also to have influenced the court in its decision in the case of *Bank of the State* v. *Bates, supra.*

(1) In the instant case the summons was not quashed, but only the return made thereon. No order of dismissal was made by the court, and no judgment, even for costs, was rendered. In these respects the instant case is distinguishable from the cases cited. Moreover, it must be borne in mind that the rigidity of the rules of pleading has been much relaxed in this State since the decision of these early cases above cited. The policy of permitting amendments in pleadings, under proper terms and conditions, is now thoroughly well fixed. The simplification of pleading was one of the principal purposes of the Code, and the policy of permitting amendments was one of the chief means to that end.

The quashal of the return of service in this case is, by analogy, like the action of the court in sustaining a

demurrer. The pleader can stand upon the sufficiency of his pleading and have final judgment pronounced thereon, dismissing his pleading and can prosecute his appeal from that action of the court. Or, on the other hand, he may amend his pleading, and the cause will not be dismissed unless he refuses to do so. *Moody* v. *J., L. C. & E. Rd. Co.,* 83 Ark. 371; *Atkins* v. *Graham,* 99 Ark. 496; *Mallett* v. *Hampton,* 94 Ark. 119; *Adams* v. *Prummer,* 102 Ark. 380.

(2) So, here, appellant had the right to stand upon the proposition that his service was sufficient, in which event a final judgment would have been pronounced; and we think the better practice is to require him either to stand upon the sufficiency of his service and permit a final order to be entered, or to have the return amended to conform to the rulings of the court.

We recognize the fact that the authorities are in conflict upon this question, but we think the rule which we have announced is not only well supported by authority, but is the one most conducive to the orderly and expeditious dispatch of the business before the courts. A well considered case on this subject is that of *Honerine Min. & Mill Co.* v. *Tallerday Steel Pipe & Tank Co.,* 85 Pac. 626, in which it was said:

"All that plaintiff claims with respect to what constitutes a final judgment may be and is conceded, but it does not necessarily follow that the order had the effect to terminate the particular action and put the case out of court, when the case has not been dismissed but is still pending in the lower court, and where the plaintiff was, and even now is, entitled to an *alias* summons. It can not be said that the case was terminated in the district court when it is still pending there. The plaintiff will not be permitted to place itself in a position where with one arm it may invoke the jurisdiction of this court, while it may with another invoke the jurisdiction of the lower court pertaining to the same subject-matter. While plaintiff is here seeking to have determined that it has the defendant in court upon the process served, it may, at the same time, also apply for and obtain an *alias* sum-

mons from the district court with which it may serve the defendant and bring it in. But the plaintiff here asserts that an *alias* summons is of no avail because plaintiff can not make a better or different service than was made, and that if it has not the defendant in court upon such service it is unable otherwise to bring in the defendant. That may or may not be true. If such were the situation, plaintiff well could have indicated such fact to the trial court, together with a desire to stand upon the record as made and a refusal to further proceed in the action, whereupon, no doubt, the court would have entered an order dismissing the action. In other words, the mere granting of the motion to quash the service of summons did not authorize the court to end the suit and dismiss the action, but, by plaintiff's indicating a desire to stand upon the record and a refusal to further proceed, the court would then be authorized to do so. Such a proceeding would not, as is claimed by plaintiff, amount to a voluntary dismissal on its part and bar its right to appeal from the judgment and have reviewed the ruling made quashing the service. The dismissal, as to it, would be submitted to, if at all, because of the adverse ruling, and therefore would be involuntary. 6 Pl. & Pr. 828. Such a judgment of dismissal would be final and appealable. 6 Pl. & Pr. 998."

See, also, *Brown* v. *Rice,* 30 Neb. 236; Vol. 2 Century Digest, § 464; *Winn* v. *Carter Dry Goods Co.,* 43 S. W. 436; *Persinger* v. *Tinkel,* 51 N. W. 299; *Goldie* v. *Stewart,* 99 N. W. 255; *Bucklen* v. *City of Chicago,* 46 N. E. 1073.

It follows, therefore, from what we have said that the appeal in this case is premature and must be dismissed, and it is so ordered.

LeSieur v. Spikes.

Opinion delivered March 15, 1915.

1. Estate tail—how created.—A conveyance to "A. and the legal heirs of her body," under Kirby's Digest, §. 735, creates in A. an estate for life with remainder in fee to the heirs of her body living at the time of her death.

2. ESTATE TAIL—GRANT—REVERSION.—B. deeded lands to "A. and the legal heirs of her body." Upon the death of A. the lands passed to the heirs of A.'s body in fee simple, but if A. died without issue living, the lands would revert to the grantor.
3. ESTATE TAIL—GRANT—REVERSION.—The entire estate, except the possibility of a reverter, not a disposable interest passes from the grantor, who deeds lands to "A. and the legal heirs of her body," and the grantor can not thereafter by conveyance defeat the rights of the remaindermen in the lands, and this without regard to whether the fee be considered in abeyance, during the estate of the life tenant, or still held by the original grantor for the purpose only of passing to the remaindermen, upon the termination of the life estate.
4. ESTATE TAIL—DEED OF LIFE TENANT.—Where land is deeded to "A. and the legal heirs of her body," she can convey no interest greater than her life term in the lands, although she attempts to do so before the birth of any child or children.
5. ESTATE TAIL—INTEREST OF REMAINDERMEN—LIMITATIONS—ADVERSE POSSESSION.—The rights of the remaindermen under a deed granting an estate tail does not accrue until the death of the life tenant, and where they were under twenty-one years at the time of the death of the life tenant, they are by the statute allowed three years after coming of full age, in which to begin suit for the recovery of the possession of the lands.

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

STATEMENT BY THE COURT.

Plaintiffs brought an action of ejectment for certain lands in Randolph County, claiming to be the owners of two-thirds thereof as children and heirs of their mother, Dixie LeSieur, who died in 1900, leaving surviving her, plaintiffs and Ethel Cowdry, her only heirs at law.

Defendant denied that plaintiffs were the heirs of said Dixie LeSieur, and that he was in the unlawful possession of the property, and alleged further that Sarah C. Fisher, who is also grantor of Dixie LeSieur, the mother of plaintiffs, on the 8th day of February, 1882, executed a warranty deed to the land to one Jabez C. Smythe and on the same date Dixie LeSieur executed a quitclaim deed to said Smythe, and that the defendant

claims title to said lands by mesne conveyances from Smythe.

The answer also pleads the statute of limitations and that defendant had made valuable improvements on the land and paid the taxes thereon since February 8, 1882.

The case was tried on the following agreed statement of facts:

1. That Sarah C. Fisher is the common source of claim of title of plaintiffs and defendant herein to the land in controversy.

2. That on the 11th day of March, 1879, the said Sarah C. Fisher deeded said land to "Dixie LeSieur and the legal heirs of her body," the habendum clause in said deed reading as follows, 'To have and to hold the same unto the said Dixie LeSieur and the legal heirs of her body, and in the event that the said Dixie LeSieur should die without leaving any legal heirs of her body surviving her, then in that case the above described property shall revert to the said Sarah C. Fisher, grantor herein, or the legal heirs of her body."

3. That on the 8th day of February, 1882, the said Sarah C. Fisher executed a warranty deed for said land to one Jabez C. Smythe.

4. That on the same day the said Dixie LeSieur executed a quitclaim deed to the said Jabez C. Smythe for said land.

5. That the defendant, W. R. Spikes claims title to the said land by mesne conveyances from the said Jabez C. Smythe.

6. That Dixie LeSieur died on the ..... day of ....., 1900, and left surviving her as the only legal heirs of her body these plaintiffs, and one Ethel Cowdry.

7. That the defendant and those under whom he claims title to said land have been in the possession of said land from the 8th day of February, 1882.

8. That the defendant has paid taxes on said land since the death of Dixie LeSieur, amounting to $..... (whatever records show.)

9. The defendant has been in possession of the said property from the death of the said Dixie LeSieur, and that the rent from the property from the date amounts to: first seven years $42-2/3 a year, and for the last six years, $56 a year, that is, the rental value of a two-thirds interest in same.

10. That the ages of these plaintiffs are as follows: J. V. LeSieur, is of the age of twenty-two years and Dolph LeSieur is an infant of the age of nineteen years, and that J. W. Shannon is duly and legally authorized to appear as next friend for the infant, Dolph LeSieur.

The cause was submitted to the court without a jury, and it refused all the declarations of law asked by plaintiffs; held that they were barred by the statute of limitations and rendered judgment in favor of the defendant, from which this appeal is prosecuted.

W. L. Pope, for appellant.

1. Appellants rely for their title upon the statute, Kirby's Dig., § 735, and decisions of this court based thereon. 44 Ark. 458; 67 Ark. 517; 95 Ark. 18; 98 Ark. 570; 72 Ark. 336.

While there is some authority for the court's holding that the fee to the land remained in the original grantor, the weight of opinion is decidedly against it. 4 Kent, Com. 258, 260; 78 Ky. 410; 38 L. R. A. 679.

2. The statute of limitations does not begin to run against a remainderman until the death of the life tenant. 58 Ark. 510; 60 Ark. 70; 69 Ark. 539; 97 Ark. 33.

S. A. D. Eaton, for appellee.

1. The fee to the land remained in Sarah C. Fisher, in the conveyance to Dixie LeSieur. 39 S. W. 525; Williams on Real Property, (4 ed.) 256; Washburn, Real Prop. 560; Tiedeman, Real Prop. 411; 67 Ark. 517; 2 Blackstone, 112; 16 Cyc. 608. And her deed to Smythe conveyed to him the ultimate fee, or reversion in the land. *Supra;* 2 Blackstone, 175; 16 Cyc. 662. This estate was subject to the contingency of heirs of the body of Dixie LeSieur; but the deed of the latter to Smythe conveying to him her life estate, caused the life estate and the es-

tate in fee to reunite in the same individual, thereby defeating the contingent remainder. 2 Washburn, Real Prop. 638; Tiedeman, Real Prop. 421; Crabb, Real Prop. 2344; Williams, Real Prop. 270; 16 Cyc. 656.

2. Appellants are barred by the statute of limitations, appellee and his grantors having been in adverse possession of the land for more than seven years prior to the death of Dixie LeSieur, and for more than seven years thereafter. Appellants can not tack their disability of coverture. If the fee passed from Sarah C. Fisher at the time she executed the deed to Mrs. LeSieur, the possession of appellee and his grantors was necessarily adverse. 46 Ark. 438; 25 Cyc. 1270.

KIRBY, J., (after stating the facts). The agreed statement of facts shows that Sarah C. Fisher was the common source of title, that she conveyed the lands on March 11, 1879, to Dixie LeSieur, "and the legal heirs of her body;" that she later on February 8, 1882, conveyed the lands by warranty deed to Jabez C. Smythe, defendant's grantor and that plaintiffs mother, Dixie LeSieur on the same date, before they were born also made him a quitclaim deed to the lands. Their mother died in 1900, leaving them surviving two of the three legal heirs of her body, they being of the ages of nineteen and twenty-one years at the beginning of the suit. The defendant, was and had been in possession of the land, the rental value of which was shown since the death of their mother, Dixie LeSieur.

(1) The conveyance from Sarah Fisher to Dixie LeSieur, the mother of appellants, "and the legal heirs of her body" created an estate-tail under the common law, which by our statute and decisions is changed to an estate for life in the grantee, with remainder in fee to the heirs of her body living at the time of her death. Section 735, Kirby's Digest; *Horsley* v. *Hilburn,* 44 Ark. 458; *Wilmans* v. *Robinson,* 67 Ark. 517; *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 23; *Dempsey* v. *Davis,* 98 Ark. 570; *Black* v. *Webb.* 72 Ark. 336.

(2-3) According to these authorities the lands granted to appellants' mother passed to them in remainder

in fee simple upon her death and if she had died without issue living, would have under the course of the common law as well as the terms of the deed, reverted to her grantor. The entire estate except the possibility of reverter, not a disposable interest, passed from Sarah C. Fisher by the conveyance to Dixie LeSieur, the mother of appellants, and said grantor could not thereafter by conveyance defeat the rights of the remaindermen in the lands and this without regard to whether the fee be considered in abeyance, during the estate of the life tenant or still held by the original grantor for the purpose only of passing to the remaindermen upon the termination of the life estate.

(4) The life tenant could not by her conveyance before the birth of her children, appellants, to the second grantee of Sarah C. Fisher, convey more than her interest in the lands which was but an estate for life and terminated upon her death, the remainder in fee immediately vesting in her children surviving at that time and their issue.

(5) The plea of the statute of limitations and adverse possession can not avail against the right of action of appellants, which was not complete and did not accrue until the death of the life tenant. *Moore* v. *Childress,* 58 Ark. 510; *Ogden* v. *Ogden,* 60 Ark. 70; *Morrow* v. *James,* 69 Ark. 539; *Watson* v. *Hardin,* 97 Ark. 33.

At the time of the death of the life tenant the appellants were infants under the age of twenty-one years, and were by the statute allowed three years after coming of full age, in which to begin suit for the recovery of the possession of the lands and this action was begun within said statutory period. Kirby's Digest, § 5056.

It follows that the court erred in its judgment, which should have been for appellants for possession of two-thirds interest in the lands, and damages for three years rental value thereof, less the amount of the taxes paid for that time. The judgment is therefore reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

MASSACHUSETTS BONDING & INSURANCE COMPANY v. HIGGINS.

Opinion delivered March 15, 1915.

1. SURETYSHIP—SURETY COMPANY—RIGHTS.—The rule of *strictissimi juris*, by which the rights of uncompensated sureties are determined, is not applicable to the contracts of surety companies, which make the matter of suretyship a business for profit.
2. SURETYSHIP—SURETY COMPANIES—RIGHTS AND LIABILITIES—HOW GOVERNED.—The business of surety companies is essentially that of insurance, and their rights and liabilities under their contracts will be governed by the laws of insurance.
3. AGENCY—UNDISCLOSED PRINCIPAL—RIGHT TO SUE.—An undisclosed principal may sue on any contract, not under seal, made by his agent in his behalf.
4. SURETYSHIP—RIGHT OF UNDISCLOSED PRINCIPAL—BINDING CONTRACT.—Appellee, a surety company, undertook to indemnify and save harmless the obligee in the contract for any breach by a certain contractor of any terms of a binding contract. The obligee named in the contract was in fact the agent for appellant, his undisclosed principal. *Held*, the contract being in no sense personal, and being merely a contract of insurance, the undisclosed principal had a right to maintain an action against the surety company to indemnify him for a breach of the contract of the building contractor.
5. MECHANICS' LIENS—DUTY OF CONTRACTOR.—The law of the State with respect to mechanics' liens will be read into any contract that is made concerning the construction of a house, and the contract will be held to carry with it an obligation to construct the house and deliver it free from liens.
6. SURETYSHIP—BUILDING CONTRACT—MECHANICS' LIENS.—A surety bond which agreed to "indemnify and save harmless the said obligee from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said principal," held to cover mechanics' liens, left on the building unsatisfied by the contractor.
7. SURETYSHIP—BUILDING CONTRACT—LIENS—LIABILITY OF BONDING COMPANY.—When the trial court, upon sufficient evidence, finds that certain liens upon a building were based upon correct bills, that fact is sufficient to justify the inclusion of the amounts of the liens against a surety on the contractor's bond.

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

Metcalf & Metcalf, *Allen Hughes* and *W. W. Hughes*, for appellant.

1. An undisclosed principal can not enforce a guaranty running to the agent alone. 2 Mechem on Agency, (2 ed.), § § 2059, 2069; 1 Brandt on Suretyship & Guaranty, (3 ed.), § 133; 20 Cyc. 1399, and notes 16 and 17; *Id.* 1429, and notes; 22 Ark. 543; 123 Mass. 28; 2 Brandt, Suretyship & Guaranty, (3 ed), § 748; 32 Cyc. 123, par. 3; 5 Yerg. (Tenn.) 193; 45 Mo. App. 273; 29 L. R. A. (N. S.) 473; 12 Q. B. 310; 157 Mass. 221; 13 R. I. 117; 90 Ill. 396, 408; 61 N. Y. 39, 42; 44 So. 642, 13 L. R. A. (N. S.) 157; 97 Mass. 303; 93 Am. Dec. 93; 121 N. Y. App. Div. 667; 143 Ia. 61; 57 Fed. 463; 4 B. & C. 664.

2. The proof shows that the amount claimed by appellee represents sums she has paid out to material furnishers. The bond does not contract to indemnify Higgins against the claims of lienholders, for either labor or materials. 27 L. R. A. (N. S.) 575, foot note; *Id.* 577, note; 26 Ore. 106; 37 Pac. 712; 37 Fla. 542; 19 So. 883.

3. A subcontractor, material man or laborer can not fix a valid lien upon the property in a proceeding against the owner, unless he first obtain a judgment against the contractor or join the contractor as a party defendant with the owner in the action to impress the lien, the contractor being a necessary party. 118 Tenn. 548, 554; 24 Mont. 65, 74; 2 Col. App. 381; 31 Pac. 187; 4 Col. App. 165; 34 Pac. 1113; 36 Pac. 445; 39 Pac. 1095; 51 Mich 573; 17 N. W. 62; 43 Minn. 449; 45 N. W. 868; 19 Mo. App. 38; 109 N. C. 658; 73 Ga. 322; 92 Ga. 499; 2 Whart. (Pa.) 193; 65 Mo. App. 435.

Moore, Vineyard & Satterfield, for appellee.

1. The decree should be affirmed because the transcript does not contain all the testimony. 89 Ark. 570; 35 Ark. 412.

2. It is well settled that an undisclosed principal may sue in actions of this kind. 76 Ark. 558, 560; 78 Ark. 244; 87 Ark. 378; 50 Ark. 433; 60 Ark. 66; 87 Ark. 434; 16 Law. Ed. (U. S.) 36; 29 *Id.* 767.

The contract provided that the price of $6,868, should "include all of the labor and materials for the building except mantels and electric fixtures." This

can mean nothing else than that the contractors should pay for the labor and materials employed upon and used in the construction of the building.

That an undisclosed principal can not enforce a "guaranty running to the agent alone," is a theory not applicable in this case. The bond is not a contract of guaranty but of suretyship, and appellant's obligation is that of a surety. 32 Cyc. 20; 93 Ark. 454; 89 Fed. 464; 20 Cyc. 21, note 52; 16 L. R. A. (N. S.) 365.

3. Appellant is an insurer, a paid and compensated surety, and the rule of *strictissimi juris* sought to be invoked by it is not applicable. 79 Ark. 530; 33 L. R. A. (N. S.) 513.

4. The contractors were not necessary parties to this suit. 82 Ark. 247; Kirby's Dig., § § 4970, 4994.

McCULLOCH, C. J. Koehler & Newhouse, a firm of builders, entered into a written contract with J. G. Higgins, one of the plaintiffs, to construct a house for the latter in the city of Helena, and defendant, Massachusetts Bonding & Insurance Company, at the instance of said contractors, undertook by written contract or bond, to "indemnify and save harmless the said obligee from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said principal to be performed." The contract of the defendant was executed at the instance of Koehler & Newhouse, and for a consideration, and recited the contract between said parties and the plaintiff Higgins. Mary W. Higgins, the wife of J. G. Higgins, was the real party in interest, she being the owner of the property, and the contract was made in her husband's name for her benefit. In other words, she was the undisclosed principal. Koehler & Newhouse failed to comply with their contract and quit the work before the building was completed, and damage was sustained in that the house was completed by Mrs. Higgins at a cost in advance of the contract price, and also liens were asserted against the property. Mrs. Higgins and her husband instituted this action in the chancery court of Phillips County against the defendant bonding company, and certain par-

ties who asserted liens were made parties to the action. No question has been raised as to the action being properly brought in the chancery court. The case was heard upon the testimony and the chancellor found in favor of the plaintiff, Mrs. Mary W. Higgins, and rendered a decree against the bonding company, after having ascertained the amount of the liens against the building.

(1-2-3) The principal contention on behalf of the defendant is that there is no liability because of the fact that J. G. Higgins, the party with whom the contract was made, had no interest in the subject-matter, and that an action could not be maintained on the contract by an undisclosed principal. In other words, they invoke the rule laid down by Mr. Mechem that "an undisclosed principal can not enforce a guaranty running to the agent alone." 2 Mechem on Agency (2 ed.) § 2059. Other authorities are cited in the brief which sustain that rule. Conceding the force of that rule, it does not follow that it is applicable to the facts of this case. The bonding company is neither a guarantor nor a surety in the ordinary sense of the word, but is a compensated insurer. This court has so held in many cases. *American Bonding Co.* v. *Morrow,* 80 Ark. 49. The cases on this subject are collected in the note to the case of *Hormel* v. *American Bonding Co.,* 33 L. R. A. (N. S.) 513, and the following is stated as the rule deducible from those cases: "The overwhelming weight of authority supports the proposition that the rule of *strictissimi juris,* by which the rights of uncompensated sureties are determined, is not applicable to the contracts of surety companies, which make the matter of suretyship a business for profit; that their business is essentially that of insurance; and that therefore their rights and liabilities under their contract will be governed by the laws of insurance." This statement is directly in line with our decisions on that subject. In an exhaustive note to the case of *Shields* v. *Coyne,* 29 L. R. A. (N. S.) 472, the rule as to actions by undisclosed principals is stated as follows: "The general rule has frequently been stated and applied that an undisclosed principal may sue on

any contract not under seal, made by his agent in his behalf. This doctrine apparently originated as corollary to the proposition that an undisclosed principal was liable upon any contract made in his behalf by his agent at the option of the other party thereto, the theory being that inasmuch as the principal was liable upon such contracts he should be permitted to sue thereon."

That doctrine was recognized by this court in the case of *Frazier* v. *Poindexter,* 78 Ark. 241.

(4) In the note last referred to, exceptions are stated to the general rule about suits maintainable by an undisclosed principal. One of the exceptions to the general rule is that an undisclosed principal can not maintain a suit upon the contract of guaranty or indemnity for the reason that "such contracts are personal in their nature, and there is a mutual trust between the parties thereto which renders the general rule inapplicable." Now, the answer to this statement of the exception to the rule is that while a contract of guaranty or of suretyship in the ordinary sense of the words is personal, a contract of insurance, such as in this case, is in no sense personal. Being merely a contract of insurance, there is no reason why the general rule should not prevail permitting an undisclosed principal to sue. It certainly is the just rule, for the undisclosed principal in this case was liable for the contract made by her agent and there is no reason why she should not reap the fruits of the contract. There were no personal undertakings on her part in the contract of insurance, which was an obligation based upon certain conditions precedent whereby the company undertook to indemnify or insure the plaintiff against any loss. We think the contention of learned counsel for defendant is therefore unsound, and that it affords no reason for denying liability under the contract.

(5-6) The next contention is that the bond does not insure against liens. It is true, the bond is only to "indemnify and save harmless the said obligee from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract

on the part of said principal," but the law of the State with respect to mechanics' liens is read into any contract that is made concerning the construction of a house, and the contract necessarily carried with it an obligation to construct a house and deliver it free from liens. In fact, the contract contains an express stipulation "that it includes all of the labor and materials for the building except mantels and electric fixtures." It would be a very narrow construction of the contract to say that the bond was not intended to cover any liens, for unpaid claims on the building causing a pecuniary loss directly from the breach of the contract on the part of the principal. That construction would indeed be a strict one in accordance with the old rules applicable to accommodation sureties, but it is not in accord with the liberal rules of interpretation placed upon contracts of insurance.

(7) The only other contention is that the amounts paid out for liens of subcontractors should not be included in the liability on the bond for the reason that the principal contractors were not made parties to the suit. It was not essential that the validity of the lien should be first adjudicated in a suit against the principal contractor, for the obligee in the bond had the right to pay off bills which constituted liens on the building without a suit. *Federal Union Surety Co.* v. *McGuire,* 111 Ark. 373. The correctness of the bills was proved however, in this suit, and a finding by the trial court, upon sufficient evidence, that the bills were correct and constitute a lien on the building, was sufficient to justify the inclusion of the amounts in the award against the bonding company.

The liability of the defendant was clearly established by the evidence, and the decree of the chancellor was correct. Affirmed.

MULLETT v. MORRIS.

Opinion delivered March 15, 1915.

1. BILL OF EXCEPTIONS—TRANSCRIPT OF THE EVIDENCE—DUTY OF COURT STENOGRAPHER.—The transcript of the evidence and proceedings

taken by the court stenographer in the trial of a cause, required by law to be filed by him with the clerk of the court in which the case was tried, is not a sufficient bill of exceptions, and was never intended to be such by the statute, and it is available upon appeal, only by being made a part of the bill of exceptions.

2. BILL OF EXCEPTIONS—TRANSCRIPT OF THE TESTIMONY—DUTY OF COURT STENOGRAPHER.—The law (Kirby's Digest, § § 1329-1336) does not require the court stenographer to prepare a bill of exceptions in a cause tried, but it requires only that a transcript of the evidence and of certain proceedings be filed with the clerk, without any fee paid the stenographer therefor.

3. BILL OF EXCEPTIONS—CONTRACT WITH COURT STENOGRAPHER—LIABILITY.—A party to an action will be required to pay the court stenographer for a bill of exceptions, prepared by the stenographer, at the direction of the party's attorney, under an agreement that it be paid for at a specified rate per page.

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

STATEMENT BY THE COURT.

This suit was brought by appellant to collect $19.20, alleged to have been wrongfully required paid by him to the appellee who was court stenographer, for a transcript of the testimony in the case of *Mullett* v. *Clarendon Electric Light & Ice Co.,* tried in the Monroe circuit court.

It is alleged that the reporter took the notes in shorthand, failed and refused to file a transcript thereof with the clerk of the circuit court as required by law, but instead sent the transcript by express to plaintiff's attorney, C. O. D., and that plaintiff was compelled to pay and did pay said amount, an illegal and extortionate fee in order to take an appeal of the cause.

After payment for the transcript, plaintiff brought the suit and issued a garnishment against the express company.

Defendant after motion to quash the summons and demurrer was overruled answered, denying that he failed or refused to file the transcript of the notes of the testimony with the clerk on plaintiff's demand, that he sent same by express C. O. D. to plaintiff's attorney who was forced to pay the amount claimed to procure their de-

livery and alleged that plaintiff's attorney directed him to make a bill of exceptions, including the written testimony and motion for a new trial, instructions of the court, etc., agreeing at the time to pay therefor. That plaintiff later filed a petition for mandamus in the Monroe circuit court, which granted an order requiring the defendant to file a transcript of the evidence in the cause within a specified time, which he did. That the bill of exceptions sent by express C. O. D. to plaintiff's attorney was in compliance with his contract with said attorney therefor.

The cause was heard in the court of common pleas and judgment rendered for plaintiff and defendant appealed to the circuit court.

It appears from the testimony of Chas. B. Thweatt, the only witness who testified, that he represented the plaintiff, as attorney in a damage suit against the Clarendon Electric Light & Ice Co., tried in the Monroe circuit court, at the April term, 1914. The defendant herein was court stenographer and took notes of the evidence and proceedings at the time. After the case was decided, a motion for a new trial was prepared and overruled and an appeal prayed to the Supreme Court and sixty days given in which to file a bill of exceptions.

Witness said further: "I saw Mr. Morris that same day, and asked him to prepare a bill of exceptions at his earliest convenience and to send same to me and I promised to pay him for it. I made this promise in ignorance of the law. I understood it was necessary in civil suits to pay the stenographer for preparing bills of exceptions. I had never taken the trouble to investigate the law and did not know at the time it was his duty to file a typewritten copy of the evidence without charge." About two weeks afterward witness had a controversy with the stenographer about his claim for preparing bill of exceptions in a criminal case. The stenographer demanded a hundred dollars and the attorney looked up the law and went to try to induce him to give up the bill of exceptions without pay. Upon his refusal to do so, after quite a controversy, witness told him he would file

a petition for mandamus in that and the Mullett case to require him to file a transcript of the testimony without charge, that the petition for mandamus was filed in the criminal case and the stenographer delivered the bill of exceptions without a contest, and he said, "What are you going to do about the civil suit?" I said, "Oh, I don't know, I may pay you for that."

I told him positively at the time I did not care to have him prepare a bill of exceptions if he would comply with the law and file the transcript of the testimony. I preferred to arrange and prepare the bill myself, and there was never at any time a separate agreement to both file the transcript as required and to also prepare a bill of exceptions.

I told him I would expect him to comply with the law. He insisted that he was entitled to a fee in civil suits. I told him that my agreement to pay for the bill of exceptions when ordering it was under a misunderstanding and I would not stand by same. A few days before the expiration of the sixty days allowed for filing the bill of exceptions, a package arrived at the express office for me from Morris with charges, C. O. D., $19.20 and also the following letter:

"Little Rock, Ark., July 18, 1914.

"Hon. Chas. Thweatt, DeValls Bluff, Ark.

"My Dear Thweatt: I am sending you today the bill of exceptions in the Mullett case. There are sixty-four pages of this bill of exceptions, which amounts to $19.20. Am sending this by express, c. o. d., less express and collection charges. Trusting that you will find this bill of exceptions all right, I am,

"Very truly yours,

"Walter L. Morris."

Witness telephoned the clerk and was informed that a transcript of the testimony had not been filed and also the circuit judge asking him to speak to the stenographer about the matter and the time for filing the bill of exceptions lacking only three days of being expired, took the package from the express office, paying the charges,

and brought suit and garnished the said company for the money paid.

Witness said on cross-examination: "At the time of filing the motion for new trial I instructed defendant to prepare bill of exceptions for me, and send same to me at my home in DeVall's Bluff C. O. D., and I agreed to pay for same. This was for Mr. Mullett, as his attorney. I countermanded this order when I saw defendant in Little Rock. I said something like that if he would send bill of exceptions I guessed I would pay for same. That was because I was feeling good over getting the criminal bill of exceptions without a lawsuit. I do not think that this was a renewal of the contract, because I told him I would expect him to comply with the law."

Plaintiff requested a directed verdict, which the court refused and both parties offered written instructions, but the court said: "You are both lawyers, suppose you state your contention to the jury and read your law to them," which was done and no instructions given.

From the judgment in defendant's favor plaintiff brings this appeal.

J. G. & C. B. Thweatt, for appellant.

The statutes make it very plain that the stenographer is not entitled to a fee for filing typewritten copy of the oral proceedings or for a bill of exceptions by him prepared. Kirby's Dig., § § 1329 to 1336, inclusive; Acts 1901, p. 324; Acts 1913. The only theory under which he would be entitled to charge for such work would be under a separate contract to furnish the same in addition to what the law required, and the testimony does not support such a contention.

If there was any agreement, it was revoked before the work had been done, both by the conversation had in Little Rock and by the institution of the mandamus proceedings, which latter was notice to appellee that appellant expected him to comply with the law.

Grover C. Morris, for appellee.

1. The contract is not void for want of consideration. Appellant's attorney did not make a demand, in

accordance with the statute, for a copy of the proceedings taken in shorthand, to be filed in the office of the clerk, but ordered it sent to him at his home. Moreover he ordered *a bill of exceptions,* and not a "longhand or typewritten copy of the proceedings so taken in shorthand." This court has clearly drawn the distinction between a bill of exceptions and a transcript of the oral proceedings. 65 Ark. 330, 332; 100 Ark. 244, 247.

2. Ignorance of the law does not render a contract void or voidable. 62 Ark. 387.

3. The evidence is not convincing that the work was countermanded; but a countermand is not a legal discharge of a contract. Anson, Law of Contracts, (11 ed.) 315; 93 Ark. 447, 452.

KIRBY, J., (after stating the facts). Appellant contends that the court erred in not directing a verdict in his favor and that the verdict is contrary to the evidence.

The law provides for the appointment of an official stenographer by the circuit judge for each judicial circuit, who shall attend all terms of the circuit court and when requested by either party "make a stenographic report of all oral proceedings had in such court, including the testimony of witnesses with the questions to them, *verbatim,* the oral instructions of the court and any further proceedings or matter when directed by the presiding judge or upon the request of counsel so to do," etc. The stenographer is required to furnish within twenty days after the trial of a cause or from the time of demand therefor, a certified transcript or typewritten copy of the proceedings taken in shorthand and file the same in the office of the clerk of the court in which the case was tried. A stenographer's tax of three dollars is taxed as part of cost in the case and his transcript of the testimony is taken when a bill of exceptions is demanded as a part of the transcript of the proceedings of the cause to be used as part of the clerk's transcript on appeal without charge for making same, except of five cents per hundred words to be charged by the clerk,

collected as costs and paid into the stenographer's fund. Kirby's Dig., § § 1329-36.

(1) Appellant insists that under the law the stenographer is not entitled to a fee for the bill of exceptions prepared by him. The transcript of the evidence and proceedings taken by the stenographer in the trial of the cause required by law to be filed by him with the clerk of the court in which the case was tried, is not a sufficient bill of exceptions and was never intended to be such, and it is available upon appeal only by being made a part of the bill of exceptions. *Moore* v. *State,* 65 Ark. 330; *Dozier* v. *Grayson-McLeod Lbr. Co.,* 100 Ark. 244.

(2) The law does not require the stenographer to prepare a bill of exceptions in the cause tried, but only a transcript of the evidence and certain proceedings to be filed with the clerk without any fee paid to him therefor, and it also provides that no party shall be denied his bill of exceptions on account of inability to pay the stenographer's tax, etc. Section 1334-5, Kirby's Digest.

(3) Of course the stenographer could not withhold the transcript of the proceedings from the clerk after demand therefor to compel the payment of the fees agreed to be paid him by the attorney of one of the parties to the suit for making a bill of exceptions in the case and it appears from the testimony that he filed such transcript with the clerk after he had been ordered to do so by the court in sufficient time for plaintiff's attorney to have procured it and prepared a bill of exceptions within the time allowed therefor, if it did not require more time to do so than stated by him at the trial. The fact therefore that the transcript of the stenographer's notes was wrongfully withheld from filing with the clerk for a time does not relieve appellant from paying for the bill of exceptions prepared by the stenographer at the direction of his attorney, under an agreement that it would be paid for at a specified rate per page. The testimony shows the charge made and paid was in accordance with the price agreed upon and the jury found upon the testimony alone of plaintiff's at-

torney that there was a contract for the making of the bill of exceptions.

The testimony is sufficient to support the verdict, and the judgment is affirmed.

STATE v. SMITH AND LONGAN.

Opinion delivered March 15, 1915.

1. BILL OF EXCEPTIONS—AGREEMENT BY COUNSEL—PARTIES BOUND.—When a bill of exceptions is signed only by counsel under the act of April 28, 1911,* it binds only those parties to the action who are represented by attorneys signing the same.
2. CONSPIRACY—ACQUITTAL OF CO-CONSPIRATOR.—If two persons alone are indicted for a criminal conspiracy, the acquittal of one is an acquittal of the other, no other person, known or unknown, having been charged with conspiracy with the persons indicted, and this rule obtains although one of two co-conspirators was acquitted upon technical grounds alone.
3. CONSPIRACY—ACQUITTAL—PRACTICE.—A. and B. alone were indicted for a criminal conspiracy. Both were acquitted. The State appealed, but failed to perfect its appeal as to B., by reason of there being no bill of exceptions in his case. The judgment against B. was therefore affirmed, and of necessity, B. being acquitted, the judgment of acquittal against A. must also be affirmed.

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

Wm. L. Moose Attorney General, *Jno. P. Streepey,* Assistant, and *C. A. Fuller,* Prosecuting Attorney, for appellant.

Rice & Dickson, for appellee Smith.

1. There is no motion for new trial in the record.

2. It is doubtful that there is a sufficient authentication of the bill of exceptions even as to Smith. Mr. Fuller's term of office had expired when he signed the agreement as to the correctness of the bill of exceptions. Had he authority to do so?

J. Wythe Walker, for appellee Longan.

The alleged bill of exceptions was not signed either by Longan or his counsel. As to him there is nothing

---

*Act 218, Acts 1911.

before the court and the judgment should be affirmed. Acts 1911, p. 192, § 1.

McCULLOCH, C. J. The defendants H. C. Smith and J. C. Longan were jointly indicted by the grand jury of Benton County for conspiracy, alleged to have been committed by conspiring together to defraud the county in a transaction concerning the purchase of a tract of land. A change of venue was granted and the cause removed to Washington County, where it went to trial. The trial resulted in a verdict and judgment for defendants and the State has appealed.

(1) It is insisted by counsel for Longan that there is no bill of exceptions in the case, and that for that reason the judgment must be affirmed, inasmuch as it is not claimed that the record entries disclose any error of the court. The bill of exceptions in the record was not signed by the judge, but was approved by counsel representing the State and also by counsel representing defendant Smith. There was an attempt on their part to comply with the act of April 28, 1911, which provides that in cases other than felony cases "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." The certificate of the attorneys was in accordance with the terms of the statute, but it binds only the parties who joined in the approval, and not parties who were unrepresented by the attorneys who signed it. Obviously it was the intention of the Legislature to permit the parties themselves, through their counsel, to agree upon a bill of exceptions without the necessity of having the judge approve it, but it was not the intention to bind a party who was not represented by the attorneys who signed it. The presumption might be indulged, in the absence of a showing to the contrary, that counsel who signed the bill of exceptions represented the parties, but

in this instance the certificate of counsel who signed shows on its face that they only represented Smith. It follows, therefore, that Longan is not bound by the bill of exceptions agreed to between the other parties, that is to say, between counsel for Smith and for the State; and, as there is no bill of exceptions in the case, there is nothing before us to review, so far as the trial of the case is concerned, and the judgment as to him must be affirmed.

It is argued by counsel for Smith that the acquittal of Longan, under the indictment which charges conspiracy between him and Smith, necessarily operates as an acquittal of Smith for the reason that the adjudication that one of the co-conspirators is not guilty operates as an acquittal of the other. *Cumnock* v. *State,* 87 Ark. 34. However, we do not get to that question in the case, for there is no motion for new trial in the record. The bill of exceptions agreed upon between Smith's counsel and the attorney representing the State, shows that the court, at the conclusion of the introduction of evidence, gave a peremptory instruction in favor of the defendants, and it is necessary for a motion for new trial to have been filed in order to bring the ruling before us for review. The record entry shows that the motion for new trial was filed, but it is not brought up in the record.

Judgment affirmed.

ON RE-HEARING.

McCULLOCH, C. J. (2-3) It is now made to appear to our satisfaction that the State's motion for a new trial in this case was brought up in the transcript but by accident was detached from it while the case was in course of preparation for submission. Counsel for the State are not, under the circumstances, open to the charge of negligence, and we deem it proper to allow a copy of the motion to be certified up so that the appeal may be considered on its merits. If, however, it be found that the judgment of affirmance is right on other grounds, the petition for rehearing should be overruled, and we have reached the conclusion that such is the state of this case. There is no bill of exceptions as to defendant Longan. There-

fore the judgment of acquittal must stand affirmed, as indicated in the original opinion. The bill of exceptions applicable to the case of defendant Smith shows that the court directed a verdict in favor of both defendants on the ground that a material allegation in the indictment had not been sustained by proof. It is unimportant, however, what ground the court based its judgment on, for it is a judgment of acquittal on the merits of the case, even though it be, as contended by counsel for the State, purely on technical grounds. If the judgment against defendant Smith should be reversed, the State would, upon another trial of the case, be confronted with a judgment of acquittal of the alleged co-conspirator Longan, and that would in law operate as an acquittal of Smith, the indictment charging only a conspiracy between the two. The rule is well established that if more than two persons are jointly indicted for a conspiracy, the acquittal of some of them does not operate as an acquittal of all, for the reason that two persons only may commit the crime of conspiracy, but "if two persons alone are indicted, the acquittal of one is an acquittal of the other, no other person known or unknown having been charged with conspiracy with the persons indicted." 5 Standard Encyclopedia of Procedure 319. The *Cumnock* case, *supra,* does not quite reach to the point of this case, though the principle is broadly stated that the acquittal of one conspirator operates as an acquittal of both. In that case both conspirators were convicted on a joint trial and on appeal the case had to be reversed as to one and we held that that necessarily operated as a reversal as to the other. Cases are cited in the opinion, however, which do thoroughly sustain the defendants' contention here that the judgment of acquittal of Longan necessarily operated as an acquittal of Smith, and it will be useless to reverse the judgment for a new trial which would necessarily result in an acquittal because of the former judgment of acquittal of the co-conspirator. It is, as before stated, unimportant whether the acquittal of the co-conspirator was upon technical grounds or not, if

there was a trial upon the merits of the case and a final judgment rendered after jeopardy had attached.

The following authorities, in addition to those already cited, fully sustain the views announced: 2 Bishop, New Criminal Procedure, § § 1019 and 1022; 2 Wharton on Criminal Law, § 1655; *Jones* v. *Commonwealth,* 31 Gratt. (Va.) 836; *State* v. *Jackson,* 7 S. C. 283, 24 Am. Rep. 476; *People* v. *Richards,* 51 Am. Dec. (note) 84; *State* v. *Tom,* 13 N. C. 569; *Evans* v. *People,* 90 Ill. 384.

It follows, therefore, that the petition for rehearing must be overruled for the reason that the judgment of affirmance is correct, notwithstanding the fact that the former opinion was based on the erroneous ground that there was no motion for new trial in the record.

WALTON v. PROUTT, RECEIVER.

Opinion delivered March 15, 1915.

WATER COMPANIES—COMPLIANCE WITH CONTRACT—RIGHT OF INDIVIDUAL CITIZEN.—A citizen and user of water in a city has the right to maintain an action to compel a water company to comply with its contract with the city.

Appeal from Mississippi Chancery Court, Chickasawba District; *Charles D. Frierson,* Chancellor; reversed.

Appellant, pro se.

1. The franchise or charter granted to the water company constitutes a contract between the company and the city for the benefit of the inhabitants thereof. 76 U. S., 9 Wall. 50; 70 L. R. A. 770; 27 L. R. A. 514.

A consumer may maintain suit to compel a water company to furnish water at the rate stipulated in the contract between the company and the municipality. 1 L. R. A. (N. S.) 958; *Id.* 963.

2. A franchise granted by a city and accepted must be strictly construed against the grantee, and where there are doubts as to the meaning of the contract, such doubts

must be resolved against the grantee and in favor of the city. 10 L. R. A. 770; 27 *Id.* 514; 48 *Id.* 41.

3. The court's construction of the contract was erroneous. In order to construe the contract as authorizing charges upon the accumulative or sliding scale, it is necessary to eliminate entirely from the franchise that clause reading "the minimum under one rate shall not be less than the maximum under the preceding rate," which, since a contract is to be construed as an entirety, and every part given due weight and meaning, would not be permissible. 9 Cyc. 580, 583.

The true object in construing a contract, is to arrive at the intention of the parties. 94 Ark. 419; *Id.* 471.

J. S. Allen, for appellee.

1. Walton had no right to intervene in this proceeding. The statutory remedy given to consumers is full and adequate, and would cover not only all matters of construction of the terms fixing the present rate, but also their reasonableness, etc. Kirby's Dig., § § 5445, 5446; 80 Ark. 128; 35 S. W. 734.

The statutory remedy is exclusive, and resort can not be had to the courts until the relief to which a consumer is entitled has been denied him under the remedy provided by statute. 55 Neb. 627, 45 L. R. A. 113; 23 L. R. A. 146; 54 Ia. 59; 79 Ia. 419; 83 Ga. 219; 48 Kan. 12; 15 L. R. A. 375; 53 Minn. 446; 37 Neb. 546; 21 L. R. A. 653.

2. The trial court's construction of the contract is correct.

The strict rule of construction contended for by appellant is controlling when the question of the right to make the grant or the terms or scope of the grant is involved; but it does not follow that all the provisions of a franchise will be strictly construed against the grantee. Abbott, Mun. Corp., 1389; 157 Ind. 169; 38 Mich. 154; 152 Ill. 184; 37 La. 589; 89 Md. 710; 175 Pa. St. 213; 57 *Id.* 301; 94 Ark. 461; 101 Ark. 22.

McCULLOCH, C. J. This case involves a construction of the language of a franchise granted by the city of

Blytheville to a private corporation, authorizing said corporation to furnish water to the inhabitants of said city. The controversy relates to the rates authorized to be charged for the consumption of water. The first question presented, however, is whether or not appellant, a citizen of the city, has a right to maintain an action to compel those acting under the franchise to comply with the terms thereof. Creditors of the water company instituted an action in the chancery court of Mississippi County and a receiver was appointed by the court to take charge of the plant and operate it during the pendency of the litigation. The receiver filed a petition asking the court to construe the contract between the company and the city, with respect to the scale of charges to be made against the consumers of water, and to give instructions to the receiver on that score. Appellant, who was a citizen of the city, intervened and asked that the contract be construed and the receiver be ordered to carry out the contract according to the court's construction of it. The court refused to place upon the contract the interpretation contended for by appellant, and an appeal is prosecuted to this court.

We are of the opinion that appellant, as a citizen and user of water in the city, has a right to maintain an action to compel the water company to comply with its contract. There are authorities which clearly sustain that view, and we think they are correct. 1 Farnam on Waters, § 160-B; *Pond* v. *The New Rochelle Water Co.*, 183 N. Y. 330, 1 L. R. A. (N. S.) 958; *Robbins* v. *Bangor R. & E. Co.*, 100 Me. 496, 1 L. R. A. (N. S.) 963. The New York Court of Appeals in the case cited above based its conclusion on the ground that the contract was made for the benefit of the citizens of the municipality, and that a citizen had a right to sue on the contract. The Maine court based its conclusion on the ground that mandamus was the proper remedy to compel the performance of the contract, and that an individual had the right to sue to compel the performance of the public duty. Both of those decisions distinguish the question of the right

of a citizen to sue for damages resulting from a breach of the contract. This court has followed the great weight of authority in holding that a citizen can not maintain a suit for damages resulting from a breach of a contract of this kind, putting it on the ground that the citizens of the municipality are not parties to the contract. *Collier* v. *Newport Water, Light & Power Co.*, 100 Ark. 47. The question now presented is different from that, and we hold that while there is no right of action for a breach of the contract a citizen of the municipality, notwithstanding the fact that he can not be treated as a party to the contract, has a right to sue to compel the performance of the public duty which rests upon the holder of the franchise. We are not concerned at this time about whether the proper remedy is in equity, or at law by mandamus. No suit could be maintained either at law or in equity against the corporation in the hands of the receiver without first obtaining the consent of the court, and a citizen had a right to come into the court of equity where the affairs of the corporation are being administered through an agency of the court.

The controversy arises over the interpretation of the following clause of the contract regulating rates:

"Any consumer whose annual rental under the flat rate for any single connection, equals $15.00 per annum, may elect to have his service metered.

METER RATES.

2,500 gallons or less, per month, per M. gal.	$0.30
2,500 to 5,000 gallons per month, per M. gal.	.25
5,000 to 10,000 gallons per month, per M. gal.	.20
Above 10,000 gallons per month, per M. gal.	.15

"The minimum amount of bill under one rate shall not be less than the maximum under the preceding rate.

"The minimum meter rate to be seventy-five cents per month.

"The water company may make special contracts with private concerns for the use of water for unusual, special, or peculiar purposes or for purposes not specified in the foregoing table of rates, but it will not be required

to furnish any service connection of less than $6.00 per annum."

It is contended on behalf of the appellee that the proper interpretation of the contract means that what is called the "accumulative" or "sliding" scale means that a consumer must pay thirty cents per thousand gallons for the first 2,500 gallons used, and twenty-five cents per thousand for excess over 2,500 gallons up to 5,000 gallons, and so on up to the maximum amount provided for. On the other hand it is contended by appellant that the contract should be construed as adopting what is termed the "flat" scale, which constitutes a division of customers into classes according to the amount of water consumed, and provides a rate for each class. The court adopted appellee's contention, but we think that is an erroneous interpretation of the contract. Much plainer language could have been used if the framers of the franchise had intended what the court interprets the language to mean. It could easily have been stated that the rate of thirty cents per thousand should be charged for the first 2,500 gallons, and the lower rates for the excess, on up to the maximum; but, instead of that, the language has, we think, been employed which means quite another thing. If that was the correct view, no meaning whatever could be given to the clause which provides for a minimum amount under each classification of rates. In other words, if the framers of the city ordinance had intended it to mean that such a rate should be charged up to a certain amount, and another rate for the excess, it would have been useless to have prescribed a minimum rate on each separate classification. When the whole of this scale of rates is read together, we are convinced that it means what the appellant contends for, that is to say, the flat scale which divides the customers into classes according to the quantity of water used per month, and that the consumers are entitled to have water furnished according to the rates fixed for the class within which each falls.

The decree is therefore reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

DAVIS v. RECEIVERS ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

Opinion delivered March 22, 1915.

1. APPEAL AND ERROR—DEMURRER—FINAL ORDER—PRACTICE.—When the court sustains a demurrer to a complaint, the plaintiff may elect to amend his complaint, or to rest and permit final judgment to be rendered dismissing the complaint, and then appeal.
2. APPEAL AND ERROR—FINAL ORDER—DEMURRER.—There can be no appeal from an order of the court sustaining a demurrer when the court renders no final judgment.
3. APPEAL AND ERROR—DEMURRER—FINAL ORDER.—The order of a trial court sustaining a demurrer is not a final judgment but is interlocutory merely.

Appeal from Lawrence Circuit Court; *R. E. Jeffery*, Judge; appeal dismissed.

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

The court erred in sustaining the demurrer. 170 S. W. 245.

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

The order sustaining the demurrer was not a final judgment, and no appeal would lie. Kirby's Digest, § 1188; 99 Ark. 496; 102 Ark. 380; 83 Ark. 371; 94 Ark. 119; 44 Ark. 344; 30 Ark. 665.

HART, J. App Davis sued the receivers of the St. Louis & San Francisco Railroad Company to recover the penalty provided in section 6620 of Kirby's Digest, for charging a greater compensation for his transportation as a passenger than is allowed and prescribed by the act. The defendant company demurred to the complaint and the court sustained its demurrer. No judgment was rendered dismissing the complaint of the plaintiff and not even a judgment for costs was rendered.

(1) When the court sustained the demurrer the plaintiff had his election to amend his complaint, or, to rest and permit final judgment to be rendered dismissing his complaint and then appeal.

(2-3) It is well settled in this State that no appeal lies where there is no final judgment. The order of the court sustaining the demurrer was not a final judgment but was interlocutory, merely.

It follows that the appeal must be dismissed for want of jurisdiction. See *Benton County* v. *Rutherford,* 30 Ark. 665; *Radford* v. *Samstag,* 113 Ark. 185, 167 S. W. 491, and cases cited; *Harlow* v. *Mason,* 117 Ark. 360.

It is so ordered.

FRAZIER v. MCHANEY, RECEIVER.

Opinion delivered March 22, 1915.

APPEAL—PARTIES—WHO MAY APPEAL.—Only those who were parties to a suit at the time final judgment was entered in the trial court have a right to prosecute an appeal to the Supreme Court.

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

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

John W. Blackwood, for appellee.

WOOD, J. The Chicago, Rock Island & Pacific Railway Company and others brought suit in the Pulaski circuit court against the directors of the Fourche Drainage District to correct the assessment of benefits made against the lands of the plaintiffs, alleging that they had been illegally classified and doubly assessed, and praying that the assessments be corrected.

E. L. McHaney filed a motion setting up that he had been appointed receiver by the Pulaski chancery court for the Fourche Drainage District, and alleging that the affairs of the district were being administered and wound up by the chancery court. He prayed that the cause be transferred to the chancery court, which was done. He filed an answer in which he denied the allegations of the complaint as to illegal classification and double assessment, and set up, among other things, that the Legislature had validated the assessment of benefits made by the assessors of the Fourche Drainage District, and alleged that the chancery court had no jurisdiction to go behind these assessments. He also demurred to the complaint. The court entered a decree making certain corrections in the assessments "for the purpose of preventing the duplication of assessments as alleged in the plaintiff's complaint." After this decree was entered, the appellants, John R. Frazier, and others, filed their petition asking to be allowed to intervene for the purpose of prosecuting an appeal from the decree of the court. The court granted their petition and made them parties, "for the purpose of appealing to the Supreme Court," and they have prosecuted an appeal to this court. No appeal has been lodged in this court by either of the parties who were the parties to the litigation in the chancery court when its judgment was rendered. A judgment is the final determination of the rights of the parties in an action. Section 6228, Kirby's Digest. Appellants were not parties to the action in the trial court. The so-called intervention of the appellants to be made parties, and the order of the court allowing them to be made parties for the purpose of prosecuting an appeal, was too late after the rendition of the court's decree. The court did not set aside this decree and make the appellants parties to the proceedings and then render its decree, but the decree recites that the appellants, naming them, were made parties "for the purpose of appealing to the Supreme Court." The lodging of the transcript of the proceedings in this court by the appellants under

the above order of the chancery court did not give this court jurisdiction to inquire into the decree of the chancery court. Only those who were parties to the suit when the final decree was entered would have the right to prosecute an appeal to this court. The chancery court after the rendition of its decree could not then bring in those who had not been parties to the litigation simply for the purpose of prosecuting an appeal; and an order granting such parties the right to appeal from its decree could not give this court jurisdiction either of the parties or of the subject-matter of the litigation in the court below.

The appeal herein is, therefore, dismissed.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. MILLER.

Opinion delivered March 22, 1915.

1. REMOVAL OF CAUSES—RAILROADS—INJURY TO EMPLOYEE—INTERSTATE TRIP.—Plaintiff was injured while performing his duties for defendant railroad company in Arkansas, while disconnecting a steam line on an interstate train. In an action for damages, *held* it was proper for the trial court to refuse to transfer the cause to the Federal court.
2. COST BOND—NONRESIDENT PLAINTIFF—ATTORNEY AS SURETY.—Where plaintiff is a nonresident of the State, and is required under Kirby's Digest, § § 959-964, to give a bond for costs, it is proper for the court to permit plaintiff's attorney, alone, to become surety on said bond.
3. EVIDENCE—PHYSICIANS—PRIVILEGED COMMUNICATIONS.—A physician is incompetent to testify as to information obtained from a patient whom he was attending in a professional character, and which was obtained in order to enable him to prescribe as a physician. Kirby's Digest, § 3098.
4. EVIDENCE—PRIVILEGED COMMUNICATIONS—WAIVER OF PRIVILEGE.—The privilege granted by the law, which prohibited a physician from testifying as to facts learned in a professional character, is not waived by the plaintiff and patient, where he brings an action for damages for the injury done him by the defendant, and, when plaintiff becomes a witness, details the facts, the treatment of his injury, and the condition resulting from it.

5. MASTER AND SERVANT—RULES—KNOWLEDGE OF SERVANT.—A servant is not bound by the rules of the master which are never brought to his attention.

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

STATEMENT BY THE COURT.

This is a suit for damages for personal injury to plaintiff's eyes, alleged to have been caused by steam escaping through the negligence of the railway company in permitting the steam line of the train to be charged at the time his duties required him to disconnect the train from the engine and when a defective test valve, or one not in working order, failed to disclose that the pipe was charged.

The answer denied any negligence as charged; all the material allegations in the complaint relative thereto; alleged that it was the inspector's duty to discover the condition of the valve and of the steam line before breaking or disconnecting it, and that if he was injured, it was because of his own carelessness or negligence or on account of the risk assumed in his employment.

It appears from the testimony that C. H. Miller was a car inspector for the railway company located at De Queen, Ark., whose duty required him to cut off the passenger train from the engine and connect it up with another engine for the continuation of the journey on to Texas and Louisiana; that about ten or fifteen minutes was allowed for the inspection of the train coming from the north out of Oklahoma and disconnecting the engine and coupling it to another engine when it was due for departure south. It was the custom for the engineer to cut off the steam from the steam line three or four miles before coming into the station where the engines were changed and the inspection made and the brakeman to open the rear valve that the steam might escape therefrom. The steam line is the pipe or hose running from the engine through the coaches for the purpose of heating them. There is a valve at each end of each coach along this steam line and one at the end thereof on the rear coach. The steam line is disconnected or broken by the

inspector at the joint between the engine and the car by raising and pushing it up. At this joint there is a small valve called a test or tell-tale valve, which upon being pushed in or pushed down should disclose whether there is pressure or steam in the line or pipe.

Appellee was injured upon the breaking or disconnecting of the steam line from the engine by the steam and hot water blowing out and burning and scalding his face, forehead and eyes. He stated that he pressed down or tapped the tell-tale valve and it did not show any steam or pressure, and that he then with the help of the other inspector raised the joint or connection and broke it in the usual way and that the steam escaped and injured him.

He also said that he went to the rear of the train after he was injured and discovered that the rear valve on the steam line was closed, and that no steam would have been in the pipe that could have injured him if it had been turned off and the rear valve opened before coming into the station as it was the duty and custom of the other employees to do.

The conductor testified that at the station above De Queen, five or six miles, he directed the brakeman to signal the engineer to cut the steam off from the valve and to open the rear valve of the line and allow it to escape.

The engineer testified that he did cut the steam off from the line, upon the signal at the station above De Queen as was the custom, and the brakeman said that under the instructions of the conductor he went to the rear end of the train and opened the rear valve on the steam line for the steam to escape.

J. R. Sanders testified that he was a car inspector and his duties were "to cut the engine off, look the train over, put the other train on as quick as possible and they had ten minutes to get the train in and out—all the coaches, to see if it was safe to go out to make the trip." He said further that sometimes the steam line was charged with steam and sometimes blown out; that they

were emptied from the rear end and he had found the steam line charged.

The master mechanic testified that the hose connection was the standard in use on the line of railroad, and there was a valve on the lower end of it for the purpose of allowing condensed steam to escape. It is called also a tell-tale valve. "If it is pushed in, it will disclose whether the steam line is charged by the steam escaping through the opening if there is any steam in it. That rule 162, requires "steam hose must not be uncoupled until the steam has been shut off." It was the inspector's duty to see that the steam was shut off and all instructions to all employees having any duty to perform in uncoupling the steam hose is to see that the steam is shut off before the hose is uncoupled. The only test of that is through that valve. It was the duty of the inspector to look for defects and discover if any are in the valve and if the hose are found defective it is his duty to change it or put another on, that is what they are hired for."

The district foreman stated it was the duty of Miller to uncouple the air hose and steam heat or line hose and to satisfy himself of their condition before uncoupling them and that he was an experienced man.

The other inspector, Becker, who was assisting in uncoupling the hose, stated there was a good deal of steam, that he could not tell which way the pressure of the steam came from, he was holding the same piece of hose that Miller was, did not get burned in any way and "I think Miller said shut off the steam. I did not know Miller was hurt until I went around the train. I suppose he stayed there to couple on the other engine. We just raised up the hose and broke it and I was not burned in any way."

Nolen Wells testified he was present when the injury occurred; that appellee was on the east side with another man on the opposite side; that he was on the west side. Miller broke the steam hose and a little bit of steam came out from the engine and very little from

the line of the train. "When that steam came out he did not make any statement or claim that it burned him, he just said it looked like the steam had not been cut off. I saw the steam that came from the engine end of the pipe. If the steam had not been cut off, it would have come out with greater force."

Miller's statement reporting the occurrence showed that he was disconnecting the steam line between the baggage car and engine to cut the engine off; "the steam line was full of steam and when I disconnected the hose the steam burned my face and forehead." In giving the nature and extent of the injury "burned face and forehead."

Doctor Lanier stated that appellee came to his hospital about April 13, 1914, for treatment, that his eyes were inflamed, he had conjunctivitis. The cornea of the eye had lost its brightness and luster, was dull looking and was inflamed. The iris and ciliary muscles of the left eye were also inflamed. He said that the eye was so injured that it would get worse; that it also impaired the vision of the other eye and it was possible that the left eye would have to be removed.

Doctor Archer, the railroad surgeon, was not permitted to testify about the condition of plaintiff's eyes when he treated him for the injury immediately after the occurrence, nor to state that he did not claim at that time his eyes were injured.

Doctor Mann, a specialist from Texarkana, was not permitted to testify about the condition of appellee's eyes in April, 1914, ascertained from an examination of his eyes at that time with a view to treating him as a physician, the information being obtained in the course of the consultation with him. He would have stated that the examination disclosed no condition that could have resulted from a scald or burn by steam at the time it was claimed the injury occurred and that appellee's eyes were not injured materially nor permanently at all at the time of his examination. After the examination was made with a view to treatment, appellee asked this physician or was told by him that he was the physician

of the railroad company to treat the injured employees and appellee went away and did not return for treatment. He told the physician at the time that he was a hunter and trapper. This physician testified from an examination made on the day of the trial that the left eye was very much inflamed; that the right eye was in a normal condition except some medicine had been used in it that as soon as its effect had disappeared, it would be as good as ever, and under proper treatment the left eye would be a very good one. In his opinion if the left eye had been burned with hot steam on the 22d day of last December, it would not have caused the present condition of the eye.

Doctor Moulton of Fort Smith also examined him and stated there were scars on the skin surface of the upper and lower lids of the left eye as though it had been recently blistered, that the white part of the eye ball was quite red. The cornea was cloudy and "there is quite an area in the center of this cornea from which the outer covering or outer layers had been recently removed." There is a denudation of the surface. The outside layers of this membrane were wanting as though they had been recently destroyed, so recently that there had not been time for these layers to have been replaced with scar tissue. If that injury had been caused on December 22, it would not have been in that condition now." There was no indication of any permanent injury to his right eye.

The train upon which the steam line was being disconnected was an interstate one, having come out of Oklahoma, and was proceeding on down through Arkansas into Texas and Louisiana upon being coupled to another engine. Appellee alleged in his complaint that he was a citizen of Bowie County, Texas.

The court instructed the jury, and from the judgment on the verdict against it, the railroad company prosecutes this appeal.

June R. Morrell and *James B. McDonough,* for appellant.

1. The proof shows that this was an interstate train. The engine, however, had ceased its work with that train at the time of the accident. If this is a case under the State statute, and not under the Federal law, the right of removal existed, and the court erred in denying the petition for removal.

Even if brought under the Employer's Liability Act, the cause is removable. The right of removal is a Federal question. 229 U. S. 123.

2. The plaintiff, by reason of his non-residence, was required to give bond for costs. Kirby's Dig., § § 959-964. A cost bond made by the attorneys in the case is not a proper bond, and the court erred in refusing to require other surety.

3. The testimony of Doctor Lanier was certainly inadmissible. His opinion was not based wholly upon a physical examination. It was aided in part at least by what the plaintiff told him. His testimony sets out certain hearsay statements of the plaintiff, and by the admission of such testimony, the plaintiff succeeded in getting self-serving declarations before the jury. 158 S. W. (Ark.) 494, 108 Ark. 387.

4. It was error to exclude the testimony of Doctors Mann and Archer. As to Doctor Mann, the plaintiff himself testified that he did not treat him. He was not plaintiff's physician, and his evidence can not properly be excluded under section 3098, of Kirby's Digest. Having testified himself as to the conversations with Doctor Mann, he waived the privilege; and this is true as to Doctor Archer, plaintiff having testified fully as to the treatment by him. 31 Ark. 684; 98 Ark. 352; 82 S. E. 718; 130 N. W. 372; 131 Pac. 534; 129 Pac. 1048; 141 N. W. 1056; 158 S. W. 733; 132 Pac. 1103, 37 Okla. 575; 123 Pac. 330; 141 Pac. 963; 125 N. W. 621; 71 Atl. 686.

Plaintiff testified that he consulted Doctor Archer, Doctor Mann and Doctor Lanier. When he himself introduced Doctor Lanier as a witness, he thereby broke

the seal of secrecy as to the other two physicians. 125 S. W. 804; 107 Pac. 369; 85 N. E. 969; *Id.* 824; *Id.* 827.

The purpose of the privilege is to protect a patient from distress and humiliation, not to aid a plaintiff in the prosecution of a law suit. 4 Wigmore on Ev., § 2389. See, also, 104 N. Y. 352; 181 Mass. 55; 85 N. Y. S. 847; 10 *Id.* 657; 148 N. Y. 88; 102 Pac. 1000; 98 Pac. 820; 90 N. E. 1014.

Steel, Lake & Head, for appellee.

1. On the question of removal to the Federal court, this case is ruled by the *Leslie* case. 112 Ark. 305.

2. Plaintiff being a non-resident, his attorneys were liable for the costs of the action anyway, hence there was no impropriety in their becoming sureties on his bond.

3. Appellant's objection to Doctor Lanier's testimony was not made a ground for new trial, and can not be considered here.

4. There is no dispute but that both Doctor Mann and Doctor Archer obtained their information while examining appellee for the purpose of treating him. Their testimony was properly excluded. 98 Ark. 352; 24 N. E. 86; 21 N. W. 495; 37 N. E. 954; 38 N. E. 871; 53 Mo. App. 39; 3 Parker, Cr. Rep. (N. Y.) 670; 24 Hun. (N. Y.) 443; 9 N. E. 320; 53 Hun. (N. Y.) 637; 46 *Id.* 448; 13 N. E. 872; 24 N. E. 1102; *Id.* 1098; 32 Am. Rep. 362; 21 Ark. 387; 55 N. E. 43; 76 N. E. 242; 13 N. E. 872; 65 N. E. 765; 61 N. E. 1135; 63 N. Y. Sup. 242; 60 *Id.* 551; 74 *Id.* 902; 89 N. W. 520; 92 Pac. 372; 116 N. W. 917; *Id.* 933; 35 App. D. C. 195; 135 N. W. 879; 62 So. 589; 137 N. W. 894; 152 Fed. 365.

KIRBY, J., (after stating the facts). It is contended first that the court erred in denying the petition for the removal of the case to the United States District Court, it being insisted that the cause of action did not arise under the Employers' Liability Act of Congress.

(1) The injury occurred in disconnecting the steam line on a passenger train running from Kansas City, Mo., to Port Arthur, Texas, through De Queen, Ark., where the engines were changed, while the employee was de-

taching the engine from the train in order to couple on another engine for the continuation of the run. The case on this point is ruled by the decision in *Kansas City So. Ry. Co.* v. *Leslie,* 112 Ark. 305, where the question was decided adversely to the contention.

(2) It is also urged that the court erred in permitting the plaintiff's attorneys to become sureties on the bond for costs and in refusing to require him to give such bond with other security. The plaintiff being a nonresident of the State, was required, under the law, to give bond with sufficient security for the payment of all costs which might accrue in the action, and the attorneys bringing his suit without such bond having been given are by the law made responsible for the payment of all costs of the action until the bond is given. Kirby's Digest, § § 959-964.

The attorneys being made liable for the payment of the costs of suit are bound for the costs before the bond is given, and we see no reason why such attorneys should not be permitted to become sureties upon the cost bond if the clerk is satisfied with their financial responsibility, and there is no prohibition in the statute against their becoming such surety, and no error was committed in refusing to require a bond given with other sureties.

Neither do we think there was any error committed in allowing the witness Sanders to testify that it was necessary for the inspectors to do their work in a hurry since as he also stated the train only stopped at that station for about ten minutes, and the plaintiff alleged in his complaint that the work was required to be done in a hurry because of the shortness of the time in which it could be done. This fact would not have excused the inspector from ascertaining by pressing, or opening the test valve, whether the steam line was charged at the time of disconnecting it, nor appellee's failure to do so, from being negligence, nor was admission of this witness's understanding of it being the duty of the train employees to cut off the steam from the line and open the valve, error under the circumstances, and it could not have been prejudicial in any event since the conductor,

brakeman, and engineer all testified that it was their duty to do this, and that they had done it in this instance.

We do not think the testimony of Doctor Lanier open to the objection that it was based upon hearsay evidence, and the court did not err in the admission of it within the principle announced in *St. Louis, I. M. & S. Ry. Co.* v. *Williams,* 108 Ark. 387, 158 S. W. 494.

(3) It is strongly urged that the court erred in excluding the testimony of Doctors Mann and Archer, which was most material as it conduced strongly to show that plaintiff's eyes were not injured materially or at all by the escape of the steam from the steam line as alleged, Doctor Archer having examined and treated him immediately after the injury. The testimony of these witnesses, neither of whom was called by appellee, was excluded under section 3098, Kirby's Digest, by the court, on the ground that the information was obtained from the patient while attending him in a professional character, and necessary to enable them to prescribe as physicians.

(4) Appellant insists that appellee, by bringing suit for the injury and becoming a witness and detailing the facts, the treatment thereof, and the condition resulting from it, thereby waived the privilege granted to him by the statute, and cites many cases from other jurisdictions in support of his contention. While there is much reason for holding that the privilege is waived under such conditions, and that in the interest of justice, the truth of the matter should be discovered by the testimony of the physicians, the patient having disclosed and detailed the facts of the injury minutely, and the treatment thereof, our court has taken the other view and held that the privilege is not thereby waived. *Collins* v. *Mack,* 31 Ark. 684; *M. & N. A. Rd. Co.* v. *Daniels,* 98 Ark. 352.

It is said in the latter case, of the statute, "This enactment was manifestly made for the benefit of the patient. * * * Being enacted for his benefit, the provision was adopted out of reasons of public policy as a privilege accorded solely to the patient, and, like any other privilege, it is one that the patient may waive, * * * in order to obtain the benefit of the physicians' evidence. When

this privilege is waived as to any particular witness, the opposing side is entitled to the benefit of the waiver as to such witness. But the benefit of such waiver in behalf of the adversary should not extend further than to the witness who has been called by the patient, or to other physicians who may have been present upon the same occasion to which the witness testifies. By virtue of the statute, the patient alone is given the right to remove the ban of secrecy. * * * The statute affords him this privilege when the testimony of the offered witness does not relate to the same occasion as that from which the patient has removed the seal of secrecy."

In *Arizona & New Mexico Ry. Co.* v. *Clark,* 35 Supreme C. R. 210, the United States Supreme Court construed a statute of Nebraska which provides that a physician or surgeon can not be examined without the consent of his patient, as to any communication made by the patient with reference to any physical or supposed physical disease or any knowledge obtained by a personal examination of such patient, "provided, that if a person offer himself as witness and voluntarily testify with reference to such communication, that is to be deemed a consent to the examination of such physician," and held that the privilege was not waived by the voluntary testimony of the patient relative to his physical condition at the time of his examination by a physician.

Decisions construing the statutes of other States unlike ours, are of little value as a guide to the meaning of our own statute in which there is no provision relative to the waiver of the privilege, and we adhere to the views announced in *Railway* v. *Daniels, supra,* for the reasons there given and hold that no error was committed in excluding the testimony of these physicians.

Neither do we agree with appellant's contention that Doctor Mann's testimony was admissible, for the reason that he did not in fact make the examination and ascertain the condition of plaintiff's eyes in the capacity of his physician, not having in fact been employed by nor treated him. It is undisputed, however, that appellee went to Doctor Mann and consulted him about his injury and per-

mitted the examination to be made with a view to engaging his professional services, and that the information was necessary to enable him to prescribe as a physician and acquired for that purpose, and the fact that appellee after the examination discovered that the physician was employed by the appellant company to treat its injured employees, and declined to engage him to treat his injuries, would not permit the physician to disclose the information so acquired over the patient's objection.

The instructions given fairly submitted the issues to the jury, and such of appellant's requested instructions as were refused were sufficiently covered by the instructions given, and we do not find that the court erred in the giving or refusing of instructions.

(5) As to assumption of risk, it was not shown that it was the duty of the inspector to examine the steam line to ascertain whether or not it was charged. It is true, however, that one of appellant's witnesses testified that under the printed rules of the company, such was his duty, but no such printed rule was produced, nor does the testimony show any such rule was ever called to appellee's attention, nor that any verbal instructions to this effect were ever given to appellee, and he could not be bound by rules not brought to his attention. In *Fort Smith Lumber Co.* v. *Shackleford,* 115 Ark. 272, 171 S. W. (Ark.) 99, the court said, quoting syllabus, "It is the duty of the master to make rules for the protection of his servants, and to make these rules known to the servants, and there is no affirmative duty devolving upon the servants to ascertain what the rules are."

The testimony of appellant's servants show that it was the duty of the train crew to cut off the steam and drain the steam line, that it was their custom to do this, and that they attempted to, or did do it, before the train came into De Queen, where the engine was detached, and the injury occurred, and, besides, the appellee testified that he pressed the tell-tale valve, and it did not disclose that the steam line was charged.

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

LILES v. STATE, *ex rel.* JOHNSON.

Opinion delivered March 22, 1915.

BASTARDY—TESTIMONY OF MOTHER—NON-ACCESS OF HUSBAND.—In a bastardy proceeding testimony of the mother of the child that she had not had sexual intercourse, during the period of gestation, with her husband, who resided in the community, and from whom she was not divorced, is inadmissible.

Appeal from Polk Circuit Court; *Jefferson T. Cowling,* Judge; reversed.

H. A. King, for appellant.

1. The court erred in allowing appellee to testify as to the non-access of her former husband. The law is well settled that neither the husband nor the wife shall be allowed to deny sexual intercourse. Jones Com. on Ev., vol. 1, p. 464; 112 Ky. 888; 66 S. W. 1036; 6 A. & E. Ann. Cas. 816 (notes); 2 Enc. Ev. 240; 3 MacArthur (D. C.) 64.

2. The court erred in allowing witnesses, Mrs. Wimberly, Ode Wimberly, Goodner and Rogers, to testify about a settlement of the matter. 8 Enc. Ev. 174; 123 Iowa 427; 73 Minn. 101.

Admissions and declarations of parents are admissible to establish *legitimacy,* but not to establish *illegitimacy.* 8 Enc. Ev. 174.

The declarations and admissions of the man claimed to be the father of such child are inadmissible. 6 Enc. Ev. 175; 8 Cyc. 175; 2 Brock 256, 22 Fed. Cas. No. 13,351; 64 Kan. 367; 67 Pac. 848.

3. The instructions of the court were prejudicial and clearly not the law. 2 Brock 256, 22 Fed. Cas. No. 13,351.

The court erred in refusing instructions No. 1 and No. 2, requested by defendant. 2 Allen (Mass.) 453; 3 Paige (N. Y.) 139; 23 Am. Dec. 778; 2 Enc. Ev. 240; 2 Bush (Ky.) 621; 23 N. Y. 90; 2 McCord (S. C.) 227; 13 Am. Dec. 713; 85 Va. 245.

Pole McPhetrige, for appellee.

KIRBY, J. This is a bastardy proceeding, and from the judgment against him in the circuit court, appellant

brings this appeal, claiming for reversal that the court erred in allowing the mother of the child, a married woman, who was living with her husband at the time of its birth, to testify that she had not cohabited with her husband, Marvin Stevens, for four or five years before the appellant had the sexual intercourse with her.

It appears from the testimony of Nora Johnson that she was the mother of an illegitimate child, born on March 7, 1914, which she alleged was begotten by appellant, a married man, in Polk County, Arkansas, of which she was a resident.

She was at the time of the sexual intercourse with appellant in June, 1913, the wife of Marvin Stevens, from whom she had been separated for three or four years, but was not divorced, and he also lived in the community.

She was divorced from her husband, Marvin Stevens, in December, 1913, after having the intercourse with appellant, in the June preceding, which resulted in the birth of the child, and immediately after the divorce was granted, married one Joe Johnson, with whom she resided and cohabited as husband and wife thereafter.

The witness was permitted to testify over appellant's objection, that she had not cohabited with Stevens, her husband, for more than four years at the time the appellant had the sexual intercourse with her.

The other testimony in the case is sufficient to support the verdict of the jury. This testimony of the wife, however, was material, doubtless convincing and certainly highly prejudicial, being incompetent. The statute makes the mother a competent witness in all cases of bastardy, "unless she be legally incompetent in any case." Section 492, Kirby's Digest; *Kennedy* v. *State,* 117 Ark. 113. The court, passing upon this question there, said:

"In the absence of a statute in express words, making the mother competent to testify to the non-access of her husband, we hold that she can not do so. Under our statute, as we have seen, the mother is a competent witness. She may testify to facts which tend to prove that access on the part of her husband within the period of gestation was impossible, and if she testified to facts of that char-

acter there would be a question for the court or jury trying the issue to determine as to whether or not the presumption of legitimacy had been overcome. * * * She may testify to any fact tending to prove the illegitimacy of the child except the single fact of non-access of her husband."

It follows that the court erred in permitting the introduction of testimony of the mother of the non-access of her husband, and the judgment must be reversed and the cause remanded for a new trial. It is so ordered.

PEKIN COOPERAGE COMPANY v. DOUGHTON.

Opinion delivered March 22, 1915.

CONTINUANCES—ABSENCE OF COUNSEL.—Where defendant's counsel is absent on the day set for a trial in pursuance of, and in reliance upon, an agreement with plaintiff's counsel that the cause would be continued, it is an abuse of the discretion of the trial court to refuse to grant a continuance.

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

J. I. Alley, for appellant.

The court abused its discretion in refusing to grant a continuance as requested by plaintiff. 69 Ark. 368; 59 Ark. 162; 60 Wis. 293; 99 Ind. 296; 62 Tex. 65.

Block & Kirsch, for appellee.

It is not error to overrule a motion for a continuance on account of the absence of witnesses, if the motion fails to state where the witnesses reside, or what is expected to be proven by them. 93 Ark. 290; 71 Ark. 62; 74 Ark. 44; 91 Ark. 567.

The court in overruling the motion for a continuance did not commit an act of flagrant injustice to plaintiff. 93 Ark. 119; 99 Ark. 581; 94 Ark. 169; 94 Ark. 538; 103 Ark. 352; 100 Ark. 132; 96 Ark. 354; 78 Ark. 299.

SMITH, J. Appellant brought an action of replevin to recover certain staves, and when the cause was called for trial a motion and an affidavit for a continuance were filed, and upon the hearing of this motion an attorney

for the appellant testified to substantially the following facts: That witness was the local attorney for appellant, and was acting for and in conjunction with its regular attorney, who resided in Paragould. That Paragould was the headquarters of the appellant company, at which place all of its records, including the record of the inspection of the staves in controversy, were kept. That about two weeks before court convened the attorney for appellee asked witness to agree to a continuance of the cause for the term on account of the illness of appellee's attorney, and that it was agreed that the cause should be continued. That just before the first day of the court appellant's general manager came to Mt. Ida to assist in the preparation of the cause for trial, but was advised of the agreement for the continuance, whereupon its general manager wired appellant's attorney at Paragould that he need not attend court for the reason that a continuance had been agreed upon, and the witness was not advised that a trial would be asked for until the second day of the court. When court convened appellee had secured other counsel and demanded a trial of the cause, whereupon the witness immediately wired the appellant company at Paragould of that fact, and appellant undertook to advise its regular attorney, but found that he had left for Washington City. The witness further testified, in substantiation of the statements contained in the motion and affidavit, that it would be impossible to prepare for trial and to get its witnesses there. It is true that it was not shown who these witnesses were, nor what their testimony would have been, and it is insisted that there was no abuse of the court's discretion in refusing a continuance for that reason.

Where a continuance is asked on account of an absent witness, it is, of course, essential that a showing be made of the materiality of the evidence of the absent witness, and that diligence was used to secure the attendance of the witness. But we think that rule is not to be applied here. The evidence offered upon the hearing of this motion for the continuance was undisputed, and it ap-

pears that appellant was in no default whatever. It is true its local attorney was in attendance upon the court, but appellant had the right to have its regular counsel, who was expected to try the case, in attendance, and the case would have been ready for trial but for the agreement made by the attorneys for the respective parties. Appellant offered no proof at the trial and judgment was rendered against it by default. Trial courts are necessarily vested with a very large discretion in granting or refusing continuances, but under the proof in this case we must hold that the court below should have granted the continuance. A case similar to this, and one which announces the principle which controls here, is that of *Richardson* v. *Boyd,* 69 Ark. 368.

For the error indicated the judgment is reversed and the cause remanded.

TATE *v.* DINSMORE.

Opinion delivered March 22, 1915.

1. CONFLICT OF LAWS—ALIENATION OF LAND—GOVERNED BY WHAT LAW.—The alienation, transmission and descent of real estate is governed by the laws of the State in which the land is situated.
2. CONFLICT OF LAWS—SALE OF LANDS UNDER DEED OF TRUST.—Where a deed of trust was executed in California, covering lands in Arkansas, the sale of the lands under the power contained in the deed must be in accordance with the laws of Arkansas regulating such sales, in order to be valid,
3. MORTGAGES—SALE OF PROPERTY—APPRAISEMENT.—Under Kirby's Digest, § § 5416-5418, all lands sold under mortgages or deeds of trust shall be first appraised, and shall not sell for less than two-thirds of the appraised value thereof, unless at a second sale as provided by the statute.
4. DEED OF TRUST—LEGAL EFFECT—FORECLOSURE.—A deed of trust is in legal effect a mortgage, and sales made under the powers contained in mortgages and deeds of trust are void if not in compliance with the statute requiring an appraisement of the lands before sale made.
5. MORTGAGES—SALE—REDEMPTION.—A mortgagor and his successors in interest have, under Kirby's Digest, § 5416, one year from the date of sale in which to redeem mortgaged lands, by the payment of the amount for which the property was sold and 10 per cent interest thereon and the costs of the sale.

6. MORTGAGES—SALE—REDEMPTION—TENDER OF AMOUNT DUE.—Where the mortgagee of land or his legal successors, where the land has been sold, tenders the amount of money required by law to redeem the land from the mortgage sale within one year from the date thereof, and continues the tender in force by bringing the money into court, he will be held to have effected a redemption from the sale, and to have satisfied the mortgage lien, discharging the lands therefrom.
7. MORTGAGES—REDEMPTION—CONFLICT OF LAWS.—A. executed a mortgage to lands in Arkansas, in California. In the latter State no redemption was allowed. *Held*, the foreclosure proceedings were governed by the laws of Arkansas, where the lands were situated, and there being no waiver of the right of redemption in the mortgage, such a right exists under the laws of this State.
8. MORTGAGES—REDEMPTION—WHO MAY REDEEM.—The successors to the interest of a mortgagor may redeem the lands mortgaged from a foreclosure sale within the time provided by law.

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

STATEMENT BY THE COURT.

Fred Tate, in 1910, owned eighty acres of land in Little River County, this State, and that year through a real estate broker in San Francisco met one Z. P. Beachboard and made a trade of lands with him on the 21st day of September, exchanging the Arkansas lands for property in California. On the next day Beachboard borrowed from Tate $400 on the Arkansas land and gave a deed of trust thereon to secure the payment of the loan. The deed of trust was made to M. L. Hanna and D. T. Minney, as trustees. There was default in the payment of interest and the land was sold under the deed of trust and Tate became the purchaser thereof and defendants Jewell and Foster claim under him.

The appellees Dinsmore and wife are claiming as successors to the Beachboard title, and asked to be allowed to redeem the lands. All the original parties to the transaction of the exchange and mortgage of the lands resided in California, where the contract was made and the deed of trust executed.

After Beachboard executed the deed of trust to secure the $400 borrowed from Tate, he conveyed the lands to appellees, subject to said deed of trust.

The complaint alleged these facts and that appellees assumed the debt under the deed of trust, paid the first installment of interest when due, sent a check to pay the second, but that the check was refused and not cashed; that they did not learn of this until in the year 1912, when informed that the deed of trust had been foreclosed for the non-payment of interest due in September that year; that they then forwarded the interest due to Fred Tate which was refused. They then offered to pay Tate and the trustees the entire amount of principal and interest, which was also refused; that upon a pretended claim of forfeiture, the land was advertised and sold to Fred Tate on January 5, 1912, in Oakland, California, for a consideration of $520, and a void deed executed to Fred Tate by the trustees, pursuant thereto; that Tate wrongfully conveyed by a warranty deed the lands to Albert Jewell in March, 1912, who on April 8, thereafter, conveyed them by a like deed to C. B. Foster.

They alleged that the trustees' sale was void because the land was not appraised as required by law; that they had the right of redemption from the sale under the deed of trust and that within one year from the date of sale, they tendered to Fred Tate and the trustees the amount required by law to redeem the land from the sale. This tender was also made good in court with the additional statement that they were ready to pay any amount found necessary to redeem the land.

Appellants denied that the tender was made; alleged the sale was made in California for a valuable consideration and the trustees' deed made pursuant thereto was valid in all respects; that the said deed of trust was made in California where all the parties lived; that it and the notes secured thereby must be construed according to the laws of that State, which required no appraisement of the property sold and permitted no redemption of lands sold under a deed of trust.

The court found that there was no waiver of the right of redemption by the grantor in the deed of trust;

no appraisement of the land before the sale thereunder, and that within twelve months after the sale, there was a tender of the full amount necessary to redeem the lands made by the appellees and Beachboard to the trustees and Fred Tate, that the tender was refused, that the trustees' deed to Fred Tate was void because there was no appraisement of the land; that all deeds made to the land after that time should be set aside, and decreed accordingly, and from the decree this appeal is prosecuted.

Manning, Emerson & Morris, for appellants.

1. The evidence shows that it was the intention of the parties to this undertaking that there should be no right of redemption.

2. There can be no redemption because this was a California contract, and under the laws of that State there is no equity of redemption under a deed of trust. 2 Kerr's Cyclopaedia Code of California, 2031; 14 Cal. 257; 73 Am. Dec. 651; 57 Cal. 480; 2 Cal. 116; 55 Cal. 298; 66 Cal. 281; 5 Pac. 353; *Id.* 813; 39 Pac. 922; 13 Mass. 1; 7 Am. Dec. 106; 9 Cyc. 667-8; 91 U. S. 406, 23 Law Ed. 225; 44 Ark. 213; 4 Ark. 230; *Id.* 76; 46 Ark. 50; 14 Ark. 610; 25 Ark. 261; 61 Ark. 1; 70 Ark. 493; 107 Ark. 70; 114 Ark. 82.

3. There was no legal tender of the amount paid by Tate within one year from the date of sale. In order to make good a tender, the money must be actually produced. 21 Ark. 559; 45 Mich. 345; 83 N. W. 144.

A. D. DuLaney, for appellee.

1. The deed of trust shows on its face that there was no waiver of the right of redemption, and, therefore, that right exists. The laws of this State and not of California will control. Minor, Conflict of Laws, 28; 71 Ark. 511; 90 Ark. 361.

The sale is void, because there was no appraisement of the land as required by statute. Kirby's Dig., § § 5416, 5417, 5418; 81 Ark. 303; 70 Ark. 492; 55 Ark. 274.

The deed of trust was given as security for a debt, and is in legal effect a mortgage. 54 Ark. 184; 31 Ark. 437.

2. The deed of trust provided that payment on the debt should be made to the trustees, and the tender to them was proper. It was made within the time allowed by law, and, being refused, it was renewed and kept good in the court below. 21 Ark. 563; 90 Ark. 209; 85 Ark. 30.

KIRBY, J., (after stating the facts). (1) There is no merit in the contention that the deed of trust was a California contract and that the laws of that State govern in the procedure for the sale of lands thereunder. "The general rule without any diversity of opinion is that the alienation, transmission and descent of real estate is governed by the laws of the country or State in which it is situated," as said in *Crossett Lumber Co.* v. *Files,* 104 Ark. 602.

(2) The lands conveyed by the deed of trust are situated in this State and their sale under the power contained in the deed must have been in accordance with our laws regulating such sales in order to be valid and this without regard to where the contract was entered into or with what intention made.

(3) Our law requires that all lands sold under mortgages or deeds of trust shall be first appraised and shall not sell for less than two-thirds of the appraised value thereof unless at a second offering as provided. Kirby's Digest, § § 5416, 5418.

(4) A deed of trust is in legal effect a mortgage and sales made under the powers contained in mortgages and deeds of trust are void if not in compliance with the statute requiring such appraisement of the lands before sale made. *Craig* v. *Meriwether,* 84 Ark. 303; *Kelley* v. *Graham,* 70 Ark. 492; *Ellenbogen* v. *Griffey,* 55 Ark. 274; *Cross* v. *Fombey,* 54 Ark. 184; *Turner* v. *Watkins,* 31 Ark. 437.

(5-6) Under our law, the mortgagor and his successors in interest are given one year from the date of sale in which to redeem the mortgaged lands by payment

of the amount for which the property is sold and 10 per cent interest thereon and the costs of the sale. Kirby's Digest, § 5416; *Allen* v. *Swoope,* 64 Ark. 576; *Wood* v. *Holland,* 57 Ark. 198; *Fields* v. *Danehower,* 65 Ark. 392. The lands herein were not appraised before the attempted foreclosure sale thereof under the deed of trust in California and the testimony shows that the appellees are the successors in interest to the mortgagor and tendered the amount of money required by law to redeem the lands from the mortgage sale within one year from the date thereof and continued the tender in force by bringing the money into court. This would have effected a redemption from the sale if it had been valid even, and resulted in a satisfaction of the mortgage lien, which discharged the lands therefrom.

It is next contended that it was not the intention of any of the parties to the contract that there should be a right of redemption of the lands and that such right was waived by the execution of the deed of trust in the State of California under the laws of which State no redemption was permitted.

(7) As already said the laws of this State control and govern in all matters relating to the alienation, transmission and descent of real estate situate here and since the right of redemption is given by our statute, it could be exercised unless waived in a manner recognized under our laws. The statutes, sections 5416, 5420, Kirby's Digest, provide a right of redemption to the mortgagor, his heirs and legal representatives from all sales of real property under mortgages and deeds of trust, and in all cases of such sales under an order or decree of the chancery court in the foreclosure of mortgages and deeds of trust, "that the mortgagor may waive such right of redemption in the mortgage or deed of trust so executed and foreclosed." This deed of trust was not foreclosed in the chancery court, and there are no expressions or terms in the deed of trust, indicating any intention upon the part of the mortgagor to waive the right of redemption and it appears to be the manifest purpose of the

law to require such intention expressed in the deed of trust or mortgage foreclosed in order to the validity of any such waiver.

(8) The successors to the mortgagor's interest had the right to redeem the lands from the foreclosure sale within the time provided by law and the evidence is sufficient to show they availed of this right.

The decree of the chancellor was right and it is affirmed.

WILSON v. STORTHZ.

Opinion delivered March 22, 1915.

1. WILLS—INTENTION OF TESTATOR—EVIDENCE TO EXPLAIN.—The testator's intention must be gathered from the will, and, while evidence may be received to explain any ambiguity in the designation of a beneficiary, yet neither the scrivener, nor any one else, however closely related to the testator, can be permitted to testify that the testator meant or intended any disposition of his property not expressed in the will.

2. WILLS—EVIDENCE—INTEREST OF DEVISEES.—A testatrix devised certain property to her heirs, without naming them. A. and R., supposing themselves to be the only heirs, took said property and attempted to convey it. *Held*, evidence that the testator intended the property solely for A. and R. is admissible to show the interest claimed by A. and R., and what they purported to convey.

3. ADVERSE POSSESSION—TITLE OF CLAIMANT.—Land was devised to the testator's heirs. A. and R. were regarded as the only heirs and deeded the land to S. *Held*, S. may set up title by adverse possession against other heirs of the testator, although he bought from A. and R. with the knowledge that there might be other heirs.

4. DEEDS—INTEREST CONVEYED—RECITAL IN DEED—PRESUMPTION.—One entering upon the possession of land under a deed of conveyance to him is presumed to occupy and intends to claim only the interest named in his conveyance.

5. DEEDS—DEED OF CO-TENANT—INTEREST CONVEYED—PRESUMPTION—ADVERSE HOLDING OF GRANTEE.—A. and R., two of a number of co-tenants of certain lands, under a will, deeded the land to S. without reciting in the deed the interest conveyed. *Held*, it then became a question of fact as to what interest the deeds were intended to convey, and what interest S. secured thereby, and the presumption is that as A. and R. did not, in fact, own the whole title, and consequently could not convey the whole title to him, that he entered as a co-tenant, and that his holding was not adverse to the other co-tenants.

6. ADVERSE POSSESSION—RIGHT OF CO-TENANT.—**The grantee of the interest of one cotenant of certain lands, who held possession and claimed the whole interest, held to be adverse, under the evidence, to the interest of other cotenants of the said lands.**

7. CONFLICT OF LAWS—INHERITANCE—REAL PROPERTY.—Inheritance is governed by the *lex rei sitae.*

8. DESCENT AND DISTRIBUTION—ILLEGITIMATE CHILDREN—NEGROES.—**Under Kirby's Digest, § 2638, illegitimate children may inherit or transmit an inheritance, on the part of the mother, as if they were legitimate of their mother.**

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

Charles C. Reid, Ashley Cockrill and *H. M. Armistead,* for appellant.

The burden was upon appellees to prove adverse possession, commencing with all of its elements on or before August 1, 1904, and continuing with all of its elements for seven years. 80 Ark. 19; 65 Ark. 426; 42 N. E. 431; 46 So. 635; 84 N. E. 893; 107 Ark. 374.

The only attempt at proof of notoriety, Storthz' testimony that he told Harp at the time he purchased from Williams and Crusoe, that he was the sole owner, was inadmissible. 77 Ark. 309. There must have been actual notice to the other owners of such a declaration. 87 Ark. 496; 57 S. E. 769.

Attornment of occupiers to one co-owner will not start the statute. 30 S. W. 817; 49 Cal. 241; 29 Pac. 635; 92 Ark. 139. The suits filed by the women could not accomplish an ouster of the co-heirs. An ouster must be by taking possession.

The possession of Storthz can not be made to relate back to the date of the filing of those suits and thus become the adverse possession of the two women, because he held under deeds to undivided interests, and claimed that there were many co-heirs of the two women who were also owners. The co-heirs were not bound to take notice of the suits or the deeds. There must have been "actual notice, or notorious acts of an unequivocal character." 99 Ark. 451; 109 Ark. 281; 55 Ark. 109; 69 Ark. 95; 80 Ark. 444; 77 Ark. 201; 90 Ark. 149; 102 Ark. 611; 99 Ark. 84.

A deed to an undivided interest will not be color of title so as to support constructive possession. 73 Atl. 1025; 55 Ark. 109; 88 Ark. 318; 121 S. W. 552; 11 S. W. 779; 110 Ill. 609.

W. T. Tucker, for appellee Storthz.

1. The law does not require the occupying tenant to give notice of his exclusive claim to all others who were or might be interested in the title. Williams and Crusoe in this case took possession in 1900, as owners to the exclusion of all others, and denying that there were any other heirs. The record affirmatively shows that there was never a time when the alleged cotenancy of the appellant and his grantors was recognized or ever known. 57 Ark. 110; 20 Ark. 359, 374; 20 Ark. 557; *Id.* 508, 516; 33 Ark. 151; 154 S. W. (Tex.) 230; 102 Ark. 611, 615; 149 S. W. (Tex.) 218.

2. Appellant should not recover because his grantors had no inheritable blood, or at least none proved. It is proved that they were slave negroes born before the Civil War, and there is no proof that such negroes have any inheritable blood in North Carolina. 234 U. S. 615; 11 La. Ann. 232; 23 Miss. 170; 35 Fla. 39; 48 Am. St. 238; 6 Am. Dig. 2026; 98 N. C. 31; 49 La. Ann. 625; 183 Mass. 448.

Coleman & Lewis and *Miles & Wade,* for appellee Miles.

1. On the question of adverse possession, the presumptions are in favor of the findings of the chancellor, on appeal, and his findings will not be disturbed unless clearly contrary to the preponderance of the evidence. 95 Ark. 482; 73 Ark. 489.

It is apparent from the evidence that appellees and their grantor's, through their tenants were in actual and visible possession of the property for more than seven years. It was not necessary that appellees should have been in personal occupation of the land. Possession by a tenant inures to the benefit of the claimant of ownership and satisfies the condition of the statute. 1 Ruling

Case Law, § 42, and cases cited in note 18; 1 Cyc. 983; 75 Ark. 395. The law of attornment does not support appellant's contentions. 80 Ark. 435; 92 Ark. 35.

Appellant's grantors were ousted prior to August 1, 1904, and adverse possession began to run in favor of appellees and their grantors. 1 Ruling Case Law, § 43, and cases cited; 68 Mo. 164; 53 Neb. 156; 27 Neb. 47; 77 Ark. 201. Actual notice to a cotenant out of possession is not necessary to start the statute to running. 102 Ark. 611; 90 Ark. 149; 69 Ark. 562.

Williams and Crusoe went into possession adverse to appellant's grantors, and never recognized them as cotenants. This amounted to a disseizin and started the statute of limitation. 67 Am. Dec. 733. The execution of deeds by them to Storthz amounted to an ouster, and he went into exclusive possession under adverse claim. 50 Ark. 152; 154 S. W. (Tex.) 230; 149 S. W. (Tex.) 218; 102 Ark. 611.

2. There is no merit in the contention that there is no privity or continuity of claim as to appellee Miles, and that there can be no tacking of successive possessions. The right to tack possessions under the circumstances shown by the record is well established. 86 Ark. 460; 67 Ark. 93; 98 Ark. 30; 106 Ark. 9; 97 Ark. 369; 71 Mo. 524; Wood on Limitations, § § 271-2. See, also, 14 Pa. St. 297; 24 Col. 252; 6 Watts (Pa.) 377; 101 Mo. 484; 67 Ark. 84; 97 Ark. 369; 1 Cyc. 1006, § 4.

3. If plaintiff is to recover anything, he should not, under the evidence, be permitted to recover the proportion awarded him by the chancellor.

4. The will gave the property to Ann Crusoe and Rosa Williams, and the chancellor should have so found. All the facts and circumstances surrounding the testator at the time she executed the will, as well as the testimony of Doctor Bentley and Evelyn West, go to show that she had only Ann and Rosa in mind and intended them to have the real estate. 49 Me. 288; 81 Ark. 235; 102 Ia. 322; Page on Wills, § § 365 and 514; Wigram on Wills, 263.

5. Grantors of appellant are illegitimate residents of North Carolina, and are not heirs of Tabitha Smith in Arkansas.

The act of February 6, 1867, does not benefit appellant because that law was enacted for negro citizens of Arkansas, and not for non-residents, and appellant does not establish facts sufficient to bring his grantors within the law if it had any application to them. See cases cited in Storthz brief, also 28 Ky. 460; 112 Ill. 234; 34 Pa. St. 126; 98 N. C. 31.

C. C. Reid and *Cockrill & Armistead,* for Wilson, on cross-appeal.

1. The will is not ambiguous and there was no necessity to resort to extraneous evidence in order to arrive at the testator's intention. The testimony of Doctor Bentley and Evelyn West was not admissible. 90 Ark. 154. The use of the word "heirs" in a will means all his heirs who would take according to the statute, and can not be limited by construction to particular heirs. 87 N. W. 564; 40 Cyc. 1459; *Id.* 1389; *Id.* 1412; 119 Ind. 254; 4 Ind. 519; 29 Gratton 9; 225 Pa. St. 574.

2. There is nothing in the record to warrant the conclusion that appellant's grantors are illegitimate; but their right to inherit is set at rest by this court's construction of the Acts of 1866 and 1867, and of Kirby's Dig., § 2638. 38 Ark. 487.

SMITH, J. Tabitha Smith, a negro woman, died February 17, 1900, owning the lot situated at the corner of Ninth and Louisiana streets in the city of Little Rock, which constitutes the subject-matter of this lawsuit. There were three houses on the lot at the time of her death; she lived in one of them and rented the other two. She made a will on February 16, under which she gave to a niece certain personal property and devised her real estate, which consisted of the lot in controversy, to her heirs, with directions that the real estate be sold if the heirs did not agree, and that the proceeds of the sale be divided among them.

Tabitha's companion and close friend, one Evelyn West, was named as executrix, and qualified as such, and collected the rents until June 20, 1901, when she resigned, and one Joshua A. Harp, qualified as administrator, and collected the rents. He filed a final settlement April 3, 1902, but collected rents after his discharge as administrator.

Tabitha Smith was born a slave in North Carolina and was brought to Pulaski County two years before the war, and thereafter resided in said county until her death. A niece of Tabitha's, named Ann Crusoe, was brought to this State at the same time. In 1891, Tabitha returned to North Carolina to visit her relatives, and on her return brought back with her a grand-niece named Rosa Williams. Neither Ann Crusoe nor Rosa Williams was living with Tabitha at the time of her death, but they were soon advised of that fact and appeared on the scene as claimants of the entire estate as sole heirs, and as sole devisees under the will. Tabitha's relatives back in North Carolina were never advised of her death until 1910.

On July 24, 1903, Ann Crusoe conveyed "all my undivided interest" in the above-mentioned lot for the consideration of a thousand dollars to appellee Storthz, and on July 7, 1903, Storthz obtained a deed from Rosa Williams conveying "all my undivided interest" for the consideration of $300. In the meantime Harp had made final settlement of his administration and had been ordered to pay over, and had paid over, to Ann Crusoe and Rosa Williams the balance of rents in his hands. This payment was made to them upon the supposition that they were the only heirs of Tabitha Smith. Harp continued to collect rents after his discharge as administrator for the account of Ann and Rosa until Storthz's purchase, at which time he accounted to Storthz for the balance in his hands, and Parker & Ewing, rental agents, were given charge of the property and the tenants in possession were notified to thereafter pay rent to Parker & Ewing, and the rents were so paid.

On December 19, 1903, Ann Crusoe and Rosa Williams filed suits in the Pulaski chancery court against Storthz for the cancellation of their conveyances, and against Harp for an accounting for the rents. They alleged that Storthz had obtained deeds from them through fraud. On June 15, 1906, Ann Crusoe took a nonsuit, but she refiled the case and prosecuted it to a final decree. Both suits reached this court, and the result of the litigation was that Rosa Williams, recovered her interest, while Ann Crusoe was unsuccessful.

The pleadings in those cases, together with certain depositions then taken, were offered in evidence in this case, and from them it appears that one of the chief questions of fact involved in that litigation was the adequacy of the consideration paid by Storthz. Storthz testified in that case that he paid less than the property was worth, but as much as he could afford to pay in view of the uncertainty about the title. But there is no intimation in the record in either case that Storthz ever admitted he had bought less than the whole title, or that the deeds to him conveyed anything less than the whole title. He appeared to recognize the possibility that he had not acquired the whole title, but his grantors insisted they had conveyed the whole title and this was the interest which he thought he had purchased. The opening sentence in the opinion in the case of *Storthz* v. *Williams,* 86 Ark. 460, shows the supposed interest over which the parties were litigating and the construction placed by them upon the will of Tabitha Smith.

Appellee Miles, by mesne conveyances, acquired the interest of Rosa Williams and since August 4, 1908, has been the owner of that entire interest, and has had joint possession of the lot with his cotenant Storthz, since that date.

Justin Matthews, a real estate dealer in the city of Little Rock, undertook to purchase the lot from appellees, and secured an option from Miles for his undivided half for the consideration of $3,000, but failed to agree on terms with Storthz, because Storthz would not exe-

cute a warranty deed for his undivided interest for that consideration.

The proof shows the lot to be worth from twelve to twenty thousand dollars. After failing to buy the interest of appellees, Matthews looked up the heirs of Tabitha Smith and located them in North Carolina, and secured deeds from them during the months of March, April and May, 1911. The consideration paid for these deeds aggregated less than $400. These deeds were taken in the name of appellant, who brought this suit in ejectment on August 1, 1911, and, without objection, the cause was transferred to chancery, where the court held that all of appellant's grantor's were barred by the adverse possession of appellees, except those under the disability of coverture. The chancellor decreed twenty-nine fortieths to appellees, and eleven fortieths to appellant, and all parties have appealed from that decree.

(1-2) Proof was offered touching the proper construction to be given Tabitha Smith's will. Evelyn West, who knew more about Tabitha's affairs than any other person, testified that it was Tabitha's intention to give the entire property to Ann Crusoe and Rosa Williams; and she was corroborated by Doctor Bentley, who was the attending physician and who wrote the will. This evidence was, of course, inadmissible for this purpose. The testator's intention must be gathered from the will, and while evidence may be received to explain any ambiguity in the designation of a beneficiary, yet neither the scrivener, nor any one else, can be permitted to testify that the testator meant or intended any disposition of his property not expressed in the will. *Longer* v. *Beakley,* 106 Ark. 219. This evidence was admissible to show, however, the interest claimed by Ann Crusoe and Rosa Williams and the interest which they purported to convey to Storthz. *Jeffery* v. *Jeffery,* 87 Ark. 496; *Seawell* v. *Young,* 77 Ark. 309.

(3) Among other depositions offered in evidence, by agreement, which were taken in the former litigation were those of Ann Crusoe and Rosa Williams, in which

they each testified, that they were the only heirs of Tabitha Smith. And there were also other depositions in which it was stated that an abstract of title had been prepared and examined by lawyers of reputation and Tabitha's Smith title was approved, and Storthz received no intimation that Ann Crusoe and Rosa Williams were not the owners of the whole title, and it appears beyond any question, in fact without dispute, that Storthz claimed the entire lot subject only to the possibility that there might be some unknown heir who could claim an interest. After Storthz's purchase he exercised every act of ownership over the lot of which it was capable. Storthz's uncertainty about the existence of other heirs is not incompatible with his claim of adverse possession. One need not have a perfect title to set up that defense. Indeed, it may be made by one whose original entry was a trespass, and that is the theory upon which title by adverse possession is acquired. This adverse entry, or wrongful ouster, gives one a cause of action to dispossess the adverse occupant and if the suit be not commenced within seven years then it can not be maintained at all.

The proof of the proceedings in the probate court shows that all of the assets in the hands of the administrator were distributed to Ann Crusoe and Rosa Williams as sole heirs and as sole devisees of Tabitha Smith.

The property had gotten in very bad repair and it was found necessary to tear down one of these houses. Storthz repaired the other two and spent considerable money in having them papered, and for plumbing and for painting and whitewashing. He made other repairs about the premises, including the cleaning out of the cistern, and he complied with ordinances of the city in building cement sidewalks along both of the streets on which the lot fronted. And he paid all taxes and special assessments in his own name, as sole owner, until Miles acquired his interest, since which time these charges have been jointly paid by him and Miles.

The principal question in the case is whether or not, under this evidence, appellees can be heard to say

that their possession has been adverse to their cotenants, who were appellant's grantors. We are referred to the case of *Parsons* v. *Sharpe,* 102 Ark. 611, in which case the court said: " 'The conveyance by one cotenant of the entire estate gives color of title; and, if possession is taken, and the grantee claims title to the whole, it amounts to an ouster of the cotenants, and the possession of the grantee is adverse to them.' 1 Am. & Eng. Enc. of Law (2 ed.), p. 806, and numerous authorities there cited.

"That rule was recognized by this court in *Brown* v. *Bocquin,* 57 Ark. 97.

"On the other hand, the principle is well settled that where a conveyance is executed to a stranger by one tenant in common, purporting to convey only his undivided interest, he becomes a tenant in common with the other tenant (17 Am. & Eng. Enc. of Law, [2 ed.], p. 661; and, in order to constitute an ouster, 'the tenant out of possession must have actual notice of the adverse holding, or the hostile character of the possession must be so openly manifest that notice on his part will be presumed.' 1 Am. & Eng. Enc. of Law, (2 ed.), p. 805.

"The conveyance to appellant Parsons, being a conveyance only of the undivided interests of some of the tenants in common, falls within the latter rule, and is controlled by the case of *Singer* v. *Naron,* 99 Ark. 446, where we declared the law to be that 'in order for the possession of one tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly, or by such notorious acts of an unequivocal character that notice may be presumed.' "

(4-5) It is true the deeds to Storthz did not recite that the interest conveyed was in each case an undivided half. Had this been done the opinion in the case of *Parsons* v. *Sharpe, supra,* would have been conclusive of this litigation. The rule is that one entering upon the possession of land under a deed of conveyance to him is presumed to occupy, and intends to claim only the interest

named in his conveyance. But, as the deeds to Storthz did not recite the interest therein conveyed; it became a question of fact as to what interest the deeds were intended to convey and what interest he secured thereby, and the presumption would be that, as his grantors did not, in fact, own the whole title, and, consequently could not convey the whole title to him, he entered as a cotenant, and that his holding was not adverse to the other cotenants.

There is a vast wealth of authorities on the right of one cotenant to claim adversely to another, and of the circumstances under which he will be held to have done so. But we need not go beyond the decisions of our own State to find a full discussion of the law on this subject. The case of *Singer* v. *Naron,* 99 Ark. 446, reviews a number of cases on this subject and concludes the discussion with the statement quoted in the case of *Parsons* v. *Sharpe, supra.*

(6) Does the evidence in this case meet the requirements set out in the cases cited? The chancellor found that it did, and we can not say that his finding is contrary to the preponderance of the evidence. The facts which we have recited show that there was never any question with Storthz about the interest which he had purchased, nor that his holding was adverse. It is true his cotenants received no actual notice of this adverse holding, but none could have been given them. Storthz was unaware of their existence. And when all the circumstances of this case are taken into account there appears to be such evidence of the adverse holding, as meets the requirements of the above cited cases. It is certain that Matthews knew of it long before he invested a dollar in this property, and while it is true that seven years have not expired since Matthews' attempt to purchase this lot, this is one of many circumstances which advised Matthews, and which in connection with all of the other circumstances, should have advised all others, of the adverse claim which appellees were making to the lot.

It is insisted there should be no recovery whatever here, for the alleged reason that the collateral kindred of Tabitha Smith can not inherit from her. It is urged that there were no valid marriages of slaves before the war, and that as slaves could not inherit at common law, no right of inheritance can be derived from one born a slave, except as such rights may have been given by statute. We are cited to the case of *Jones* v. *Jones,* 234 U. S. 615. The syllabus in that case is as follows:

"The surviving brothers and sisters of a colored freedman dying intestate, who were the children of a born slave and were themselves born slaves, are not denied the equal protection of the laws, contrary to U. S. Constitution, Fourteenth Amendment, by a decision of a State court construing Shannon's Comp. Tenn. Laws, § 4163, preferring the brothers and sisters of an intestate dying without issue over the husband or widow, as applying only to brothers and sisters born free, with the result that the intestate's real property acquired by him while he was a freedman passed to his widow under section 4165, which provides that if one dies intestate 'leaving no heirs at law capable of inheriting the real estate, it shall be inherited by the husband or wife in fee simple.' "

(7) The decision of that case turned, of course, upon the consideration of the laws of Tennessee, in which State the case originated. That case announced the well known rule that inheritance is governed by the *lex rei sitae,* and it was there said: "It (inheritance) is not a natural or absolute right, but the creation of statute law. If one claim the right to succeed to the real property of another, as heir, and his right is denied because he must trace his pedigree or title through an alien, a bastard, or a slave, the question is one to be determined by the local law."

(8) But we have had legislation on that subject, which Tennessee apparently has not had. Section 2638 of Kirby's Digest, is as follows: "Illegitimate children shall be capable of inheriting and transmitting an in-

heritance, on the part of their mother, in like manner as if they had been legitimate of their mother."

The proof is that all the heirs interested in this property trace their descent from Tabitha Smith's mother, who appears to have been twice married. The section of the Digest quoted was construed in the case of *Gregley* v. *Jackson,* 38 Ark. 487, where it was said: "But with regard to children professedly *illegitimate,* the same act provides that they shall be capable of inheriting and transmitting an inheritance *on the part of the mother,* 'in like manner as if they had been legitimate of their mother.' Legitimate children *of the mother* may transmit an inheritance to any and all collateral relations on the mother's side, who are of her blood, and so may her illegitimate children. This construction is too obvious to allow any serious consideration of the suggestion that the statute was meant to confine inheritance of illegitimate children to or from the mother, or through her in the direct ascending or descending line. 'On the part of the mother,' means on the mother's side of the genealogical tree. The effect of the old legislation was meant to be remedied to cure illegitimacy in the innocent. It amounted to this, that if there had been an actual marriage ceremony, the children should be legitimate for all purposes, although the marriage might be null. If it were a case of simple bastardy, the children were to be considered, nevertheless, upon the same ground with regard to heritable blood, as if the father were dead, leaving no blood relations. The father being supposed unknown, was simply ignored with all his blood, but no new laws of inheritance were intended, as to further line or limit."

In addition to the section of the Digest above quoted, we have an act, approved February 6, 1867, which is entitled, "An Act to declare the rights of persons of African descent." Section 3 of this act reads as follows:

"That all negroes and mulattoes who are now cohabiting as husband and wife, and recognizing each other as such, shall be deemed lawfully married from the pas-

sage of this act, and shall be subject to all the obligations, and entitled to all the rights pertaining to the marriage relation; and in all cases, where such persons now are, or have heretofore been so cohabiting, as husband and wife, and may have offspring recognized by them as their own, such offspring shall be deemed in all respects legitimate, as fully as if born in lawful wedlock." Act No. 35, of Acts of 1866-1867.

This act has never been carried into any Digest, yet it is discussed in the case of *Gregley* v. *Jackson, supra,* where it was said:

"Looking to its language, its remedial nature, and the circumstances of which the court can take cognizance, it would be a very narrow, and exceedingly literal, construction of this act to exclude from its scope those children, whose parents, although then dead, had cohabited as husband and wife, and recognized them as their offspring. The act is not in derogation of the common law. It is in aid of it—applying its rules of inheritance to what was really a new people, amongst whom there had been formerly no marriages, no property, nor any rules of inheritance whatever. It had in view the complete homologation of all *legal* rights of all classes in the State, as distinct from *political* rights—the latter coming through the Federal Constitution and acts of Congress.

"In any view of the case, whether considered simply as illegitimate children of one mother, or as Africans, the offspring of a former slave marriage, the brothers could inherit from each other, and Marshall Jackson, as held by the circuit court, became the heir of Jacob Keith."

It is also insisted that the court erred in holding that Emma Elliott, one of the heirs, inherited a one-eighth interest, when the court should have found that the said Emma Elliott owned a one-sixteenth interest. On the other hand, it is urged that appellant was not allowed to recover a sufficiently large interest, for the reason that certain of appellant's grantors were under the disability of minority prior to their conveyance. We have con-

sidered these questions and, without reviewing the evidence in support of the respective contentions, we have concluded that the chancellor's finding is not contrary to the clear preponderance of the evidence. The decree of the chancellor is, therefore, affirmed.

ALLEN v. STATE.

Opinion delivered March 22, 1915.

1. ASSAULT WITH INTENT TO KILL—PROVOCATION—DELIBERATION.—Where an assault is made with a deadly weapon, with the specific intent to kill the person assaulted, and where no considerable provocation appears, or where the circumstances show an abandoned and wicked disposition upon the part of the assailant, the offense of an assault with an intent to kill is established, regardless of whether or not the assault was committed with deliberation.
2. ASSAULT WITH INTENT TO KILL—MALICE—INTENT.—If an assault be committed with the specific intent to take life, and with a deadly weapon, under circumstances which show implied malice, it will be sufficient to constitute the crime of an assault with intent to kill, even though there be no express malice; there must be malice, either express or implied, but either is sufficient.
3. ASSAULT WITH INTENT TO KILL—ELEMENTS OF CRIME—EVIDENCE.—A charge of assault with intent to kill can not be sustained unless the evidence would have warranted a conviction for murder if death had resulted from the assault, but the proof will be sufficient to sustain the charge where, if death had resulted from the assault it would have been murder in the second degree, coupled with the specific intent to take the life of the person assaulted.
4. CRIMINAL LAW—ARREST—CRIME COMMITTED IN THE PRESENCE OF OFFICER.—Where a constable saw A. sell whiskey, unlawfully, to B., and arrested B., directing a deputy constable to go and arrest A., the arrest will be held to have been made for an offense committed in the presence of the officer making the arrest, where only a few minutes elapsed before A. was arrested, and where the deputy actually making the arrest was near at hand.
5. CRIMINAL LAW—ARREST—NECESSITY FOR WARRANT.—It is not necessary for an officer to have a warrant in order to arrest a person engaged in the act of illegally selling liquor.

Appeal from Miller Circuit Court; *George R. Haynie*, Judge; affirmed.

STATEMENT BY THE COURT.

The appellant was convicted of the crime of assault with intent to kill one Dick Choate, and he has duly prosecuted this appeal.

On the part of the State, there was evidence tending to show that on the night of October 23, 1914, Dick Choate, who was a deputy constable, and John Strange, a special deputy, and Walter Crowell, the regular constable, passed the appellant's restaurant. Crowell went around to the back door and saw the appellant let a negro named Tom Crump have some whiskey. Crump was intoxicated and Crowell arrested him and found a bottle of whiskey upon his person. He took Crump to jail, which was about fifty or sixty feet from appellant's restaurant. While he was in jail, he directed his deputy, Choate, to arrest appellant. Crowell could see appellant from the jail door locking up his restaurant. The next thing Crowell knew, he heard two shots, close together. He unlocked the jail door, and when he got outside he saw a scuffle between appellant and one Coleman and his deputy, Choate. Coleman was lying on his back, appellant was on top of him and Choate was over both of them. Appellant had hold of Choate's gun. Crowell, the constable, drew his gun on appellant and demanded of him to turn Choate's gun loose; he did so and grabbed Crowell's gun. The reports of the first two shots that were fired were the reports of a small pistol and the last two were loud reports. Crowell did not notice before he lodged appellant in jail that appellant had been shot, but appellant was bloody. Crowell had had a warrant that morning for appellant. Appellant was searched at the jail and two pocket knives and some money were found on his person. Choate testified for the State that he arrested the appellant on the charge of running a "blind tiger." He told him at the time that he had a warrant for him, the appellant asked when he was supposed to have been running a "blind tiger," and witness told him that he would inform him when they got to the jail. Appellant kept pulling back; Jack Coleman, who was accompanying the witness, Choate, caught ap-

pellant by the right arm and Choate caught him by the left arm; they had gone about twenty feet from where they started and appellant kept trying to get his left hand loose. Appellant pulled his pistol with his right hand and fired at the witness. Witness grabbed appellant's wrist and appellant fired again. Appellant then threw the pistol about ten feet; witness hit the appellant with his gun while the same was in the scabbard; witness did not draw his gun until appellant had drawn his; when witness hit appellant with his gun, it went off and appellant grabbed it and all three fell together; at the time they fell, witness's gun went off again and the shot took effect in appellant's jaw. Witness knew appellant before he arrested him; witness did not, in fact, have a warrant at the time that he arrested appellant; appellant did not ask the witness to show any warrant.

On behalf of the appellant, the proof tends to show that he and his wife were on their way to a circus and met Choate and Coleman, who directed appellant to halt; they walked up to appellant and one of them shoved his hand into appellant's coat pocket and the other slapped him on the side. Appellant said, "Wait a minute, what are you going to do to me?" and one of them answered, "Don't give me none of your head," and hit appellant with a gun; appellant commenced backing off; they got him about middle ways the street car track when Mr. Choate hit him again; appellant was weak from loss of blood, and when he got up on the sidewalk Choate hit him again and knocked him from the sidewalk; appellant then threw up his hands and caught the barrel of Choate's gun, and all three of them fell together; Choate again hit him with the gun and appellant by that time was "bleeding like a hog;" Crowell came up, and the three of them took appellant into the jail. While in the jail, Choate walked up near the edge of the door, pulled his gun out quickly and threw it up to make a shot; appellant threw his hand up and the bullet went through one of his fingers and through his jaw; ap-

pellant did not own a gun and had no gun on him that night; the cartridges taken off of him had been taken by appellant out of an old gun that belonged to his boy. Choate and Coleman searched appellant, getting his money and a bottle of whiskey. Appellant knew Choate, but did not know the man that was with him; he knew Choate was an officer, but Choate did not tell appellant that he had a warrant for him.

Another witness on behalf of appellant testified that he had a lunch stand across the street in front of which the trouble occurred; there were about two or three of the shots and he saw some of them; all of them were fired in the air; the first two seemed to be from a small gun; he did not hear any shot fired in the jail.

The court, on its own motion, instructed the jury as follows:

"Gentlemen of the Jury: This defendant, Tom Allen, is on trial under his plea of not guilty, charged with assault with intent to kill, alleged to have been committed upon one Dick Choate. The burden is on the State in this case to prove the defendant's guilt from the evidence beyond a reasonable doubt; and if after considering all the evidence in the case you entertain a reasonable doubt as to defendant's guilt, you will give him the benefit of that doubt by an acquittal.

"Now, gentlemen, I will read you the statute under which this indictment was returned and upon which this defendant is being prosecuted: 'Whoever shall feloniously, wilfully and with malice aforethought assault any person with intent to murder or kill, shall administer, or attempt to give any poison or potion, with intent to kill or murder, and their counselors, aiders and abettors shall, on conviction thereof, be imprisoned in the penitentiary not less than one nor more than twenty-one years.'

"The intent in this case is one of the most important ingredients of the offense. Before you could convict this defendant of assault with intent to kill, you would have

to find from the evidence beyond a reasonable doubt that at the time of the alleged attack by him upon the witness, Dick Choate, that he had malice in his heart, and that he had a specific intent in his mind at that time to take the life of the witness, Dick Choate.

"Now gentlemen, in this charge there is included two other charges. After considering the question as to the charge of assault with intent to kill—if, after considering all the evidence upon that charge, you entertain a reasonable doubt as to defendant's guilt of the charge of assault with intent to kill, then you will acquit him of that charge, and then next consider the question of whether he is guilty of an assault with a deadly weapon, and this is the statute upon which that charge is to be based:

"'If any person assault another with a deadly weapon, instrument or other thing, with an intent to inflict upon the person of another a bodily injury where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition, he shall be adjudged guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than fifty nor exceeding one thousand dollars and imprisoned not exceeding one year.'

"If you find from the evidence in considering this charge that the defendant is guilty of that charge, then your verdict will be, 'We, the jury, find the defendant guilty of an assault with a deadly weapon,' and fix his punishment at a fine not less than fifty nor more than one thousand dollars, and imprisonment for some time in the county jail not exceeding one year. If, after considering all the evidence upon that charge you should entertain a reasonable doubt of his guilt of that charge, you will acquit him on that charge, and next consider whether he is guilty of a simple assault or not:

"'A simple assault, unattended with any apparent design to commit homicide or felony, shall, upon the conviction of any person thereof, be punished by a fine not exceeding one hundred dollars.'

"So, if you find him guilty of that charge, you will assess his punishment at a fine not exceeding one hundred dollars.

"Now, gentlemen, you are the sole and illimitable judges of the credibility of the witnesses, and in determining the amount of credit that should be given to the testimony of any witness, you should take into consideration his demeanor on the witness stand, his interest or lack of interest, if any, in the result of your verdict, his apparent fairness or lack of fairness in the matter in which he testifies, or any other matter that you think would throw any light upon the credibility that you should give to the testimony of any witness."

Among other prayers, appellant presented the following:

"3. Before you would be authorized to find the defendant guilty of an assault with intent to kill it must be shown from the evidence beyond a reasonable doubt that the defendant intentionally shot at Dick Choate with malice aforethought and with a specific intent to kill said Dick Choate, and if death had resulted it would have been murder."

"4. Murder is the unlawful killing of a human being against the peace of the State with malice aforethought, either express or implied. Malice aforethought means after deliberation, but the period of time of deliberation is not material if the specific intent to kill exists in the mind of the person killing for any period of time before the attempt to kill. The State must, however, show beyond a reasonable doubt that the defendant shot at Dick Choate with a pistol, after deliberation, with the specific intent to kill him, and unless the evidence shows this beyond a reasonable doubt, you should acquit the defendant of the charge of assault with intent to kill."

"8. You are instructed that under the law an officer can make an arrest for a misdemeanor only where a warrant is placed in his hands, or, without a warrant where the offense is committed in his presence; that the law requires that no unnecessary force or violence shall be used

in making an arrest, that the person making the arrest shall inform the person about to be arrested of the intention to arrest him, and the offense charged against him, for which he is arrested, and, if acting under a warrant of arrest, shall give information thereof, and, if required, show the warrant; and if you find from the evidence in this case that Dick Choate attempted to arrest the defendant for a misdemeanor when he had no warrant of arrest, or, if, having a warrant of arrest, he used unnecessary force or violence, or failed to inform the defendant of his intention to arrest him and the nature of the offense for which he was being arrested, then in either event the said Choate was acting unlawfully and the defendant had a right to resist the arrest, using no more force than was reasonably necessary to prevent said arrest."

"9. If you find from the evidence in this case that Choate either alone, or with another, caught hold of the defendant and attempted to arrest him on a charge of violating the liquor laws, or any other misdemeanor, and that at the time the said Choate, or his assistant, had no warrant for the arrest of said defendant, and that the offense upon which the arrest was made was not committed in the presence of said Choate or any officer assisting in the arrest, then you are instructed that said arrest was unlawful and the defendant had a right to resist the same and meet force with force, and if the defendant, without fault or carelessness on his part, used no more force in resisting an unlawful arrest than appeared to him at the time to be reasonably necessary to prevent said arrest, he would not be guilty and could not be convicted of any offense in this case."

The court refused these prayers, and appellant duly excepted.

Webber & Webber, for appellant.

1. To constitute the crime of assault with intent to kill, the evidence must show that had death resulted from the assault, it would have been murder. The court, therefore, erred in refusing to give appellant's third and

fourth requests for instruction. 72 Ark. 569; 82 Ark. 64, 74; 91 Ark. 503.

2. It was error to refuse the eighth instruction requested by appellant. A peace officer can only make an arrest for a misdemeanor where a warrant is placed in his hands, or, without a warrant, where the offense is committed in his presence. Moreover, he is forbidden to use unnecessary force or violence in making the arrest, etc. Kirby's Dig., § § 2119, 2123, 2124; 100 Ark. 139.

The court apparently proceeded on the theory that the constable having had a warrant, or having seen an offense committed, and, therefore, having authority to make an arrest himself, could delegate that authority to his deputy. This is not contemplated by the statute. 55 L. R. A. 866-868; Kirby's Dig., § 2119.

Choate, the deputy, was a trespasser in making this arrest. 100 Ark. 139. Appellant had a right to resist the arrest, using no more force than was reasonably necessary under the circumstances. 76 N. C. 10; 33 L. R. A. (N. S.) 150, note.

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

1. Courts are not required to repeat instructions, and the general charge given by the court having fully covered the matter called for in appellant's proposed instructions 3 and 4, they were properly refused. 88 Ark. 117; 91 Ark. 505.

2. The arrest of appellant without a warrant was lawful, the evidence being sufficient to show that the offense was comitted in the presence of the officer, and he had the power to delegate his authority to his deputy.

WOOD, J., (after stating the facts). Appellant's prayer for instruction No. 3 was correct. *Chowning* v. *State,* 91 Ark. 503-5, and cases therein cited.

(1-2) But the court correctly defined the essential ingredients of an assault with intent to kill in the language of our statute, section 1588, Kirby's Digest. This charge was sufficiently specific to cover the declarations of law contained in appellant's prayers 3 and 4. More-

over, appellant's prayer No. 4 was not the law; it told the jury that before they could convict the defendant they must find that he shot at Dick Choate with a pistol after deliberation, with the specific intent to kill him. Where the assault is made with a deadly weapon with the specific intent to kill the person assaulted, and where no considerable provocation appears, or where the circumstances show an abandoned and wicked disposition upon the part of the assailant, the offense of an assault with intent to kill is established, regardless of whether or not the assault was committed with deliberation. Appellant's prayer No. 4 contains a correct definition of express malice, but if an asasult be committed with the specific intent to take life, and with a deadly weapon, under circumstances which show implied malice, it will be sufficient to constitute the crime of an assault with intent to kill, even though there be no express malice. There must be malice either express or implied, but either one is sufficient. See *Satterwhite* v. *State,* 82 Ark. 64-73.

(3) A charge of assault with intent to kill can not be sustained unless the evidence would have warranted a conviction for murder if death had resulted from the assault, but the proof will be sufficient to sustain the charge where, if death had resulted from the assault it would have been murder in the second degree, coupled with the specific intent to take the life of the person assaulted. See *Chowning* v. *State, supra; Chrisman* v. *State,* 54 Ark. 283.

(4-5) We do not agree with the learned counsel for the appellant in the statement that "the arrest was not made for an offense committed in the presence of the officer making the arrest." We are of the opinion that the uncontroverted facts as disclosed by the testimony set forth in the statement show that the arrest was made for an offense committed in the presence of the constable. The facts show that the constable saw the appellant sell a negro a bottle of whiskey and that he arrested the negro to whom the whiskey was sold and took him to jail; and when he went in the jail, he told his deputy, Choate,

to "go get him (appellant) before he got away." He was then within fifty or sixty feet of the jail. This testimony was uncontradicted, and it was sufficient to show that the arrest was made for an offense committed in the presence of the officer making the arrest. The directions by the constable to his deputy, Choate, under the circumstances were tantamount to an arrest made by the constable himself. The distance was so close and the time intervening between the sale and the directions given the deputy and the arrest made by him were but a part of one transaction and constitute an arrest made by an officer for an offense committed in the presence of the officer making the arrest. It was not necessary for the officer making the arrest under the circumstances to have a warrant in order to constitute the arrest a lawful one. The court, therefore, did not err in refusing appellant's prayer for instructions Nos. 8 and 9 and in admitting the testimony of Crowell showing the circumstances under which the arrest was made. Section 2125, Kirby's Digest, provides that "an officer making an arrest may orally summon as many persons as he deems necessary to aid him in making the arrest." Under the circumstances, even if Choate had not been a deputy constable, the arrest by him of appellant would have been lawful under the above section, for the constable would have had the right to have orally summoned Choate to assist him in making the arrest of appellant. The constable's testimony shows that while he was busy with the arrest and confinement of the other party, he directed Choate to arrest appellant "before he got away." This testimony tends to show that the constable anticipated that the appellant would escape, and, therefore, he directed his deputy to arrest appellant in order to prevent his escape.

The instructions of the court correctly submitted the issues to the jury and the evidence was sufficient to sustain the verdict. The judgment is, therefore, affirmed.

MERIDETH v. MATTHEWS.

Opinion delivered March 22, 1915.

1. CONTRACTS—SALE OF CHATTELS—BREACH—DEMURRER—COUNTER-CLAIM.—In an action for damages for failure by the purchaser to accept and pay for goods bought from the appellee, the defense that the goods were not delivered at the time contracted for, can not be set up by demurrer to the complaint, the time of delivery not being of the essence of the contract; under the facts appellant could have set up appellee's failure to deliver the goods on time, by way of counter-claim.
2. SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES.—The measure of the buyer's damage, where the seller of goods failed to deliver the same according to the contract of purchase, is the difference between the contract price and the market price of the goods, at the time and place of delivery, provided there was a market price for goods of the character and quality contracted for at such time and place.
3. CIRCUIT COURTS—JURISDICTION SECOND CIRCUIT.—Under Act 138, Acts 1911, it shall not be reversible error to try any case in that division in the second circuit, to which the case has not been specially assigned by the act.

Appeal from Clay Circuit Court, Eastern District; *J. F. Gautney*, Judge; affirmed.

STATEMENT BY THE COURT.

The Spartan Hosiery Mills, one of the appellees, obtained a judgment against the appellant on account for merchandise in the sum of $79.28. This judgment was rendered by the justice of the peace on the 4th day of April, 1914. Appellant appealed to the circuit court. The second division of the circuit court in Clay County convened on the 25th of May following. Upon appellant's failure to appear and prosecute his appeal in the circuit court, judgment by default was rendered against him and execution was issued on the judgment. Appellant sought and obtained a temporary injunction restraining the appellee, J. E. Matthews, as sheriff, from levying the execution, and alleged as grounds therefor that he "expected that the appeal would stand for trial at the next term of the first division of the circuit court where all civil cases are tried and disposed of, except where said cases are

tried and disposed of by said second division of said court with the consent of the parties; "that he made inquiry of his attorney whether his appeal could be tried in said second division of said court and was informed that it could not and would not be tried in said second division unless it was done with the knowledge and consent of both the plaintiff and defendant—and that, "without his knowledge and consent, the said appeal was docketed in the said second division of said court, and on May 28, without his knowledge and to his great surprise, plaintiff in said cause obtained a judgment against him in the sum of $79.28 for want of prosecution."

The complaint further set out that the Spartan Hosiery Mills fraudulently induced the clerk of the second division to docket appellant's appeal in that division, and fraudulently induced the court to render judgment against the appellant. Appellant then set up that the custom and practice in the circuit court was that all appeal cases from justices of the peace of the county stand for trial at the next term of the first division of the circuit court where the transcripts are filed with the clerk ten days before the first day of the term; that if the court had been advised of the facts, the court would have either had the plaintiff, or appellant, notified that his case was set for trial, or transferred the case to the first division of the court where same belonged in the absence of the consent of all parties to the litigation.

Another paragraph of the complaint, numbered 6, is as follows:

"The amount said Spartan Hosiery Mills sued this plaintiff for is the price of a bill of merchandise consisting of a lot of gloves; that at the time the plaintiff ordered said bill of goods, the Spartan Hosiery Mills represented to this plaintiff that the goods would be shipped to him immediately, or not later than May 1, 1913, the contract for the purchase of said goods having been entered into on or about April 1, 1913, but that the said bill of goods were not in fact shipped until November 1, 1913, at which time the plaintiff could not use said bill of goods, and con-

sequently refused to accept them; that the main inducement actuating the plaintiff to order and contract for the bill of goods was the fact that it would be shipped and delivered to him not later than May 1, 1913, but the said Spartan Hosiery Mills failed and refused to live up to the contract."

The appellees filed a demurrer to the sixth paragraph of the complaint on the ground that it did not constitute "a meritorious defense to the cause of action originally filed against the plaintiff." The court sustained the demurrer and the appellant rested on the complaint; and the court entered a judgment dismissing the same, from which this appeal has been duly prosecuted.

W. W. Bandy, for appellant.

The demurrer admits the facts stated in the sixth paragraph of the petition. It therefore admits the truth of the statement that "at the time this plaintiff ordered said bill of goods, Spartan Hosiery Company represented to this plaintiff that the goods would be shipped and delivered to him immediately, or not later than May 1, 1913." The word "immediately," modified by the clause "not later than May 1, 1913," makes it clear that the intention of the parties was to make time of the essence of the contract. 1 Parsons on Contracts (7 ed.), 606, 607; 3 *Id.* 338, 339; 134 U. S. 68; 95 Ark. 531; 105 Ark. 626; Bishop on Contracts, § 1344; *Id.* § 1347.

R. H. Dudley, for appellee.

The matters set out in the petition did not constitute a defense, and it was not error to try the case in the second division. 104 Ark. 45; 79 Ark. 338; 35 Cyc. 633; Tiffany on Sales, 235.

WOOD, J., (after stating the facts). (1-2) The demurrer was properly sustained. The sixth paragraph of appellant's complaint does not constitute a meritorious defense; it does not, in express terms, state that the provision of the agreement that "the goods would be shipped and delivered to him immediately, or not later than May 1, 1913," was of the essence of the contract, and the facts stated do not show that it was intended by this provision

to make time the essence of the contract. The most that can be claimed for the allegations of the sixth paragraph are that the appellees, Spartan Hosiery Mills, violated its contract in failing to ship the goods by May 1, 1913, but this did not constitute a meritorious defense to the appellee's cause of action, for the purchase price of the goods. Conceding the facts to be true as the demurrer admits, appellee would have had no right to repudiate the contract, but he could have, on a suit to enforce the same, set up the damages resulting to him on account of the Spartan Hosiery Mills' failure to comply with its contract, by way of counter-claim. *Brownfield* v. *Dudley E. Jones Co.*, 98 Ark. 495. The measure of appellant's damages would have been the difference between the contract price and the market price of the goods at the time and place of delivery, provided there was a market price for goods of the character and quality contracted for at such time and place. See *Walnut Ridge Mercantile Co.* v. *Cohn*, 79 Ark. 338; 35 Cyc. 633.

There are no allegations in the paragraph of the complaint to the effect that appellant was damaged by reason of the failure of the appellee, Spartan Hosiery Mills, to have the goods delivered according to the contract, and setting forth the amount of such damages.

Even if the court erred in sustaining the demurrer to the sixth paragraph, its judgment can not be reversed. Section 6 of Act 138 of the Acts of 1911, providing for an additional circuit judge for the second judicial circuit of Clay County, and regulating the practice in said circuit, provides as follows:

"It shall not be reversible error that any case is tried in the division to which it has not been specially assigned."

In *Blackstad Mercantile Co.* v. *Bond*, 104 Ark. 45, the court had under review the above statute, and after setting out section 6, we said:

"It is manifest from the section just quoted that the jurisdiction of the court does not depend upon the proper assignment of a case to either division. The statute ex-

pressly declares that it shall not even be reversible error; that is, that it shall not affect the validity of the proceedings even on a direct attack by appeal for any case to be tried in a division to which it has not been assigned."

(3) The court, therefore, did not err in sustaining the appellee's demurrer to appellant's complaint, even if it was based upon appellee's complaint. For the judgment rendered against appellant in favor of the appellee on appeal, by the circuit court, under the above statute and decision construing the same, could not be set aside upon the allegations mentioned in appellant's complaint.

The judgment of the circuit court dismissing appellant's complaint is correct, and it is, therefore, affirmed.

KIMBALL v. GOLDMAN.

Opinion delivered March 22, 1915.

1. CARRIERS—DAMAGE TO BAGGAGE—SUFFICIENCY OF EVIDENCE.—Evidence held sufficient to show that the damage to plaintiff's trunk and contents, occurred while the same was in the custody of defendant carrier.
2. DAMAGES—PERSONAL BAGGAGE—MEASURE OF DAMAGES.—Where plaintiff's baggage is damaged while in the custody of a carrier, the value of the personal baggage is to be determined by what it is worth to its owner, and not what it would bring on the market.

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

STATEMENT BY THE COURT.

The facts of this case are correctly and succinctly stated by counsel for appellee, as follows:

The appellant owns a ferry and hack line operating between Arkansas City, Arkansas, and Lamont, Mississippi, which constitutes a necesary link in the chain of transportation from Pine Bluff, Arkansas, to Greenville, Mississippi. Passengers and baggage are taken upon a gasoline ferry-boat at Arkansas City, and, after being landed on the Mississippi side of the river, are carried by hack to Lamont, which is a station on the Yazoo & Mis-

sissippi Valley Railroad, a short distance from Greenville.

On May 13, 1913, the appellee in the course of a trip from Pine Bluff to Greenville, took passage upon appellant's ferry-boat. She had with her a trunk constituting her baggage and containing her wearing apparel for the trip. This trunk was transported by appellant across the Mississippi River on the ferry-boat with the appellee and the other members of her party. The trunk was packed in Pine Bluff the previous day, when its contents were in first-class condition. As the trunk was carried across the river on the same boat with appellee, it came under her observation and the observation of others who were with her, and no damage had occurred up to the time it reached the Mississippi shore.

There was a stretch of back-water between the point where the ferry-boat landed on the Mississippi side of the river and the top of the levee. It was necessary for the passengers to walk across a sand-bar and then cross this back-water in a rowboat operated by appellant's employees. The undertaking of those in charge of the ferry-boat was to land the passengers and baggage on top of the levee, and the rowboat was used by the same people who operated the ferry-boat to complete the trip after the ferry-boat had gone as far as it could on account of the sand bar.

Appellee left the trunk at the top of the levee and went from there to Greenville, Mississippi, by automobile. On arriving at Greenville, she found that the contents of the trunk had been damaged by water. She brought suit against appellant, alleging that the damage was caused through the negligence of appellant in permitting the trunk to get into the narrow strip of water above described. She listed the contents of the trunk and the value of each article, and alleged that the articles were water-soaked and of no value.

The appellant denied the allegations of negligence and denied that the contents of the trunk were damaged while the relation of carrier and passenger existed be-

tween them, and set up that this relation ceased when the trunk was delivered on the Mississippi shore, and that it was delivered at the top of the levee where appellant undertook to deliver it in good condition.

The appellee, in addition to the facts already stated, testified: "The trunk must have gotten wet while being carried across the slough while in the boat because there was no water between the top of the levee and Lamont, for it had not rained. The trunk was in my sight, and I know that the contents when we landed just across the river from Arkansas City, were in the same condition as when they were placed in the trunk at Pine Bluff." Appellee was asked to state the contents of the trunk with the reasonable market value of each article. Appellant did not object to the question nor the answer. The appellee answered the question by enumerating the articles and giving the same value as that stated in the complaint.

Another witness testified in part as follows: That the trunk was on the front end of the boat where he rode going across the river; that he saw it as it was taken from the boat to the bank of the river; upon arrival on the Mississippi shore several of his party and other persons that were on the boat went ahead of the trunk; that he remained behind; that the trunk, after being landed once, was put into a small rowboat, where it was transferred across the slough to the levee; that it was then taken up the levee by the same men who operated the launch, with the assistance of a negro who was standing on the levee, when he arrived; having seen the trunk landed safely on the top of the levee, he started to walk to meet the car that was waiting for his party; the last he saw of the trunk it was on top of the levee; at this point his party were met by the car and rode into Greenville. He did not see the trunk drop into the water at any time. When the trunk was landed on the levee he saw nothing unusual with it, but did not examine it very closely at that point; was not expecting at that time anything unusual.

The court, over the objection of appellant, gave among others the following instruction:

"In determining the value of the goods destroyed, you should not consider their salable market value as second-hand clothing, but base your estimate on their original cost, the character of the materials, the extent to which they had been used and would probably be suitable for future use by the plaintiff, and all other circumstances which the proof, in your opinion, shows existed at the time of the injury which would affect their value for use by the plaintiff. It is the value of the goods to the plaintiff for her own use at the time they were injured and not their market value which the plaintiff is entitled to recover, if you find from the evidence that defendant is liable."

Appellant duly excepted. The court refused to allow appellant to show what the market value of the contents of the trunk was in their damaged condition, to which appellant excepted. Appellant asked for a peremptory instruction in its favor, which the court refused, and appellant duly saved its exceptions.

The verdict and judgment were in appellee's favor for five hundred and forty-one and 08/100 dollars.

Appellant duly prosecutes this appeal.

F. M. Rogers, for appellant.

In cases of injury to or destruction of personal baggage, the rule is that the value thereof is to be determined by what it is worth to the owner, and not by what it would bring on the market; but the owner may waive this rule and sue for the market value, and that is what the appellee did in this case. The evidence adduced by her was directed to proving the *market value.* Therefore, the court erred in refusing appellant's request to charge the jury that if they found for the plaintiff they should find the market value of the goods at the time and place of the injury as shown by the proof.

J. Bernhardt and *Coleman & Gantt,* for appellee.

The court's instruction on the measure of damages was correct. 6 Cyc. 677; 162 S. W. 73, and authorities cited.

Testimony as to the second-hand value of the goods was incompetent and properly excluded. 156 S. W. 1119.

The question of waiving the right to sue for the value of the goods to the owner does not enter into the case. There was no occasion to exercise such an election, and neither the complaint nor appellee's testimony justifies such a conclusion.

WOOD, J., (after stating the facts). (1) Appellant contends here that there was no evidence to sustain the verdict because there was no affirmative evidence on the part of appellee, showing that the trunk had dropped into the water while in charge of the employees of appellant, and that the circumstances were not sufficient to show that the damage was done by appellant's employees. But the circumstances detailed by the witnesses were sufficient to warrant the finding of the jury that appellant's employees caused the damage. The testimony warranted the jury in finding that there was no water into which the trunk could have dropped so as to cause the damage as discovered at Greenville, between the top of the levee where the trunk was landed by appellant and Greenville, its destination.

The testimony shows that there was water in the slough, and the manner of handling the trunk over the slough in the rowboat, with the condition the trunk was shown to be in before and after this transfer, made the conclusion inevitable that the damage was produced while it was being transported over the slough. The finding of the jury was therefore not speculative, as appellant insists, but was based upon substantial evidence.

The most reasonable conclusion from the evidence adduced, in fact the only conclusion, was that the trunk was allowed to become water-soaked while in the possession of the employees of appellant. See *Georgia S. & F. Ry. Co.* v. *DuBose,* 71 S. E. 945.

(2) The ruling of the court on the measure of damages was correct. The doctrine on this subject is accurately stated in 6 Cyc. 677, as follows:

"The value of personal baggage is to be determined by what it is worth to its owner and not what it would bring on the market." See cases cited in note.

The appellee was not estopped by the allegations of her complaint from showing what the apparel was worth to her after the damage occurred, and the evidence was sufficient to sustain the verdict.

The judgment is correct, and it is therefore affirmed.

JONESBORO, LAKE CITY & EASTERN RAILROAD COMPANY v. DUNAVANT.

Opinion delivered March 22, 1915.

1. CARRIERS—FREIGHT—LIABILITY.—By the common law a carrier is in effect an insurer of goods entrusted to it for carriage, while the same are being transported, except where the loss occurs by *vis major*, or by act of the public enemy, or public authority, or from the inherent nature of the goods, and the burden of proving that a loss was occasioned by any of these excepted acts, rests upon the carrier.
2. CARRIERS—FREIGHT—VIS MAJOR.—If there is any negligence on the part of a common carrier of freight which, if it had not been present, the injury to the freight would not have occurred, notwithstanding the act of God, the carrier can not escape liability.
3. CARRIERS—DELAY IN SHIPMENT OF FREIGHT—SPECIAL DAMAGES.—Where defendant carrier was negligent in failing to make a prompt shipment of corn, it will be liable for special damages, when it had knowledge that special damages would result from a failure to make a prompt shipment.

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

Coleman, Lewis & Cunningham, for appellant.

1. No negligence is shown. The uncontradicted evidence is that the shipment was accepted subject to interference by high waters, and that every effort was made to carry it to its destination. The delay, however, even if negligent, did not make appellant liable. It is well settled that mere negligent delay on the part of a carrier, followed by an act of God which prevented the performance of the contract of carriage, is not such negligence as will

render the carrier liable for breach of the contract. 36 Am. St. Rep. 838, note; 13 Gray, 481; 115 Mass. 304; 10 Wall. 176; 92 Ark. 573-581; dissenting opinion and authorities there cited. There is no proof that appellant would not have forwarded the car if the levee had remained intact. The break in the levee intervened between appellant's negligence and the breach of the contract, and appellant is not liable. 4 Elliott on Railroads, art. 1488; Wharton on Negligence, § § 73, 558, 559; 55 Ark. 510; 58 Ark. 157.

2. The court erred in its charge as to the measure of damages. The contract was to deliver the corn to appellee at Savage Crossing, not at his residence. Had appellee permitted the corn to remain in the hands of appellant, the latter would have performed its contract, and in that case it would have been liable for the delay, the measure of damages being the difference between the value of the corn at the time and place where it should have been delivered, and its value when delivery was made, with interest. 74 Ark. 360; 6 Cyc. 525.

When appellee elected to receive the corn at Wilson and send it back to Osceola, as he had a right to do, appellant's liability on account of the delay ceased. 6 Cyc. 468, note 33.

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

1. A railway company is liable for delay in shipment where it accepts a consignment for shipment to a prepay station without demanding the prepayment of freight. There is no merit in the plea of the "act of God." Where railroad companies injure shippers by reason of negligence, the courts do not lend a ready ear, when the companies are sued for damages, to such a plea, nor are they quick to hold the Lord responsible for the companies' negligence. 102 S. W. 11; 6 Ind. App. 57; 32 N. E. 1134; Ray on Neglect of Imposed Duties of Carriers, 126; 3 Wood on Railroads, 428; 4 Elliott on Railroads, 1558, 1559; 65 Ind. 188; 32 Am. Rep. 63; 18 Adolph & Ellis, 785; 2 Shower, 82; 8 Meeson & Welsby, 372.

2. A railroad company is liable for special damages where it is alleged and proved that the company was advised or knew of an emergency and that special damages would result through neglect. 103 Ark. 522, 527, and cases cited.

HART, J. H. P. Dunavant sued the Jonesboro, Lake City & Eastern Railroad Company to recover damages on account of the alleged negligent delay in transporting a car of corn. The jury returned a verdict in favor of the plaintiff in the sum of $187.55 and the defendant has appealed.

The plaintiff proved a state of facts substantially as follows: On the 2d day of April, 1913, a car of corn was shipped from Hayti, Missouri, over the Frisco railroad through Osceola, Arkansas, to Wilson, Arkansas, consigned to H. P. Dunavant at Savage Crossing on the Jonesboro, Lake City & Eastern Railroad Company's line. The latter company operates a branch line from Wilson to and beyond Savage Crossing and the latter point is nine miles from Wilson and about the same distance from Osceola. This car of corn was billed "Shipper's Order," and arrived at Wilson on the 5th day of April, 1913. Dunavant paid the freight and draft attached to the bill of lading and procured the bill of lading on the 5th day of April, 1913. The agent of the Frisco at Osceola called the latter's agent at Wilson and advised him that the draft was paid. The Frisco's agent at Wilson agreed to release the shipment and deliver it over to the Jonesboro, Lake City & Eastern Railroad Company's agents at Wilson.

On the 6th day of April, 1913, Dunavant called up the agent of the Jonesboro, Lake City & Eastern Railroad Company at Wilson and had a conversation with him over the telephone and told the agent that the levee was likely to break and that he needed his corn, and asked the agent to send it out on the first train. The agent agreed to do this. On the next day the train left Wilson for Savage Crossing about 10 o'clock in the morning. The corn did not arrive on that train and Dunavant again

called up the agent of the defendant company over the telephone and told him that the train had gone by and the car of corn had not arrived. The agent replied that he had forgotten to send it but would send it on the next train. The plaintiff heard a train pass Savage Crossing over the line of the defendant's railway the next day but the corn did not arrive. About 5 o'clock in the afternoon on the 9th of April the levee broke and flooded the defendant's line of railroad so that it was not able to operate its trains for about a month thereafter.

The plaintiff then reshipped his corn from Wilson to Osceola and paid the freight which amounted to $25. He had already paid the freight from Wilson to Savage Crossing, amounting to $28.55. He hired wagons to haul the corn from Osceola to his residence at Savage Crossing at a cost of $150. It took fifteen wagons two and a half days to haul the corn, and he paid therefor $4 for each team. This was the only way he could get the corn to his residence. He was a farmer and had no feed with which to feed his stock and was obliged to have the corn hauled by wagon because there was no other corn available that he could buy or borrow.

The testimony on the part of the defendant company tended to show that it did not accept the corn for transportation until after its last train had left Wilson for Savage Crossing on April 7, 1913, and that it did not accept the shipment sooner because it was billed "Shipper's Order" and the expense bill for the car of corn had not been paid. Its agent admitted that the plaintiff called him up and told him that he needed the car of corn with which to feed his stock and said that he promised the plaintiff that he would do the best he could, but told him that the levee was likely to break at any time and he did not know whether or not he could carry the corn.

It was also shown by the railroad company that no trains were run over its road after the 7th of April; that on the 8th of April they were busy clearing the yards of the railroad equipment in order to get it out of the way of the high water; that the St. Francis levee broke on the

afternoon of April 9 and flooded the tracks of the railroad company so that it could not operate trains for more than a month thereafter.

The agent of the railroad company also stated that he did not remember telling Mr. Dunavant that he had forgotten to send the car out on the 7th of April, but said that he might have done so.

(1) By the common law a common carrier is in effect an insurer of goods entrusted to it for carriage while same are being transported, except when the loss occurs by the act of God, of the public enemy or public authority, or from the inherent nature of the goods, and the burden of proving that the loss arose from any of these excepted acts rests upon the carrier. *St. Louis, I. M. & S. Ry. Co.* v. *Pape,* 100 Ark. 269; *St. Louis, I. M. & S. Ry. Co.* v. *Wood,* 99 Ark. 363.

(2) So, under the testimony adduced by the defendant, the jury might have returned a verdict in its favor. On the other hand, it is equally well settled that if there is any negligence on the part of a common carrier which, if it had not been present the injury would not have occurred, notwithstanding the act of God the carrier can not escape responsibility. See *Chicago, R. I. & P. Ry. Co.* v. *Miles,* 92 Ark. 573.

Therefore, under the testimony adduced by the plaintiff, the jury might have found the issue of negligence in favor of him. It will be remembered that according to plaintiff's testimony he paid the draft and expense bill attached to the bill of lading on the 5th day of April and the defendant company on the 6th inst. promised to carry the corn from Wilson to Savage Crossing on its next train; that the agent of the company, after its train had passed Savage Crossing on the 7th of April, told him that it had not carried the corn because he had forgotten it, and that he would send it on the next train. There was also testimony tending to show that another train ran over the defendant's line of road on the 8th day of April.

The question of the defendant's negligence was submitted to the jury under proper instructions, about which no complaint is made, and the finding of the jury that the defendant was guilty of negligence in transporting the corn, being warranted by the evidence, will be upheld.

It is next insisted by counsel for the defendant that the court erred in allowing special damages to the plaintiff. It will be remembered that the verdict of the jury was for $187.55. The plaintiff testified that on the 6th day of April he told the defendant's agent at Wilson that the levee was likely to break at any time, and that he needed his corn badly. The agent promised him that he would send it on the first train. The jury might have inferred from the testimony of both the plaintiff and defendant that the plaintiff lived at Savage Crossing. The evidence shows that there was no way to get the corn to Savage Crosing after the levee broke except to reship it to Osceola and to haul it in wagons from there to plaintiff's residence in Savage Crossing, a distance of nine miles. The plaintiff had already paid the freight from Wilson to Savage Crossing, amounting to $28.55. He also paid the freight to reship the corn from Wilson to Osceola, amounting to $25. He testified that it cost him $150 to haul the car of corn from Osceola to Savage Crossing. This amounted to more than the amount recovered by him.

(3) It will be noted that according to the testimony of the plaintiff the defendant company had notice before it accepted the corn for transportation from Wilson to Savage Crossing that plaintiff would suffer special damages if there were negligent delay in the transportation of the corn. See *Kansas City So. Ry. Co.* v. *Morrison,* 103 Ark. 522, and cases cited.

The judgment will be affirmed.

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

Opinion delivered March 22, 1915.

1. EVIDENCE—EXPERIMENTS—PERSONAL INJURY ACTION.—In an action for damages resulting to plaintiff, who was struck at a crossing by a moving train, testimony of a witness that the approaching train could not be seen at the point near the track where plaintiff stopped to look and listen, is admissible, where witness derived his information under conditions substantially like those existing at the time of the accident.
2. EVIDENCE—WHEN NOT UNCONTRADICTED—OPERATION OF TRAIN—WARNING SIGNALS.—Although the engineer and fireman on a railway locomotive both testified that the whistle was blown and the bell rung upon approaching a crossing, the testimony will not be regarded as uncontradicted, where several persons near the crossing, and who were in a position to make accurate observations, state that the whistle was not blown nor the bell rung.
3. RAILROADS—PERSONAL INJURIES—SPEED OF TRAIN.—In an action for damages to plaintiff, by being struck by a moving train at a crossing in a town, the speed of the train may be considered by the jury in determining the issue of defendant railway company's negligence, although the speed of the train alone, would not show liability.
4. RAILROADS—DUTY OF TRAVELER AT A CROSSING.—A traveler approaching a railroad crossing must take notice of the fact that it is a place of danger, and must not only look and listen for the approach of trains, before he goes upon the track, but must continue to look and listen until he has passed the point of danger.
5. RAILROADS—DUTY OF TRAVELER AT CROSSING.—It is the duty of a traveler, upon approaching a railroad crossing, to stop, to look, and to listen, and that duty must be performed at such a time and place, with reference to the particular situation in each case involved, as will enable him to accomplish the purpose the law has in view in imposing such duty upon him.

Appeal from White Circuit Court; *J. M. Jackson*, Judge; affirmed.

E. B. Kinsworthy, P. R. Andrews, Troy Pace and *T. D. Crawford*, for appellant.

1. The testimony of R. B. Campbell as to the experiment made by him was erroneously admitted. Such testimony is not admissible unless the experiment was made

under substantially the same conditions as existed at the time of the accident. 115 Ark. 101.

2. Counsel contend that the court erred in refusing to give instructions 21, 22 and 24, as stated in the opinion, but cite no authorities.

3. The court erred in refusing to direct a verdict for the appellant. Appellee, as the evidence shows, was guilty of contributory negligence. If, as he says, he stopped fifteen or twenty feet from the sidetrack and could not see because the box cars cut off his view, and could not hear because a gravel train near him was making so much noise, it was his duty to go to a place from which he could see before venturing into a place of such obvious danger. 106 Ark. 399; 32 L. R. A. (Ind.) 151.

There is no proof of negligence on the part of appellant. There is affirmative proof, not only by the testimony of the engineer and fireman but also by other witnesses, that the statutory signals were given while the testimony to the contrary is purely of a negative character. 9 Enc. of Evidence, 866; 17 Cyc. 800; *Id.* 804; 6 How. 589; 130 Fed. 65; 60 N. Y. 133; 101 Mich. 234; 159 Mass. 320; 54 Fed. 301; 19 Ill. 499, 71 Am. Dec. 236; 18 Ill. App. 404; 61 Wis. 391; 19 Am. & Eng. R. Cas. 276; 98 Wis. 157; 212 Pa. St. 409; 109 Am. St. 872; 128 Wis. 357; 17 Wall. 385; 27 Hun, 325; 7 Ark. 470; 24 Ark. 140; 50 Ark. 477.

S. Brundidge and *J. W. & J. W. House, Jr.*, for appellee.

1. R. B. Campbell's testimony was clearly admissible. 42 Ark. Law Rep. 101.

2. The court properly refused to give instructions 21, 22 and 24, requested by appellant. The testimony, which is substantially the same as when this case was before the court on former appeal, warranted a finding that the train was running at an unusually high rate of speed, and the speed of the train was a proper element for the jury to consider with other facts in proof in determining appellant's negligence. This instruction is in direct conflict with the former opinion. 111 Ark. 134. Instruction 24 seeks to impose on appellee a degree of care which the

law does not contemplate nor require. 90 Ark. 19; 99 Ark. 167; 97 Ark. 411; 100 Ark. 62; 88 Ark. 530; 79 Ark. 157; 76 Ark. 224; 76 N. E. 804; 51 N. E. 708; 62 S. W. 94; 61 S. W. 147; 8 Atl. (Pa.) 789, 790; 147 Mass. 495; 34 Ia. 158; 111 N. Y. 419; 88 Am. Dec. 356; 14 Abb's Practice R. N. S. 29; 30 N. Y. 11; 89 Hun, 596; 23 N. Y. Sup. 193; 116 Mass. 540.

3. The contributory negligence of appellee was a question for the jury, and was submitted to them under proper instructions. It would not have been proper to direct a verdict, unless reasonable minds could have reached but one conclusion from the evidence. 89 Ark. 534; 90 Ark. 33; 16 L. R. A. (Mo.) 189; 20 Atl. 976; 53 N. Y. 654; 96 N. Y. 676; 78 Ark. 520; 125 N. Y. 526; 26 N. E. 741; 27 Atl. 847; 158 Pa. St. 82; 67 Barb. (N. Y.) 205. 206; 32 How. Pr. (N. Y.) 61; 94 Mo. 150; 52 Mo. 259; 45 Am. & Eng. Ann. Cases, 163; 61 Cal. 326; 56 Ark. 459.

HART, J. Joe W. Kimbrell sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages for injuries sustained by him while driving a two-horse wagon across the railroad tracks of defendant at a public crossing in Beebe, a town of 1,800 or 2,000 inhabitants. He was alone in the wagon, and stopped his team ten or twelve feet before he reached a sidetrack on which were stored some box cars which obstructed his view toward the south. He looked up and down the track the best he could for the approach of trains, and also listened for the approach of them. Not seeing or hearing any trains, he drove across the sidetrack and on to the main track where his wagon was struck by a fast mail train approaching from the south. The train was running at a high rate of speed. The steam had been cut off and this caused the smoke to blow back as soon as it came out of the smokestack, and also caused the train to make much less noise in running than usual. The plaintiff was severely injured and his mules killed by the train striking them. The crossing in question was on the most traveled street in Beebe. The bell was not rung, and the whistle was not blown for the crossing, according to witnesses

who observed the train approach and saw the accident, until just as the train struck the plaintiff's wagon.

On the other hand, the engineer and fireman testified that the whistle was blown at the whistling post, and that the bell was kept ringing from there until the wagon was struck by the train; that they did not see the plaintiff or his wagon until just as they were struck, because the view was obstructed by the box cars on the sidetrack. The jury returned a verdict for the plaintiff, and the defendant railroad company has appealed.

It is first earnestly contended by counsel for the defendant that the evidence is not sufficient to warrant a verdict. This is the second appeal in the case. The opinion in the former appeal is reported in 111 Ark. at page 134. The facts on the present appeal are not essentially different from those on the first appeal. We then held that there was sufficient testimony to warrant the jury in finding that the defendant was guilty of negligence, and that the plaintiff was free from contributory negligence. Therefore, it is unnecessary to again discuss that question. The facts are set forth more in detail in the former opinion, and reference is made to that opinion now.

It is also insisted that the court erred in admitting the testimony of R. B. Campbell as to experiments made by him. This witness was allowed to testify that he stood out ten, fifteen or twenty feet from the sidetrack at the crossing where the plaintiff was injured with several box cars extending down from the crossing, and was unable to see a train approaching from the south; that one of the box cars which obstructed his view was about ten feet from the crossing, and the others a little further down.

(1) There was no error in admitting this testimony. According to the testimony of the plaintiff and of the other witnesses who saw the accident, this was about the position plaintiff was in when he stopped to look and listen for approaching trains. The experiment was made by the witness to test the accuracy of the plaintiff and his witnesses who observed the accident, and was made under conditions substantially the same as those at the time

the accident happened. *St. Louis, I. M. & S. Ry. Co.* v. *McMichael,* 115 Ark. 101.

(2) It is next insisted that the court erred in refusing to give instruction No. 22, asked by the defendant. This instruction in effect told the jury that under the uncontradicted evidence in the case, the statutory warnings for the crossing were given, that is, that the whistle was blown and the bell rung, and that the plaintiff having failed to establish this allegation of negligence, could not recover on that charge of negligence.

The court did not err in refusing to give this instruction. In the first place, it may be said that the uncontradicted evidence does not show that the bell was rung, and the whistle blown for the crossing. It is true that both the engineer and the fireman stated that such was the case, and it is also true that the witnesses for the plaintiff on cross examination say that they may be mistaken in testifying that the whistle was not blown or the bell rung for the crossing as the train approached. But these same witnesses testified on direct examination that they were looking at the train as it approached, and did not hear the whistle blown or the bell rung. One of the witnesses stated positively that he was observing the train, and knew that the bell was not rung, and the whistle was not blown. Under these circumstances it can not be said that the testimony of the plaintiff's witnesses as to this matter was of such a negative character that it did not contradict the testimony of defendant's witnesses. According to the testimony of plaintiff's witnesses, they were giving such attention to the approach of the train that the jury might well have found that they might reasonably have been expected to notice whether the whistle was blown for the crossing or whether the bell was ringing as the train approached the crossing. Moreover, under the opinion on the former appeal, this testimony was admissible on the question of plaintiff's contributory negligence. He testified that his view toward the south was obstructed by box cars, and that when he stopped, and could not see in that direction, he listened, and did not hear the statutory warnings of an approaching train.

(3) Again it is contended that the court erred in refusing to give instruction No. 21 asked for the defendant. This instruction reads as follows:

"You are instructed that the plaintiff alleges negligence on the part of the defendant railway company on account of running its train at a high and unusual rate of speed through the town of Beebe at the time the plaintiff was injured. The court instructs you that the plaintiff has failed to establish this allegation of negligence, and the plaintiff can recover nothing on account of this allegation of his complaint."

The court did not err in refusing to give this instruction. Some of the witnesses for the plaintiff testified that the train was running at an exceedingly high rate of speed. On the former appeal this court held that the speed of the train was a proper element of consideration under the circumstances of the case, though the speed of the train alone would not be sufficient to establish liability if all other precautions were observed by those in charge of the train. The testimony was competent to be considered by the jury in determining the question of the defendant's negligence and the instruction asked by the defendant would have taken the consideration of that fact away from the jury.

Finally, it is insisted by counsel for the defendant that the court erred in refusing to give instruction No. 24, asked by the defendant. That instruction is as follows:

"You are instructed that the only other allegation of negligence charged by the plaintiff in his complaint is that the defendant company left empty box cars standing on its sidetracks, on both sides of the crossing where he was injured, which obstructed the view of the plaintiff, and prevented his seeing the approach of the train from the south which struck and injured him. The court instructs you that, although you may find from the evidence in this case that the plaintiff, before going upon the crossing where he was injured, stopped, looked and listened for the approach of the train from the south, and in both directions, still, if you find that the plaintiff stopped at a point

where his view was entirely obstructed, when he looked south, that it was his duty, before going upon the crossing, to go to some point of view where he could see whether or not a train was approaching the crossing over which he was about to pass. What the law requires is, that a person about to cross a street crossing shall stop, look and listen at such a time and place as will enable him to determine whether or not he is going into a place of danger; and, if you find from the evidence in this case that the plaintiff stopped, looked and listened just before approaching the crossing where he was injured, and could not see the train on account of the depot, and other obstructions on or near the defendant's sidetracks, and then failed to go to some point where he could discover the approach of said train, this would amount to contributory negligence on the part of plaintiff, and he can recover nothing in this action, and your verdict shall be for the defendant."

It will be noted that instruction No. 24 is in its nature peremptory and in effect formulates a rule that if the view of the track is obstructed, a traveler should get down from his vehicle and go to a point where he can see both up and down the track. This rule has never prevailed in this State. *St. Louis, I. M. & S. Ry. Co.* v. *Stacks,* 97 Ark. 405; *Ark. Cent. Ry. Co.* v. *Williams,* 99 Ark. 167; *St. Louis, I. M. & S. Ry. Co.* v. *Garner,* 90 Ark. 19; *St. Louis, I. M. & S. Ry. Co.* v. *Prince,* 101 Ark. 315.

To hold that the traveler should in every instance leave his team standing unprotected on the highway, and walk ahead of it to look up and down the track before driving upon it, would be more likely to cause accidents in many cases than to prevent them.

In the case of *C., O. & G. Rd. Co.* v. *Baskins,* 78 Ark. 355, the court said:

(4) "The doctrine has been repeatedly stated by this court that a traveler approaching a railroad crossing must take notice of the fact that it is a place of danger, and must not only look and listen for the approach of trains before he goes upon the track, but must continue

to look and listen until he has passed the point of danger. He must continue his vigilance until the danger is passed, and must look both ways, up and down the track."

(5) This proposition has been so frequently declared by the court that further citation of authorities in support of it is useless. It is clear that the duty to stop, to look and to listen, if need be, must be performed at such a time and place, with reference to the particular situation in each case involved as will enable a traveler to accomplish the purpose the law has in view in imposing such duty upon him.

The court in numerous concrete instructions given at the request of the defendant submitted to the jury the question of the defendant's negligence and of the plaintiff's contributory negligence in accordance with the principles of law just announced. Moreover, at the request of the defendant, the court gave instruction No. 10, which reads as follows:

"The court instructs you that if you find from the evidence that plaintiff's view south of the crossing, where he was injured, at the time when he was injured, was obstructed by cars standing on the sidetracks near the crossing, that the duty devolved upon him to use a higher degree of care of stopping, looking and listening for the approach of trains for the purpose of ascertaining whether or not he was going into a place of danger by undertaking to cross the tracks; and, if you find from the evidence that the plaintiff was trying to determine whether or not a train was approaching by looking and listening in both directions, and was unable to see same on account of the obstructions on the track, then it was the plaintiff's duty to use the highest degree of care by stopping, looking and listening for the approach of trains; and, if he failed in this, your verdict should be for the defendant."

The court also gave instruction No. 15, which, in effect, told the jury that if it found that plaintiff's view of the railroad track south of the crossing where he was injured was obstructed by box cars which prevented him seeing the approach of the train which injured him, yet

if the jury should find that the plaintiff, before going upon the track by listening for the train could have heard the same in time to have avoided his injury, then the plaintiff's failure to ascertain the approach of the train by listening for the same would be such contributory negligence as would bar his right to recover.

We have carefully examined the record, and find no prejudicial error therein.

It follows that the judgment must be affirmed.

HILDRETH v. TAYLOR.

Opinion delivered March 22, 1915.

1. CONSTITUTIONAL LAW—AMENDMENTS—VALIDITY OF PASSAGE—JUDICIAL QUESTION.—Where the validity of the adoption of an amendment to the Constitution is in issue, on the grounds that notice of the submission was not given by advertisement in a newspaper, as required by statute, and that the amendment did not receive the number of votes requisite for its adoption; *held*, these issues are judicial in their nature, and if the amendment to the Constitution was not legally adopted, it becomes the duty of the court to so declare; the declarations of the result made by the presiding officers of the two branches of the General Assembly, are not conclusive.
2. INITIATIVE AND REFERENDUM — CONSTITUTIONAL AMENDMENT — ENABLING ACT—PUBLICATION OF NOTICE—SUBSTANTIAL COMPLIANCE.—The Enabling Act, Public Acts 1911, page 582, which regulates the submission of measures to the people, under the Initiative and Referendum Amendment to the Constitution, and requires the publication of the proposed measure in every county within the State within a certain time, does not require a literal compliance as to the time of publication, and a failure to publish the notice within the time specified, will not, of itself, prevent the people from adopting a measure at an election, as specified in the Constitution.
3. INITIATIVE AND REFERENDUM—CONSTITUTIONAL AMENDMENTS—ADOPTION—MAJORITY VOTE.—An amendment to the Constitution, when initiated by the people under Amendment No. 10, the initiative amendment, must be voted for by a majority of all those voting at the election, and a majority of those voting on that question is insufficient.

4. STATUTES—BORROWED CONSTRUCTION.—Where a constitutional amendment is almost literally borrowed from a similar constitutional amendment of another State, there is a presumption that a construction of it in that State, is also borrowed.
5. INITIATIVE AND REFERENDUM—VETO POWER OF GOVERNOR.—The governor is without power to veto an initiated measure.
6. INITIATIVE AND REFERENDUM—CONSTITUTIONAL AMENDMENT—AMENDMENT—MAJORITY VOTE.—The provision in Amendment No. 10, that "any measure referred to the people shall take effect and become a law when it is approved by a majority of the votes cast thereon and not otherwise," does not change the law that an amendment to the Constitution, to be adopted, must receive a majority of the votes cast at the election, and applies to legislative acts, referred to the people.

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

Hal L. Norwood, Ratcliffe & Ratcliffe, Moore, Smith & Moore, Morris M. Cohn and *J. C. Marshall,* for appellants.

1. The notice of the submission was not given by advertisement in a newspaper as required by statute.

2. The amendment did not receive the number of votes requisite for its adoption. The amendment was not legally adopted. 106 Ark. 506; Const., art. 19, § 22; *Ib.,* art. 6, § 15; Amendment No. 10; 93 Pac. 254; 78 Ark. 346; 98 *Id.* 125; 104 *Id.* 417; Endlich on Int. of Stat., 747; 74 Pac. 721; 105 Ark. 381; 104 *Id.* 583; 106 *Id.* 63; 93 *Id.* 228; 27 *Id.* 648; 60 *Id.* 343; 12 *Id.* 101; 2 *Id.* 98; 4 *Id.* 473; 9 *Id.* 270; 78 *Id.* 442; 24 Ala. 108; 50 L. R. A. (N. S.) 196; 61 Ark. 594; 76 *Id.* 534; 106 *Id.* 248-253; Kirby's Dig., § § 702, 710, etc.; 98 Pac. 241; 34 Utah 369; 98 Pac. 180; 96 *Id.* 1047; 58 S. E. 715; 92 Pac. 353; 100 N. E. 833; 115 N. W. 429; 70 Ark. 326; 79 *Id.* 236; 156 Ky. 783; 162 S. W. 99; 25 L. R. A. (N. S.) 560; 19 Pac. 894; 24 Ala. 108; 104 Ark. 510; 78 *Id.* 422; 106 Ark. 506-508; 78 *Id.* 442.

J. W. Mehaffy, Coleman & Lewis, Cockrill & Armistead and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for appellee.

1. The notice was sufficient. The provision is not mandatory. The measure received a majority of the

votes cast thereon, and was legally adopted. "Referred to the people" applies to initiative measures. Amendment No. 10; 93 Pac. 237. "Measure" includes a constitutional amendment. Thorpe, Am. Charters, vol. 6, p. 3404; 7 *Id.* 4278; 109 Pac. 823; 11 *Id.* 802; 109 *Id.* 658; 124 Pac. 176; 114 *Id.* 293; Cooley, Const. Lim., 76; 20 N. E. 461; 8 Cyc. 736; 15 Ark. 675; 52 *Id.* 339; 80 *Id.* 374; 85 *Id.* 95; 50 *Id.* 266; *Ib.* 278; 132 Mass. 289; 15 O. St. 532; 33 Ark. 716; McCrary on Elections, § 150; 146 N. W. 785; 104 Pac. 56. The electors had *actual* notice. 50 Ark. 277; 36 *Id.* 450; 106 *Id.* 512. This was sufficient.

McCULLOCH, C. J. (1) Each of these cases involves the inquiry whether or not proposed Amendment No. 14 to the Constitution, authorizing cities and towns to issue bonds, was legally adopted. In each of the cases a citizen and taxpayer of the city of Little Rock has sought to restrain the mayor and city council from taking steps toward the issuance of bonds. The validity of the amendment is attacked on two grounds: First, that notice of the submission was not given by advertisement in a newspaper as required by statute; and, second, that the amendment did not receive the number of votes requisite for its adoption. Both of these questions are judicial in their nature, for if the proposed amendment to the Constitution was not legally adopted, it becomes the duty of the court to so declare. The declarations of the result made by the presiding officers of the two branches of the General Assembly are not conclusive. *Rice* v. *Palmer,* 78 Ark. 432; *St. Louis S. W. Ry. Co.* v. *Kavanaugh,* 78 Ark. 468; *Grant* v. *Hardage,* 106 Ark. 506.

We will address ourselves first to the question of giving notice, or, stating the proposition as argued by counsel in the case, whether or not the provisions of the statute concerning notice are mandatory. The amendment itself is silent on this subject, but it contains a provision authorizing the General Assembly to pass laws prescribing the method of submitting to the people petitions for the initiative and for the referendum.

The General Assembly of 1911, at the extraordinary session, enacted what is popularly known as the Enabling Act, Public Acts 1911, page 582, which undertakes to regulate submission of measures to the people under the initiative and referendum. Section 15 of the statute provides that not later than "the first Monday of the third month before any regular general election at which any proposed law, part of an act or amendment to the Constitution or measure referred is to be submitted to the people, the Secretary of State shall cause to be published in one newspaper in each county * * * for thirty days a true copy of the title and text of each measure to be submitted with the number and form in which the ballot title thereof will be printed on the official ballot." Another section provides that when any measure is initiated by a percentage of the people, in conformity with the Constitution as amended, the Secretary of State shall furnish the Attorney General a copy, and within ten days thereof the Attorney General shall return to the Secretary of State a ballot title for the measure. Petitions to initiate measures are required to be filed four months before the election at which they are to be voted on, and it so happens that that date occurred in the year 1914 on May 14, and the last day for publication under the Enabling Act fell on the 1st day of June. If, therefore, the Attorney General took the full number of days allowed to him for preparing the ballot title, it only left seven days before the date of publication, during which time the Secretary of State would have had to mail out the copy for the printer and it would have to be set up before the date of publication. It is conceded that the terms of the statute were not literally complied with in this instance; that the Secretary of State did not mail out the copies for publication until May 25, 1914, and that only in two counties were the publications made before the first Monday in June, in the other counties the publication being from three to thirteen days late. It is urged by learned counsel that this imposed the performance of

an almost impossible condition, and that to require literal performance would defeat the provisions of the Constitution itself. There is much force in the argument, we think, and the fact that a condition has been imposed by the Legislature which is, to say the least, difficult of literal performance, affords much reason for holding that it was merely directory, and not mandatory. It can be readily seen that strict compliance with that provision depends upon acts to be performed by nonofficials, and if it is held to be mandatory and given literal interpretation, it would mean that there is entrusted to those who are not public officials the duty of carrying out the terms of the act, thus leaving it possible for them by their own misconduct to prevent a submission of a measure to the people, and to defeat an expression of the popular will. If the act involved only the conduct of a public official, such as the Secretary of State, there might be more reason for assuming that the lawmakers, in reliance upon a discharge of public duty by that official, made the provision mandatory; but when we consider that this notice must necessarily go through and into the hands of many others, who may not always act under a strict sense of public duty, we can not presume that the Legislature meant to make the right to submit a measure to the people depend upon the strict performance of duty by all those individuals. The framers of the amendment to the Constitution did not see fit to put in a condition or provision about publication of notice, but left the whole subject to the will of the General Assembly. That delegation of power did not, however, constitute authority to adopt a regulation so strict in its terms as would defeat the purpose of the amendment itself.

Now, it is worthy of consideration that the lawmakers, in framing this provision, have not imposed any requirement for the preservation of the evidence of the notice. It contains no provision at all with reference to proof of the publication nor of preservation of that proof. It is true, the general statute on the subject of legal advertisement (Kirby's Digest, § 4924) provides

that the affidavit of the editor, proprietor, manager or chief accountant of a newspaper shall be sufficient evidence of a publication of any notice or advertisement required by law; but neither in that statute nor in the Enabling Act is there any express provision for preservation of the notice. It is inconceivable that the lawmakers would have imposed upon the Secretary of State a duty intended to be mandatory without making some provision for preservation of the evidence of his act so that the courts might take notice of his records and discover whether or not that duty has been discharged. This omission furnishes strong evidence that the lawmakers did not intend the provision to be mandatory.

The authorities on this subject are not entirely harmonious. This court is, however, committed to the rule, which is in accord with the great weight of authority, that, so far as concerns elections of officers, the failure to perform any duty such as giving notice does not deprive the electors of the right to choose public officials. In *Wheat* v. *Smith,* 50 Ark. 266, Chief Justice COCKRILL, speaking for the court, said: "The right to hold the election in such cases comes from the statute, and the notice required to be given thereof is only a reminder to the people of what the law has otherwise provided. An omission to publish the statutory notice of the election does not, in such cases, affect its validity."

It is argued that the rule thus announced does not apply to an election upon some proposition other than the selection of an officer. That contention is not without authorities to support it. *Janesville Water Co.* v. *City of Janesville,* 156 Wis. 655, 146 N. W. 784.

Cases cited by counsel for the appellants hold that provisions for notice are mandatory, and that they must be strictly complied with, otherwise the election is void. *McCreary, Governor,* v. *Speer,* 156 Ky. 783; *State* ex rel. *Woods* v. *Tooker,* 15 Mont. 8, 25 L. R. A. 560. Those were cases, however, where the Constitution itself, by way of condition upon which amendments may be made, required that notice must be first given; and the courts, following

the rule of presumption that all language in the Constitution itself is, in the absence of something showing a contrary intention, intended to be mandatory, held that the provision for notice must be treated as mandatory. The reasons in those cases do not apply here inasmuch as our Constitution, as amended on that subject, does not itself prescribe a condition concerning notice.

(2) The following cases, in addition to those already cited, bear with more or less directness upon the question of the interpretation to be placed upon provisions of this sort: *Seymour* v. *City of Tacoma,* 6 Wash. 427, 33 Pac. 1059; *Bauer* v. *Board of Denmark Tp.,* 157 Mich. 395, 122 N. W. 121; *State* ex rel. *Thompson* v. *Winnett,* 78 Neb. 379, 10 L. R. A. (N. S.) 149; Prohibitory Cases, 24 Kan. 700; *Hammond* v. *Clark,* 136 Ga. 313; *Town of Grove* v. *Haskell,* 24 Okla. 707, 104 Pac. 56. The doctrine of those cases is, we think, that effect is to be given to such provisions only to the extent of requiring substantial compliance, and that is as far as we are willing to go in determining the cases now before us. We do not mean to say that a total failure to give notice of any kind would not invalidate an election. On the contrary, the fact that the lawmakers have provided a method of compelling public officials, by writ of mandamus, to comply with their duty, with respect to the submission of these questions, shows that some importance was attached to the requirement; and if nothing is done at all toward giving the notice, and the people acquiesce in the omission, it might be held that it affected the validity of the election. But we do hold, at least, that a literal compliance is not required, and that a failure to publish the notice within the time specified does not of itself prevent the people from adopting a measure at an election as specified in the Constitution. In order to defeat the submission, it must at least be shown that the omission to publish amounted to such a radical disregard of the requirements imposed by the Legislature that it probably affected the result of the election. The Legislature has provided no record whereby the fact can be definitely

ascertained whether or not the publication has been made as directed, therefore it would be disastrous to hold that a statute or amendment to the Constitution could be defeated by showing that the publication in fact was not made in accordance with the specified terms.

We turn, then, to the second question presented, whether or not the proposed amendment received the necessary number of votes to legally adopt it. It may be well to set out Amendment No. 10 at this point of the discussion so that its provisions may be fully analyzed and considered. It reads as follows:

"Section 1. The legislative powers of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people of each municipality, each county and of the State, reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls as independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than 8 per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon.

"The second power is a Referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety), either by the petition signed by 5 per cent of the legal voters or by the legislative assembly as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when the legisla-

tive assembly shall order a special election. Any measure referred to the people shall take effect and become a law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be, 'Be It Enacted by the People of the State of Arkansas.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for the office of Governor at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal votes necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people, he and all other officers shall be guided by the general laws and the acts submitting this amendment until legislation shall be specially provided therefor."

According to the returns as made to the Speaker of the House of Representatives and the Secretary of State, in accordance with the election laws of the State, there were cast 135,517 votes for Governor, and other State officers at the general election in September, 1914, and of this number 54,782 votes were cast in favor of Amendment No. 14, and 40,441 votes against it. It will thus be seen from the record that the proposed amendment received a majority of the votes cast upon that question, but not a majority of the votes cast at the election. Section 22, article 19, of the Constitution, which provides for submission of constitutional amendments by the General Assembly, specifies that "if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution." If it be held, therefore, that the provisions just quoted apply to an amendment proposed on the initiative of a percentage of the people, Amendment No. 14 did not receive a sufficient number of votes to adopt it.

It is contended, however, by learned counsel for appellees, that Amendment No. 10 specified a different rule with reference to amendments initiated by the people,

and they base their argument upon the following language found in the amendment: "Any measure referred to the people shall take effect and become a law when it is approved by a majority of the votes cast thereon, and not otherwise." The contention is that the language just quoted is broad enough to cover measures of every kind, statutes and amendments to the Constitution initiated by the people, as well as referred bills of the General Assembly. It is argued that the word "referred," as used in that connection, means all measures submitted to the people in any manner under the provisions of Amendment No. 10. A consideration of the sentence quoted above, when viewed in its connection with the other parts of the amendment, does not, we think, bear out that contention. Any argument that can be made in support of the view that that sentence includes anything more than legislative bills referred to the people is erroneously based upon the assumption that the people by framing and adopting this amendment intended to tear away all other provisions of the Constitution and substitute this in place. The argument is necessarily based upon the idea that Amendment No. 10 is revolutionary, and that every sentence contained therein must be considered without reference to its relation to the provision of the unamended Constitution. This is, we think, an entirely erroneous view to take of the amendment and the design of the people in adopting it. We have said in other cases dealing with the provisions of the amendment that it was intended to take its place in the Constitution as other amendments and to be considered with reference thereto, and that it only repealed other provisions which are found to be necessarily repugnant. *Hodges* v. *Dawdy,* 104 Ark. 583; *State* ex rel. v. *Donaghey,* 106 Ark. 56; *Grant* v. *Hardage, supra.*

(3) In *State* ex rel. v. *Donaghey, supra,* we held in reference to the provision of the Constitution limiting constitutional amendments to be submitted at one election to three in number that that provision was not re-

pealed by Amendment No. 10, but applied to amendments initiated by the people as well as those referred by the Legislature. In disposing of that question we said: "It was not the purpose nor the intention of the people in the adoption of Amendment No. 10, the Initiative and Referendum Amendment to the Constitution to abrogate and destroy the Constitution of the State, the framework of its government, by substituting therefor the provisions of said amendment. * * * There is no intimation in it of an intention to propose or adopt amendments to the Constitution, independent of the provisions of the Constitution, nor otherwise than in accordance with its requirements, as modified by the amendment." It is our duty, therefore, to give this amendment a reasonable interpretation in the light of other provisions of the Constitution, and to determine, according to the ordinary canons of construction, what the language of the Constitution really means. When its language is carefully considered and analyzed, we think there can be no doubt that it does not contain any provision specifying the number of votes necessary to adopt an amendment, and that that must be left to pre-existing provisions of the Constitution. Little reason can be discovered for requiring a less number of votes to adopt an amendment proposed by the voters themselves, than one proposed by the General Assembly. All that the amendment accomplished with respect to amendments to the Constitution is that the people may initiate them with like effect as those proposed by the General Assembly. It leaves in full force the provisions of the Constitution requiring the majority vote of those voting at the election.

(4) One of the convincing things which leads to that conclusion is that the language of the amendment was in substance, nay almost literally, borrowed from a constitutional amendment adopted by the people of another State, and that there is a presumption that the construction of it in that State was also borrowed. The amendment was copied from a like one which was adopted by the people of the State of Oregon in the year 1902. The

language is nearly identical, but not quite so. The few changes do not relate at all to this question. There does not seem to have been any judicial determination in that State of the question whether or not it required a majority of the votes cast at the election to adopt an amendment, but such, evidently, was the popular interpretation, for in the year 1906 another amendment was adopted which expressly provided that a proposed amendment to the Constitution, initiated by the people, could be adopted by a majority of those voting on the question. Our amendment was framed by the General Assembly of 1909, and it framers took the original form of the Oregon amendment without including the amendment which was there thought to be necessary to give the right of adoption merely by a vote of a majority of those voting on the question. The inference is therefore strong that it was not intended to so frame the amendment as to change the rule here with respect to the majority necessary to amend the Constitution. If such had been the intention, it would have been easy to make it clear by explicit language about which there could be no doubt. We think, therefore, that the rule concerning adoption of a borrowed construction is applicable.

But is is by no means necessary to rest the case upon the application of that principle for the reason that there are so many other indications in the amendment, when considered as a whole, which show that the framers did not have it in mind that the words "measure referred to the people" were to be interpreted as meaning all amendments to the Constitution submitted in any manner. The section is easily divisible into paragraphs. The first one, after defining the legislative power of the General Assembly, relates both to the initiative and referendum features and states broadly the reservation by the people to themselves of the power "to propose laws and amendments to the Constitution and to enact or reject the same at the polls as independent of the General Assembly," and also the "power at their own option to approve or reject at the polls any act of the Legislative Assembly." The word "laws" was obviously used as

meaning statutes in contradistinction to amendments to the Constitution, and it is significant that in the later sentence, which we are called upon to construe, the framers of the amendment wrote of laws but made no reference specifically to amendments to the Constitution, which shows that the later sentence was not intended to cover amendments to the Constitution and had reference only to statutes referred under the referendum feature of the amendment. Another significant thing is that the first paragraph uses the words "enact or reject" with regard to initiated measures, but uses the words "approve or reject" when dealing with acts of the General Assembly referred to the people. Now, the sentence under consideration, which concerns the number of votes, speaks only of approval by a vote of the majority, thus making use of the word which had in the preceding sentences been applied to acts of the General Assembly referred to the people. The next two sentences, which were manifestly intended to constitute a paragraph, refer entirely to the power reserved by the people through what is termed the initiative, and specifies the percentage of voters necessary to propose a measure and the time within which it must be filed with the Secretary of State. Then begins another paragraph which deals entirely with the power of the people through what is termed the Referendum, and it is manifest that that paragraph continues down to the one which relates to the style of bills and includes the sentence now under consideration which speaks of the number of votes necessary to approve a law. If it be construed otherwise, that sentence would have to be treated as being coupled with the one which relates to the style of bills, and would make that, too, relate to legislative measures as well as initiated measures. This court held to the contrary in the case of *Ferrell* v. *Keel,* 105 Ark. 380, where it was decided that the sentence defining the style of bills related only to those initiated by the people. It was said in that case that the framers of the amendment when using that sentence had in mind only the question of reserving the power of the

Initiative and were not dealing with the question of legislative bills.

(5-6) It is argued that the sentence about the veto power of the Governor breaks the continuity of the paragraph when considered as dealing alone with the matter of the Referendum, and that that sentence must be treated as necessarily applying to initiated measures, otherwise the Governor would have the power to veto them. Such, however, is plainly not the case because the Governor, even without this sentence, would have no power to veto an initiated measure. There is no inherent power in the executive to veto even legislated bills, and the power is derived only from the Constitution itself which provides that bills passed by the houses of the Legislature shall be presented to the Governor and that he may veto the same. If Amendment No. 10 was entirely silent as to the veto power of the Governor, he would have no right to veto an initiated bill. The sentence concerning the veto power relates exclusively to legislative bills which are referred by the Legislature itself to the people. Of course, it has no reference to bills passed by the Legislature and not referred by that body, because if the Governor vetoes them that is the end of the matter and there can be no reference to the people. If, however, this provision had been omitted, the Governor could veto bills which were by the Legislature referred to the people and thus prevent a reference, and it was the plain intention of the framers of the amendment to prevent that and to allow the General Assembly, without the concurrence of the Governor, to refer measures to the people. Nor can it be said that the next sentence, specifying the election, can be treated as using the words "measures referred" relative to initiated bills. That sentence clearly relates to legislative bills referred to the people, for it is not to be supposed that the framers of the Constitution thought it appropriate to give the Legislature power to provide special elections before it was known whether or not any measure was to be initiated or referred. Our conclusion

is that the sentence specifying the majority necessary to adopt was put in mainly for the purpose of suspending the operation of a legislative bill referred to the people, and that it only provided for such a law going into effect when approved by a majority of votes cast thereon. The addition of the words "and not otherwise" manifests beyond doubt the intention to make this apply only to legislative bills referred, otherwise these words would be meaningless, for, of course, an initiated bill could not in any event become a law until it is approved by the people at an election.

It is said that the argument of counsel for appellants is based entirely on a confusion in the use of the word "refer" in the amendment with the term "referendum," but it seems to us that the argument does not involve any such confusion. The word "referendum" has a well known significance, and it is by no means new. Mr. Webster defines it as follows: "The principle or practice of referring measures passed upon by the legislative body to the body of voters, or electorate, for approval or rejection, as in the Swiss cantons (except Freiburg) and in various local governments in the United States, and also in the local option laws, etc.; also the right to so approve or reject laws, or the vote by which this is done. *Referendum* is distinguished from the *mandate,* or instruction of representatives by the people, from *direct government* by the people, in which they initiate and make the laws by direct action without representation, and from a *Plebiscite,* or popular vote taken on any measure proposed by a person or body having the initiative but not constituting a representative or constituent body." Now, that word was used advisedly by the framers of Amendment No. 10, and the use of the word "referred" in the sentence now under consideration shows that it was intended to apply to those measures which were submitted to the people under the referendum. In other words, the framers of this amendment observed clearly the distinction between the two powers reserved by the people, one through the Initiative and the other through the Referendum, and the exercise of those powers was

designedly kept separate, except in the two instances specified about the basis for determining the requisite number of signatures on a petition and also the power of the Legislature to provide the method of submission. It would therefore be doing violence to the design of the framers of the amendment to attribute to them an intention to require a less number of votes to adopt an amendment proposed by the people through the power of the Initiative than one submitted by the General Assembly.

It is earnestly insisted that this view of the matter leaves Amendment No. 10 without any specification at all as to the number of votes necessary to enact or adopt an intiated bill. That is true, but it does not follow that that feature of the amendment would in the absence of enabling legislation fail because there is no such specification. This is a government of majorities, or rather of plurality of the votes cast on any given question, unless there is some contrary specification in the organic law; and when the framers of the amendment provided for the exercise of the Initiative and the submission of laws to the people through that agency, they necessarily meant that the majority of those voting on any particular question should control. That, however, does not apply to the adoption of amendments to the Constitution, for the obvious reason that the Constitution itself provides another rule, and the framers of this amendment are presumed to have omitted any other provision in recognition of the force of that provision.

We are of the opinion, therefore, that the majority of all votes cast at the election, as shown by the returns, is necessary to adopt a proposed amendment to the Constitution initiated by the people, and that in this instance the proposed amendment has not received such majority, and that therefore it is not legally adopted. The declaration of the Speaker of the House of Representatives was therefore based upon a misconception of the law and has no binding force when we come to consider as a judicial question the matter of the adoption of the amendment. *St. Louis Southwestern Ry. Co.* v. *Kavanaugh, supra.*

The chancellor erred in dismissing the complaints in these cases, and the decree in each case is reversed and the causes remanded with directions to enter decrees in accordance with the prayers of the complaints.

MATHIS v. LITTERAL.

Opinion delivered March 29, 1915.

1. APPEAL—RIGHT OF—WAIVER.—A litigant waives his right to an appeal by accepting a benefit which is inconsistent with the claim of right which he seeks to establish by the appeal.
2. APPEAL—WAIVER OF RIGHT.—A second mortgagee sought to foreclose his mortgage, claiming that the first mortgage was barred by limitations. A decree was rendered, foreclosing the second mortgage, but subject to the first as a superior lien. At the sale the holder of the second mortgage bought in the property for a nominal sum and appealed from that part of the decree which declared his mortgage to be junior to the first mortgage. *Held*, the appeal will be dismissed on the ground that the appellant, by accepting the benefits awarded to him under the decree, waived his right of appeal.
3. APPEAL—WAIVER OF RIGHT.—A litigant can not accept benefits under a decree, and also appeal from it.

Appeal from Benton Chancery Court; *T. H. Humphreys,* Chancellor; appeal dismissed.

Walter Mathews, for appellant.

Rice & Dickson, for appellee.

Supporting appellee's motion to dismiss the appeal because appellant has accepted benefits under the decree inconsistent with the appeal, counsel cite 47 Ark. 320; 53 Ark. 515; 53 N. E. 765; 2 Standard Enc. of Proc. 211, 212; 57 Pac. 261.

PER CURIAM: Appellant instituted this action in the chancery court of Benton County to foreclose a mortgage on certain land, and made appellee a party defendant, alleging that a mortgage held by the latter was barred by the statute of limitations. The suit was to cancel appellee's mortgage and to establish the priority of appellant's mortgage and to foreclose it. Appellee answered, claiming that his mortgage was not barred but

was superior to that of appellant's, and the court sustained that contention. A final decree was rendered foreclosing appellant's mortgage, subject, however, to that of appellee's as a superior lien, and the commissioner of the court was directed to sell the land, subject to appellee's mortgage, to satisfy appellant's debt. The sale was made by the commissioner, and appellant became the purchaser for the sum of $100, the sale being subsequently confirmed by the chancery court. Appellant then prosecuted an appeal to this court from that part of the decree which declared his mortgage lien to be junior and subject to that of appellee's.

(1-2-3) A motion is now presented by appellee to dismiss the appeal on the ground that appellant, by accepting the benefits awarded to him under the decree, waived his right of appeal. That contention is sound, for appellant's purchase under the decree constituted a recognition of the superiority of appellee's lien, and his attack upon that lien by this appeal puts him in an inconsistent position. He can not accept benefits under such decree and then appeal from it. He purchased the land for a small sum at the sale, which was intended only to dispose of the property subject to appellee's mortgage lien; and if he should obtain a reversal of the decree, it would result in his getting more than he purchased. His position is therefore inconsistent. A litigant "waives his right to an appeal by accepting a benefit which is inconsistent with the claim of right he seeks to establish by the appeal." *Bolen* v. *Cumby,* 53 Ark. 514; *Albright* v. *Oyster,* 60 Fed. 644; 2 Standard Encyclopedia of Procedure, 213.

The right of appeal having been waived, it can not be prosecuted. The appeal is therefore dismissed.

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

Opinion delivered April 12, 1915.

1. APPEAL AND ERROR—UNCONTRADICTED EVIDENCE—DUTY OF JURY.—In an action for damages due to personal injuries, caused by plaintiff's being struck by a moving train, where the testimony of the locomotive engineer and fireman, upon whom liability was predicated, is reasonable and consistent, and uncontradicted, the jury has no right, arbitrarily, to disregard the same.
2. RAILROADS—INJURY TO TRESPASSER—LOOKOUT.—Where plaintiff was a trespasser on defendant railway's right-of-way, the defendant will not be liable for an injury to plaintiff, caused by running into him, where the engineer and fireman maintained a proper lookout, and did not see the plaintiff in time to avoid hitting him.

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

STATEMENT BY THE COURT.

The appellee, a seventeen-year-old boy, came from Louisiana to Dexter, Arkansas. He sat down by the side of a cattle guard at night to rest a little while and went to sleep. He sat down on the second cross-tie. He was on the right side going towards Pine Bluff. He indicated how he was sitting. He did not know when he went to sleep. The next thing he knew was when the train hit him. He did not hear any whistle or bell or anything. The train did not stop. There was a road crossing the track at that point. He described his injuries, and stated that the claim agent paid him $50 to pay his expenses in the hospital, and that he used the money to pay the hospital expenses and doctor bills.

Other testimony on behalf of the plaintiff tended to show that the injury occurred at a public crossing, and that the trainmen did not ring the bell or blow the whistle for that crossing. The train did not stop or check or give any indication that any person had been discovered on the track. The track was straight for something like two miles above and three miles below where the appellee was injured.

The engineer testified as follows: "I was keeping a lookout and did not observe anyone on or close to the

track that night. I know where the cattle guards are just beyond the station. I did not observe anyone about those cattle guards. My position on the engine is sitting looking ahead, watching straight ahead. I did not hear anyone halloo that night. There was nothing whatever to call my attention to anybody that was injured there. I knew nothing about it until the next night at Monroe.

The fireman testified as follows: "I never saw anybody near Dexter that night. When I am not putting in a fire I am looking ahead. There was nothing whatever to attract my attenton about Dexter. My first knowledge about it was when they wrote me a letter."

To test the ability of a person to see one lying on the side of the cattle guard, as appellee had described his position, the appellant made an experiment by two witnesses. One Huckleberry, a claim agent, was told to place himself in the same position that appellee said he was lying. One of the witnesses who made the test, testified, in part, as follows: "I am sixty-three years of age. I do not know that I could see the gravel. We had a good headlight and I could see everything else. I was not looking for the gravel, but the man. The light was perfect and I could see the cross-ties. We saw a man there; don't know how long he had been there. I don't know whether that claim agent was there any length of time; he might have just slid around to get me to see him. I didn't see him until he moved. I know he was there when that train was within fifteen or twenty feet of him, and I saw him pull up a little. I could see the cattleguard and that thing up by the side of it. We had no interest in it whatever; just went down there because a man wanted us to see if we could possibly see that man."

Another witness, after testifying that he went down at the request of the agent of appellant to make the test, proceeds as follows: "I was riding on the left hand side of the engine. I will soon be seventy-three years old. The light was good. I was keeping a sharp lookout. I looked all the way, that is, after we got to a certain point. He said, 'Keep a lookout all the time'; but when we got

there at a certain point he said, 'Keep a sharp lookout, there will be a man on the track and I want you to see if you can see him,' and I kept a sharp lookout and never did see anybody. Where the track was straight I could see for a long distance; something like a quarter of a mile. I could not say how far. I could see the side fenders, or whatever they call those things, on the side of the cattle guard. If there had been a man on one of them on my side I could have seen him, because the light is bright and I was keeping a lookout all the time; he told me to keep a sharp lookout. A man might have been lying on the cattle guard and I would not have noticed that any more than I would the cattle guard. I could have seen the man if he had been there, but there was not any man there." He was asked the following question: "If a man had been on that cattle guard you could have seen him before you got in fifteen feet of him?" and answered, "Well, I could not say as to that; if there had been a man on there I could have seen him before I passed him, I think. There were places I could see away out on each side of the track, twenty-five or thirty feet, where the track is straight. The track was straight where the men made the stop."

Witness Huckleberry, who, for the purpose of the experiment, was placed in the position that appellee was in at the time of his injury, testified as follows: "I placed myself in the cattle guard before the train was within half a mile of the station. I remained in that position until I moved my foot and leg to keep from being struck by the train. I remained absolutely quiet until that time. I had my foot on the guard rail." The front of the engine was about four to six feet away when he moved to get out of the way. The station was some 300 yards from the cattle guard. "I placed myself as nearly as possible in the position and was there until the test was completed. I do not know how long it was. It was longer than half a minute."

The above are the facts upon which the appellee sued the appellant for personal injuries, alleging that appellant negligently and carelessly ran its train upon him;

that appellant's employees failed to keep a lookout, through which negligence appellee was injured, etc.

The appellant denied the material allegations of the complaint and set up contributory negligence, and pleaded a release on the part of the appellee. There was a verdict and judgment in favor of the appellee in the sum of $1,000. Appellant moved for a new trial, one of the grounds being, "That the evidence is insufficient to sustain the verdict, and because the court erred in refusing appellant's prayer for instructions 1 and 3, which, in effect, were for a directed verdict.

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

The evidence does not sustain the verdict. The testimony of the test witnesses, who had the advantage of the engineer and fireman in knowing that there was a man to be looked for who had placed himself at the cattle guard in the position plaintiff said he was in, shows that they were unable to discover the man until they were within fifteen feet of him, when he moved.

Nothing in their testimony tends to contradict the engineer and fireman. 171 S. W. 912; 115 Ark. 584.

Appellee, pro se.

Notwithstanding the engineer and fireman testified that they were keeping a lookout and did not see a man on or near the track, it is also in proof that the track was straight and open for a long distance approaching the place of injury; that there was a bright headlight on the engine and that a person on the engine could have seen any one on or near the track. The jury evidently believed, as they had the right to believe from the facts and circumstances, that the engineer and fireman were not keeping the lookout. The evidence is sufficient. 110 Ark. 444.

WOOD, J., (after stating the facts). (1) The testimony of the engineer and fireman, employees in charge of appellant's train, upon whose alleged negligence the liability of appellant to appellee was predicated, is perfectly reasonable and consistent. Their testimony was uncontradicted, and the jury had no right to arbitrarily

disregard the same. *St. Louis, I. M. & S. Ry. Co.* v. *Humbert,* 101 Ark. 532, and cases there cited.

(2) The undisputed testimony shows that appellee was a trespasser, and that the engineer and fireman, at the time of his injury, were keeping the lookout required by the statute, and that they did not discover the perilous situation of appellee, and could not have discovered the same in time to have avoided the injury for which he sues. The night was dark, and the position that appellee assumed in lying down upon the cross-ties at the cattle guard was such that the engineer and fireman did not and could not have discovered him in time to have prevented injuring him.

Witnesses who made the test as to the ability of one to see a person lying upon or by the track from the engine corroborated the testimony of the engineer and fireman. The case is wholly unlike the cases of *St. Louis, I. M. & S. Ry. Co.* v. *McMichael,* 115 Ark. 101, and *St. Louis, I. M. & S. Ry. Co.* v. *Belcher,* 117 Ark. 638, *infra,* recently decided by this court. There the injury occurred in daylight, and there was a conflict in the evidence as to whether the employees had kept the lookout required by the statute.

While one of the witnesses says that he could see the gravel a distance of a quarter of a mile and could see the cross-ties, the cattle guard and the "thing up by the side of it," he testified that he could not and did not see the man until he was within fifteen or twenty feet of him. And the other witness testified that he could see a man on the cattle guard as easily as he could see the cattle guard; that he could see the side fenders on the cattle guard, and that if there had been a man on his side he could have seen him because the light was bright; but he does not say at what distance he could have seen him. There was no man on his side, and he therefore did not see the man who was placed in the position that appellee was in when his injury occurred.

There is no testimony to sustain the verdict. The judgment will therefore be reversed, and as the case has been fully developed the cause will be dismissed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. WATKINS.

Opinion delivered April 12, 1915.

1. RAILROADS — PAYMENT OF FARES — REASONABLE REGULATIONS. — The regulation by which railroads, where passengers are found on their trains, who have no tickets or passes, requiring such passengers to pay fare not only for that part of the route to be traveled, but also for that part already passed over, is a reasonable one.
2. RAILROADS—EJECTION OF PASSENGERS—FAILURE TO PAY FARE.—Where a passenger has been lawfully ejected from a railway train for nonpayment of fare, he can not demand to be carried forward on the same train without paying the disputed fare, and the purchase of a ticket at the point of ejection will not entitle him to readmission to the train.
3. RAILROADS—PASSENGERS—REFUSAL TO PAY FARE.—A passenger, riding on a railway train, without a ticket or a pass, can not recover damages for being ejected from the train, when he tenders the fare or buys a ticket for that portion of the journey only to be passed over, but refuses to pay for that portion already traveled.

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

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

Appellant was entitled to a peremptory instruction. Appellee having rightfully been ejected from the train at Hazen, because of his refusal to pay fare except from that point on to his destination, could not create a new contract by purchasing a ticket at Hazen and ignore the implied contract he entered into by boarding the train at Brinkley. 47 Ia. 82; 29 Am. Rep. 458; 16 L. R. A. 55; 132 Mass. 116; 42 Am. Rep. 432.

No brief filed for appellee.

HART, J. Appellee sued appellant for damages for alleged wrongful ejection from its train. Appellee, J. L. Watkins, lived in Little Rock and in July, 1914, got a pass over appellant's line of railroad to Brinkley to become a brakeman between that point and Memphis. After he had made a few trips on the local freight train the conductor told him that he did not need him any longer. This occurred at Brinkley. Appellee wired to Little Rock for a pass home. While he was waiting for

an answer to his message a passenger train came along on its way to Little Rock and appellee boarded the train. When the auditor came around to collect his fare he told him the circumstances detailed above. The auditor wired to Little Rock to see if he could obtain a pass for him and the dispatcher wired back that appellee should have waited at Brinkley to get a pass and instructed the auditor to eject him from the train if he did not pay his fare. Appellee refused to pay his fare, and when the train arrived at Hazen the conductor told him to get off the train. Appellee then offered to pay his fare from Hazen to Little Rock but the conductor and auditor of the train refused to receive it unless he would pay the fare from Brinkley to Little Rock, and ejected him from the train. Appellee then went to the ticket agent at Hazen and bought a ticket from that place to Little Rock and again attempted to enter the train but was not permitted to do so. Appellee did not offer to pay his fare from Brinkley to Hazen but, on the contrary, refused to do so.

Under the rules of the company the conductor or auditor were not allowed to permit appellee to ride unless he paid the full fare from the point where he got on the train to the point of destination. The jury returned a verdict in favor of appellee in the sum of $50 and to reverse the judgment rendered appellant has prosecuted this appeal.

Section 6591 of Kirby's Digest, provides that if any passenger shall refuse to pay his fare it shall be lawful for the conductor of the train to put him out of the car at any usual stopping place the conductor may elect. According to the undisputed testimony the appellee got on the train at Brinkley to go to Little Rock. He had no ticket or pass and refused to pay his fare. Under the statute above referred to the conductor had a right to eject him from the train at Hazen which was a usual stopping place. The appellee then bought a ticket from Hazen to Little Rock and attempted to board the same train to be carried to Little Rock but the conductor and train auditor refused to permit him to ride on the train

because under the rules and regulations of the company he was required to pay fare from the point where he entered the train to the point of destination and, having refused to pay fare from Brinkley to Little Rock, they would not permit him to again embark on the train at Hazen.

(1) The regulation by which railroads, when passengers are found on their trains who have no tickets or passes, requiring such passenger to pay fare not only for that part of the route to be traveled but also for that part already passed over, is a reasonable one. *Manning* v. *Louisville & Nashville Rd. Co.,* (Ala.) 16 L. R. A. 55.

(2) Where a passenger has been lawfully ejected from a railway train for nonpayment of fare he can not demand to be carried forward on the same train without paying the disputed fare and his purchase of a ticket at the point of ejection will not entitle him to readmission to the train. *Stone* v. *C. & N. W. Ry. Co.,* 47 Iowa 82, 29 Am. Rep. 458.

(3) When the train auditor demanded of appellee the fare from Brinkley to Little Rock appellee refused to pay him and told him that he would pay him from Hazen to Little Rock. It is apparent that appellee having got on the train at Brinkley would not be entitled to ride to Little Rock by tendering the fare from Hazen to Little Rock, and his purchase of a ticket from Hazen gave him no greater rights than his tender of the fare from Hazen to Little Rock.

In the case last cited the court, in discussing a precisely similar situation said: "The purchase of a ticket from the ticket agent would give him no greater rights. For under such a ticket he would be claiming the same rights under the same state of facts upon which he would not be entitled to them had he dealt alone with the conductor. The fact that he made use of an agent of the company other than the conductor can not enlarge his rights or change the legal aspect of the case. It must be that the transaction with the agent was a mere continuation of the transaction with the conductor."

To the same effect see *Swan* v. *Manchester & Lawrence Rd. Co.*, 132 Mass. 116, 42 Am. Rep. 432; *Phillips* v. *Atlantic Coast Line Rd. Co.* (S. C.) 73 S. E. 75; *Pickens* v. *Richmond & D. R. Co.*, (N. C.) 10 S. E. 556; *Pennington* v. *Philadelphia, Wilmington & Balt. Rd. Co.*, 62 Md. 95; *Gulf Coast & S. F. Ry. Co.* v. *Riney*, (Tex. Civ. Ct. Appeals), 92 S. W. 54.

It follows that the court should have directed a verdict for the appellant and for its refusal to do so the judgment must be reversed; and, inasmuch as the facts have been fully developed, the cause of action will be dismissed.

DRIFOOS v. STATE.

Opinion delivered April 12, 1915.

CRIMINAL PROCEDURE—ONE DEFENDANT—CONSOLIDATION OF SEVERAL INDICTMENTS.—Where several indictments against one defendant are consolidated for the purpose of trial, with his consent, it will be presumed that the defendant agreed to the consolidation because he would obtain some advantage thereby, and the order of consolidation will be allowed to stand.

Appeal from Craighead Circuit Court, Jonesboro District; *J. F. Gautney*, Judge; affirmed.

Hawthorne & Hawthorne, N. F. Lamb and *Archer Wheatley*, for appellant.

Counsel raise no question in this case as to the consolidation. For argument otherwise see *Davis* v. *State, supra.*

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

Every objection raised here was disposed of in the Davis case.

No point is made as to the consolidation, but that having been done by appellant's consent, he could not complain. *Silvie* v. *State*, 117 Ark. 108.

HART, J. Ten separate indictments were returned against Lee Drifoos, appellant, charging him with run-

ning a "blind tiger" in the city of Jonesboro, Arkansas, in August, 1914. By consent of appellant the cases were consolidated for trial. A separate verdict of guilty was returned in each case and from the judgment rendered the appellant prosecutes this appeal.

It is conceded by counsel for appellant that the evidence is sufficient to sustain the verdict in each case.

This is a companion case to that of *C. H. Davis* v. *State,* 115 Ark. 566. Drifoos and Davis were partners in the business conducted in the storehouse where it was charged and shown that the "blind tiger" was operated. Except as to the question of consolidation the issues are precisely the same, and as to these questions the instant case is ruled by the Davis case. In the Davis case the consolidation was ordered by the court over the objection of the defendant and for that reason the judgment was reversed. In the case at bar the consolidation for the purpose of trial was had with the consent of the appellant and on this point the case is ruled by *Silvie* v. *State,* 117 Ark. 108.

In that case it was held that where cases are consolidated for the purpose of trial with the consent of the defendant it will be presumed that the defendant agreed to the consolidation because he would obtain some advantage thereby and on this account the order of consolidation works no reversal of the judgment.

The judgment will be affirmed.

BAKER v. HUDSON.

Opinion delivered April 12, 1915.

1. HOMESTEAD—RIGHT OF OWNER TO CONVEY—RIGHT OF CREDITORS—One may convey his homestead for any consideration or purpose for which he pleases, and no creditor can complain of this action, because a creditor has no right to demand its subjection to the payment of his debt.
2. HOMESTEAD—DEFENSE—FAILURE TO ASSERT.—The right to claim a homestead will be concluded by a decree which necessarily involves that issue, and can not be claimed in subsequent litigation.

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

G. B. Oliver, for appellants.

The court should have directed a verdict for the defendants. The question whether or not the property was the homestead of appellees was put in issue in the case of *Hovey* v. *Stephens,* and even if this precise question was not in issue in that case, it was a proper defense and ought to have been pleaded. 96 Ark. 545; 76 Ark. 423; 77 Ark. 379; 79 Ark. 185; 84 Ark. 92; 23 Cyc. 1295 (g) *et seq.;* 33 Ark. 454; 23 Cyc. 1239-d, and note; 22 Cyc. 698 (11); Freeman on Judgments, (4 ed.), § 151; Black on Judgments, § § 197, 535.

F. G. Taylor, for appellees.

The question of *res judicata* is settled contrary to appellant's contention by the decision of this court in *Stephens* v. *Stephens,* 108 Ark. 53.

SMITH, J. One G. H. Hovey recovered a judgment on March 21, 1907, against J. M. Stephens for a debt contracted in 1903 and 1904. After this debt was contracted he executed a deed to certain lots in the town of Success to his infant children, Maude, Bert and Robert Stephens. His wife joined him in the execution of this deed. Stephens died on the 25th day of March, 1908, but before his death a suit had been begun to set aside this conveyance. His widow and his minor children were made parties defendant to that suit. It was alleged that the conveyance was without consideration, and was made for the fraudulent purpose of hindering and delaying plaintiff in the collection of his debt. The court found the allegations of the complaint were sustained by the proof and cancelled the conveyance and ordered the property there described sold to satisfy the plaintiff's judgment. The decree was affirmed by this court.

The lots were sold under this decree and G. B. Oliver became the purchaser and later conveyed them to appellants. After the sale under this decree Mrs. Stephens refused to surrender possession and a writ of assistance was prayed for. Upon the hearing of the application

for this writ the contention was made that the lots described in the conveyance to the children constituted the homestead of Mr. Stephens, and that, therefore, the sale of them was void. The writ was awarded, however, and Mrs. Stephens and her children were dispossessed. After remaining out of the possession of the lots for some years Mrs. Stephens, who in the meantime had intermarried with a Mr. Hudson, brought suit, in conjunction with her children and with William Stephens, an adult son of J. M. Stephens, but who was her step-son, for the recovery of the possession of these lots. It was alleged in this complaint that J. M. Stephens died seized and possessed of these lots and that the same was his homestead, and the complaint, with the answer, put in issue the questions involved in this litigation.

It was shown upon the trial below that J. M. Stephens had resided in a house not located on the lots in question for a number of years, and that his health having failed he removed to Illinois on that account. Before leaving for Illinois, however, he stored some of his furniture in a house on the lots in controversy and reserved two rooms in that house for that purpose. His health did not improve while he was in Illinois and he returned to this State, where he soon died. He was unable to secure possession of the house now claimed to have been his homestead, and he went to the home of his son William, where he remained until his death some days later. His wife and the minor children, however, moved into the house in question before the death of Mr. Stephens and resided there until they were ejected under the writ of possession. The evidence shows that Mr. Stephens was himself prevented from moving into the house only because of his illness and subsequent death, and that it was his intention to occupy the house as his homestead when he caused his family to move into it.

The deposition of William Stephens, which was taken in the former case, was read in evidence in the present case, and from this deposition it appeared that the house and lots in question were claimed as a homestead at that time.

Instructions were given defining a homestead and the action necessary to impress that character upon a piece of property.

At the request of appellants the court gave the following instruction: "If you find from a preponderance of the evidence that in the trial of the case of G. H. Hovey against Luella Stephens, Maud Stephens, Bert Stephens and Robert Stephens evidence was introduced by defendant to show that the property in controversy was the homestead of plaintiffs in this case; that said issue was submitted to the chancery court; that plaintiffs appealed to the Supreme Court and the same question was presented in briefs to the Supreme Court, you will find for the defendants, even though they now bring other witnesses who give stronger testimony on that point and even though it was the homestead of J. M. Stephens."

But the court refused to give an instruction at the request of appellants which was to the effect that the right to claim a homestead was necessarily involved in the original litigation and was concluded by the decree rendered in that case.

The jury returned a verdict in favor of the appellees, and this appeal has been duly prosecuted from that judgment.

Many alleged errors are complained of in the motion for a new trial, which are discussed in the briefs.

(1) It is chiefly insisted that the decree in the original suit is conclusive of the right of appellees to claim the property as their homestead. We think appellants are right in their contention and it is, therefore, unnecessary to discuss any of the other questions involved in the case. One may convey his homestead for any consideration or purpose for which he pleases and no creditor can complain of this action, because a creditor has no right to demand its subjection to the payment of his debt. Nor need we consider whether the finding of the jury on the question as to whether or not the homestead was in fact claimed in the original suit was unsupported by the evidence. That question was necessarily involved in that case. If the lands were in fact the homestead of

Mr. Stephens at the time of the conveyance to his children, then Stephens had a complete defense to that suit. The principle which controls here was involved in the case of *Fourche River Lumber Company* v. *Walker,* 96 Ark. 540. It was there said:

"It is true that a judgment is conclusive, not only upon the question actually determined, but upon all matters which might have been decided in that suit, but this refers to all matters properly belonging to the subject of the controversy and within the scope of the issues. In other words, the defendant must set forth in his answer all grounds of defense that he may have or he will be held to have waived such defenses as he failed to set out."

(2) It follows, therefore, that the court should have directed a verdict as prayed in appellant's favor, and for the error of the court in refusing so to do the judgment of the court below will be reversed and the cause remanded with directions to set aside the judgment heretofore rendered and render judgment in favor of appellants.

BOWSER FURNITURE COMPANY v. JOHNSON.

Opinion delivered April 12, 1915.

1. SALES—RESERVATION OF TITLE—REMEDY OF VENDOR.—Where property is sold with a reservation of title, the vendor has the right to elect between the remedies he may pusue; he may bring replevin and recover the specific article sold by him, or he may affirm the sale and waive the reservation of title and sue for the purchase money alone and recover judgment, which entitles him to process for the collection of the money.
2. REPLEVIN—EXEMPTIONS.—Kirby's Digest, § 6868, provides that a judgment in replevin shall be for the return of the property, or for the value thereof, in case a delivery can not be had, and damages for the detention, and against this character of judgment, the defendant can not claim his exemptions.
3. REMEDIES—ELECTION—REPLEVIN—EXEMPTIONS.—Where the appellant has the alternate remedy to bring replevin, or to affirm the sale and recover a money judgment, and he elects the latter remedy, the appellee will be permitted to schedule his exemptions.

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

Kerby & Floyd and *Carmichael, Brooks, Powers & Rector,* for appellant.

1. A judgment necessarily follows the pleadings and proof, and takes its coloring and meaning from the pleadings. Originating in a justice of the peace court, it was only necessary to file an affidavit for replevin and get an order of delivery. The affidavit is for replevin, and the judgment of the circuit court recites that "if the furniture involved in this suit be returned within thirty days" etc. This shows that the subject-matter of the suit was replevin, and that the judgment was a replevin judgment. 2 Enc. Pl. & Pr. 868, 870, and cases cited; 23 Cyc. 793.

The defendant made no objection to it being *in solido.* 53 Ark. 411; 43 Ark. 207; 37 Ark. 544.

2. One is not entitled to claim exemptions in a judgment in replevin. 36 Ark. 297, 298; 84 Ark. 187; 63 Ark. 540; 82 Ark. 236.

R. W. Robins, for appellee.

1. The judgment speaks for itself. It does not recite that it is for damages or for the value of any property converted, but is clearly a judgment for the purchase money of the property involved in the suit, in form a judgment for debt, and the court in this proceeding can not go behind the face of the judgment to ascertain its nature. Waples on Homestead and Exemptions, 914.

2. The claim of exemptions was filed by appellee pursuant to section 3905, Kirby's Digest. This statute does not limit the right to exemption as to time wages to judgments on contracts. 12 Am. & Eng. Enc. of L., (2 ed.), 169; *Id.* 184. Statutes of this kind are construed liberally in favor of the right to exemption. 63 Ark. 83; 31 Ark. 652; 38 Ark. 112.

SMITH, J. Upon the trial of this cause in the court below the following judgment was rendered:

"* * * This cause was submitted to the court sitting as a jury, and the testimony of the witnesses was heard, and the court being well and sufficiently advised,

it is by the court considered, ordered and adjudged that the plaintiff have and recover of and from defendant the sum of $60.25, principal, and $10.80 interest, being a total of $71.05, and all the costs of this cause; and it is further considered, ordered and adjudged by the court that if the furniture involved in this suit be returned by the defendant within thirty days, that the records of this court shall be endorsed and satisfied in full by the plaintiff."

A writ of garnishment was issued on this judgment and served upon appellee's employer, who stated in his answer that he was indebted to appellee in the sum of $8 for wages. Appellee filed a schedule of his property and claimed the wages due him as exempt, and his claim was allowed, and this appeal is taken from the judgment allowing the exemption.

It is claimed by appellant that the pleadings in the case will show that this was an action in replevin brought to recover the possession of certain furniture sold appellee, under a reservation of title in favor of appellant, and that consequently there can be no exemptions claimed against the judgment. Upon the other hand, the appellee insists that the judgment must speak for itself, and that while appellant may have had the right to have demanded that the ordinary judgment in replevin be rendered in its favor, it did not do so, and that the judgment in question is a mere judgment for the recovery of money, with the *proviso* that it might be satisfied in thirty days, by appellee by the return of the property originally sued for.

We think appellee's position is correct and that he, therefore, has the right to claim his exemptions against the enforcement of this judgment.

(1) Where property is sold with a reservation of title the vendor has the right to elect between the remedies he shall pursue. He may bring replevin and recover the specific article sold by him, or he may affirm the sale and waive the reservation of the title and sue for the purchase money alone, and recover a judgment

which entitles him to have process for the collection of the money.

In the case of *Spear* v. *Arkansas National Bank,* 111 Ark. 29, it was said: "Replevin is not an action for the collection of debt, but upon the contrary is a possessory action for the recovery of specific personal property."

And that case cited the opinion in the case of *Hawes* v. *Robinson,* 44 Ark. 308, in which case it was said: "It is essential to a proper affidavit in replevin that it describe the property sued for in such manner as to afford the means of identifying it."

And in the case of *Swantz* v. *Pillow,* 50 Ark. 300, Chief Justice COCKRILL said: "In replevin, the delivery of the property is the primary object of the action. The value is to be recovered in lieu of it, as an alternative only 'in a case a delivery can not be had' of the specific property. Man. Dig., § 5181. Whatever purpose beneficial to the defendant the judgment in the alternative may serve, it is not put in that form to give one who has been adjudged to be in the wrong, his election to pay the assessed value and retain the property as his own, against the will of the party to whom the judgment of the court has awarded it."

(2) The statute prescribes the form of a judgment to be rendered in a replevin suit. Section 6868, Kirby's Digest. It is provided that the judgment shall be for the return of the property, or for the value thereof in case a delivery can not be had, and damages for the detention, and this is the character of judgment against which one can not claim his exemptions. *Smith* v. *Ragsdale,* 36 Ark. 297.

(3) Appellant may have been entitled to a judgment of this sort, but we must determine the election he made of the remedy which he would pursue by the judgment rendered in his favor, and when we have done so, it appears that he has the money judgment to which he was entitled upon affirming the sale and electing to sue for the purchase money. Ordinary process might issue,

and did issue, for the enforcement of this judgment, and its nature as a money judgment is not changed by the fact that appellee within thirty days after its rendition might have satisfied it by the return of the property sold him by appellant. The judgment of the court below is, therefore, affirmed.

KIRBY, J., dissents.

STORTHZ v. WATTS.

Opinion delivered March 29, 1915.

1. CONTRACTS—EXPIRATION—RENEWAL.—Where a contract for the lease of land has expired, in order to show an oral agreement to renew the same, the language used, in order to operate as a renewal of the contract, must be sufficient, either by express reference to the terms of the old contract or the statement of new terms to amount to a complete contract.

2. CONTRACTS—LEASE OF LAND—STATUTE OF FRAUDS.—An oral contract of lease of land is taken out of the statute of frauds, when the lessee complies with the terms by paying rent for the years actually occupied, and making valuable improvements upon the land.

3. CONTRACTS—LEASE OF LAND—STATUTE OF FRAUDS.—In order to take an oral contract of lease of land out of the statute of frauds, there must be substantial expenditures in the way of performance of the contract over and above the mere occupancy of the land, and payment of rent for the period actually occupied.

4. CONTRACTS—STATUTE OF FRAUDS—SUBSTANTIAL PART PERFORMANCE.—Substantial part performance operates to take an oral contract of lease out of the operation of the statute of frauds, but partial execution does not have that effect.

5. APPEAL AND ERROR—REVIEW—STATUTE OF FRAUDS—QUESTION RAISED, HOW.—Where plaintiff has plead the statute of frauds, and duly saved exceptions to the overruling of an objection to the introduction of testimony tending to take the contract out of the operation of the statute, it will be held that the issue of the statute may be reviewed on appeal.

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

W. T. Tucker, for appellant.

Miles & Wade, for appellee.

McCULLOCH, C. J. The plaintiff, L. Storthz, leased his farm to defendant Watts by oral contract entered into in March or April, 1913. Defendant held over into the year 1914, and this is an action of unlawful detainer instituted by plaintiff to regain possession. Plaintiff contends that the contract only covered the renting of the farm for the year 1913, whilst defendant's contention is that the lease covered a period of two years, that is to say, the remainder of the year 1913, and also the year 1914. The defendant was put out of possession under a writ issued at the commencement of the action, and a trial of the case resulted in a verdict in his favor, and his damages were assessed at the sum of $160. Plaintiff has appealed.

There was a sharp conflict in the testimony. Plaintiff testified that he rented the land to defendant for the year 1913 at a specified rental price of $3 per acre; that there were eighty acres of the land which defendant agreed to cultivate and pay for; but that at the end of the year, defendant having cultivated only about thirty or forty acres, they compromised by defendant paying rent on forty acres of the land. Defendant testified that plaintiff made a verbal contract with him for a lease of the farm for the years 1913 and 1914.

(1) It is insisted, that the alleged oral contract for lease of the lands for a period of more than one year was within the statute of frauds and therefore void. Plaintiff pleaded below the statute of frauds. There is no contention that the contract was in writing, but defendant contends that it was taken out of the operation of the statute of frauds on two grounds, namely: One that there was a ratification or renewal of the contract after the expiration of the first year, which amounted to a new contract; and, second, that defendant made valuable improvements on the place in anticipation of enjoying the use of it for the full period stipulated in the alleged contract. We have examined the testimony carefully and reached the con-

clusion that it is not legally sufficient to sustain the defendant upon either of those points. Plaintiff denied that he ever leased the place for a longer period than for the year 1913, and denied that anything was said by defendant after the expiration of the year, about holding it for another year, and denied that there was any agreement made between him and the defendant for leasing the place during the next year. Defendant testified that about the 1st of January, 1914, the plaintiff came to the farm for the purpose of collecting the rent for the year 1913, and that after he paid plaintiff by giving a check for the agreed amount, something was said about a ditch to drain the water off of some of the land, and that plaintiff stated in reply that the next time he came down to the place he would go over there and see about the ditch. There is no contention on the part of defendant that there was any specification in that conversation about renting the place for another year, but this testimony is brought forward as tending to show a recognition of the existing contract. This, however, is far from establishing a new contract or a renewal or ratification of the one alleged to have been theretofore entered into. The statements of the parties as related by the defendant in his testimony, were not sufficient to establish a new contract or to take the old one out of the operation of the statute of frauds. In order to be operative as a renewal of the contract, the language used must have been sufficient, either by express reference to the terms of the old contract or the statement of new terms to amount to a complete contract.

(2-3-4) Nor was there, we think, sufficient testimony to warrant a finding that there had been such performance of the contract as would take the case out of the operation of the statute of frauds. In the recent case of *Phillips* v. *Grubbs,* 112 Ark. 562, we announced the principle that an oral contract of lease is taken out of the statute of frauds when the lessee complies with the terms by paying rent for the years actually occupied and making valuable improvements upon the land. About all the defendant's testimony on this point amounts to is that

the character of the soil was such that he wouldn't have cared to rent it for a single year, and that he made some slight repairs on the fence. He undertakes to testify about expenditures made to tenants on the place, but he does not show that the expenditures were for permanent repairs, or repairs necessary to cover the period of the alleged contract, nor that the repairs were contemplated by the terms of his contract. The only item of repairs specified is a trifling amount expended on the fence, which is too insignificant to be treated as a substantial performance of the contract. There is nothing more in the testimony, in the way of part performance, than occupancy for the first year and payment of the rent for that year, which is not sufficient to take the case out of the operation of the statute. There must be substantial expenditures in the way of performance of the contract over and above the mere occupancy and payment for the period actually occupied. There is a difference between substantial part performance of a contract, which takes it out of the operation of the statute, and partial execution, which does not have that effect. *Henry & Bro.* v. *Wells,* 48 Ark. 485.

(5) Counsel for defendant insists that the questions just discussed have not been properly raised, for the reason that there were no objections made to the testimony as to the contract not being in writing. We think the questions were properly raised, and call for a review here. Plaintiff pleaded the statute of frauds, and there was no conflict in the testimony about the contract being oral, though there was a conflict as to whether it covered a longer period than the year 1913. Defendant undertook to get the case out of the operation of the statute by showing that he made valuable improvements in part performance. That testimony was objected to and exceptions were saved. It was, as we have already said, insufficient to show partial execution of the contract, but the objection to the ruling of the court in admitting the testimony, and the saving of exceptions to the ruling of the court, were sufficient to bring this matter before us for review. There was nothing else plaintiff could do in the way of

raising the question after having pleaded the statute and objected to any testimony which did not tend to take the case out of its operation.

The testimony being insufficient to sustain the verdict, the judgment is reversed and the cause remanded for a new trial.

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

Opinion delivered March 29, 1915.

1. ATTORNEY AND CLIENT—FEES—PARTY TO SUIT.—While an attorney has a lien upon the proceeds of his client's claim against a defendant, under the statutes, whether the action is reduced to judgment or settled by compromise, he can not properly be made a party to the litigation.
2. ATTORNEY'S FEES—LIEN.—Under the statutes an attorney has a lien for his fee, which can not be defeated by any settlement of the parties litigant, before or after final judgment or final order.
3. ATTORNEY AND CLIENT—FEES—RIGHTS INTER SE.—An attorney has no right to compel his client to continue litigation; a client may dismiss his cause of action or may settle with the opposite party without consulting his attorney, but when there are any proceeds from the litigation derived by settlement, compromise or final judgment, the attorney has a lien thereon, of which he can not be deprived by the parties to the lawsuit, by any settlement they may make.
4. ATTORNEY AND CLIENT—FEES.—Appellee, through certain attorneys, brought suit against appellant in S. County, and thereafter brought suit against appellant on the same cause of action, through other attorneys, in L. County. Appellant moved in the L. County action to have the first attorneys made parties, in view of their interest in their fees in the outcome of the litigation. *Held*, the motion would be overruled, as that was a matter collateral to the only issue in L. County, namely, the liability of the appellant to the appellee on the cause of action, and that under the facts appellant's only concern was to see that the proceeds of a judgment in appellee's favor were not paid over until it should be determined whether or not the attorneys first employed had a lien upon such judgment.
5. EVIDENCE—RULES OF CORPORATION—PRACTICE—REBUTTAL.—In a personal injury action, when defendant has introduced evidence showing a certain rule to exist, and plaintiff's duty with reference thereto, it is competent for plaintiff to introduce testimony in re-

buttal, showing a different interpretation of the rule to be understood by plaintiff and other employees of defendant company.

6. EVIDENCE—INTERPRETATION OF RULES.—The above evidence held competent as showing the construction placed upon the rule by the workmen in defendant's employ, and as actually followed, by them.

7. NEGLIGENCE—STATUTORY PRESUMPTION—OPERATION OF TRAINS.—The statutory presumption of negligence applies in all cases where employees of railway companies receive injuries by the running of trains, except as to those employees who are themselves engaged in the actual running of the train which causes the injury. (Kirby's Digest, § 6773.)

8. NEGLIGENCE—STATUTORY PRESUMPTION—OPERATION OF TRAIN.—Kirby's Digest, § 6773, provides that when an employee of a railway company is injured by the operation of a train, when he is not actually engaged in the operation thereof, a presumption of negligence on the part of the train crew arises, placing on the railway company the burden of proving that it was not guilty of negligence.

9. APPEAL AND ERROR—INSTRUCTIONS—COMPLETENESS.—Where the instructions given in a cause, separately present every phase of the law as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others.

10. MASTER AND SERVANT—INJURY TO SERVANT—VIOLATION OF RULE—KNOWLEDGE.—When a servant is injured by reason of his violation of a rule of the master which he knew or ought to have known, the servant may be held guilty of contributory negligence in not observing the rule, but when a plea of contributory negligence is predicated solely upon plaintiff's failure to observe a rule, he must be shown to have knowledge of the rule before he can be held culpable on the ground of his not having obeyed it.

11. MASTER AND SERVANT—RULES—ABROGATION BY CONDUCT.—Where a rule which is made for the protection of the employees of appellant is habitually violated by the employees for a long time, with the knowledge and acquiescence of those servants of appellant whose duty it is to enforce the rule or report any infractions thereof, so as to establish the custom of violating the rule, and thus bring home to the appellant knowledge thereof, an abrogation of the rule is effected, regardless of whether the servants charged with its enforcement affirmatively or expressly consented or acquiesced or not.

12. APPEAL AND ERROR—INVITED ERROR—INSTRUCTIONS—INCONSISTENT POSITIONS.—Where appellant has asked the court to declare the law in a certain way, he can not thereafter object to a ruling of the court in accordance with said prayer, without some affirmative showing in the record that it had abandoned and withdrawn its objection to the court's ruling, rejecting the prayer when first offered.

13. APPEAL AND ERROR—INVITED ERROR—RULING OF TRIAL COURT.—A party will be held to have waived the error in the court's ruling which he invited the court to make.

14. MASTER AND SERVANT—INJURY TO SERVANT—VIOLATION OF RULE—CONTRIBUTORY NEGLIGENCE.—Where appellant's servant was injured while acting in the course of his employment, and the evidence was conflicting as to whether he violated a rule of the appellant while performing his work, the question of contributory negligence is for the jury.

15. MASTER AND SERVANT—INJURY TO SERVANT—AMBIGUOUS RULE—CONSTRUCTION.—An ambiguous rule promulgated by a corporation for the government of its employees in a dangerous service should generally be taken in its stronger sense against the corporation and in favor of the employee.

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

STATEMENT BY THE COURT.

Plaintiff was employed by the defendant as a laborer and commenced work on the rip track in November, 1911. The rip track is the place where they put bad order cars for repairs; there are a number of these tracks at the Argenta yards, all in a body. Plaintiff was what is known as a "steel car helper," and on the morning of September 3, 1913, while in the performance of his duties, he received personal injuries for which he brought this suit in the Lonoke Circuit Court on July 9, 1914, alleging that defendant's switchmen, "without notice to plaintiff, negligently shoved cars upon the track where he was engaged at work, striking the car that was being repaired and running it over him; that he was injured by reason of the negligence of his foreman in failing to notify the switchmen that repairs were being made upon the car where the injuries occurred." He further alleged that he was exercising due care for his own safety, and that at the time was doing repair work upon one of the cars under the direction of his foreman, one Vance, who was present. He described his injuries and alleged damages in the sum of $50,000, for which he prayed judgment.

The defendant moved to dismiss the cause, setting up that plaintiff, through his attorneys, Jackson and Jones, on the 16th day of September, 1913, instituted suit against

defendant in the Saline Circuit Court to recover for the same injuries, and that said suit was still pending in that court; that at the March term of that court, the cause was continued by agreement between Jackson and Jones, attorneys for the plaintiff, and the attorneys for the defendant; that the cause under the agreement for continuance stands for trial at the next September term of the Saline Circuit Court; that plaintiff employed Jackson and Jones under a contract which provided that they should have a contingent fee out of the proceeds of the amount recovered; that Jackson and Jones have a vested interest in plaintiff's cause of action, and asking that Jackson and Jones be made parties, or that the cause be dismissed. The defendant, as an exhibit to its motion, filed a copy of the complaint filed by Jackson and Jones in the Saline Circuit Court, and also a copy of defendant's answer to said complaint.

The plaintiff responded to the motion denying its allegations; he denied that he employed Jackson and Jones, or either of them, to represent him, or that they had any right to file suit in the Saline Circuit Court, and denying that they had any interest in his cause of action. He exhibited with his response copy of the order of the Saline Circuit Court dismissing the case of plaintiff against the defendant; he also exhibited a copy of an affidavit made by him in which he denied that he had entered into a contract authorizing Jackson, of the firm of Jackson and Jones, to represent him in his claim for damages against the defendant, and setting up that he had nothing to do with the case filed in the Saline Circuit Court except to cause the same to be dismissed on June 25, 1914.

The defendant amended its motion to dismiss, setting up that the dismissal of the action in the Saline Circuit Court was without the knowledge or consent of Jackson and Jones, the attorneys representing the plaintiff in that court, and was unauthorized; and that Jackson and Jones did not dismiss their cause of action arising out of their right to a lien on plaintiff's cause of action. In support of its motion to dismiss, defendant adduced the affidavit

of Jackson and Jones in which they stated that they were employed by the plaintiff on the 16th day of September, 1913, to prosecute his claim against the defendant for damages suffered by him on the 3d day of September, 1913; that they had an agreement with plaintiff that they should receive for their fee one-half of any sum recovered in any suit brought by them for the plaintiff, and that if no suit was brought and the claim was compromised, their fee should be equal to one-third of the amount recovered by compromise; that the contract entered into between affiants and the plaintiff contained a power of attorney authorizing affiants to bring suit on plaintiff's claim against the defendant in a court having jurisdiction of the matter; that in pursuance of this contract, affiants on the 16th day of September, 1913, instituted action for plaintiff in the Saline Circuit Court, where the action is still pending; that affiants had not been paid anything for their services rendered under the contract with plaintiff; that at the March term, 1914, affiants and the attorney for the defendant agreed that the cause should be continued until the September term, 1914, which was done, and that the cause stands for trial at that term, and affiants intended to prosecute the cause; that they had not authorized or participated in the bringing or prosecution of the suit in the Lonoke Circuit Court. On August 10, 1914, the court overruled the defendant's motion to dismiss, and its motion to have W. D. Jackson and Gus W. Jones made parties plaintiff.

The defendant then filed its answer denying the allegations of the complaint as to its negligence and as to the injuries of the plaintiff, and setting up the affirmative defenses of contributory negligence and assumed risk on the part of the plaintiff. On August 13, 1914, defendant renewed its motion to dismiss the cause, alleging that since the court passed upon the former motion, the plaintiff, through his attorneys Jackson and Jones, had reinstated the suit in the Saline Circuit Court, and it exhibited a certified copy of the complaint that was filed in the Saline Circuit Court, and renewing its allegations to the

effect that Jackson and Jones had a vested interest in the plaintiff's cause of action, and praying that the cause be dismissed; and that it be transferred to the Saline Circuit Court in order that defendant might have it consolidated with the suit pending there, or that the cause be continued in order to give the defendant an opportunity to have the Saline Circuit Court, at its September term, determine whether Jackson and Jones and the plaintiff had the right to maintain plaintiff's suit in that court.

The court overruled the renewed motion of the defendant to dismiss, to which ruling exception was duly saved.

At the time the plaintiff received his injury, he had been working for defendant nearly two years. Up to that time, he had never worked away from the rip tracks; when they were working on a rip track, the switches were locked; plaintiff had nothing to do with protecting himself on the rip track; he never had a blue flag and never used one as long as he stayed there. Plaintiff and another helper worked under one Vance as their foreman; they did such work as they were ordered to do by the foreman, and under his supervision, the three constituting what was known as a "steel car gang." The plaintiff describes what took place on the day of his injury, as follows: "Mr. Vance told me to get my hammer and my wrench and come to this car and tighten up some draft bolts; we went alongside by these engines and found a bolt and came back together, and he told me to put this bolt in. I started under the car to put the bolt in, and Mr. Vance walked across the track, and I just got my hand on this brake to do the work, and those cars came back and hit the one I was under, and it ran over me. When Mr. Vance took me out there that day and told me to go under that car and go to work, I supposed they had been protected. I looked to my foreman for my protection; I did not have any connection with the switch crew." The testimony of the plaintiff tended further to show that one Bosshardt, who was a general foreman of the yards, directed Vance to repair certain cars that were not placed on the rip

tracks where plaintiff had been working before, and where he had been protected by locked switches.

The defendant introduced witnesses whose testimony was to the effect that sometimes repairs were made on other tracks than the rip tracks, and the workmen were protected under the following rule:

"A blue flag by day and a blue light by night displayed at one or both ends of an engine, car or train indicates that workmen are under or about; when thus protected, it must not be coupled to or moved; workmen will display the blue signals and the same workmen are alone authorized to move them, others must not be placed on the same track so as to intercept the view of the blue signals without first notifying the workmen."

This rule was "generally and regularly observed." "Under that rule as enforced and in effect, it was Blaylock's duty upon going to work upon a car upon the storage tracks in the yards to display the blue flag."

One of the witnesses testified: "For the last two years they have not used them (the flags) on the heavy repair tracks, they are locked," it is customary to do such repairs as the plaintiff was doing, out in the yards on other tracks besides the rip tracks; in such cases, the blue flag rule is observed: "When we go outside to make minor repairs, I think the men going out should carry a flag; that rule of putting out blue flags is generally known in the yards; it is observed among the repairers." The plaintiff in rebuttal introduced witness J. R. Countryman, who, over defendant's objection, testified: "I am acquainted with the custom and practice with reference to putting out flags where men are at work on the cars. Under the blue flag rule, where a steel car man takes his two helpers and goes out in the yards to perform work under a car, it is the foreman's duty to put out a blue flag. I have had about twenty-four years' experience as a railroad man." Also, witness Erickson, who testified to the same effect, except that he had worked for the defendant about three years and left its employ, he thought, in 1912. At the conclusion of the testimony of each of these wit-

nesses, the defendant moved to exclude the same "because the rule is in writing and can not be proved by parol testimony, and for the further reason that the only way it could be competent would be in the way of proving the general custom in abrogation of the rule, and plaintiff's testimony is not sufficient for that purpose, as it does not show any general custom." The court overruled the motion to exclude, and defendant duly saved exceptions.

The defendant duly objected and excepted to certain rulings of the court pertaining to the giving, refusing and modifying prayers for instructions, which we will notice in the opinion.

From a judgment in favor of the plaintiff for $15,000, this appeal has been duly prosecuted. Other facts stated in the opinion.

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

1. The court erred in overruling appellant's motions to dismiss this case, and to make Jackson and Jones attorneys for appellee in the case pending in Saline County, parties to this action. Kirby's Dig., § § 4458, 4462; Act No. 293, Acts 1909; Kirby's Dig., § 6093, subdiv. 3; 26 Ark. 17.

2. It was improper to permit witnesses to testify as to what the blue flag meant. The rule is in writing, is unambiguous, and its construction was for the court as a matter of law. 57 Ark. 410. In any view the testimony was incompetent, since it was an attempt to prove a writing by parol, or to contradict the language of the rule by parol.

3. Instructions 1 and 2 should not have been given. The first makes the fact that plaintiff was injured presumptive of negligence, and ignores the defense of assumed risk which was pleaded by defendant, and the first of these defects is carried into the second instruction. 87 Ark. 321; 100 Ark. 467.

The statutory presumption of negligence, Kirby's Dig., § 6773, relates merely to alleged negligence in the operation of trains and does not apply where the injury

was caused by the negligence of a fellow-servant having no connection with the running of a train.

4. Instruction 9 errs in making the duty of the employee to obey the rule depend upon his actual knowledge of it, and is in conflict with instruction "B," given at appellant's request, which correctly states the law. 99 Ark. 279.

5. The modification of instruction 14 requested by appellant was erroneous in that it tells the jury that, even though there was a rule which required the plaintiff to put out a blue flag to protect himself, he would be excused in law for violating the rule unless the violation of it was negligent. 110 Mo. 387; 86 Ga. 15; 66 Me. 420; 31 Mich. 429; 85 Ark. 240; 83 Ark. 428; 80 Ga. 427.

Davis & Pace, for appellee.

1. The motion to dismiss was properly overruled, and Jackson and Jones were not necessary parties to the proceedings resulting in the judgment, neither did they appear and ask to be made parties. 66 Ark. 190; 171 Ill. 100; 66 Ark. 260; 61 L. R. A. 340

2. There was no error in admitting the testimony with reference to the rule. It was given in rebuttal and was to the effect that under the blue flag rule, as interpreted and practiced, where a steel car repairer took his men and went out into the yards to repair cars, it was the duty of the foreman to protect his men by seeing that the switch was locked, or a blue flag put up.

3. Instructions 1 and 2 are correct. The long-established rule under the statute is that where an injury is cause by the operation of a railway train, a *prima facie* case of negligence is made against the company operating such train. 33 Ark. 816; 64 Ark. 364; 49 Ark. 535; 63 Ark. 636; 68 Ark. 171. This rule applies in favor of employees not engaged in the operation of the train that caused the injury. 100 Ark. 476; 81 Ark. 275; 83 Ark. 61; 88 Ark. 207. Negligence having been established, the doctrine of assumed risk would not apply. *St. Louis, I. M. & S. Ry. Co.* v. *Sharp,* 115 Ark. 308; White on Personal Injuries, § § 378-380.

4. Instruction 9, given at appellee's request, is a correct declaration of the law of this case. 48 Ark. 348; 88 Ark. 187. And there is no conflict between this instruction and instruction "B," given for appellant, but, in fact, the latter only adds to and makes plain the meaning of the former. 78 Ark. 22. Having raised only a general objection in the lower court to instruction 9, and failed to point out specifically wherein it was misleading, appellant can not urge error here. 103 Ark. 391; 105 Ark. 575; 98 Ark. 227; 97 Ark. 226; 95 Ark. 213.

5. There was no error in the court's modification of instruction 14, which was probably suggested to the court by appellant's requested instruction "A." Even if it were erroneous, appellant can not complain. 95 Ark. 209; 88 Ark. 172; *Id.* 138; 39 *Id.* 476.

6. There was no error in giving instruction 10. It is more nearly open to the objection that it was too favorable to the appellant. 88 Ark. 204.

WOOD, J., (after stating the facts). We will discuss the assignments of error in the order presented in appellant's brief.

I. (1-2-3) The court did not err in overruling appellant's motion to dismiss the cause and in refusing to make the firm of Jackson and Jones parties. Our statutes provide that the compensation of an attorney for his services is governed by agreement express or implied, which is not restrained by law, and that for such compensation, "from the commencement of an action, the attorney * * * has a lien upon his client's cause of action, * * * which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosesoever hands they may come." They also provide how the lien shall be perfected and enforced. Act 293, Acts of 1909. Sections 4458 and 4462, Kirby's Digest. These statutes do not make the attorneys either necessary or proper parties to the lawsuit. While they have a lien on their client's cause of action "which attaches to a verdict, judgment, etc., and the proceeds, thereof, into whosesoever hands they may come," this lien does not give

the attorney any interest in the cause of action, itself, or any control over the cause of action. The parties to the litigation must necessarily control the proceeding affecting their respective interests until the lawsuit is ended. The attorney, under the statutes, has a lien for his fee which can not be defeated by any settlement of the parties litigant before or after judgment or final order. The attorney has no right to compel his client to continue litigation. A client may dismiss his cause of action or may settle with the opposite party without consulting his attorney, but where there are any proceeds resulting from the litigation, either through settlement or compromise, or as the final result of the prosecution of the lawsuit to the end, the attorney has a lien on such proceeds of which he can not be deprived by the parties to the lawsuit by any settlement they may make. This is as far as the attorney's rights go. Of course, under section 4457, Kirby's Digest, where the parties compromised, the attorneys for the respective parties had a right of action "against both plaintiff and defendant for a reasonable fee to be fixed by the court or jury trying the case." See *Rachels* v. *Doniphan Lumber Co.*, 98 Ark. 529; *K. C., F. S. & M. Ry. Co.* v. *Joslin*, 74 Ark. 552; *Fordyce* v. *McPhetridge*, 71 Ark 327; *Bush* v. *Prescott & N. W. Ry. Co.*, 83 Ark. 210.

In *Davis* v. *Webber*, 66 Ark. 190, we quoted from Judge Dillon in *Ellwood* v. *Wilson*, 21 Iowa 523, as follows: "The law encourages the amicable adjustment of disputes and the construction of a contract which would operate to prevent the client from settling will not be favored," and from *Lewis* v. *Lewis*, 15 Ohio 715, as follows: "A contract with an attorney to prosecute a suit containing a stipulation that the parties should not have the right to settle or discontinue it without the assent of the attorney, would be so much against public policy that the court would not enforce it." The relation of the attorney to his client, so far as not having an interest in the pending cause of action (giving him the right to be heard on the prosecution thereof) is the same now as it was at the time

the above decision was rendered. Giving the attorney a lien on his client's cause of action, which entitles him to have the compensation for his services paid out of the proceeds of whatever disposition the client makes of his cause of action, whether by settlement or final judgment or order, is quite a different thing from giving the attorney an interest in the cause of action itself, or the right to have any voice in the disposition of such cause of action. Section 2 of Act 293, Acts 1909, *supra,* provides that "the court before which said action was instituted or in which said action may be pending at the time of settlement, compromise or verdict upon the petition of client or attorney shall determine and enforce the lien created by this act."

(4) Jackson and Jones, attorneys, are not asking to be made parties to the litigation, and if they were, it could not be done. Certainly, if appellant could have them brought into the lawsuit at all under the statute, it would have no right to do so in advance of the verdict or final order or judgment. If Jackson and Jones, under a contract with the appellee before the present suit was begun, instituted suit for him in the Saline Circuit Court on the same cause of action as the present suit, the only concern that the appellant could have under the statute would be to see that the proceeds of the judgment in appellee's favor were not paid over to him until it should be determined whether or not Jackson and Jones had a lien upon such judgment; that is a matter entirely collateral and foreign to this suit between the appellee and appellant, in which the only issue involved is whether or not the appellee should recover damages for the personal injuries which he alleges were caused by the negligence of appellant.

II. (5) The court did not err in overruling the motion of appellant to exclude the testimony of witnesses Erickson and Countryman. Witnesses on behalf of appellant had testified that under the blue flag rule when minor repairs were being made on cars in the yards outside of the rip track, the men were required to protect themselves by

a blue flag; that "when a man went out in the open yard where work is to be done under a car, they put out a blue flag;" that the rule as thus interpreted was "generally known among the workmen," and "generally and regularly observed by them," under this rule it was Blaylock's duty to put out the blue flag. The testimony of witnesses Erickson and Countryman was strictly in rebuttal of the above testimony, as it tended to show a different interpretation of the rule—that is, that "where a steel car man takes his two helpers and goes out in the yards" (off of the rip tracks) "to perform work under a car it is the *foreman's* duty to put out a blue flag," and that it was the custom to observe the rule as thus interpreted. Counsel for appellant suggest as one reason why the testimony of witness Erickson was incompetent was the fact that he left the company's service two years before the accident occurred, but this reason was not made a ground in the motion to exclude as set forth in appellant's abstract; and appellant having specified the reasons for exclusion in its motion must be deemed to have waived other reasons not mentioned. See *Timothy J. Foohey Dredging Co.* v. *Mabin,* 118 Ark. 1.

(6) Furthermore, the testimony of witnesses Erickson and Countryman was competent. It did not tend to vary or contradict the rule itself, but only tended to show the construction placed upon the rule and the manner of its enforcement by those who were charged with that duty. The rule required "workmen" to "display" and the same workmen to "remove" the blue signals. When the men were working in "gangs" out in the yards (off the rip tracks), the rule was obeyed, according to the testimony of Erickson and Countryman, when the foreman put out the blue flag.

III. (7-8) The effect of instructions Nos. 1 and 2 granted at appellee's request, were to tell the jury that if appellee was at work in the discharge of his duties under a car, and that while so engaged, defendant's servants ran a car over him and injured him, this would be *prima facie* proof of negligence that would warrant a verdict in

his behalf, provided he was not guilty of contributory negligence, and that such facts being established by the evidence, the burden was then upon the appellant to show that the injury was not caused through negligence on its part. The appellant contends that the instructions were erroneous for the reason that the presumption of negligence under the statute (Kirby's Digest, § 6773), does not apply in this case because the proof is that the injury was not produced through the negligence of those servants of appellant who were running the train. The statutory presumption applies to all employees of railway companies who receive injuries by the running of trains, except those employees who are, themselves, engaged in the actual running of the train which causes the injury. *K. C. So. Ry. Co.* v. *Cook,* 100 Ark. 476. The statute is comprehensive and its purpose is to shift the burden of proof to the railway company to show that the injury was not caused through its negligence in all those cases where it is alleged and proved that the employee (not engaged in the running of the train), received his injuries by reason of the running of such train. Here the appellee alleged that "defendant's switchmen, without notice to plaintiff, negligently shoved cars upon the track where he was engaged at work, striking the car that was being repaired and running it over him," and he proved that his injury was produced by the running of appellant's train—that is, that the switch crew ran the cars against the car under which appellee was working, knocking same over him. These allegations and this proof were sufficient to entitle appellee to invoke the statutory presumption and to place the burden of proof upon appellant to show that the injury was not caused through its negligence. See *St. Louis, I. M. & S. Ry. Co.* v. *Puckett,* 88 Ark. 207; *St. Louis, I. M. & S. Ry. Co.* v. *Graham,* 83 Ark. 61; *St. Louis, I. M. & S. Ry. Co.* v. *Standifer,* 81 Ark. 275.

Appellant also contends that the first instruction ignored the defense of assumed risk, but if it be conceded that appellant, under the evidence, was entitled to this defense, it got the benefit of it in other instructions given

at the instance of the appellee, and also in instructions given at the instance of the appellant. For instance, appellant's prayer No. 16, is as follows:

"16. You are instructed that where a person enters into an employment, he assumes all the risks and hazards ordinarily incident to such employment, and he will be presumed to have contracted with reference to such risks and hazards. He assumes all the risks and hazards he knows to exist, or by the exercise of ordinary care he should know to exist in the performance of the duties he engages himself to perform. So, if you believe from the evidence that the plaintiff was injured by one of the risks ordinarily incident to his employment, then your verdict should be for the defendant."

(9) Where the instructions separately present every phase of the law, "as a harmonious whole," there is no error in each instruction failing to carry qualifications which are explained in others. *St. Louis, I. M. & S. Ry. Co.* v. *Graham, supra,* and cases cited.

IV. The court granted appellee's prayer No. 9, in effect telling the jury that if appellee did not know of the blue flag rule he would not be bound by such a rule, and at the instance of the appellant, the court in prayer B instructed the jury, in effect, that if appellee knew, or by the exercise of ordinary care on his part could have known, of the existence of such a rule, and that he negligently failed to obtain such knowledge, or, having obtained same, violated the rule and was injured on account thereof, he could not recover. The appellee testified that he could read a little, that when the employees went to work they were furnished each day with a time card on which they were expected to keep their own time. In one corner of this card was printed in small type the following: "If your duties require you to go around, under or on cars, protect yourself with blue signals." Appellee testified that he carried this card around ever since he had

worked there (over a year), but he had never read the above print; all he knew the card was for was to put thereon his name and the number of hours he had worked, and to turn it in to the check room when he returned from work. The testimony on the part of the appellant showed that the rule was generally known among the repair men and helpers. Under the above testimony, the court could have very well treated the prayers for instructions submitting to the jury the issues as to whether or not the appellee had knowledge of the blue flag rule or whether he was bound to take notice of such rule, as abstract, and have refused to submit these issues to the jury. But the appellant joined with the appellee in having these issues submitted, and is, therefore, not in an attitude to complain of the ruling of the court in submitting them. The instructions, when considered together, as they must be, were not in conflict, and under the rule above announced in *Railway Company* v. *Graham, supra,* instruction B granted at the instance of appellant was but a qualification or explanation of instruction No. 9 given at the instance of appellee. Moreover, there was no specific objection to instruction No. 9, and as an abstract proposition of law it was correct, whereas, appellant's prayer for instruction B, as an abstract proposition of law, was erroneous. Appellant, therefore, is not prejudiced, and is not in an attitude to complain that the ruling of the court was erroneous in granting conflicting prayers for instructions, even if such were the case.

(10) The effect of appellant's prayer B was to make it the affirmative duty of the appellee to exercise ordinary care to ascertain the existence of the blue flag rule. Such is not the law. In the recent case of *Fort Smith Lumber Co.* v. *Shackleford,* 115 Ark. 272, we said: "But it is the duty of the master, as we understand the law, to make rules for the protection of the employees and to make those rules known to the employees. There is no affirmative duty devolving upon the employees to ascertain what the master's rules are." To be sure, it is the

duty of the servant to exercise ordinary care for his own protection, and if the servant failed to observe the rule which the master had made and brought to his notice, or published under circumstances of which the servant was bound to take notice as in this case, then the servant might be guilty of negligence in not observing the rule. See *St. Louis, I. M. & S. Ry. Co.* v. *Webster,* 99 Ark. 265, pages 279, 280. Mr. Labatt says: "Both on principle and authority, it is manifest that insofar as the servant's contributory negligence is predicated merely from his failure to perform the duty prescribed by rule, he must be shown to have had knowledge of it before he can be held culpable on the ground of his not having obeyed it." 3 Labatt's Master and Servant, page 2992, section 1132. And numerous authorities cited in note.

V. This assignment of error has been abandoned.

VI. (11) Appellant's prayer for instruction No. 14, as modified and given,* was not correct as asked. If the rule for the employees' protection had been habitually violated by the employees for so long a time, with the knowledge and acquiescence of those servants of appellant whose duty it was to enforce the rule or report any

*No. 14 (As Requested). Even if you believe from the evidence that the rule which required workmen to put out a blue flag to notify that they were at work under a car was frequently or habitually disregarded by the workmen in the Argenta yards, still, if you also believe from the evidence that the defendant did not consent to such disregard of the rule, and did not acquiesce therein, then the plaintiff is not excused in law for the violation of the rule, and if he was hurt while violating it, and on account thereof, your verdict should be for the defendant.

No. 14 (As Modified). Even if you believe from the evidence that the rule which required workmen to put out a blue flag to notify that they were at work under a car was frequently and habitually disregarded by the workmen in the Argenta yards, still, if you also believe from the evidence that the defendant did not consent to such disregard of the rule and did not acquiesce therein, then the plaintiff is not excused in law for the violation of the rule, and if he was hurt while negligently violating it, and on account thereof, your verdict should be for the defendant.

infractions thereof, as to establish the custom of violating the rule, and to thus bring home to the appellant knowledge thereof, this would constitute an abrogation of the rule, regardless of whether the servants charged with its enforcement affirmatively or expressly consented or acquiesced or not. Their silence after knowledge of an habitual violation of the rule, so as to show a custom to violate it, would be sufficient to constitute an abrogation of the rule. *St. Louis, I. M. & S. Ry. Co.* v. *Sharp,* and cases therein cited.

(12-13) Appellant invited the error of the modification made by adding the word "negligently" to the instruction; for in one of its rejected prayers, appellant had requested the court to tell the jury, in effect, that if the blue flag rule existed and was known to appellee, and appellee "negligently, and in violation of said rule, went under the car and was injured on account thereof, he could not recover." Appellant presented the above prayer and the same was at first refused, and appellant duly objected and excepted to the ruling of the court in refusing the same. Appellant could not thereafter object to a ruling which it had at first invited, without some affirmative showing in the record that it had abandoned and withdrawn its objection to the court's ruling rejecting the prayer when first offered. A party will not be allowed to take inconsistent or double positions nor "play fast and loose," so to speak, with the rulings of the court. In the motion for a new trial, appellant assigns as error the refusal of the court to give its prayer No. 8; it also assigns as error the refusal of the court to give its instruction No. 14 as requested, and in "modifying and giving the same as modified." Thus the appellant, on the face of the record, is in the attitude of saying to the trial court: "You erred because you refused my instruction when I first asked it, and then you afterward erred because you, in effect, granted the request I first made." This comes within the well established principle often announced by this court, that a party will be held to have waived the error in a court's ruling which he invited the

court to make. *Fort Smith Light & Traction Co.* v. *Barnes*, 80 Ark. 169. See, also, *St. Louis & S. F. Ry. Co.* v. *Vaughan*, 88 Ark. 138; *Little Rock & Monroe Ry. Co.* v. *Russell*, 88 Ark. 172; *St. Louis, I. M. & S. Ry. Co.* v. *Thurman*, 110 Ark. 188; *Little Rock Railway & Electric Co.* v. *Bracy*, 111 Ark. 613.

VII. In instruction No. 10, the court, in effect, told the jury that if appellee was injured because of his failure to observe any of the rules of the company given him for his own safety, he would be guilty of contributory negligence, unless the jury found that in violating said rules, he was acting under directions of a foreman or some other employee of the railway company under whom he was working and who had authority to direct his work, in which case it was a question for the jury to determine whether the appellee was guilty of contributory negligence, considering all of the facts and circumstances causing the injury.

(14) The appellant contends that it was the duty of the appellee, under the blue flag rule when he went to do the work where he was injured, to put out the blue flag to protect himself, that the rule required this, and that the fact that he was working at the time under the directions of Vance, who, as appellee testified, was foreman of the gang, and whom he was expecting to protect him, made no difference. The effect of the contention is that the court should have instructed the jury, as a matter of law, that appellee was violating a rule of the company made for his protection, and in so doing was guilty of contributory negligence and assumed the risk of the injury which he received. But we are of the opinion that under the evidence it was a question of fact for the jury as to whether appellee was guilty of contributory negligence, and whether he assumed the risk, and that these issues were fully and properly submitted to the jury by the instructions which the court gave. The rule was ambiguous and the testimony shows clearly that those whose duty it was to enforce the same placed different interpretations upon the rule. There was testimony on behalf of the ap-

pellant tending to show that the rule was interpreted by the employees to mean that it was the duty of each workman when engaged in work such as appellee was doing at the time of his injury to put out the blue flag. On the other hand, the testimony on behalf of the appellee tended to show that the rule was interpreted by those whose duty it was to enforce the same to mean that it was the foreman's duty to protect the men under his immediate charge by putting out the flag. The appellee testified to facts which warranted the jury in finding that at the time of his injury he was doing his work under the direction of a foreman. One of his witnesses testified that "in the case of a steel car gang foreman who leaves the track and goes out in the yards to work on cars, it is the duty of the man in charge to protect the track." See *St. Louis, I. M. & S. Ry. Co.* v. *Puckett,* 88 Ark. 204. With the rule thus susceptible of different interpretations, and with different interpretations put upon it by those who were charged with its immediate enforcement, the court correctly submitted the issue, as to whether appellee was guilty of contributory negligence and whether or not he had assumed the risk.

(15) The language of the rule is that "workmen will display the blue signals and the same workmen remove them." This term "workmen" is indefinite, for it was shown that the foreman—that is, the steel car man who took his two helpers and went out in the yards to perform work—was a workman.

"An ambiguous rule," says Mr. Labatt, "promulgated by a corporation for the government of its employees in a dangerous service should generally be taken in its stronger sense against the corporation and in favor of the employee. * * * Where the consequence of holding a given rule valid will be to disable an employee from recovering damage on the ground that he violated its provisions, the courts very properly apply the principle that rules are to be strictly construed against the master." (3 Labatt, Master and Servant, pages 2968 and 2969.)

VIII. What we have already said disposes of appellant's contention that the evidence is not sufficient to sustain the verdict.

We find no reversible error, and the judgment is, therefore, affirmed.

HART and SMITH, JJ., dissenting.

PINE BLUFF, SHERIDAN & SOUTHERN RAILWAY COMPANY v. LEATHERWOOD.

Opinion delivered April 12, 1915.

1. MASTER AND SERVANT—INJURY TO SERVANT—DUTY TO INSPECT FOR DEFECTS.—Plaintiff, a locomotive fireman, was injured by the bursting of a defective hose pipe. It was the engineer's duty to inspect the same. *Held*, mere proof that the engineer was an experienced engineer, and that he made repeated inspections, will not show that the defendant company was not liable in letting the hose get into a defective condition.
2. RELEASE—DUTY OF COURT TO CONSTRUE.—Where a release from liability is in writing it is the duty of the court to construe the same.
3. RELEASE—BINDING EFFECT.—When a release from liability is unambiguous in its terms, and the plaintiff signed it without any deceit or fraud being practiced upon him, he is bound by it.
4. RELEASE—CONSTRUCTION—DUTY OF COURT.—It is the duty of the court to construe a written release from liability, and it is error to leave to the jury the duty of construing its terms to determine whether it covered in its terms the element of personal injury or only the element of loss of time.
5. APPEAL AND ERROR—INSTRUCTIONS—HARMLESS ERROR.—Appellant can not complain of the giving of an erroneous instruction requested by appellee, where he has requested the giving of an instruction involving the same erroneous proposition of law.
6. DAMAGES—PERSONAL INJURIES—PERMANENCY OF INJURY—HARMLESS ERROR.—Although it is erroneous to submit the issue of the permanency of plaintiff's injury, where there is no proof to warrant the same, the error will be held harmless, when the verdict is so small as to show that that element of damage was not considered by the jury.

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

W. D. Brouse and *John L. Hughes,* for appellant.

1. This case falls within the rule that the servant assumes the usual and ordinary risks incident to his employment. 41 Ark. 382, 383; 104 Ark 489.

If the hose was attached in a defective manner, it was necessarily patent to the appellee, and he assumed the risk. 58 Ark. 125; 65 Ark. 98.

He was presumed to know of such dangers and risks as he had the opportunity to know of, and, having such opportunity, if he failed to inform himself, he can not recover for the resulting injury.

2. Both the superintendent and the engineer, who were men of long experience as locomotive engineers, had inspected the attachment, and thought it safe; and the engineer had inspected it every time he stopped, five or six times a day. This was certainly all the inspection that could be required, because the defect in the appliance, if any, must have been such as a reasonably careful inspection would disclose. 20 Am. & Eng. Enc. of L. 90, and cases cited.

3. Instruction 7 was not the law of the case and was misleading and prejudicial. It was the duty of the court to construe the release, and to instruct the jury that if appellee signed it, he was bound by it and could not recover. 78 Ark. 574; 105 Ark. 213; 1 Greenleaf on Ev. (16 ed.), § 277.

D. D. Glover, for appellee.

1. The connection was made by the engineer under the orders and directions of the superintendent before appellee went to work there. He knew nothing of its danger until he was injured. It is well settled that the servant does not assume the risk of dangers arising from or consequent upon the negligence of the master, but he has the right to assume, and act upon the presumption, that the master has exercised due care and diligence for his protection. 93 Ark. 93; 77 Ark. 367; *Id.* 463; 79 Ark. 53; 87 Ark. 396; 85 Ark. 503; 89 Ark. 424; 95 Ark. 291; 90 Ark. 223; 98 Ark. 227.

2. If appellee signed the release it would not bar this action, because it shows on its face that it was for *loss of time and damages arising therefrom,* i. e., loss of time.

The questions, whether the appellee signed the release or not, and whether, if he signed, it was for loss of time only, and not for personal injuries, were questions for the jury. 89 Ark. 368. It is when the terms of a written contract are undisputed that it is the province of the court to construe it. 101 Ark. 469.

McCULLOCH, C. J. This is an action instituted by appellee to recover damages on account of injuries received while working in the service of appellant as fireman on its railroad. There was a rubber hose attached to the injector pipe and appellee was using it for the purpose of wetting the coal in the tender so as to keep down the coal dust, and the hose, on account of the insecure connection with the pipe, would not stand the pressure, and blew off, causing a stream of hot water to be thrown against appellee's leg. He was severely scalded below the knee, and was confined to his house about ten days, suffering considerable pain in the meanwhile, and was incapacitated from work for a still longer period of time. Appellant's manager paid appellee the sum of $24, and introduced in evidence a contract in writing purporting to release the company from all liability for the injuries received. Appellee admitted that the sum of money named above was paid to him for thirteen days of his time lost after the injury, but denied that it was to cover any other elements of damage, or that he signed any writing of any kind or agreed to accept the sum in full compensation of all of his injuries. The case was tried before a jury and a verdict was rendered in appellee's favor assessing damages in the sum of $100.

It is insisted in the first place that the evidence was not sufficient to sustain the verdict in that there was no negligence proved, and that the appellee himself was guilty of negligence in failing to inspect the defective ap-

pliance which caused his injury. It appears from the evidence that the piece of hose was about four feet long and was connected with the pipe back under the side of the engine at an inconspicuous place. The piece of hose was attached for use especially in watering the coal in the tender so as to keep the coal dust from flying. The engineer applied to his superior for a piece of hose and a clamp with which to attach it to the pipe, and when it was furnished to him, the clamp was too large. The manager told the engineer to put in an additional strip of rubber so as to make the connection secure, and the evidence adduced by appellant tends to show that the engineer frequently inspected the connection, and that there was no negligence in leaving it in that condition. We think there was enough evidence to warrant the inference that there was negligence in the manner in which the hose was attached. It is conceded that the clamp was too large, and the jury might properly have found that there was negligence in using that kind of a clamp, or that there was insufficient stripping to make the hose large enough to fit the clamp. The defect was, too, of such a character as to warrant the inference that there was negligence in not making proper inspection to discover its condition. The engineer testified that he made frequent inspections, but the jury might have found that his inspections were not sufficiently searching and accurate to discover the defect. The duty devolved upon the master to exercise ordinary care to make this appliance reasonably safe for the use intended. It can not be said that the appliance was solely for the personal use and convenience of the engineer and fireman, though it is true that it added to their comfort in keeping down the coal dust. It was, after all, one of the appliances about the engine which was considered necessary in the performance of the duties of the servants in charge of the engine. Nor can it be said that the defect was such an obvious one that the appellee was bound to take notice of its condition. The duty of inspection was that of the master, and the appellee, as fireman, was not bound to search for hidden defects, but was only

compelled to take notice of those which were open to observation. We think the evidence was sufficient, and that the verdict ought not to be set aside on that ground.

It is claimed that some of the instructions given at the request of plaintiff on the subject of the master's duty were erroneous in ignoring the question of release, but the answer to that contention is that those instructions covered different subjects and could not very well have been understood by the jury as excluding the defense predicated on the release inasmuch as numerous instructions were given on the latter subject at the request of plaintiff, and also at the request of defendant.

(1) Appellant asked the court to give the following instruction:

"9. You are instructed that if the engine upon which the hose was attached was inspected some five or six times a day by the engineer in charge thereof, and that he was an experienced engineer, and no faulty attachment was discovered, this would be all the inspection that a reasonably prudent man would do, and even if the plaintiff was injured by the hose becoming detached, then you are told that this would be a mere accident which the defendant could not reasonably anticipate, and your verdict will be for the defendant." The court refused to give the instruction as requested, but modified it so as to tell the jury that it was proper to consider the frequent inspections made by the engineer in determining whether or not there was negligence on the part of the master. The instruction as requested was erroneous for the reason that it told the jury as a matter of law that, because the inspections were made by an experienced engineer, there could be no negligence in the case. The jury might have found that the engineer made inspections, but that notwithstanding, he was guilty of negligence in failing to discover the defect, and that the master was responsible. That was one of the master's duties, and if the servant to whom it was delegated made an insufficient inspection, the master was liable for his negligence. After all, it was a question for the jury to determine whether or not the

defect was of such a character as should have been discovered upon proper inspection, and the fact that repeated inspections were made is not conclusive that there was no negligence. The court was correct, therefore, in making the modification in the instruction.

(2-3-4-5) The following instruction on the subject of release was given over appellant's objection, and error is assigned in that regard: "7. You are instructed that if you believe from the evidence in this case that the plaintiff signed a receipt in full for loss of time only, and for all damages arising from loss of time only, caused by the injury, and not for his personal injuries received, this would not prevent the plaintiff from recovering in this case, if you find that plaintiff was injured by the negligence of the defendant while the plaintiff was in the exercise of due care of his own safety." This instruction was erroneous in that it submitted to the jury for determination the question whether the release embraced all the elements of damages set forth in the complaint. The release was in writing, and it was the duty of the court to construe it. Our examination of it convinces us that it is unambiguous and covers all the damages, and if appellee signed the release for the consideration named therein, and no fraud or deception was practiced, he is bound by it. Appellee admitted that he received the amount named for his loss of time up to that date, but denied that he signed any release then or at any other time. If, as he claimed, he did not sign the release and only accepted the amount named as compensation for a particular element of his damages, then he was not bound by the settlement. *St. Louis, I. M. & S. Ry. Co.* v. *Smith,* 82 Ark. 105. The court ought to have construed the release, and told the jury that if plaintiff signed it in consideration of the sum named, he was bound by it and could not recover, and it was erroneous to delegate to the jury the duty of construing the terms of the release and determining whether or not it in fact was intended to cover the element of personal injuries other than loss of time. Appellant can not complain, though, for the reason that it asked and the

court gave, an instruction submitting that issue to the jury. The court gave the following instruction at appellant's request: "If you find from the evidence that the plaintiff went to the office of the defendant and agreed with the defendant, through its officers and agents, that if the defendant would pay the plaintiff the sum of $24.40 in full settlement for any and all claims that he had or might have by reason of any injuries he sustained while firing defendant's engine No. 50, and you find that the defendant, through its agents, did pay the plaintiff the sum of $24.40 with this understanding, and that it was the intention of both the plaintiff and the defendant at the time that this amount should be in full settlement for all claims for damages, and that plaintiff accepted this voucher and thereafter signed and received the money on the same, then, gentlemen of the jury, you are told this would be a full settlement between the parties, and your verdict will be for the defendant." It will be observed that this instruction leaves it to the jury to determine whether or not the sum of $24.40 was paid with the understanding and intention that it should be in full of all claim for damages. In other words, it submitted the same question to the jury that appellant now says was erroneously submitted in instruction No. 7, asked by appellee, and appellant can not complain of the ruling of the court in which it acquiesced by asking a similar instruction. *Fort Smith Light & Traction Co.* v. *Barnes,* 80 Ark. 169; *St. Louis, I. M. & S. Ry. Co.* v. *Coke,* 118 Ark. 51.

(6) Error is also assigned in submitting to the jury the question of the permanency of the injury, it being contended that there was no evidence tending to show that the injury was permanent. It is true that the injury was not permanent, except that there will probably be a scar on the lower part of appellee's leg, and it was improper to submit to the jury that question; but the jury assessed a very small amount of damages and the testimony as to pain and suffering is abundantly sufficient to warrant a finding for the amount which the jury awarded. It is manifest, therefore, that the jury did not allow any-

thing for permanent injury, and the error in submitting that issue was not prejudicial.

We are of the opinion that upon the whole there was no prejudicial error in the matters brought to our attention in the argument, and that the judgment should be affirmed. It is so ordered.

CARPENTER v. LEATHERMAN.

Opinion delivered April 19, 1915.

1. SCHOOL DISTRICTS—FORMATION—PETITION—DISCRETION OF COUNTY COURT.—Under Kirby's Digest, § § 7543 and 7544, the county court has a discretion in the matter of carving a new school district out of an old district, when petitioned to do so by the inhabitants of the former.
2. APPEALS—APPEAL FROM COUNTY COURT—DISCRETION OF CIRCUIT COURT.—On an appeal from the county to the circuit court, the cause is tried *de novo*, and the circuit court has the same discretion as the county judge had in the same matter.

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

O. H. Sumpter, for appellant.

Under our present laws, neither the county court, nor circuit court on appeal has any discretion to refuse the creation of a new school district, if the law is complied with. The statute is imperative, and it was the duty of the court to form the new district. Endlich, Int. Stat., 422-5, § § 306, 312, 315; 91 Ark. 5; 36 Mo. 278.

Rector & Sawyer, for appellees.

The formation of a new school district is within the sound discretion of the court, and unless its discretion is abused or arbitrarily exercised, its action should be upheld. 10 Enc. U. S. Sup. Ct. Dec. 1130; 34 Ark. 394-398; 1 Johns. Ch., 488; 27 N. Y. S. 407; 28 Ala. 36; 19 *Id.* 462; 70 Ark. 471; 104 Ark.

Mandatory words are often construed to be merely permissive. See cases cited *supra*.

HART, J. Appellants filed a petition in the Garland County Court for the formation of a school district to be carved out of certain territory embraced in School District No. 8. The county court granted the petition and appellees appealed to the circuit court. In the circuit court it was proved that the petition was signed by a majority of all the electors residing in the territory of the district to be divided; that the new district would not have less than thirty-five persons of scholastic age residing in it; that the formation of the new district would not reduce the number of persons of scholastic age in District No. 8 to less than thirty-five; and that the notice of the presentation of the petition, as required by the statute, was duly posted. The circuit court so found; and further found from the testimony of witnesses introduced by the remonstrants that the establishment of a new school district in the territory embraced in said petition would not be for the best interests of the school and the inhabitants of said district and denied the petition. From the judgment rendered denying the establishment of a new district, appellants have duly prosecuted an appeal to this court. Counsel for appellants concede that there was no abuse of discretion on the part of the circuit court in its finding, but contend that the act providing for the formation of new school districts is so worded as to exclude all discretion on the part of the court. On the other hand, it is contended by counsel for appellees that the court has a discretion in the formation of new school districts, and that unless its discretion is abused or arbitrarily exercised, it should be upheld.

Counsel for appellants concede that under the act of December 7, 1875, relating to the matter of the formation of new school districts, the county court was invested with a large discretion which it should use for the best interests and convenience of the citizens residing therein. The act provides that the county court shall have power to alter the boundaries of school districts in counties in this State and further provides that "in all changes due regard shall be had to the convenience of the citizens,"

etc. They contend that the discretion vested in the court by this act has been taken away by the subsequent acts of the Legislature relating to the subject. The acts referred to by them as making this change are the following provisions of Kirby's Digest:

"Section 7543. No new school district shall be formed, having less than thirty-five persons of scholastic age residing within the territory included in such new district, and no district now formed shall, by the formation of a new district or transfer, be reduced to less than thirty-five persons of scholastic age. Act April 8, 1887, section 2."

"Section 7544. The county court shall have the right to form new school districts or change the boundaries thereof upon a petition of a majority of all the electors residing upon the territory of the districts to be divided. Act of April 8, 1887, section 3."

(1) Counsel insist that the language of the provisions above quoted is imperative and excludes all discretion. From a careful consideration of the provisions, we are of the opinion that such was not the intention of the Legislature. If the Legislature had intended to change the entire policy of the system forming new school districts or changing the boundaries thereof from discretion to a mandatory requirement on the part of the county court, it would have done so by express and peremptory terms. It will be observed that it uses the language, "the county court shall have the right to form new school districts or change the boundaries thereof upon a petition," etc. These are not words of command, and do not mean that the county court can only record the will of a majority of all the electors residing in the territory of the district to be divided where not less than thirty-five persons of scholastic age reside within the territory of the new district and the old district is not reduced to less than thirty-five persons of scholastic age.

It will be observed that the language of the statute does not provide that it shall be the duty of the county court to form the new district, nor does it require the

county court to form the new district when the conditions imposed by statute have been complied with, but the language is that the court shall have the right to form new school districts or change the boundaries thereof. This rather implies that the court has a discretion in the matter which is to be exercised for the best interests of the citizens of the district to be affected when the conditions imposed by the statute are complied with.

(2) Though the precise question has not been decided by this court, the views we have expressed are in accord with the trend of our former decisions. In the case of *Stephens* v. *School District No.* 85, 104 Ark. 145, there was an appeal from the judgment of the circuit court setting aside an order of the county court forming a new school district. It was urged there that it was incumbent upon those resisting the petition to show upon appeal to the circuit court that error was committed by the county court in making the order forming the new district. The court said:

"When an appeal is taken from an order or judgment of the county court, it is the duty of the circuit court to try the matter or case *de novo*. By such appeal, the circuit court obtains jurisdiction over the matter and proceeding to the same extent as if it had been originally brought in that court. It does not pass upon the question as to whether or not the county court has committed error in any of its findings, either of fact or of law, but it must try the cause and proceeding upon its merits, both of law and of fact, just as if it had been originally brought in the circuit court. It does not either affirm or reverse the order or judgment of the county court, but determines the same upon a new trial by the exercise of its own discretion and judgment, and comes to a final determination of the matter and enters a final judgment thereon."

It will be noted that the court in that case had in mind that the circuit court might exercise discretion in determining whether or not the prayer of petitioners should be granted. So, also, in the case of *Hale* v. *Brown,* 70 Ark. 471, the court used this language:

"This cause being tried *de novo* in the circuit court on appeal, the circuit judge had the same discretion as had the county judge."

The judgment will be affirmed.

WILLIAMS v. MOORE.

Opinion delivered April 19, 1915.

1. CONTRACTS—CONTRACT OF SALE—DAMAGES—BREACH.—Defendant contracted to purchase a monument from plaintiff which had to be manufactured, and after the contract was closed undertook to cancel the same. *Held*, while the contract was binding, and could not be cancelled, defendant would be liable only for damages, and after notice plaintiff could not augment his damages by a continuance of the performance of the contract.
2. CONTRACTS—MANUFACTURE OF ARTICLE BOUGHT—BREACH.—Defendant contracted to purchase a monument from plaintiff, the same to be manufactured. *Held*, the contract was one for labor to be performed in the manufacture of the monument, and defendant will be liable in damages when he refused to accept the same, when tendered by the plaintiff, and the same was burned in a fire immediately thereafter.

Appeal from Lawrence Circuit Court, Eastern District; *John B. McCaleb*, Special Judge; affirmed.

W. E. Beloate and *Smith & Gibson*, for appellant.

1. The signed order and note, dated January 5, 1913, left it optional with appellee to fill the same. Until he accepted same and bound himself to fill it, there was no contract. 47 Ark. 519; 90 Ark. 131; *Id.* 184; 97 Ark. 613; 95 Ark. 421; 100 Ark. 510.

2. Until the order had been accepted, though it contained a condition that same was not subject to countermand, it could be countermanded. 96 Ark. 616; 110 Ark. 128; 98 Ark. 621.

3. Appellee has shown no damages that he could recover. Appellee could not augment the damages by proceeding with the work, after being notified not to do so. The right of a party to renounce a contract on terms of

just compensation, is well recognized. 7 Am. & Eng. Ann. Cases, 1172. The measure of damages is the difference between the cost and sale price—the profits. 2 *Id.* 997; 20 N. Y. 495.

In the case of chattel property to be manufactured, the rule is that the buyer acquires no property therein until it has been finished and delivered. 90 Ark. 134; Tiedeman on Sales, § § 94, 95, 96, 98; 11 N. Y. 46.

4. Pinchback's possession was appellee's. Destruction of the monument while in appellee's possession, was his loss, not appellant's. 20 N. Y. 495.

H. L. Ponder, for appellee.

1. The written contract was given by the appellant and signed by him. Appellee's letter of January 7, 1913, was a clear and unequivocal acceptance. It was a firm and binding contract, and nothing was left optional with appellee.

2. Appellant's letter did not amount to a countermand. Cases cited by appellant upon the question of shippers' orders do not apply. That question does not arise in this case. The question of countermand is one for the jury, if it was made before acceptance. 110 Ark. 128.

3. When the order was given and the contract entered into, it was specified that the monument should be shipped to Pinchback, at Walnut Ridge. Appellant thereby made Pinchback his agent for delivery. 88 Ark. 269; 42 Ark. Law Rep. 225.

McCULLOCH, C. J. This is an action on a promissory note executed for the price of a monument. Plaintiff Moore is engaged in manufacturing and selling monuments and tombstones at Poplar Bluff, Mo., and the defendant Williams, who resides at Walnut Ridge, Ark., entered into a contract with plaintiff for the preparation of a monument to be erected at the grave of defendant's wife at Walnut Ridge. The order for the monument, and specifications and details concerning its preparation, were set forth in writing as a part of the promissory note executed for the price. The order for the monument was

made through one Pinchback, the agent of the plaintiff at Walnut Ridge, and was forwarded to plaintiff on January 5, 1913, the day it was solicited and received from the defendant. The contract contained a provision that delivery of the monument should be made on February 5, 1913, "or as soon afterward as possible," and it was to be shipped to Pinchback at Walnut Ridge. There was no specification in the contract that it was to be erected by plaintiff or his agent. The testimony shows that it was customary for the agent to do so, and that he offered in this instance to do it.

It was necessary for the plaintiff, according to the testimony, to order the rough material from other places, and that he proceeded to do so as soon as he received the order. On January 7, 1913, plaintiff wrote to defendant, acknowledging receipt of the order and promising to proceed with dispatch to fill it and deliver the monument at the earliest possible date, but suggested that it would probably be impossible to fill the order before about March 1. The letter, however, contained an unconditional acceptance, and it was a mere suggestion about the time for delivery being postponed beyond the date specified in the order. On January 18, 1913, defendant wrote the plaintiff a letter in which he requested that the order be held up until further notice while he was trying to adjust a complication by reason of having given a previous order for a monument to a Memphis house, and the letter also said, "Please consider this order countermanded pending my negotiations with Morris Brothers, and if I can adjust the matter with them so as to effectually countermand my order with them, I will notify you so that you can go ahead." Upon the receipt of this letter. plaintiff promptly wrote to the defendant a letter in which he refused to recognize the countermand, and, after reciting the efforts that plaintiff had made to get the material to complete the order, wound up by expressing the hope that defendant would reconsider the matter, and not attempt to cancel the order. No answer was made to this letter, and the monument was completed and shipped to Pinchback, the

agent at Walnut Ridge, arriving there about the 1st of February. Pinchback notified defendant of the arrival of the monument, and proposed to take it out and erect it at the proper place in the cemetery. Pinchback testified that defendant repudiated the order at that time and refused to allow him to erect the monument. Defendant denied that he made a direct refusal, but stated that when Pinchback informed him about the monument being there, he (defendant) replied, "All right, I am not ready to take it up now." The jury returned a verdict in favor of the plaintiff and defendant has appealed.

It is insisted, in the first place, that there was no acceptance of the order, and for that reason there can be no recovery. The evidence, we think, shows that no acceptance was necessary by plaintiff in person for the reason that Pinchback was the agent for the purpose of making sales, and that he had authority to accept the order, and did accept it. But, be that as it may, the letter of plaintiff to defendant was an unconditional acceptance of the order, and, as before stated, the statement about a postponement of the date for delivery was a mere suggestion which did not amount to a proposal of a new contract or placing a condition upon the performance of the old one.

(1) It is next contended that the order was countermanded before complete performance, and the defendant is only liable for the damages which were suffered by plaintiff up to the time of the breach. It is true that, notwithstanding the stipulation against countermand, defendant would only be liable for the damages arising from the breach of the contract, and not necessarily for the full amount stipulated in the contract. In other words, the plaintiff, after notice, would not be permitted to augment his damages by a continuance of the performance of the contract. The correspondence between the parties at that time does not, however, show an unconditional countermand of the order, and when the two letters on the subject are read together, we think that the silence of the defendant justified the plaintiff in continuing in the preparation of the monument. The plea of the defendant was

merely for time for further negotiation with the Memphis house, and if he expected to insist upon the countermand, he should have answered the plaintiff's letter.

(2) The evidence shows that the monument was burned in the warehouse of the railroad company at Walnut Ridge a day or so after it was tendered to defendant, and he had refused to permit it to be erected at the grave of his wife. The testimony is conflicting as to what occurred between Pinchback and defendant concerning the delivery of the monument, but the verdict of the jury settled that issue against defendant. Counsel insist that there can be no recovery for the reason that the monument was not in fact delivered, and that its loss fell upon the plaintiff. That contention is not sound. It was not a contract for the sale and delivery of an article, but was one for labor to be performed in the manufacture of the monument. *Moore* v. *Camden Marble & Granite Works*, 80 Ark. 274. When the plaintiff's agent tendered the delivery of the monument, it was all he could do, and the loss, resulting from the destruction of it thereafter, fell upon the defendant. The fact, as some of the evidence tended to show, that plaintiff made an ineffectual effort to collect from the railroad company does not bar his recovery. Of course, if he had collected the amount of his claim from the railroad company, he could not recover from the defendant, but there is no proof that there was a collection of the amount. The only thing shown is that he presented a claim which does not appear to have been acted upon.

We are of the opinion that the plaintiff has fully made out his case by the evidence, and that the verdict in his favor was correct.

Judgment affirmed.

RAWLINGS v. STATE.

Opinion delivered April 19, 1915.

1. INDICTMENT—VARIANCE—FORGERY.—An indictment charged appellant with uttering a forged check drawn on the C. bank, while

the instrument as set out in the indictment, and as shown by the proof was drawn on the P. bank; *held*, there is no variance as the instrument as set out in the indictment controls, and the inconsistent statement in the indictment will be treated as surplusage.

2. CONFESSIONS—OTHER EVIDENCE.—A confession, unless made in open court, will not warrant a conviction, unless accompanied by other proof that such offense was committed.

3. CRIMINAL LAW—UTTERING FORGED INSTRUMENT.—Evidence held insufficient to warrant a conviction of defendant of the crime of uttering a forged instrument.

Appeal from Boone Circuit Court; *John I. Worthington*, Judge; reversed.

STATEMENT BY THE COURT.

Riley Rawlings, appellant, was indicted as Riley Rollins, jointly with Abe Curry, for forgery of a check and uttering the forged instrument.

He was tried separately, the court instructed a verdict in his favor on the charge of forgery, and he was convicted for uttering the forged instrument, and from the judgment has appealed.

The indictment, formal parts omitted, charged the commission of the offense as follows:

"The said Riley Rollins and Abe Curry, in the county aforesaid, on the 10th day of April, 1914, did unlawfully, wilfully, and feloniously utter and publish, as true to Marion Lamb, a certain forged and counterfeit writing on paper purporting to be a check on the Citizens Bank of Harrison, Ark., in words and figures as follows, towit:

Harrison, Ark., Feb. 2, 1914. No. 239. PEOPLES BANK OF HARRISON. Pay to L. B. HARRIS or ORDER, $12.50, Twelver Fifty Ct., $12.20 DOLLARS.

W. H. Midwell.

The said forged writing being then and there passed, uttered and published as true, etc."

The check was not copied in the indictment, but a blank check of the bank was filled out, an exact copy of the forged instrument and pasted on the indictment in each of the counts.

J. Loyd Shouse and *Guy L. Trimble,* for appellant.

1. An alleged confession made out of court will not warrant a conviction unless accompanied by other proof that the offense was committed. Instruction 10 erred in declaring that a confession "is sufficient under the law to sustain a conviction." Kirby's Dig., § 2385; 77 Ark. 128; 94 Ark. 344.

In an instruction commenting on the evidence, as in No. 13, given by the court, it is erroneous to omit stating to the jury that they are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, and that it should be given such weight as the jury believes it is entitled to, unless there has been given a general charge covering all witnesses. 77 Ark. 336; 58 Ark. 362; 61 Ark. 102.

2. It was shown that the defendant was subject to fits and was weak-minded; but when it was attempted to be shown that these fits were traceable to hereditary influences, and inquiry was made as to his mother's mental incapacity, the court erroneously excluded such testimony and limited the inquiry to the defendant alone. Jacobson's Dig. Crim. Laws of Arkansas, 6; Wharton, Crim. Law, (10 ed.), § 65; 54 Ark. 284.

3. The second count of the indictment is insufficient in that it does not state the offense with that degree of certainty required by statute. The check pasted on the indictment is on the Peoples Bank, while in the body of the indictment, defendant is charged with uttering a forged writing "purporting to be a check on the Citizens Bank of Harrison." Kirby's Dig., § § 2227-2243; 9 Enc. Pl. & Pr. 552; *Id.* 592, and note 1; 58 Ark. 242; 97 Ark. 176; 77 Ark. 537; Wharton on Crim. Ev., § 114; 9 Enc. Pl. & Pr., 578 and note 3; *Id.* 593, and notes; 30 S. W. 1009; 19 Vt. 530; 23 Tex. App. 401; 4 Bliss (U. S.) 61.

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

1. Instruction 10 was a correct declaration of law, and was approved by this court in the case of *Marshall* v. *State,* 84 Ark. 92; 107 Ark. 568.

Instruction 13 complained of is also correct. 67 Ark. 543; 69 Ark. 558; 78 Ark. 36.

2. The evidence as to the mother's weak-mindedness was properly excluded. There was no attempt to prove *insanity*. On the contrary, counsel stated that he was not relying on insanity, but on weak-mindedness of the mother.

3. There is no defect in the indictment calling for a reversal. Wharton's Crim. Law (11 ed.), § 243; 63 Ark. 618; 119 Pac. 795-806; Kirby's Dig., § § 2229-2233.

KIRBY, J., (after stating the facts). It is contended first for reversal that there was a variance between the proof and the allegations of the indictment, since the check alleged to be uttered as a forged instrument, was drawn on the Peoples' Bank of Harrison, as shown by the copy set out in the indictment and the check introduced in evidence, while the indictment stated it purported to be a check drawn on the Citizens' Bank of Harrison.

(1) The indictment was not insufficient on this account, nor was there a variance in the proof of the instrument alleged to have been uttered in producing the check, which was exactly set out in the indictment. Its statement that the paper purporting to be a check on the Citizens Bank of Harrison, would be controlled by the terms of the instrument set out in exact tenor and effect, or such inconsistent purporting clause treated as surplusage. Wharton's Crim. Law (11 ed.), section 943; *Read* v. *State,* 63 Ark. 618; *Wishard* v. *State,* 115 Pac. (Okla.), 796; Kirby's Digest, § § 2229-2233.

It is next insisted that the court erred in giving instruction numbered 10, over appellant's objection. This instruction reads as follows:

"I charge you that when a party commits a crime, and then confesses freely and voluntarily and without any promise of hope or without any fear of punishment, then the confession is admissible and sufficient under the law to sustain a conviction.

"Confessions, it is true, are always to be received with caution, but they are taken with all the facts and circumstances in the case, and, coupled with the additional proof that a crime has been committed."

(2) This instruction was given by the court in relation to the statements made by the accused, claimed to be confessions made at the time of his arrest, and the statute provides that "a confession of a defendant unless made in open court, will not warrant a conviction unless accompanied with other proof that such offense was committed." Kirby's Dig., § 2385.

The instruction is not happily phrased, and does not as clearly and definitely express the law as could have been done, but it does in effect tell the jury that the confession must be coupled with the additional proof that the crime has been committed in order to warrant a conviction, and it is not erroneous as already held in *Marshall* v. *State,* 84 Ark. 92.

(3) It is next urged that there is no testimony showing that the offense was committed outside that of the statements of the defendant made at the time of his arrest. Two witnesses testified that the defendant said that Abe Curry had had his niece to change the date of the check alleged to have been uttered as the forged instrument, and there is no testimony other than this showing that there was an alteration of the check. Nowhere was it shown that this check ever bore a different date than that appearing upon it at the time of the trial, nor that it had ever been changed in any respect whatever, nor that it had not been signed by the drawer and written as it appeared at the time of the trial.

The testimony is not sufficient to support the verdict, and the judgment is reversed and the cause remanded for a new trial.

DAVIE v. PADGETT.

Opinion delivered April 12, 1915.

1. INFANTS—SUIT IN NAME OF—INCAPACITY—WAIVER.—Under Kirby's Digest, § § 6073-96, the incapacity of an infant to sue in his own name may be waived by the defendant, and is waived by the defendant's failure to take advantage of the defense, at the time, and in the manner pointed out by the statute.
2. INFANTS—INCAPACITY TO SUE—JUDGMENT—VALIDITY.—A judgment in a suit brought in the name of an infant is not void, and the defect constitutes error which calls for reversal only when taken advantage of in apt time.
3. INFANTS—JUDGMENT AGAINST—VALIDITY.—Judgments against infants are not void because of the omission to appoint a guardian, but are merely voidable, and can be avoided only on appeal or writ of error, or other direct proceedings authorized by statute.
4. INFANTS—INCAPACITY TO SUE—WAIVER.—The defendant waives the objection that the plaintiff is an infant. and suing without guardian or next friend, by pleading to the merits and by failing to raise the objection by demurrer or answer.
5. INFANTS—CONTRACTS OF—MAY BE AVOIDED, WHEN.—The contract of an infant is not absolutely void, but is only voidable at the instance of the infant himself.
6. CONTRACTS—BREACH OF PROMISE—IMMORAL CONSIDERATION.—An immoral consideration will not support a promise of marriage, and if a promise to marry is on consideration that the promisee shall before marriage have sexual connection with the promisor, it is void.
7. CONTRACTS—BREACH OF PROMISE—SUFFICIENCY OF THE EVIDENCE.—Evidence held sufficient to show that defendant promised to marry the plaintiff, and that he committed a breach of that promise, and warranted a verdict in favor of the plaintiff.
8. DAMAGES—BREACH OF PROMISE—ELEMENTS OF DAMAGE.—The elements of loss of virtue, shame and mental anguish are matters of aggravation which are proper to consider in determining the damage which grow out of a breach of promise of marriage, and seduction which was an incident of the breach.

Appeal from White Circuit Court; *J. M. Jackson*, Judge; affirmed.

S. Brundidge and *J. W. & J. W. House, Jr.*, for appellant.

1. The plaintiff, being an infant, could sue only by guardian or next friend. She had no right to bring the suit in her own name, and the court had no jurisdiction.

The statute is mandatory and jurisdictional. Kirby's Dig., § § 6021, 6022; 9 Am. & Eng. Ann. Cas. 1114; 71 Ark. 258; 50 Ark. 480; 63 Ark. 155; 55 Ark. 29; 87 Ark. 184.

2. At the time the alleged contract of marriage was entered into, the plaintiff was incapable of entering into a valid contract. The verdict is, therefore, contrary to the law and the evidence. 4 Ruling Case Law, 143, § 1; Kirby's Dig., § § 5171, 5172; 43 Ark. 185; 59 Ark. 4; 38 Ark. 278; 13 Abb. Prac. (N. S.) 402; 51 S. W. 503; 42 Ill. App. 511; 37 Mich. 65.

3. Instructions which are abstract and misleading are necessarily prejudicial. The court therefore erred in giving an instruction which allowed the jury to assess damages for bodily pain, blighted affections, disappointed hopes, loss of friends, shame, disgrace, humiliation and loss of opportunity to marry, when, in fact, there was no testimony whatever introduced directed to or touching these matters. 111 Ark. 140, and cases cited; 86 Ark. 91.

4. If the appellant promised to marry the plaintiff solely on consideration that she would have sexual intercourse with him, this was an immoral and nonenforceable contract, and the court erred in refusing appellant's request so to instruct the jury. 4 Ruling Case Law 145, § 3; 20 Am. & Eng. Ann. Cas. 1352; 87 Ark. 175; 174 U. S. 639; 32 Ark. 619; 74 S. W. 283; 11 Pa. St. 316; 54 Cal. 51, 35 Am. Rep. 67; 16 Abb. Prac. (N. S.) 26; 92 Va. 345, 23 S. E. 749; 26 Barb. 615.

5. The prejudicial effect of counsel's argument (referred to in the opinion) was not removed nor cured by the admonition of the court. It was wholly out of the record, and could have had no other effect than to cause the jury to return the excessive verdict that was returned in this case. 89 Ark. 64; 103 Ark. 358; 95 Ark. 237.

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

1. Appellant's objection to appellee's want of capacity to sue, because of her minority, ought to have been made in the lower court. The complaint showed on its face that the plaintiff was a minor, yet appellant failed to raise the question either by demurrer or in his answer.

He can not raise the question here for the first time. Kirby's Dig., § § 6093-6096; 108 Ark. 490; 112 Ark. 332; 107 Ark. 74; *Id.* 353; 103 Ark. 387; *Id.* 613; 101 Ark. 250; 94 Ark. 390; 90 Ark. 531; 95 Ark. 593; 86 Ark. 608; 105 Ark. 353; 97 Ark. 623; *Id.* 560. The court unquestionably had jurisdiction. 31 Ark. 684; 43 Ark. 33; 77 Ark. 498; 98 Ark. 394; 17 Am. & Eng. Enc. of L. 1059-1063; 22 Cyc. 644, 645, 685; 1 Ruling Case Law, 52, § 53.

2. If plaintiff was a minor at the time appellant made the contract of marriage with her, he knew it, and negotiated at his peril. The defense of minority is personal in its nature, and is to be taken advantage of only by the infant himself. 4 Ruling Case Law, 165; 4 Standard Procedure, 548; 16 Am. & Eng. Enc. of L. 265; *Id.* 296; 31 Ark. 364; Rodgers on Domestic Relations, § 10; 1 A. K. Marshall (Ky.) 76; 10 Am. Dec. 709; 5 Cowen (N. Y.) 475, 15 Am. Dec. 475; 7 Cowen 22, 17 Am. Dec. 496; 63 Am. Dec. 534; 5 Sneed (Tenn.) 659.

3. If there had been any error either of form or substance in the instruction with reference to anguish of mind, bodily pain, blighted affections, etc., it should have been met by specific objection, which was not done. But the instruction was fully warranted by the evidence, and was correct. 84 Ind. 3; 42 Mich. 346; 4 N. W. 8; 36 Am. Dec. 442; 2 Kan. App. 764, 44 Pac. 47; 31 Ark. 696; 4 Ruling Case Law, 155, § 14; *Id.* 156, § 15; 76 S. E. 454, 43 L. R. A. (N. S.) 556; 41 L. R. A. (N. S.) 841.

4. There was no evidence on which to base the sixth instruction requested by appellant. Under the evidence, there either was or was not a promise of marriage, and if there was such a promise, it preceded the seduction accomplished on the strength thereof. The court was right in refusing to give the instruction.

5. Counsel's argument was legitimate. Nevertheless, the court sustained appellant's objection to it, and nothing more was asked of the court. 96 Ark. 87; 84 Ark. 128; 77 Ark. 64; 74 Ark. 256.

McCULLOCH, C. J. This is an action to recover damages for breach of an alleged contract for intermarriage

between the parties. The complaint sets forth the allegations as to the contract of marriage and breach thereof, and also alleges seduction as a matter in aggravation of the alleged breach of contract. There was a verdict in favor of the plaintiff and defendant has appealed.

(1-2-3-4) It is alleged in the complaint, and established by proof, that the plaintiff was about sixteen years of age at the time defendant promised to marry her and seduced her, and was seventeen years old on the day of the trial in the circuit court. She instituted this action in her own name without a guardian or next friend. No objection was made below in any form as to plaintiff's incapacity to sue in her own name, and that question is raised here on appeal for the first time. It is insisted that under our statute, which provides that the action of an infant "must be brought by a guardian or next friend" (Kirby's Digest, § 6021), the incapacity of an infant to sue in his own name is jurisdictional, and that the question of jurisdiction may be raised at any stage of the proceedings, even on appeal to this court. The contention is, we think, unsound. The code of civil practice provides, as one of the grounds for demurrer, that the plaintiff has not legal capacity to sue, and that when such matter does not appear upon the face of the complaint, the objection may be made by answer (Kirby's Digest, § § 6093-6096). The last section just cited provides that "if no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same." It thus appears that the statute itself provides that the incapacity of the plaintiff to sue may be waived by the defendant, and is waived by failing to take advantage of the defense at the time and in the manner pointed out by the statute. The judgment is not void because of the plaintiff's incapacity to sue, but that defect only constitutes error which calls for a reversal of the judgment, if taken advantage of in apt time. It has always been the rule of this court that judgments against infants are not void because of the omission to appoint a guardian, but are merely voidable and can only be avoided on appeal or writ

of error or other direct proceedings authorized by statute. *Trapnall's Admx.* v. *State Bank,* 18 Ark. 53. The authorities generally lay down the rule that the defendant waives the objection that the plaintiff is an infant, and suing without guardian or next friend, by pleading to the merits and by failing to raise the objection by demurrer or answer. 22 Cyc. 645; 1 R. C. L. 52.

(5) It is next insisted that the alleged contract of marriage lacked mutuality because of the incapacity of the plaintiff to enter into a contract, and that the alleged breach of it can not be made the basis of a right of action. The contract of an infant is not absolutely void, but is only voidable at the instance of the infant himself. This court, in *Bozeman* v. *Browning,* 31 Ark. 364, said: "As a general rule, no one but the infant himself, or his legal representatives, executors and administrators, can avoid the voidable acts, deeds and contracts of an infant, for, while living, he ought to be the exclusive judge of the propriety of the exercise of a personal privilege intended for his benefit." The numerous authorities cited by counsel for plaintiff on their brief show that the rule is thoroughly established elsewhere, and that only the infant can take advantage of that incapacity to contract.

Error is assigned in the refusal of the court to give the following instruction requested by defendant:

"The jury are instructed that if you find from the evidence that the defendant promised to marry the plaintiff solely on consideration that she should permit him to have sexual intercourse with her (solely on the consideration that she would permit him to have intercourse with her), and as a result of such intercourse she became pregnant, is illegal and can not be enforced in law; and in this case, if you find from the evidence that the defendant did promise to marry the plaintiff upon the consideration that she allow him to have sexual intercourse with her, and that there was no other consideration for such promise, then your verdict will be for the defendant."

(6) The instruction just quoted announced the correct principle of law, and should have been given to the

jury if there was evidence which justified it, for "an immoral consideration will not support a promise of marriage, and consequently if a promise to marry is on consideration that the promisee shall before marriage have sexual connection with the promisor, it is void." 4 R. C. L. 145. See, also, *Connolly* v. *Bollinger,* 20 Am. & Eng. Ann. Cases 1352; *Burke* v. *Shaver,* 92 Va. 345; and other authorities cited on the brief of counsel for defendant.

The facts of this case did not, however, call for the submission to the jury of that issue, for there is no testimony which would have justified the jury in reaching the conclusion that the alleged promise of marriage was made by defendant in consideration of plaintiff granting him the privilege of sexual intercourse with her. Plaintiff was a domestic servant in the household of defendant's sister, who resided with her husband on a farm in White County. Plaintiff was, as before stated, about sixteen years of age at that time, and defendant was about fifty-two years of age and a bachelor. He was living with his sister at the time and slept under the same roof with plaintiff. She testified that she arose early every morning and went to the kitchen for the purpose of preparing the breakfast for the family, and that defendant usually met her in the kitchen and remained there with her while she was preparing the meal. She stated that it was under those circumstances that he wooed her and finally promised to marry her. One night during the month of January, 1913, he came to her room, according to her testimony, and proposed sexual intercourse. That was after they had become engaged to be married, and the day for marriage had been fixed. She said that she demurred, but that he insisted upon the intercourse, assuring her that because of their affection and approaching marriage no harm would be done, and that if she became pregnant before the date fixed for the marriage, he would immediately marry her. She yielded to his solicitation, and thereafter for a period of six months or longer, they frequently had sexual intercourse under the same circumstances, that is to say, he would come to her room at night

after the family had retired. The date of the marriage had been set for a certain day in June, and she said that after that date passed without his complying with his promise, she told him of her condition, and that he finally announced to her that he would not marry her at all. She then left the home of his sister and soon after gave birth to a child. Defendant intermarried with another about that time. The testimony of the plaintiff was sufficient to establish the contract of marriage and the breach thereof, and also the aggravating circumstances by reason of the seduction. The defendant denied that he promised to marry the plaintiff, or that he had sexual intercourse with her, and undertook to show that improper relations existed between the plaintiff and another man. The jury evidently rejected the whole statement of defendant and accepted the testimony of the plaintiff as true. Now, there was no issue in the case as to a promise of marriage based upon the consideration of having sexual intercourse. It is true that plaintiff says that the defendant promised to marry her in advance of the day already set if she should become pregnant before that time, but that did not vitiate the original promise of marriage. The fact of seduction, even though it was accomplished by a promise to hasten the marriage, only afforded aggravating circumstances to be considered by the jury in assessing the damages resulting from the breach of the original promise. According to the plaintiff's testimony, there was an unconditional promise of marriage, and on the other hand the defendant testified that there was no promise at all, therefore, there was no issue as to there being a conditional promise or one based upon the consideration of sexual intercourse. The instruction therefore submitted a matter foreign to the issues, and was properly refused by the court.

(7) It is earnestly insisted that the evidence is not sufficient to sustain the verdict, but we are clearly of the opinion that the evidence is sufficient for that purpose, and that we are not at liberty to disturb the verdict on that ground. The parties in interest, and others who tes-

tified in the case, were before the jury, and the jurors were in better position to judge of the credibility of the witnesses.

(8) There is an assignment of error based on alleged misconduct of one of the attorneys for the plaintiff in making a statement concerning the verdict of the jury in a certain case of a similar nature tried at Little Rock in which the plaintiff was given a verdict for the sum of $100,000. The record shows that counsel for the defendant objected to the argument at the time, and that the court sustained the objection, but there was no request made concerning any further action of the court; in fact, there was no exception saved to the remark, defendant's counsel contenting themselves merely with an objection which the court sustained. Later, there was another objection which the court overruled, and an exception was saved. The statement objected to at that time was as follows: "You ought to award this plaintiff such a sum as will compensate her for her loss of virtue, shame and mental pain and anguish." The action of the court in overruling the objection was tantamount to an approval of the argument, and thus accepting it as a proper statement of the elements of damages. We are of the opinion, however, that the statement was not incorrect as to the elements of damages, for they could all be considered in determining the amount of damages to be awarded to the plaintiff. The elements of loss of virtue, shame and mental anguish were matters of aggravation which were proper to be considered in determining the damages which naturally flowed from the breach of the promise of marriage and the seduction, which was one of the incidents of such breach. *Collins* v. *Mack,* 31 Ark. 684.

There are other matters discussed in the brief, but none which calls for further discussion.

Judgment affirmed.

OZARK DIAMOND MINES CORPORATION v. TOWNES & GARANFLO.

Opinion delivered April 19, 1915.

1. INSTRUCTIONS—REQUEST BY BOTH SIDES FOR A DIRECTED VERDICT.—When both parties to an action request a directed verdict and ask no other instructions, they in effect agree that the question at issue shall be decided by the court, and the court's finding has the same effect as the verdict of a jury.
2. BILLS AND NOTES—FAILURE OF CONSIDERATION.—The total failure of the consideration is as good a defense to a suit upon a bill or note as the original want of it, and is confined to the like parties.
3. CONTRACTS—FAILURE OF CONSIDERATION.—Failure or want of consideration is a defense or a defense *pro tanto* to an action between the parties, but inadequacy of consideration, does not in law constitute a defense.
4. BILLS AND NOTES—CONTRACTS—INADEQUACY OF CONSIDERATION.—Where A. purchased stock, giving his note therefor, the fact that the stock depreciated in value or became worthless gives A. no right to avoid his obligation.
5. CONTRACTS—FAILURE OF CONSIDERATION—SALE OF STOCK.—A. executed his note to appellant corporation, in consideration that he should sell for appellant certain stock in appellant corporation, and the proceeds of the sale were to be given to appellant and appellant was to issue stock to the purchasers; A was to receive as compensation all sums received from sales of stock in excess of the amount of the note; after a small amount of stock was sold the appellant corporation failed and was adjudged a bankrupt. *Held*, when appellant ceased to do business the contract was terminated, as A. could no longer sell stock, and this constituted a failure of consideration so that appellant could not recover on A's note.
6. EVIDENCE—CONTRACT—FAILURE OF CONSIDERATION.—Although parole evidence to contradict, alter or vary a written contract, upon the ground that written evidence is of a higher grade than oral testimony, it is equally settled that the maker of a note may show against the payee or other person standing in the same situation, that the consideration has failed.
7. CONTRACTS—FAILURE OF CONSIDERATION.—Failure of consideration, total or partial, occurs when the consideration, good and sufficient at the time the agreement is made, by some breach of contract, mistake or accident, has afterward failed.

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

McRae & Tompkins, for appellant.

1. Parol testimony is inadmissible to contradict the terms of a valid written instrument. Greenleaf on Ev., § § 275-277; 153 U. S. 224; 117 *Id.* 582; 17 Cyc. 647; 50 Ark. 393; 25 *Id.* 191; 24 *Id.* 20; 36 *Id.* 487; 37 *Id.* 110; 83 *Id.* 163; 49 *Id.* 285; 20 *Id.* 293; 127 S. W. 882; 115 Fed. 397; 31 L. R. A. (N. S.) 235.

This case does not fall within the rule as held in 76 Ark. 140; 82 *Id.* 219, or 100 *Id.* 360.

The agreement attempted to be proven by parol was certainly "contemporaneous" and inadmissible. Cases *supra.*

Murphy & McHaney and *Wallace Townsend,* for appellees.

Parol evidence is admissible to show that a note was never delivered as a final or completed transaction, or that there was no consideration for it, or that the consideration had failed. 1 Greenleaf on Ev. (15 ed.), § 284; 100 Ark. 360; 105 *Id.* 281; 82 *Id.* 219; 76 *Id.* 140.

HART, J. Appellant sued appellees to recover upon a promissory note for $10,000. Appellees interposed a plea of a failure of consideration in defense to the action on the note. The facts are as follows:

The note in question was introduced in evidence and shows that it was executed by appellees on October 26, 1912. It was payable to the order of appellant for $10,000, and was nonnegotiable. For several years prior to the execution of the note, appellant company had not done any business, but about the time the note was executed, it began the establishment of its plant, and was proceeding to develop its property. Fifty-nine thousand dollars worth of stock in the corporation had been sold by the company to an engineer in consideration of certain services to be performed by him. The engineer failed to perform the services and the stock was not issued or delivered to him. R. D. Duncan, president of the appellant company, made an agreement with appellees J. M. Townes and W. H. Garanflo to sell this stock on a basis netting

the company $4.23 per share. The agreement was that appellees should sell the stock for any amount over $10,000 that they pleased, and that the excess over that amount should be received by them as consideration for their services in selling the stock. The stock was to be issued by the corporation to the purchasers procured by the appellees, and appellees were to turn in to the corporation the amounts they received for the purchase price of the stock until the corporation received $10,000. The note was simply executed as a memorandum of the agreement. Soon after the date of the execution of the note, appellee Townes began the sale of the stock and turned in $1,700 to the corporation. The corporation issued the stock to the persons purchasing it as directed by Townes. Some time in June, 1913, the corporation became insolvent and subsequently its affairs were wound up in bankruptcy. The above facts were testified to by appellees, and also by Duncan, the president of the corporation.

At the close of the evidence, both parties asked the court for a directed verdict. The court instructed the jury to return a verdict in favor of appellees, and from the judgment rendered upon the verdict appellant has prosecuted this appeal.

(1) In the case of *St. Louis S. W. Ry. Co.* v. *Mulkey*, 100 Ark. 71, the court held that where each of the parties to an action requests the court to direct a verdict in his favor, and requests no other instructions, they in effect agree that the question at issue should be decided by the court and the court's finding has the same effect as the decision of a jury.

Counsel for appellant objected to the introduction of the oral testimony, and assigns as error the action of the court in admitting it. They insist that this case does not fall within the principles of *Graham* v. *Remmel*, 76 Ark. 140, where it was held that it can be shown that a note sued on was not to operate as a binding obligation until certain conditions were performed, since such evidence does not vary or alter the instrument, but merely shows that it never became a valid undertaking. Counsel are

correct in this contention because the evidence introduced does not tend to show that the note sued on was not to become a binding obligation until certain conditions had been performed. It became an absolute agreement when it was executed, but it by no means follows that the admitted evidence violates the well-known rule that parol evidence can not be introduced to vary or alter a written instrument.

(2) The defense relied upon by appellees was a failure of consideration of the note sued on. The total failure of the consideration is as good defense to a suit upon a bill or note as the original want of it, and is confined to the like parties. Daniel on Negotiable Instruments (6 ed.), volume 1, section 203; *Gale* v. *Harp,* 64 Ark. 462; 3 Ruling Case Law, Bills and Notes, sections 138-142.

In the case of *Webster* v. *Carter,* 99 Ark. 458, the court held on a plea of a partial failure of consideration in an action on a promissory note that a defendant is entitled by way of recoupment for so much of the consideration as has failed.

The undisputed evidence in this case shows that appellees did not purchase the stock of the corporation, and that the note was not given for stock which was issued to them in exchange for the note. If the note had been given for the purchase of stock by appellees, there would be a valuable consideration, for the stock was property, and the mere fact that the stock subsequently proved to be worthless would not affect the validity of the note.

(3) A distinction is to be observed between want or failure of consideration, which is a defense or a defense *pro tanto* to an action between the parties, and inadequacy of consideration which does not in law constitute a defense.

(4) If appellant had sold stock to appellees and appellees had given their note in exchange for the stock which subsequently depreciated in value or became worthless, such depreciation would give appellees no greater right to avoid their obligation than an enhanced value of

the stock would avail appellant an excuse for nonperformance of the contract on its part.

Here, however, as we have already seen, there was no sale of stock by appellant to appellee. The consideration for the execution of the note was that appellees should sell for appellant fifty-nine thousand shares of stock at the net value of $4.23 per share; and the note was given for the proceeds of the sale of the stock. Appellees were to receive as compensation all sums in excess of that amount. It was understood that as sales of stock were made, the money should be turned in to the appellant company by appellees and appellant would issue stock to the purchasers for the amount sold to them. There was no time limit within which the sale was to be made. Appellees proceeded under the agreement and turned in to appellant company all amounts received by them for the purchase of the stock and appellant issued stock to the purchasers.

(5) About seven months after the note sued on was executed, the corporation ceased to do business, and was subsequently adjudged a bankrupt. When the appellant company became insolvent and ceased to transact business, the contract was terminated. Appellees thereafter could not sell any of the stock of appellant because appellant had, by its insolvency, put it out of its power to issue the stock. This constituted a failure of consideration.

(6-7) Though it is the settled rule in this State that parol evidence is not admissible to contradict, alter or vary a written contract upon the ground that written evidence is of a higher grade than oral testimony of witnesses, it is equally well settled that the maker of a note may show against the payee or other persons standing in the same situation that the consideration has failed. It has been said that failure of consideration, total or partial, occurs when the consideration good and sufficient at the time the agreement is made, by some breach of contract, mistake or accident, has afterward failed.

The evidence to the admission of which objection was made by appellant shows that the proceeds arising from

the sale of stock in appellant corporation was the consideration for the note sued on, and appellant, by its insolvency, having put it out of its power to issue the stock which was to be sold by appellee for it, the consideration for the note failed.

It follows that the judgment must be affirmed.

SWEARINGEN v. BULGER & SON.

Opinion delivered April 12, 1915.

1. CONTRACTS—CONTRACT OF AGENT—LIABILITY.—A church corporation authorized its building committee to procure architect's plans and specifications for a building not to exceed a certain sum in cost. *Held*, when the committee entered into a contract with appellee architect for plans and specifications covering a building of an estimated cost far in excess of the amount authorized the church will not be liable on the same.

2. CONTRACTS—AGENCY—CONTRACT IN EXCESS OF AUTHORITY—LIABILITY OF AGENT.—Appellants as agents for a religious corporation, entered into a contract with appellees for work in excess of the authority conferred by the corporation. In an action against the appellants personally on the contract; *held*, it was error to instruct the jury that they were personally liable, without submitting to the jury the issue of whether appellees knew that appellants were exceeding their authority, when there was no personal undertaking on the part of the appellants.

3. PRINCIPAL AND AGENT—EXCEEDED AUTHORITY—LIABILITY OF AGENT.—If the party with whom an agent deals has full knowledge of the lack of authority of the agent, and there is no express undertaking on the part of the agent to make himself personally liable, he does not become liable merely because of the fact that he exceeds his authority.

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

A. J. Murphy, for appellants.

C. Floyd Huff, for appellees.

McCULLOCH, C. J. Hot Springs Baptist Church (incorporated), of the city of Hot Springs, Arkansas, decided to build a new church edifice in April, 1908, and through its pastor began negotiations with appellees, a firm of architects in the city of Dallas, Texas, for the preparations of plans and specifications. Appellants and certain other members of the church were appointed as a building committee with authority to make contracts, but the authority was limited to that of forming plans and building a church not to cost exceeding the sum of $50,000. The pastor of the church was *ex-officio* a member of the committee, and was the most active member, most of the negotiations with appellees being conducted through him. A contract was finally entered into with appellees for preparation of the plans and specifications, the compensation to be 3 per cent on the estimated cost of the building, or $1,500, payable in three equal installments, the first of which was paid. Appellees prepared plans and specifications and delivered them to the committee, and this is an action to recover the sum of $1,000, and interest thereon, balance due on the price agreed to be paid. Appellants, as members of the committee, and the church itself were sued jointly. The church defended on the ground that it had given no authority to make a contract for the construction of a church in excess of the cost of the sum of $50,000, and appellants defended on the ground that they made no contract to bind themselves individually but acted only as agents of the church and were not personally liable. The trial of the case resulted in a verdict in favor of the church but against appellants, as members of the building committee, for the amount of the balance due under the contract.

(1.) It is not contended that appellants entered into any contract except in their representative capacity for the benefit and in the name of the church, but recovery against them was sought alone upon the theory that they exceeded their authority. It is undisputed that the plans and specifications were for a church of an esti-

mated cost far in excess of the sum of $50,000, and that the church itself is not liable on account of the lack of authority to bind it to the contract which was in fact made with appellees. The court properly submitted, in instructions requested by appellees, the question of the nonliability of the church if its authority had been exceeded. The instructions told the jury that if "said building committee exceeded its authority and did contract with plaintiff for plans for a building to exceed in cost $50,000," the church would not be liable. The jury found in favor of the church, and we must treat the issue settled that the church is not liable because of the fact that it had not authorized the committee to enter into a contract for the preparation of plans in excess of the cost named above.

The court gave the following instruction, over the objection of appellants:

"3. The court instructs the jury that even though you may believe from the evidence that the defendants had no authority to contract with plaintiffs for plans for a building to cost exceeding $50,000, and that in fact the building provided for by the plans could not be built for $50,000, and the committee had full knowledge of this fact before it made such agreement, yet if you further find from the evidence that a settlement was reached by said parties by an agreement to pay $500 by March 1, 1910, and the balance of $1,000 within two years thereafter, then you will find for the plaintiffs in the sum of $1,000 with 6 per cent interest from the 10th day of February, 1912, as against the defendants composing the building committee."

(2.) We are of the opinion that that instruction contained an incorrect statement of the law which calls for a reversal of the judgment. The effect of the instruction was to tell the jury that appellants would be liable merely because they entered into an agreement to pay for the plans with knowledge that the contract exceeded the authority extended to them, and entirely ignored the

question of knowledge on the part of appellees themselves. In that respect it was in conflict with the first instruction given by the court at the request of appellees. Notwithstanding the fact that the contract exceeded the authority, if appellees had knowledge of the fact, and there was no personal undertaking on the part of appellants, they did not become liable. This is true, also, concerning the question of ratification, for if appellees possessed knowledge of the fact that appellants had exceeded the authority actually conferred upon them by their principal, ratification by payment of a portion of the agreed price did not render appellants personally responsible. On the contrary, any payment made by the church, with knowledge of the fact that the authority conferred had been exceeded, constituted ratification which relieved appellants from existing personal liability by reason of having exceeded the authority of their principal without the knowledge of appellees. This results from the fact that the principal and agent can not both be liable on the contract, and if the former is liable the latter is not. So in any view of the above instruction, it was incorrect in ignoring the question of knowledge on the part of appellees that appellants had exceeded the authority conferred on them by their principal.

(3.) In the case of *Rittenhouse* v. *Bell,* 106 Ark. 315, we had occasion to lay down the law generally as to the personal liability of an agent who contracts in excess of the authority delegated to him by his principal. There are, however, many limitations upon that general rule, and one of them is that if the party with whom the agent deals has full knowledge of the lack of authority, and there is no express undertaking on the part of the agent to make himself personally liable, he does not become liable merely because of the fact that he exceeds his authority. The law on that subject is stated as follows:

"The above rules in respect to an agent's liability for entering into a contract on behalf of an assumed principal apply, however, only where the third party has acted

in good faith and has been induced or misled into entering into the contract by the agent's express or implied representations as to authority. In order that such party may hold the agent liable for damages, it is necessary that he should have been *bona fide* ignorant of the extent of the agent's authority. If he knows, or has knowledge sufficient to put him on inquiry, of the facts and circumstances surrounding the agency, and he fails to make use of such knowledge or to make such inquiry, it can not be said that he has been induced or misled into the contract by the agent's express or implied representations, and he can not hold the agent responsible for any injury he may have suffered thereby, unless the agent has concealed or misrepresented material facts to his injury. Hence, where an agent, at the time he enters into the contract, *bona fide* discloses to the other party all the facts and circumstances in the case, in reference to the authority which he claims to have, such party can not say that he has been misled, so as to hold the agent liable for any damage he may have incurred." 2 Clark & Skyles on Agency, § 582.

There are many decisions on that subject and the law is well settled. The Kentucky Court of Appeals, in the case of *Sandford* v. *McArthur,* 18 B. Monroe, 411, said: "It is a general principle that where a person undertakes to do an act as an agent of another, and exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing; but this liability is founded upon the supposition that the want of authority is unknown to the other party."

The late Justice Brewer, speaking for the Supreme Court of Kansas in the case of *Abeles* v. *Cochran,* 22 Kan. 405, after reviewing the authorities on the subject, said: "The doctrine is clear that where the contract is made in the name of the principal, and without any personal covenant on the part of the agent, and without any wrong on his part, either in act, statement or omission, the latter is not responsible, even though the former be not bound."

In delivering the opinion of the court in *Newport* v. *Smith,* 61 Minn. 277, Judge Mitchell said: "The ground and form of the professed agent's liability in such cases has been the subject of discussion, but all the authorities are agreed that he is liable in damages to the person dealing with him upon the faith that he possessed the authority assumed. * * * But in whatever phase the question has arisen, or whatever diverse views the courts may entertain as to the precise ground of the liability or form of the remedy, all the authorities are agreed that, to give a party a legal remedy against the professed agent, he must have been ignorant of the want of authority, and have acted upon the faith of the representations, express or implied, that the professed agent had the authority assumed. Hence, the law is that when the professed agent, acting in good faith, fully discloses to the other party, at the time, all the facts and circumstances touching the authority under which he assumes to act, so that the other party, from such information or otherwise, is fully informed as to the existence and extent of his authority, he can not be held liable."

The Supreme Court of Connecticut, in a well considered case, had this to say on the subject: "It does not follow that an agent, acting either in a public or private capacity, is of necessity made personally liable, although he does not give a cause of action against some one else. We believe the law to be, that if a person assumes to act and enter into contracts in the name of another as his principal, and does this with an honest intent, openly and fully disclosing all the facts touching his supposed authority, or which may be fairly implied from his situation, and especially if he provides against his personal liability, in any event he can not be held liable unless he be guilty of fraud or false representation." *Ogden* v. *Raymond,* 22 Conn. 379.

There are many other decisions to the same effect. *Halbot* v. *Lens* (1901), 1 Ch. 344; *Smout* v. *Ilbery,* 10 M. & W. 1; *Newman* v. *Sylvester,* 42 Ind. 106; *Ware* v. *Mor-*

gan, 67 Ala. 461; *Hall* v. *Lauderdale,* 46 N. Y. 70; *Western Cement Co.* v. *Jones,* 8 Mo. App. 373; *Humphrey* v. *Jones,* 71 Mo. 62; *Michael* v. *Jones,* 84 Mo. 578.

Now, in the face of the well-established principles of law above announced, the court in this case gave an instruction which permitted the appellees to recover of appellants, as agents, notwithstanding appellees' complete knowledge of all the facts and lack of authority, if there was such lack of authority. The evidence is abundant, even if it can not be said to be undisputed, that appellees had full knowledge of the fact of the limitations upon the authority of the committee, and dealt with the latter accordingly. That being true, the committee was not personally liable, not having assumed any expressed personal liability in entering into the contract.

For the error in giving the instruction referred to, the judgment is reversed and the cause remanded for a new trial.

HUBBARD v. McMAHON.

Opinion delivered April 12, 1915.

1. TRUSTS—CONSTRUCTIVE TRUST—PROOF.—A husband engaged actively in business in his wife's name, all of the property being in the wife's name; *held,* under the evidence, that is was the intention of the parties that the wife hold the property in trust for the husband, and that the proof was sufficiently clear and convincing to raise a constructive trust.
2. TRUSTS—CONSTRUCTIVE TRUST—PROOF.—When property is acquired by a husband in the name of his wife, the presumption that the property belongs absolutely to the wife, may be overthrown and a resulting trust established by proof that is clear, satisfactory and convincing, and which leaves no well founded doubt, but that a trust was intended by the parties.

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

STATEMENT BY THE COURT.

Appellee is a grandson of W. F. Hubbard, who died in Mississippi County in the fall of 1913, leaving surviv-

ing him his widow and the following children: Mrs. Hattie McMahon, Mrs. Mays, Mrs. Huggins, Mrs. Dean and Clarence Hubbard, Sr. Mrs. Hattie McMahon was the mother of appellee, and Clarence Hubbard, Sr., was the father of Clarence Hubbard, Jr. Mrs. McMahon died leaving surviving her, as her sole heir at law, the appellee. Clarence Hubbard, Sr., also died, leaving surviving him, as his sole heir at law, Clarence Hubbard, Jr. The mother of the above children of W. F. Hubbard died when they were small, in Iuka, Mississippi, where W. F. Hubbard at that time was residing. About the year 1889 W. F. Hubbard failed in business in Mississippi. Judgments amounting to a large sum were rendered against him and it does not appear from the records that they were satisfied. Hubbard moved to Arkansas and settled in Mississippi County. He brought with him a sawmill and a few oxen. He began operating there a sawmill. Mrs. H. M. Potts came with him from Iuka and established a boarding house, where W. F. Hubbard and some of his employees at the sawmill boarded. Mrs. Potts intermarried with W. F. Hubbard March 3, 1891. After their marriage a large estate was accumulated in Mississippi County, all in the name of Mrs. H. M. Hubbard, the wife of W. F. Hubbard. Soon after the death of W. F. Hubbard, this suit was instituted by the appellee in the chancery court of Mississippi County against Mrs. H. M. Hubbard and the other appellants, the widow and heirs of W. F. Hubbard, deceased, to have a trust declared of the property in the hands of Mrs. H. M. Hubbard in favor of the estate of W. F. Hubbard, deceased, and that appellee be decreed his portion of the estate and that a receiver be appointed to take charge of the property, etc. The appellants answered, denying that the property was held in trust by Mrs. H. M. Hubbard for the estate of W. F. Hubbard, deceased, and alleged that all of the property at the time of the death of W. F. Hubbard belonged to Mrs. H. M. Hubbard.

The court found that "all of the property conveyed to Mrs. H. M. Hubbard after her marriage to W. F. Hubbard was the property of the said W. F. Hubbard at the time of his death and that the said W. F. Hubbard was the owner of all the personal property of every kind and description in his possession and in the possession of Mrs. H. M. Hubbard and claimed by her at the time of the death of W. F. Hubbard and that the said W. F. Hubbard operated and did business under the name of H. M. Hubbard, and that H. M. Hubbard had no right therein except the right of dower and homestead at the time of death of W. F. Hubbard."

The court decreed that the appellee, as the grandson of W. F. Hubbard, was the owner of a fifth interest in all of the property, subject to the dower and homestead rights of Mrs. H. M. Hubbard. Proper orders were entered appointing a receiver to take charge of the property and appointing commissioners for setting aside the homestead and dower of Mrs. H. M. Hubbard. And from the final judgment of the court approving the report of the commissioners disposing of the estate in accord with the above finding this appeal has been duly prosecuted. Other facts will be stated in the opinion.

J. T. Coston, for appellant.

1. The agreement on the part of Hubbard with appellant prior to their marriage and their subsequent marriage pursuant thereto afforded a sufficient consideration to support the transfer of the property to her. 96 Ark. 531; 132 S. W. 645; 1 Moore, Fraudulent Conveyances, 325.

2. The first conveyance to Mrs. Hubbard was made March 6, 1891, and the last was on December 18, 1911. A trust resulted at the instant of each conveyance or not at all. 20 Atl. 285; 51 N. E. 153; 36 N. E. 619.

There is no competent evidence in the record to show anything said or done, either by Hubbard or his wife, contemporaneous with the execution of any of the conveyances, showing that it was his intention to reserve a beneficial interest in the property, or her intention to hold it

in trust for him. The proof is that while his wife allowed Hubbard a large discretion in handling the property, her word was final as to all transactions and he always consulted her. But, if it be conceded that he used the property in all respects without restraint or control on her part, the evidence is still wholly insufficient to strike down a deed. 71 Ark. 373; 74 S. W. 517; 1 Pomeroy, Equity, § 1041; 171 S. W. 477; 58 N. E. 237; Kirby's Dig., § 5227; 43 S. W. 275; 115 Ark. 416.

3. Where a husband purchases real estate and takes the title in his wife's name, the law presumes that he intended it as an advancement or gift; and while it is admissible to prove a trust in opposition to a deed, the evidence offered for this purpose must be of such character as to leave no doubt of the fact. 149 S. W. 83; 48 Ark. 173; 104 Ark. 303.

In this case the presumption is not overcome. The proof is that Hubbard did not like the plaintiff, and had said that if he had any property in Arkansas he would disinherit him; had changed an insurance policy some years before his death so as to cut out plaintiff's rights therein, and when appellant took sick he wrote her will in which she gave her husband the use of the property for life and at his death it was to go to Clarence Hubbard, Jr., and the three surviving daughters, thus cutting out the plaintiff. 66 Atl. 190; 47 N. E. 432; 86 Atl. 406; 103 N. E. 194. See also 58 Pac. 544; 16 Atl. 325; 142 S. W. 925; 50 Pac. 471; 100 S. W. 583.

The execution of the will at Hubbard's request, the writing of it by him, and the conveyance of several tracts of land to appellant afterward, evidence the fact that they both understood that the property belonged to her and not to Hubbard, and that in case she died without a will he and his children would not get the property. 116 S. W. 192; 89 Ark. 187.

Lamb & Rhodes and *Stone & Son,* for appellee.

1. The presumption that where a husband buys real estate and takes the title in his wife's name he intended it as an advancement or gift is not conclusive. It may be

rebutted by antecedent or contemporaneous declarations and circumstances which tend to prove the intention of the husband that the grantee should hold as a trustee and not beneficially for herself. 40 Ark. 62.

All the facts and circumstances developed in the evidence, Hubbard's financial embarrassment when he left Mississippi, his having a family of children by a former marriage and none by the second, his merging his business identity into that of H. M. Hubbard, his transacting all business in all respects as his own, the making of the will and Mrs. Hubbard's own admissions that she intended to give certain of his children all of his real estate, lead to the one conclusion that they both understood that the property was his, and that she recognized the trust relationship in which she stood. The evidence is so clear, convincing and conclusive that the chancellor could not have found otherwise. 58 N. E. 237, and cases cited; 66 Ala. 55; 44 Vt. 555; 25 Ia. 43; 169 U. S. 398; 67 Neb. 548; 23 Vt. 638.

Trusts of this nature are taken out of the statute of frauds and may be proved by parol, the evidence, of course, to be full, clear and convincing. 41 S. W. 845; 84 S. W. 491; 88 S. W. 999; *Id.* 949; *Id.* 573; 96 S. W. 175; 102 S. W. 228; 74 S. W. 516; 151 S. W. 284; 149 S. W. 80; 146 S. W. 867; 117 S. W. 747.

In all cases the courts look to the intention of the parties as shown by acts and circumstances in determining whether a trust resulted from the transaction. *Supra;* 42 S. E. 547; 23 Atl. 57; 102 N. W. 774; 72 N. W. 771.

2. It is well settled that the chancellor's findings of facts are conclusive unless clearly contrary to the preponderance of the evidence. 168 S. W. 616; 166 S. W. 740; *Id.* 636; 165 S. W. 457; *Id.* 269; 113 Ark. 19; 112 Ark. 134, and many other Arkansas cases.

WOOD, J., (after stating the facts). After the marriage of W. F. Hubbard (who will hereafter be designated as Hubbard) to Mrs. H. M. Potts (who will hereafter be designated as Mrs. Hubbard), real estate was

accumulated in the name of Mrs. Hubbard in Mississippi County, Arkansas, that was appraised at $40,180, as shown by the report of the commissioners appointed to set apart her dower and homestead.

Mrs. Hubbard testified that Hubbard was running a store at Iuka, Mississippi, before he came to this country, and that he turned the store over to a clerk named Jordan and the clerk broke him. "That was why he left there." In explanation of why the real estate was taken in her name, she says: "When he (Hubbard) got the telegram from Jordan that his store was closed, of course I got dissatisfied and packed my trunk to go away. He said: 'Now, if you will stay here and marry me, I will marry you, and what we accumulate in this bottom will be yours.'" When asked if there was any consideration for her marriage to Hubbard other than simple love and affection, she answered: "He told me if I would marry him everything he made in Arkansas would be mine." She further stated that his proposition was accepted by her. In response to the question why all of the deeds were taken in her name instead of Hubbard's, she answered: "Because I would not live in Arkansas except everything was in my name." She also stated that at that time she was engaged to Hubbard, expected to marry him, and when the telegram came telling of the failure of his business in Mississippi she became dissatisfied. The shutting down of the mill would have taken away her boarders, and she made up her mind to leave. She knew that when she went away Hubbard would have gone, too. She says: "I expected him to be mine some time, and I did not want to have a broke man." In regard to the understanding between herself and Hubbard concerning the acquisition of the property, the record shows the following:

Q. It is a fact that practically all during the married life with Mr. Hubbard, and when you were accumulating that property there, that it was with the under-

standing that at your death it was to be his property absolutely, and your will provided that?

A. I do not know as it read that way.

Q. That was the meaning of it?

A. It was to be divided among the children that stuck to him—the children were to have a certain part of it.

Q. If you died before he did?

A. Yes, sir.

Q. If you died before Mr. Hubbard, then it was to go to the children?

A. No; he was to have his part of it and a living.

Q. A life interest?

A. Life interest, of course.

Q. Then it was to go to his children?

A. Not to his children, certain ones of his children.

Mrs. Hubbard was asked: "Do you know of any writing made by him regarding the distribution of any property that he was interested in?" and answered: "Nothing but my will that he wrote for me." She further testified in regard to this will that in it she made a provision by which she gave Hubbard all of the property, and states that "it was drawn by an understanding and agreement with Mr. Hubbard." (This instrument purporting to be Mrs. Hubbard's will, although not signed by her, was confessed by her to be her will. It was in evidence and disposed of all her estate real and personal equally among the heirs of Hubbard, omitting appellee. The instrument provided that Hubbard was to have control of all of the property during his life applying the rents and increase "as he may deem necessary for his support," and giving him the right to sell any part of the property and apply the same to his support. Hubbard was appointed guardian of the minor, Clarence Hubbard, and was made executor of the will without bond.) Mrs. Hubbard further testified that Hubbard conducted the business as he thought best, that he was a very successful business man; that the only property that he ever

helped to accumulate was the property that appeared in her name. The business was conducted "just as other husbands and wives conduct their business." He used his own judgment in buying and selling, but was "like all other men with their wives, he always asked if it was agreeable. When I said no, no went, and yes went in any kind of trade." At another point in her testimony, she stated: "He generally always asked me what I thought about it, and my answer would be, 'Do just what you like about it, whatever you think is right.' So far as I know, he acted on his own judgment." She was asked if she told her husband at the time he drew the will how she wanted the property divided, or if he divided it to suit himself, and she answered: "We talked it over, he and I together." She was asked why she gave all that property to Hubbard's children without any provision for her own relatives, and she answered that she made such provision because she thought more of Hubbard's children than of her own people. In this connection are the following questions and answers:

Q. You also consider that Hubbard, who created that property, had an interest in it?

A. Why, certainly.

Q. And that he had a right to say where it should go?

A. No, no; he had no right only as I said.

(1) The above are the material portions of Mrs. Hubbard's testimony, and, taking it all together, and in connection with the other facts adduced in evidence (which it is unnecessary to set out in detail) we are convinced that, at the time the property in controversy was acquired and the deeds to the real estate were taken in the name of Mrs. Hubbard, it was the intention of Hubbard, and also Mrs. Hubbard, that the latter should hold the same in trust for Hubbard. In other words, the record discovers full, clear and convincing proof of a resulting trust in favor of Hubbard, and the chancellor was correct in so holding.

Soon after Hubbard came to Arkansas, his business that he had left in Mississippi "went to pieces." Judgments in large sums were obtained against him. His property was attached and sold. True, there was oral testimony tending to show that these judgments were afterward paid off, but the records do not show that they were satisfied. The records show that there was a fine entered against Hubbard and they do not show that this fine was paid. The records further show that Hubbard was on a bail bond in Mississippi for $1,000 that had been forfeited. These facts are wholly immaterial further than that they tend to show an unsuccessful business career in Mississippi and that this experience of financial embarrassment there possibly accounts for the motive that actuated him, after he began business in Arkansas, to acquire all of his property and transact all of his business in the name of his wife, Mrs. Hubbard. But whatever may have been his motive, the fact is as shown by the uncontroverted evidence, that soon after Hubbard came to Arkansas, and after his intermarriage with Mrs. Hubbard, he transacted all of his business and acquired all of his property, both real and personal, in her name. To the commercial and business world, he lost his identity completely. He was known in all his business transactions as H. M. Hubbard. He even paid his poll tax under the name of H. M. Hubbard. He had four girls and one boy by his first wife. Some of these were minors. He had no children by Mrs. Hubbard, the appellant. Mrs. Hubbard had three sisters. The testimony of Mrs. Hubbard shows that Hubbard was a good business man, and the large and valuable estate he had accumulated is evidence of his frugality and business acumen.

If, as appellants contend, this large estate was acquired with the intention upon the part of Hubbard that it should be the sole and separate property of Mrs. Hubbard, then at the death of Mrs. Hubbard, intestate, the property would have belonged to her sisters. If her death had occurred prior to the death of Hubbard, under such a disposition, he would have been wholly denuded of

his property, and, as a consequence, those of his children who were dependent upon him would have had nothing. As a sensible business man, Hubbard must have known that the dower and homestead rights of Mrs. Hubbard in his estate (assuming that the property was his) would have amply provided for her every comfort necessary, and even every luxury she might desire.

Mrs. Hubbard seems to have been impressed with the idea that Hubbard, before their intermarriage, was so enamored of her that he would have abandoned all to follow, and be with, her wherever she might go. But even if before marriage there was the all-impelling infatuation for her that would have moved him to go anywhere in order to have her companionship, there is nothing in this record to justify the conclusion that after their marriage he was under any such strange delusion of love or fancy for Mrs. Hubbard that caused him to forget himself and his own offspring while he was accumulating the property in controversy. It is inconceivable that he would have acquired this large estate in the name of his wife, and with the intention that the same should be her sole and separate property, and by this arrangement render himself a pauper in case of her death, intestate. The motive of self-preservation, so to speak, and the natural impulses of love for, and duty toward, his children render it entirely unreasonable that he would have accumulated all this property and vested the absolute title thereto in Mrs. Hubbard.

Therefore, we are of the opinion that the effect of Mrs. Hubbard's testimony, when considered as a whole, is that the property in controversy was accumulated by Hubbard and the title placed in her name with the understanding at the time this was done that the property really belonged to her husband.

The will, when taken in connection with the testimony of Mrs. Hubbard, showing why it was made, is a very cogent fact in establishing that it was the intention of Hubbard and Mrs. Hubbard that the property should be held in her name, but in trust only, and that the real bene-

ficial interest was in Hubbard. For she says: "I don't know of any will that my husband made except the one he wrote for me;" thus showing that she recognized that her husband really had the power to absolutely dispose of the property. Again, she says she made a provision by which she gave Hubbard all the property, and that the will was to be drawn "by an understanding with Mr. Hubbard."

After the death of Hubbard, when she began to make disposition of the property, she ignored the appellee. The reason she assigns for not awarding to appellee the interest that belonged to him as the sole heir of Mrs. McMahon is that "he never did own Mr. Hubbard as his grandfather; never called him grandfather." She says: "He never wrote his grandfather but one letter in his life that I know of, and then called him Mr. Hubbard, and signed his name, 'Your friend, W. B. McMahon.'" She says the letter was lost, but in further explanation of its contents she stated that it read, "Will you please loan me $500 to complete my education as a dentist?" and signed it, "From your friend, W. B. McMahon." She stated that Hubbard, when he received the letter, turned around and said: "If I ever get to own anything in Arkansas I intend to disinherit him."

This testimony in regard to the contents of the letter that appellee wrote to his grandfather was specifically denied by the appellee. Appellee, while admitting that he wrote his grandfather letters, stated that he always addressed him as "Dear Grandfather." He stated that he did not ask him to loan him any money and did not sign any of his letters, "From your friend, W. B. McMahon."

The father of appellee testified that he was a dentist and in reasonably prosperous circumstances; that he did not need any "financial help to raise and educate his son;" that he educated his son at the University of Mississippi and Vanderbilt, paying the expenses himself.

The testimony of Mrs. Hubbard in regard to this purported letter is so unreasonable that we do not think it is worthy of credit. That a youth attending college, in writing a letter to his grandfather for the purpose of securing a loan to enable him to finish his education, would address his grandfather as "Mister" and sign the letter "From your friend, Walter McMahon," seems to us so utterly incredible that we can not accept it over the positive testimony of the young man himself and of his father, showing that the most cordial relations existed between them and the grandfather, and that there was no reason why the grandson should not have addressed his grandfather in the usual natural language of endearment in which such letters are couched. It is most natural that a grandson who desired to borrow money from his grandfather would seek not to offend him by ignoring the close tie of kinship. The purpose of his letter on the contrary being to borrow money it seems but reasonable that he would recognize and seek to emphasize the relationship, rather than manifest an indifference to it.

The only effect of this testimony is to show that Mrs. Hubbard, in this particular, failed to recognize and carry out the trust that was reposed in her by her husband. But even for this conduct on her part she assigns as an excuse the desire to carry out what she says was her husband's express wish before his death in regard to the disposition of the property so far as appellee was concerned.

We can not believe upon such testimony that Hubbard ever expressed a wish to disinherit his grandson, and since Mrs. Hubbard realized her obligation to conform to his wishes as to his other heirs, in justice to appellee she should also have awarded him his portion of Hubbard's estate.

Taking the testimony of Mrs. Hubbard as a whole, it alone furnishes full, clear and convincing proof that when Hubbard accumulated the estate in controversy in

her name and had the title to the real property described in the complaint taken in her name, he did not intend the same as a gift or advancement to her, but, on the contrary, only intended that she should hold the same in trust for him.

The law applicable to the facts of this record has been often declared by this court. The facts do not call for the announcement of any new principle.

In *Milner* v. *Freeman,* 40 Ark. 62, it is held that in equity, where a husband purchases real estate and pays the purchase money, but takes the title in the name of his wife, the presumption is that the transaction was an advancement or gift. But such presumption is not conclusive, and may be rebutted by antecedent or contemporaneous declarations or circumstances tending to prove that it was the intention that the wife as grantee should hold the property, not absolutely, but in trust for the benefit of her husband; that the husband as the *cestui que trust* is not estopped by the recitals or covenants in the deed from proving by parol all the facts from which a trust may be inferred. These principles have often been reiterated. See *Camden* v. *Bennett,* 64 Ark. 155; *Chambers* v. *Michael,* 71 Ark. 373; *Poole* v. *Oliver,* 89 Ark. 578; *Della* v. *Della,* 98 Ark. 540; *Harbour* v. *Harbour,* 103 Ark. 273; *Keith* v. *Wheeler,* 105 Ark. 318.

The above principles are so well established by the decisions of our own court that we are not called upon to go beyond these. But an excellent statement of the same doctrine is contained in One Perry on Trusts, section 147, which is cited and quoted with approval in *Smithsonian Institution* v. *Meech,* 169 U. S. 398-407.

(2.) The fact that the property in controversy was acquired by Hubbard in the name of Mrs. Hubbard, and that the title to the real estate was taken in her name, create a strong presumption of a gift or advancement and that the deeds are what they purport to be. But this presumption, as we have seen, is not conclusive. We have often ruled that under such circumstances, the proof to overcome the presumption of a gift and to establish a

resulting trust must be clear, satisfactory and convincing. It must be such as to leave no well founded doubt that a trust was intended. *Keith* v. *Wheeler, supra; Hall* v. *Cox,* 104 Ark. 303; *Mason* v. *Harkins,* 82 Ark. 569; *Foster* v. *Beidler,* 79 Ark. 418; *Tillar* v. *Henry,* 75 Ark. 446.

In arriving at the intention of Hubbard and Mrs. Hubbard, we have carefully considered all of the testimony in the record. As to whether or not it was their mutual intention that the property in controversy should be acquired in her name, but held by her in trust for Hubbard, was purely a question of fact, and it could serve no useful purpose to further discuss the evidence in detail. In suffices to say that it measures up to the requirements of the law as to the character of proof necessary to establish that such was their intention. Upon being thus established the law declares a resulting trust.

While the deeds recite that the consideration was paid by the grantee, Mrs. Hubbard, and while Mrs. Hubbard, in regard to the purchase of the tract of land from Goodwin, in answer to the direct question, stated that she paid $1,000 named as the consideration in the deed, yet when asked how she earned it she stated that she "cooked, milked, raised hogs, cattle of all descriptions, chickens."

In regard to a tract purchased from Geo. W. Shroyer, she stated that the cash payment of $500 was made by Hubbard, and that the balance of the purchase money was borrowed. She says, "We made notes and paid the notes."

Appellants contend that this testimony shows that the purchase money for these tracts of land was not furnished by Hubbard. These isolated portions of Mrs. Hubbard's testimony would tend to sustain their contention. But when all of her testimony is considered together, and when the testimony of the other witnesses is considered, it is clear to our minds that Hubbard managed all the business; that Mrs. Hubbard had no separate business of her own and that she did not transact any of the business by which the property in controversy was

acquired. We have set forth enough of her testimony to show that the business of accumulating the property was conducted by Hubbard, and not Mrs. Hubbard. For instance, at one place in her testimony, in answer to a question as to why he took all of the deeds in her name, she says: "Because I would not live in Arkansas except everything was in my name." In another place, speaking of the business, in answer to a question, she stated that "it was conducted, so far as she could tell, just the way other husbands and wives conduct their business."

A business man in Memphis, with whom Hubbard had extensive business transactions, and who was the draftsman of three of the deeds to lands that were taken in Mrs. Hubbard's name, testified that Hubbard transacted all the business "with the same freedom and authority as if he was absolute owner of everything."

The testimony of other witnesses as to Hubbard's declarations at the time they were engaged in business transactions with him shows clearly that while he was conducting his business in the name of his wife, he asserted that all the property acquired in her name belonged to him. These were declarations made in the course of the transaction of business at the time and prior to the acquisition of the property in controversy, and made this testimony competent under the doctrine announced above in *Millner* v. *Freeman* and *Smithsonian Institution* v. *Meech.*

There is no doubt that Mrs. Hubbard performed faithfully such duties as she described and such as thousands of industrious and loyal housewives are daily performing in their domestic relations with their husbands. And there is no doubt that the relation between herself and husband, as she expresses it, was "just the way other husbands and wives conduct their business." But there is no proof, as we view the whole record, to justify the conclusion that she in any way managed the business by which the property belonging to the estate of Hubbard was accumulated. She discharged her duties nobly as a

loyal wife, and, of course, in this way, by industry and economy, she doubtless greatly assisted her husband to become the successful financier and business man that the record shows him to have been. But to say that she managed the business and furnished the purchase money which enabled Hubbard to accumulate the snug fortune disclosed by this record would be wholly at variance with the true state of the case.

The testimony of Mrs. Hubbard to the effect that Hubbard said to her, "Now, if you will stay here and marry me, I will marry you and what we accumulate in this bottom will be yours," and that she accepted his proposition; that she "would not live in Arkansas," etc., unless all the property was taken in her name, is not sufficient to establish an antenuptial contract for the conveyance of real estate and personal property which at that time had not been acquired by Hubbard. The testimony is too indefinite to show a marriage contract.

The findings of the chancery court are in all things correct, and the decree is therefore affirmed.

McCULLOCH, C. J., and KIRBY, J., (Dissenting). We think that the majority of the court have failed to give proper effect to the testimony as set forth in the opinion; and have disregarded well-settled rules concerning the presumption arising from the act of a husband in conveying property or causing it to be conveyed to his wife, and the degree of proof necessary to establish a resulting trust. There is, we think, no proof at all tending to overcome the legal presumption that the conveyances to Mrs. Hubbard were intended as a gift. Every act of the parties is, according to our view, consistent with the idea that a gift was intended, and there are no facts or circumstances proved which are inconsistent with that intention.

NEWMAN v. PEAY.

Opinion delivered April 19, 1915.

1. ADVERSE POSSESSION—BURDEN OF PROOF.—In an action involving the boundary between two lots of ground, the defendant set up, among others, the defense of adverse possession; *held*, under the pleadings it was not error to charge the jury that the burden of proof was upon the plaintiff and that he must establish his case by a fair preponderance of the evidence.
2. APPEAL AND ERROR—INSTRUCTIONS—INACCURACY.—Before the plaintiff can be heard to complain of the court's refusal to instruct upon a given issue, it is his duty to ask a correct instruction upon that issue.
3. ADVERSE POSSESSION—BURDEN OF PROOF.—On the issue of adverse possession the burden is always on the party who asserts it.
4. VERDICT—INDEFINITENESS—VALIDITY.—In an action over a disputed boundary the verdict was "we the jury find for the defendant, his line being from the corner of the barn to the retaining wall." *Held*, although the verdict was indefinite, when read in the light of the pleading and proof it could easily be interpreted, and it was proper for the trial court to render judgment thereon.

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

A. J. Newman and *Marshall & Coffman*, for appellant.

When appellee set up title by adverse possession as a defense, the burden of proof shifted to him to establish that plea. 65 Ark. 426. The court erred in refusing to instruct the jury that the burden of proof was on the defendant to prove adverse possession, and also in charging the jury that the "burden of proof is upon the plaintiff and he must establish his case by a fair preponderance of the evidence."

No brief filed for appellee.

McCULLOCH, C. J. This is an action to recover possession of three and a half feet of ground along the boundary line of certain lots in the city of Little Rock. The plaintiff and defendant are, respectively, owners of contiguous lots, and the controversy arises over the question whether the strip in controversy along the boundary

is on plaintiff's side of the line or defendant's. The parties deraign title to the lots from a common source, and the testimony tends to show that the defendant had been in possession of the disputed strip for about twelve years. Plaintiff bought the adjoining lots a few years ago and claimed that he made inquiry of the defendant concerning the boundary line and bought on the faith of defendant's representation. That claim is disputed by defendant, who denies that the strip in controversy lies within the boundary of plaintiff's lots, and also sets up the defense of adverse possession for a period of more than seven years. The trial jury returned a verdict in favor of the defendant, and in the verdict described what the jury found to be the true line. The plaintiff has appealed.

The evidence is sufficient to sustain the verdict in defendant's favor.

(1.) It is insisted, however, that the court committed errors in its charge to the jury. In the first place, error of the court is assigned in telling the jury that "the burden of proof is upon the plaintiff and he must establish his case by a fair preponderance of the evidence." Under the issues as presented by the pleadings, the burden upon the whole case was on the plaintiff, and the court was correct in so declaring the law to the jury. It is true the principal issue in the case was that of adverse possession, but it was not the sole issue, inasmuch as there was a denial of the allegation that the strip was within the boundaries of the lots owned by plaintiff and the evidence was conflicting on that issue.

(2-3.) Error is also assigned in the refusal of the court to give an instruction requested by plaintiff in the following words: "The burden of proof is upon the defendants to prove adverse possession to the land in controversy." Now, the language of the instruction is that used by this court in one of its decisions (*Nicklace* v. *Dickerson,* 65 Ark. 422), but it does not follow that it is appropriate for use in an instruction to the jury. On the issue of adverse possession, the burden is always on the party who asserts it, but the particular language em-

ployed in this instruction might have led the jury to believe that the court meant that the question of adverse possession was the only issue in the case, when as a matter of fact there was another issue, namely, that of the location of the strip in controversy. Before the plaintiff can be heard to complain of the court's refusal to instruct upon a given issue, it is his duty to ask a correct instruction, and the action of the court in refusing an inaccurate instruction is not grounds for reversal, even though the idea embraced in the instruction was a correct one.

The issue as to adverse possession was properly submitted to the jury on an instruction which was fair to the plaintiff and was in accord with the many decisions of this court on that subject. There was evidence that even though a mistake was made as to the boundary, the defendant had held for the statutory period under a hostile claim of ownership, and that the bar of the statute was complete.

(4) The form of the verdict is as follows: "We, the jury, find for the defendant, his line being from the corner of the barn to the retaining wall." The verdict is indefinite unless aided by other parts of the record, but when read in the light of the pleadings and the proof in the case it can easily be interpreted, and the trial court was correct in rendering judgment thereon in favor of the defendant. *Russell* v. *Webb,* 96 Ark. 190.

It is manifest that the jury found the facts in favor of the plaintiff on the issue as to the true location of the original boundary line between his lots and those of the defendant, but found in defendant's favor on his plea of adverse possession. The jury found that defendant has perfect title by adverse possession to all of the space between his lots described on the plats and a line running from "the corner of the barn to the retaining wall." In other words, the jury found that the barn and the retaining wall constituted natural barriers beyond which defendant's possession either did not extend at all, or was not hostile, and that a line drawn between those two

points would delimit the extent of the defendant's adverse possession. The words "corner of the barn" used in the verdict mean the whole front of the barn on the side next to defendant's lots, for the undisputed testimony shows that the barn was built and occupied by plaintiff's grantor and that defendant has never been in possession of any portion of it. The words necessarily refer to the full space occupied by the barn, including the eaves, for there could not have been any adverse occupancy by defendant of any part of that space. The verdict therefore must be considered as having awarded to defendant all of the land lying west of a line drawn from the west side of the barn (treating the eaves of the building as the outer line) to the retaining wall, and as having settled the title of the plaintiff to all of the land lying east of that line.

It is insisted that the verdict awarded to the plaintiff a portion of the land sued for, and that judgment should have been rendered in his favor for possession of that much of the land. Under the evidence adduced, the jury could and did doubtless find that defendant was not claiming possession of the land on plaintiff's side of the line mentioned in the verdict. The area on that side of the line amounts to a mere trifle, and as the jury found that defendant was not claiming it the court properly rendered judgment for costs against plaintiff. Inasmuch as plaintiff failed to recover the disputed strip of land, the costs were properly awarded against him.

Judgment affirmed.

DICKINSON, STATE AUDITOR, v. JOHNSON.

Opinion delivered April 19, 1915.

1. LEGISLATURE—CONCURRENT RESOLUTION—EFFECT.—Under § § 21 and 22, art. 5, Const. 1874, all laws of the State must be passed by bill, and a concurrent resolution of both houses of the General Assembly can not be used to enact a law.
2. STATE GOVERNMENT—INVESTIGATION OF STATE DEPARTMENTS—LEGISLATIVE FUNCTION.—The investigation into the management of the

various institutions of the State and the departments of the State government, is a legitimate function of the Legislature.

3. STATE GOVERNMENT—COMMITTEES OF GENERAL ASSEMBLY—APPOINTMENT.—The houses of the General Assembly may by concurrent resolution appoint a committee to investigate the management of a State institution, and as long as the General Assembly is in session it has full control over the committee, but when it is necessary to continue the work of investigation after adjournment of the General Assembly, the committee could only be constituted by a bill enacting a law to that effect.

4. STATE GOVERNMENT—LEGISLATIVE COMMITTEES—APPOINTMENT.—Under the Constitution the Legislature has no power by concurrent resolution, to appoint committees or to continue committees already appointed, for the purpose of making investigations after the Legislature has adjourned.

5. LEGISLATURE—ADJOURNMENT—CONTINGENT EXPENSES OF COMMITTEE.—Expenses incurred by a legislative committee appointed by joint resolution of both houses of the General Assembly, can not be charged against funds appropriated for contingent expenses, where the expenses were incurred after the adjournment of the Legislature *sine die.*

6. STATE GOVERNMENT—LEGISLATIVE COMMITTEE—APPROPRIATION FOR EXPENSES.—Under art. 5, § 29, Const. 1874, the expenses of a committee appointed by the General Assembly to make certain investigations, can be paid only after the passage of a bill making the specified appropriation.

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

STATEMENT BY THE COURT.

The last Legislature, by concurrent resolutions, authorized the appointment, by the presiding officers of both houses, of two joint committees for the purpose of investigating certain State departments and institutions. One of the resolutions provided for the appointment of a special committee to investigate the State charitable institutions, and "to make a thorough investigation of the State Hospital for Nervous Diseases and a thorough auditing of the accounts." The other resolution authorized the appointment of a committee "to investigate and examine the books, accounts and files of the several departments of the State government and of the State in-

stitutions. The resolutions empowered the committee to take testimony, employ auditors of account, etc.

Just before the adjournment of the Legislature concurrent resolutions were passed by a *viva voce* vote, which were duly enrolled and signed by the Governor. One of these resolutions provided that a committee consisting of certain members of the committee already appointed should constitute a committee "to continue the work of auditing the several departments of the State government and of the different institutions of the State" (naming them), and authorized the committee to continue the work until the same was completed, and granting the committee power to "recommend a uniform system of accounting for the different State institutions." The resolution provided for the printing of five hundred copies of their report; and "that the said committee shall for their work receive the same per diem allowed to members of the General Assembly, and the expenses of the said committee and the expert accountants, auditors, stenographers employed by them and printing and postage, shall be paid out of the contingent expenses of the General Assembly, upon vouchers issued by the secretary of Senate directed to the Auditor, who shall draw his warrant on the Treasurer, who shall pay the same." It further provided that when the work of the committee was completed it should make final report to the Governor.

The other joint resolution had a similar provision, constituting the special committee that was appointed to investigate the State charitable institutions a special committee to investigate and audit the accounts of the State Hospital for Nervous Diseases, and provided that it be likewise constituted a committee to continue their work until the investigation and auditing was completed; also allowing the members of the committee the same per diem as allowed to members of the General Assembly, and providing "that the expenses of said committee in the use of expert accountants, stenographers and for

printing and postage shall be paid out of the "contingent expenses of the said committee," and shall be paid by vouchers issued by the secretary of the Senate, directed to the Auditor, who shall draw his warrant on the Treasurer, who shall pay the same."

These committees continued their sittings after the Legislature adjourned, incurring expenses for witnesses, expert accountants and per diem of the members of the committees.

Appellee, Jo Johnson, for himself and all other taxpayers of the State, instituted this suit in the Pulaski Chancery Court, setting up in his complaint the above facts, and praying that the Auditor be enjoined from issuing, and the Treasurer be enjoined from paying, any warrants for expenses incurred under the concurrent resolutions.

Appellants filed a general demurrer to the complaint. The court overruled the demurrer and entered a decree granting the prayer of the appellee, and this appeal has been duly prosecuted.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellants; *Elmer J. Lundy* and *L. E. Sawyer,* of counsel.

1. The Legislature has the power by concurrent resolution to continue the work of investigation by committees after the expiration of the term. This is a recognized power of legislative bodies, a legitimate exercise of legislative function, which can be exercised where there is no constitutional inhibition. There is no express limitation in our Constitution. 49 Pac. (Kan.) 160; 55 S. E. 910; Cushing's Law & Practice of Legislative Assemblies, 737; *Id.* 930; *Id.* 2043; 30 L. R. A. 261; 71 Ark. 196; 16 Ind. 497; 40 Miss. 268.

2. While members of the committees are not now members of the Legislature as contemplated in Constitutional Amendment No. 11, these committees are agencies of the Legislature and their payment from the contingent fund of that body could be authorized, as was done by the

Legislature of 1915 by an act setting aside a certain amount of money for the contingent expenses of the Legislature. 71 Ark. 193.

The General Assembly is the judge of what are its contingent expenses, and it would be superfluous to require a special act providing for the expenses of these specific committees.

3. It is only while the Legislature is in session that members thereof can not receive any further *per diem* for their services after the expiration of the constitutional limitation of sixty days, regular session, and fifteen days special session. The Legislature is not now in session. The committees are not serving during the session, nor as members of the Legislature. It is not contemplated by the amendment that such committees should be required to do their work without receiving pay for their services. Their work is necessary, it is a prerogative of the Legislature to provide for the continuance of their work after the expiration of the term, and the General Assembly has the right to name their compensation.

4. Appellee's objection to the language of the concurrent resolutions continuing the work of the committee investigating the charitable institutions, is without merit. True, the provision of the resolution for the payment of the contingent expenses reads that it shall be paid out of the "contingent fund of the committee," whereas, the words "General Assembly" should have been written for the word "committee;" but the only reasonable construction is that the Legislature had reference to the contingent fund of the General Assembly. It is the duty of the court to construe the resolution so as to give it force and effect rather than defeat the intention of the Legislature by giving it a literal construction which would make it absurd on its face.

Jo Johnson, for appellees.

The resolutions for the continuance of the committees have not the force and effect of laws, because not passed in accordance with the provisions of law, and all committees expired at and with the expiration of the term

of the General Assembly. Art. 5, section 21, Const.; 71 Ark. 193; 74 S. W. 298; art. 5, sec. 28, Const.; Amendment No. 11, Acts 1913, p. 1525; 58 Kan. 368; 49 Pac. 160; 40 Miss. 268; 16 Ind. 497; 61 W. Va. 49; 55 S. E. 910; 117 N. C. 145, 30 L. R. A. 261.

WOOD, J., (after stating the facts). 1. The first question is, did the General Assembly have power, by concurrent resolution, to continue its committees for the purposes expressed in the resolutions after the adjournment *sine die?*

For the purpose of obtaining information looking to the enactment of laws to meet the requirements of Government, the appointment of committees by either branch of the Legislature, or by the concurrent action of both branches, is absolutely necessary for the efficient discharge of legislative functions, and is recognized under our systems of Government, both State and National. Ordronaux Constitutional Legislation, p. 373.

When such resolutions are constitutionally adopted concerning a subject-matter within the proper sphere for such resolutions they may have the force and effect of a law. Our own Constitution has recognized concurrent resolutions as one form in which the Legislature may express its will, and when it is expressed in the manner prescribed, and concerning those matters within the legitimate scope of concurrent resolutions, such resolutions may have the force and effect of law. Yet they were not regarded by the framers of our Constitution as of the same dignity and importance as a bill. The same solemnity and strictness is not required for the adoption of resolutions, as is to be observed in the passage of bills, except when the resolutions are disapproved by the Governor. Const. of Ark., art. 6, sec. 16. Concurrent resolutions are necessary, but have the force and effect of law only within the limited sphere incident to the work or legislation which the Legislature may complete before its final adjournment.

In Congress a joint resolution is regarded as a bill. See Cushing's Law and Practice of Legislative Assem-

blies, p. 93. And in many of the States joint resolutions are recognized as equivalent to laws enacted by bill. See *State* ex rel. *Peyton* v. *Cunningham,* 18 Am. & E. Ann. Cas., p. 707, case note.

But such is not the case under our Constitution. Article 5, section 19, provides: "The style of the laws of the State of Arkansas shall be: 'Be it enacted by the General Assembly of the State of Arkansas.' "

Section 21 provides: "No law shall be passed except by bill." And section 22 provides: "Every bill shall be read at length on three different days in each house, unless the rules be suspended by two-thirds of the house, when the same may be read a second or third time on the same day; and no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal and a majority of each house be recorded thereon as voting in its favor."

(1) Thus a clear distinction is made between bills and concurrent resolutions. The one can not take the place of the other. All laws must be passed by bill. Concurrent resolutions can not be used to enact laws.

(2) Now, an investigation into the management of the various institutions of the State and the departments of the State Government is at all times a legitimate function of the Legislature. When the Legislature of 1915 assembled, it was a matter of common knowledge that the State treasury was depleted, the State heavily indebted, and there were charges of mismanagement on the part of those having control of the State charitable institutions. Under these circumstances, it was peculiarly appropriate that the Legislature, in the interest of economy and honesty in all the departments of Government and the management of its State charitable institutions, should institute an investigation to ascertain the facts as a basis for any remedial legislation that it might deem necessary.

(3) As the only efficient method of making the investigation and procuring the information desired, the General Assembly, by concurrent resolution, appointed

its committees, and these committees reported that they were not able to complete their work and make report before the time for the expiration of the session under the Constitution. The committees were the agencies of the General Assembly which created them, and so long as the Legislature was in session, it had full control over them. When it became apparent near the close of the session that the committees would not have time to make the investigation and procure the information contemplated for the purposes of any present legislation it was not only within the power of the Legislature, but was a proper exercise of that power, for it to continue the work of the investigation for the information of the Governor and the people generally, and as a guide for any future legislation that might be necessary. But this continuation or reappointment of the committees for the important work outlined for them after the adjournment of the Legislature was not a proper subject-matter for concurrent resolution. It could only be done by a bill enacting a law to that effect.

(4) Under our Constitution, the Legislature has no power, *by concurrent resolution,* to appoint committees or to continue committees already appointed for the purpose of making investigations after the Legislature has adjourned. The principle controlling this question was announced by this court in *Tipton* v. *Parker,* 71 Ark. 193-196. There the question was as to whether the Senate had authority to direct a committee to make certain investigations after the adjournment of the Legislature and report its findings to the Governor. In that case we said: "The committee, being the mere agency of the body which appointed it, dies when the body itself dies, unless it is continued by law; and it is not within the power of either house of the General Assembly to separately enact a law, or pass a resolution having the force and effect of a law. To do this requires a majority of each house voting in its favor. Const. 1874, art. 5, sec. 23.

"The only legitimate office, power or duty of a committee of the Senate, in the absence of a law, prescribing

other functions and duties, is to furnish the Senate which appointed it with information, and to aid it in the discharge of its duties."

It was there distinctly ruled that the committee dies when the body creating it dies, unless the committee is continued by law. The court, by the language used in that case, did not mean to hold or indicate, even by indirection, that a committee of the Legislature could be continued by a concurrent resolution beyond the adjournment (*sine die*) of the Legislature. While the writer is the only member of the present court who participated in that decision, yet the majority of us concur in the view therein expressed, that to continue or appoint a committee whose work of investigation is to go on beyond the session of the body which created it, requires the enactment of a law by bill, passed in the manner prescribed by the Constitution.

The principle announced in *Tipton* v. *Parker, supra,* and here reiterated, is not only sound, but it is supported by the weight of authority in this country having Constitutions similar to our own. See *State* ex rel. *Peyton* v. *Cunningham,* 18 A. & E. Ann. Cas. 705, and authorities cited in note.

In jurisdictions where the Constitution expressly recognizes joint resolutions as equivalent to laws enacted by bill, such resolutions, when duly passed under the Constitution, are given the force and effect of laws. Such is the case under the Constitution of the United States and some of the States. As a fair illustration of this may be mentioned *Olds* v. *State Land Commissioner,* 134 Mich. 442, 86 N. W. 956. There the Constitution provides: "Every bill and joint resolution shall be read three times in each house before final passage thereof. No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house." Of course, under such constitutional provision a concurrent resolution, when constitutionally passed, becomes a law the same as a law enacted by bill. But, as we have already observed, under a Constitution like ours, a concurrent resolution duly passed is not a law, and can

not be used as a substitute for a bill. *Mullan* v. *State,* 114 Cal. 578-587; *Lithographing Co.* v. *Henderson,* 18 Col. 259; *Boyers* v. *Crane, Auditor,* 1 W. Va. 176; *May* v. *Rice,* 91 Ind. 546. See, also, *Hiram B. Burritt* v. *Commissioners of State Contracts,* 120 Ill. 322.

Counsel for appellants rely upon the case of *In re Davis,* 49 Pac. 160 (Kans.) There a committee was appointed under a concurrent resolution to investigate certain charges of bribery. The resolution itself did not expressly provide for the committee to continue its investigation after the adjournment of the Legislature creating it. The Supreme Court said: "The concurrent resolution under which the committee claims the right to act contains no directions on the subject, and if the question were to be determined solely on the resolution itself, it would follow that the committee is without power to proceed. But in the act making appropriations for miscellaneous purposes the ninety-fifth paragraph reads as follows: "There is hereby appropriated $3,000 to pay expenses of committee officers, clerks, stenographers, witnesses and other necessary expenses incurred in an investigation for bribery, as recited in Senate resolution No. 26, or so much thereof as may be necessary." Then, after reciting other provisions of the act, the Supreme Court continues: "This act was approved March 15, and appears as chapter 11 of the Laws of 1897. The clause quoted lacks much of being clear or explicit, but it seems to contemplate a session of the committee after the 15th of May, rather than before, and evidences an intent on the part of the two houses that the committee should sit after final adjournment."

Thus it appears that the Supreme Court of Kansas upheld the right of the committee to proceed with the investigation after adjournment of the Legislature, not on any authority contained in the concurrent resolution, but on the authority of an act in which the Legislature manifested its intention to have the investigation continued after final adjournment of the Legislature.

In the instant case the Legislature attempted to do by concurrent resolution that which they had no power to do, but which they did have the power to do by an act, as was done *In re Davis, supra.*

II. Our conclusion on the first proposition makes it unnecessary for us to discuss the question as to whether the expenses incurred by the committees could be paid out of the contingent expenses of the Legislature. But on account of the importance of the question, we will consider this, as it affords an additional reason for affirming the decree of the chancery court.

(5) This question is likewise ruled by *Tipton* v. *Parker, supra,* where we said: "The expenses of this Senate committee were not incident to any legislation originating in the Senate, and could not properly be classed as contingent expenses of that body." The same doctrine applies here to the expenses of these committees. They were not incident to any legislation originating in the General Assembly of 1915, and could not be classed as contingent expenses of that body. When the Legislature of 1915 adjourned *sine die,* there could be no future contingent expenses of that Legislature except those that were necessary to enroll and put in shape for publication the laws that had been already enacted. It would be a contradiction in terms to say that there could be contingent expenses of a Legislature after that Legislature had ceased to exist.

(6) The act making appropriations for contingent expenses of the Legislature nowhere makes appropriation, as was said *In re Davis, supra,* for the payment of expenses of committees that had been continued for the purpose of making certain investigations. Article 5, section 29, of the Constitution, provides: "No money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill."

Even if the Legislature, by concurrent resolution, could have continued its committees after final adjournment, it could not by resolution under the above provision

of the Constitution, appropriate the money necessary for the payment of the expenses of such committees out of the funds appropriated to pay the contingent expenses of the Legislature. To do this would have required a bill making the specific appropriation. *May* v. *Rice, Auditor,* 91 Ind. 546. See, also, *Reynolds* v. *Blue,* 47 Ala. 711.

It follows that the decree of the Pulaski Chancery Court is correct, and it is therefore affirmed.

KIRBY, J., dissenting. SMITH, J., concurs in the judgment.

MOORE v. MOSS.

Opinion delivered April 19, 1915.

REAL ESTATE BROKERS—RIGHT TO COMMISSIONS.—A real estate broker is entitled to his commissions when he has been given authority to sell the land, and he produces a purchaser ready, willing, and able to buy, and the sale is delayed because of acts of the seller, but is finally sold to the purchaser procured by the broker.

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

STATEMENT BY THE COURT.

The appellee sued the appellants for a commission as real estate broker, alleging that appellants, on the 20th day of October, 1909, placed in his hand for sale a section of land in White County; that appellants agreed to pay him 5 per cent commission on the purchase price for securing a purchaser for the lands; that appellee did procure one W. P. Porter to buy the land at $13 per acre, and that appellants were indebted to him in the sum of $406.41 as his commission. The appellants denied the material allegations of appellee's complaint.

The appellee testified that the agency to sell the lands was first given him in 1907; that he furnished a plat of the lands to Porter, and afterward took up the sale of the lands with him by correspondence, and that appellants dictated the answers to letters which he received from Porter; that the lands which Porter bought were listed

with him as many as three times. He exhibited a letter from Porter dated October 21, 1907, in which Porter acknowledged receipt of appellee's letter dated October 19, 1907, in which Porter stated that he had written to a local agent to look over the lands; another letter of February 8, 1908, in which Porter asked appellee to advise him if the owners of the land would be willing then to accept a lower price than the price named, and asking appellee to advise him of the best terms that the owners would take. The letter of February 8, 1908, had a notation at the bottom stating the terms upon which the owners would sell the lands, and advising that they would let it go at such price, but "no less." Another letter from Porter to appellee dated June 27, 1908, in which Porter stated that if he did not obtain certain lands in Michigan under negotiations that were then pending, he would be in the market for any good proposition in Arkansas, etc. And a letter from Porter to appellee dated November 27, 1908, in which Porter stated that the gentlemen who had once accompanied him to Arkansas, and who appellee had met would be down again and look over the lands, and referring in the letter to certain particulars in regard to the lands which appellee had before furnished him. Another letter from appellee to Porter dated December 12, 1908, in which he tells Porter that the owners of the land would raise the price on the 1st of January, and urging him to decide to take the same. Appellee also introduced a letter which he wrote to appellant H. A. Moore on date February 9, 1910, in which he informed Moore that he had interested a party from Markle, Indiana, who was coming to look at appellants' lands; and also a letter from appellee to H. A. Moore, dated February 21, 1910, in which appellee stated that the prospect for selling the land to the man from Markle, Indiana, was favorable; and another letter to Moore of February 4, 1910, in which appellee stated that the party who was to come down and look at the land was reported sick, and would come as soon as he recuperated. Also a letter from L. E. Moore to the appellees, dated April 25, 1910, in which Moore en-

closed a list of lands, and stating that if a certain sale was made, they would pay appellee a commission, and giving appellee the number to call in the event he should wish to see appellants about their lands. These letters showed a correspondence between Porter and appellee as to the purchase of the lands mentioned in appellee's complaint and other lands. The last of the series of letters between appellee and Porter was of date ten months prior to the date of the contract upon which appellee sues. All of these letters were introduced over the objections of appellants.

Continuing his testimony, appellee stated that he had conversations with appellants in regard to the sale of the land for quite a while; that at one time he had the sale almost consummated with Porter for a price of $3,200, and that appellants allowed the sale to drop because of a controversy in regard to commission. He stated that the land was afterward sold to Porter at $12 an acre. He stated that he introduced Porter to the Moores and brought them together by correspondence; that the land was in his hands at the time it was sold, and he seemed to have full control as far as an agent was concerned. He notified Moore that he was claiming a commission.

On cross-examination, he stated that the contract price for which he was to sell the land was $13 per acre, with 5 per cent commission. He stated that he was the party who first interested Porter in the land, and was the procuring cause of the sale.

The appellants testified that the land was sold to Porter by them through one Harry Saxe, whom they paid a commission of 5 per cent. The land was sold to Porter for $12.50 per acre. The land was sold in June, 1911. They stated that they had some conversation with Moss in regard to the sale of the land in which they told him that if he sold the land, they would pay him a commission, but that at the same time they had the land in the hands of of other agents, and that they reserved the right to sell it themselves. They denied that appellee ever told them that he had a buyer. Stated that they never did enter into

a contract with him for the purpose of selling the land; that he never mentioned Porter's name to them. Some time after the sale was made, appellee did state to appellants that he thought he should have a commission.

One of the appellants testified that they first heard of Porter through one Severance. The letter that Moss wrote one of the appellants in 1910 was about other lands altogether, and another party. When Saxe wrote appellants, asking if they would pay him a commission if he sold the land, they advised him that they would, and they did not know at that time who the purchaser was.

Witness Saxe testified on behalf of appellants that he conducted the negotiations for the sale of the lands from appellants to Porter. He represented Porter, and was instructed by him to look up lands and report to him. At one time there was a deal between Porter and Moore Brothers for the land, but it was dropped. After witness got the agency from the Moores to sell the land, he wrote Porter what the land could be bought for, and was instructed by the latter to buy it. At that time, Ross & Caldwell were the agents for Moore Brothers, and Porter wrote the witness to take the matter up with Ross & Caldwell. The first man who showed the land to Porter was Mr. Baldock. Baldock first took the witness on the land in 1907. The trade that they were contemplating then was not perfected on account of the panic. Neither Moss nor Porter ever went with witness on the land. When witness sold Porter the lands for the Moores he received no commission from Porter.

Witness Baldock testified that in 1907 he showed Saxe the land for Mr. Porter, as he understood. He was a member of the firm of Caldwell Realty Company. Mr. Moss had nothing to do with showing the lands to Saxe in 1907.

Porter testified on behalf of appellants, in substance, that his attention was first called to the land of appellants by one Severance; that Severance first submitted to him the proposition of buying the land; that the appellee did

not have anything to do with bringing about the sale; that he had correspondence with appellee in the latter part of 1907 and the first part of 1908, in regard to the purchase of the entire tract of land owned by appellants, consisting of about 2,400 acres, but the correspondence did not result in a sale. The sale was made through Severance and Harry Saxe.

The testimony of Severance tended to corroborate the testimony of Saxe. He stated that the sale was brought about partly through the representation of witness, but largely by Saxe. Witness stated that appellee had nothing to do with the sale of the lands; that during the year 1906, witness had a conversation with Moore concerning the lands and partially examined them, and upon his return to Michigan called Porter's attention to the tract, and in 1908, Porter and witness made a trip to Arkansas for the purpose of looking over the lands. They were joined by Saxe and Moore. After an examination of the lands, they decided that the price was too high and the deal was called off. Later, in the year 1911, Porter negotiated with Moore for the lands. Witness was a brother-in-law of Porter.

Caldwell testified that he remembered when there was a deal pending between Moss and Porter for the lands. That sale did not go through.

The court granted, among others, the following prayers at the instance of the appellee:

2. "You are instructed that if you believe from the testimony that the defendants placed this land with the plaintiff to sell, and that through him entered into negotiations with W. P. Porter in regard to the sale of the lands, and afterward procured a proposition from W. P. Porter, which was acceptable to the defendants, but the trade fell through by reason of some dispute as to commission, and afterward became the purchaser of the lands from the defendants, then the plaintiff would be entitled to recover, and you will find for him in the amount which he was to receive for the same."

3. "You are instructed that if you believe from the testimony that the plaintiff was authorized to sell the land for which he now claims commissions, together with other lands, and if, after the property was placed in the hands of the plaintiff, the sale was brought about or procured by his correspondence or negotiation or exertions, he would be entitled to his commission, and if you find such to be the case, you must find for the plaintiff."

The court also granted several prayers for instructions in which it, in effect, told the jury that if they believed from the testimony that the plaintiff was authorized to sell the land, and that afterward the plaintiff disclosed the name of the purchaser, W. P. Porter, to the defendants, and thereupon the plaintiff began negotiations and correspondence with the purchaser, W. P. Porter, and through such disclosures the negotiations were begun and the sale of the property was effected, then the plaintiff will be entitled to his commissions, although the jury might find that the sale was consummated by the owners.

P. R. Andrews and *John DeBois,* for appellants.

It was error to admit the letters of J. S. Moore as to an old and abandoned contract. These letters were calculated to mislead the jury and prejudicial. The instructions referring to these letters were also prejudicial and abstract. 91 Ark. 212; 55 *Id.* 574; 89 *Id.* 147; 94 *Id.* 350; 71 *Id.* 197; 6 A. & E. Ann. Cases, 564; 13 Enc. Ev. 680, 663, 672; 59 Ark. 165; 11 Enc. Ev. 210.

S. Brundidge, Jr., for appellee.

The letters of J. S. Moore were competent. Appellee's contract was continued from time to time, and the correspondence was admissible to show who interested Porter to purchase the lands.

There is no error in the instructions complained of. 106 Ark. 536; 89 Cal. 251; 84 Ark. 462.

Where a broker is the procuring cause of the sale, he is entitled to his commissions, notwithstanding the sale was finally made by the owner himself. 53 Ark. 49; 76 *Id.* 375; 88 *Id.* 375; 89 *Id.* 195; 84 *Id.* 462.

WOOD, J., (after stating the facts). Appellee seeks to recover under a contract which he alleges was made with the appellants on the 20th of October, 1909, and he was permitted to introduce letters concerning a contract that was made with J. L. Moore, who had since died. Under that contract, appellee was to sell the land at $12 per acre and receive 5 per cent commission of the purchase price. Appellee himself admits in his testimony that this contract "did not materialize." These letters bore date from some time in October, 1907, up to as late as December 26, 1908, the last letter being some ten months before the present contract is alleged to have been entered into. Under this last contract appellee alleged that he was to secure a purchaser for the lands, and did succeed in selling the same at $13 per acre.

These letters were well calculated to mislead the jury and were highly prejudicial to appellants. The contract for the sale of lands entered into in 1907 or 1908 had nothing to do with the contract sued on. The issue was sharply drawn as to whether or not appellee had procured Porter to purchase the lands under the contract upon which he sued, and the inquiry should have been directed to that. The fact that appellee may have interested Porter in the lands in 1907 or 1908, under contract, expecting to sell the lands at that time, which the letters tended to prove, did not show or tend to show that the appellee procured Porter to purchase the lands under the contract on which he sued.

The contract with J. L. Moore was an entirely different contract from the one in suit, with different parties, and the correspondence had with Porter tending to show what appellee had done under that contract was wholly incompetent under the issues joined in the present suit.

Appellee testified that he brought Porter and the Moores together by correspondence. These incompetent letters constituted the correspondence to which he refers, as there were no other letters after the date of the contract on which he sued introduced in evidence tending to

prove that he brought the Moores and Porter together under this contract.

The instructions, in which the court refers to the correspondence and permits the jury to consider the letters in determining the issue as to whether or not appellee, by correspondence with Porter, interested him in these lands and procured him as a purchaser for the same, were likewise prejudicial for the reason that they were abstract, there being no testimony upon which to predicate the same. Except in the particulars herein mentioned, the instructions of the court conform substantially to the law as has been often announced by this court. *Scott* v. *Patterson,* 53 Ark. 52; *Taylor* v. *Godbold,* 76 Ark. 395; *Pinkerton* v. *Hudson,* 87 Ark. 506; *Branch* v. *Moore,* 84 Ark. 462; *Stiewel* v. *Lally,* 89 Ark. 195; *Blumenthal* v. *Bridges,* 91 Ark. 212; *Poston* v. *Hall,* 97 Ark. 23.

It is unnecessary to reiterate the principles announced in these decisions.

Appellants insist that most of the other prayers for instructions besides the ones above considered were abtract, but inasmuch as the case must be reversed for the errors indicated, and as different facts may be developed on another trial, we will not pass upon the question as to whether or not other instructions than those mentioned above were abstract and prejudicial.

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

LUKE v. RHODES.

Opinion delivered April 19, 1915.

1. PARTNERSHIP—ACCOUNTS—ADJUSTMENT.—The probate court has no authority to adjust accounts between a decedent and his surviving partner.

2. PARTNERSHIP—ADJUSTMENT OF ACCOUNTS—LACHES.—Appellant and deceased were partners engaged in business. After the death of the deceased the appellant waited over three years before bringing proceedings in the chancery court looking to an adjustment of the partnership affairs. *Held,* appellant was barred by laches, from seeking such an adjustment.

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

St. John Waddell and *B. J. Semmes,* for appellant.

The period of limitation did not begin to run until Rhodes had repudiated his trust and notified the appellant that he would not grant the accounting, which was in June, 1910. Therefore, conceding that equity in applying the doctrine of laches, follows by analogy the period of limitation, and that this period, in this case, would be three years, plaintiff is not barred by laches. 135 U. S. 621; 73 Fed. 374; 7 N. C. 139; 9 Ark. 527.

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

Counsel review the testimony and, citing no authorities, contend that the chancellor's decree is supported by a clear preponderance of the evidence.

SMITH, J. Appellant filed two suits in the chancery court of Mississippi County on the 8th day of June, 1912, which were consolidated by consent, and both submitted at the same hearing on the same proof. One of the cases was a suit against appellee Rhodes as administrator for an accounting of the partnership affairs of the firm of Keiser & Luke; and the other was for possession and partition of lands held by the widow and heirs of Keiser.

The complaint in the first case alleged that Rhodes was the administrator of J. P. Keiser, deceased, who was formerly a partner of the appellant, Charles O. Luke; that the death of Keiser dissolved the partnership, which had been extensively engaged in the sawmill and lumber business in Mississippi County, Arkansas, and Rankin County, Mississippi; that there had been no accounting of the partnership affairs in Keiser's lifetime, and that the administrator had led appellant to believe that he would, as administrator, have an accounting and settlement with appellant, but that the said administrator refused to have an accounting and settlement of the partnership affairs, and that all of the books and property of the partnership were in the hands of Rhodes as administrator. This was a suit for an accounting.

The complaint in the second case was against the widow and heirs of Keiser, and it was there alleged that the partnership owned certain lands, the title to which had been taken in the name of Keiser individually, and that there had never been any accounting and settlement of the partnership affairs, and it was prayed that an accounting be had and that a trust be declared, and that the lands be partitioned. The pleadings were amended after a demurrer had been filed.

An answer was filed in which the existence of the partnership was admitted, but it was alleged that appellant had only a working interest in this partnership, and that its capital consisted principally of lands owned by Keiser in his lifetime.

Among other defenses set up was that of laches in the institution of the suit, and it appears that under the direction of the chancellor, the proof was devoted entirely to this question, and upon the final hearing, the court found the fact to be that appellant had been guilty of laches in bringing these suits, and they were accordingly dismissed, and this appeal has been prosecuted from that decree.

The depositions of only three witnesses were taken, being those of the appellant, the administrator, and that of Judge W. J. Driver, who had been employed by appellant to represent him in the litigation which he anticipated instituting for the accounting which he now asks.

It appears that the partnership was formed about 1900, and that in 1902 it began the operation of a sawmill plant in Mississippi, but there was never any settlement of the partnership affairs. Keiser died October 15, 1907, but on February 6, 1905, he wrote appellant a letter, in which he strongly intimated that the affairs of the partnership were in very desperate circumstances, and that he had carried its burdens to about the limit of his capacity. Some time thereafter, appellant came to Osceola, which was the principal place of business of the partnership, and spent about two weeks going through the books of the partnership, and upon his departure, carried away with

him a book designated as the "Lumber Book," and has since retained this book in his possession. The administrator was appointed on the 23d of October, 1907, and immediately entered upon the discharge of his duties. Appellant testifies that he first called on the administrator for a settlement in December, 1907, at which time he discussed at some length the affairs of this partnership, and that he next conferred with him on this subject on the 29th of May, 1908, at which time he gave the administrator a paper showing his demands against the estate. The purpose of this paper, and of appellant in delivering it to the administrator, and the conversation had about it, constitutes the principal questions of fact in the case. The appellant says that the paper was a mere memorandum, which he had made from the partnership books at the time of his inspection of them, and that it was designed only to aid the administrator in ascertaining the state of the accounts between the partners. Appellant admits, however, that in June, 1910, the administrator told him that the estate owed him nothing, and that no settlement would be made with him; but he contends that prior to this time he had relied upon the administrator's assurance that a settlement would be made. Upon the other hand, the administrator testified that the paper was given to him as a statement of appellant's demands against the estate, and that he told appellant at the time that if his demand was allowed it would consume the entire assets of the partnership, and that he could not, and would not, allow it, whereupon, he testified, appellant told him he would employ an attorney to represent him, and that in anticipation of a suit, witness retained counsel to represent the estate.

Some time later, appellant consulted and retained Judge W. J. Driver as his attorney. There was introduced in evidence a letter from Judge Driver to appellant, dated the 22d of December, 1910, in which appellant was advised that relief could only be obtained by suit for an accounting to be brought in the chancery court, and in this letter Judge Driver stated that he would file such a suit at the next term of court, but before this suit was filed,

Judge Driver was appointed judge of his circuit and wrote appellant to employ other counsel to represent him. Judge Driver further testified that he found the accounts of the partnership had been kept without system, and that after considerable investigation, he was unable to determine the state of the accounts between the partners. The administrator testified that he was a bookkeeper of many years' experience, and that he had spent much time working on the books of the partnership, and that he was wholly unable to tell the state of the accounts between the partners, and that in his judgment such an account could not be made up from the books which were in Keiser's possession at the time of his death.

In his statement of the case, appellant says: "It is conceded that equity, in applying the doctrine of laches follows by analogy the period of limitation, and that the period of limitation in this case would be the three-year period.

"The question then narrows down to the proposition of whether the statute of limitation began to run at Keiser's death on October 15, 1907, or whether it began to run in June, 1910."

On the other hand, appellee says that the statute of limitation began to run against this suit upon Mr. Keiser's death, and, if not, that it at least began to run on the 29th day of May, 1908, when, according to the administrator's testimony, appellant was told that his right to an accounting would be resisted. This suit was not brought until more than three years after the 29th day of May, 1908.

There are no circumstances in proof which forbid the application of the rule that one must not be guilty of laches in enforcing a right. The partners had equal means of information, and there was no concealment of facts by one from the other. This partnership was formed in 1900, and appellant was advised by Mr. Keiser on February 6, 1905, that the partnership was in straightened circumstances, and yet he took no action during the life of this partner to ascertain the condition of the partnership ac-

counts. Of course, the right to sue for an accounting would continue as long as the partnership continued, and no plea of limitation or laches could be made against such suit while the partnership continued. Yet the nature and character of the partnership business may be considered in determining when a surviving partner would be guilty of laches in instituting a suit for an accounting after the death of his copartner.

(1) Appellant was correctly advised by Judge Driver that he could obtain relief only in the chancery court, and while it is true that appellant did not wait three years after receiving this advice before instituting suit, that fact can make no difference, because appellant stood charged with this knowledge even before this information was given him by his attorney. It has been repeatedly decided that under our laws the probate court has no jurisdiction to adjust accounts between a decedent, and his surviving partner. *Nelson* v. *Green,* 22 Ark. 547; *Tiner* v. *Christian,* 27 Ark. 306; *Culley* v. *Edwards,* 44 Ark. 423; *Choate* v. *O'Neal,* 57 Ark. 299. Discussing this question in the case of *Choate* v. *O'Neal, supra,* it was said: "As that court (the probate court) could not ascertain whether anything was due to the appellant except from an account which it had no power to state, it should have refused to take jurisdiction of his claim; and the circuit court should have dismissed the case on appeal. *Grider* v. *Apperson,* 38 Ark. 388.

"The appellant's remedy was by suit in equity against the appellee to obtain a settlement of the partnership accounts and a decree for any balance shown to be due him. On obtaining such decree, it would, of course, become the subject of an allowance in the probate court under the statute, in the manner provided for common-law judgments recovered against a decedent's personal representative."

(2) As a surviving partner, appellant's rights were not dependent upon the administrator's action. He could have made this accounting himself, and should have done so. It was his right as well as his duty to gather in and

make available all the assets of the firm for satisfying firm creditors, and adjusting partnership equities, and then to hold the residue for distribution to those entitled thereto. *Coolidge* v. *Burke,* 69 Ark. 237; *Hill* v. *Draper,* 54 Ark. 395.

The court below found that appellant was guilty of laches, and as we think this finding is not contrary to the preponderance of the evidence, the decree of the court below is affirmed.

STATE *ex rel.* WM. L. MOOSE, ATTORNEY GENERAL *v.* KANSAS CITY & MEMPHIS RAILWAY & BRIDGE COMPANY.

Opinion delivered November 16, 1914.

1. STATUTE—CONSTRUCTION—PROSPECTIVE OPERATION.—All statutes are to be construed as having only a prospective operation, unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared, or is necessarily implied from the language used.
2. TAXATION—BACK TAXES—COLLECTION.—Kirby's Digest, § § 7204-7213, as amended by Acts of 1911, p. 324, and Acts of 1913, p. 724; *held,* to afford a remedy for the collection of back taxes, and that it was retrospective in its nature, independent of any express declaration therein, to that effect.
3. STATUTES—AMENDMENTS—CONSTRUCTION.—Amendments are to be construed together with the original act to which they relate, as constituting one law.
4. TAXATION—BACK TAXES—COLLECTION—REMEDY.—The object of Act 169, Acts 1913, p. 724, amending Act 354, Acts 1911, p. 324, was to give a complete remedy for the recovery of back taxes due by a corporation upon any property then in the State, which belonged to any corporation at the time such taxes should have been properly assessed and paid.
5. TAXATION—BACK TAXES—COLLECTION.—Act 169, p. 724, Acts 1913, amending Act 354, p. 324, Acts 1911, providing for the collection of back taxes due by a corporation, has the effect of bringing forward the unamended sections of the latter act, and making these a part of a complete act which operates retrospectively from the date of the amended act, the same as if the said amended act had been repealed and a new, independent, and complete act had been passed.

6. TAXATION—BACK TAXES—COLLECTION—DUE PROCESS.—Kirby's Digest, § § 7204-7213, as amended by Act 354, p. 324, Acts 1911 and Act 169, p. 724, Acts 1913, providing for the collection of back taxes, due on property belonging to corporations; *held*, to be a proper exercise to the State's right of taxation, and not to be in violation of the Federal Constitution, as denying to corporations equal protection of the laws, or depriving them of property without due process of law.
7. TAXATION—ERRONEOUS ASSESSMENT—COLLECTION OF BACK TAXES.—Where erroneous assessments of property for taxation have been made, the Legislature may by retrospective legislation provide a remedy for the collection of the same.
8. TAXATION—ACTS OF ASSESSING OFFICERS—FINALITY.—The Legislature has the power to provide for correcting the acts of assessing boards and officers, for fraud or errors of judgment.
9. TAXATION—BACK TAXES.—The owner of property which has for any reason escaped payment of a part of its just share of taxation, can not have a vested right to immunity from payment of the balance due.
10. TAXATION—BACK TAXES—LEGISLATION AUTHORITY.—The fact that no statutory remedy exists for the correction of an erroneous assessment at the time it is made, does not preclude the Legislature from granting a remedy at a subsequent time.

Appeal from Crittenden Chancery Court; *John M. Rose,* Special Chancellor; reversed.

STATEMENT BY THE COURT.

March 1, 1887, the Arkansas General Assembly passed an act to provide for the collection of overdue taxes from corporations doing business in the State. Acts of 1887, p. 33; Kirby's Digest, § § 7204 to 7213, inclusive. It was amended by an act of May 30, 1911, as to the compensation to be paid to counsel employed to assist the Attorney General. Acts of 1911, p. 324. The title of that act was "An act to amend section 7204 of Kirby's Digest of the Statutes of Arkansas, which provides for the collection of overdue taxes form corporations." It divided the original section into sections 1 and 2, the latter section containing the amendment. Section 3 repealed conflicting laws and put the act into effect from the time of its passage. The first section of the act, section 7204, was further amended by the act of March 12, 1913, which is

entitled "An act to amend section 1 of Act No. 354 of the Acts of 1911, approved May 30, 1911." Section 2 repealed all laws in conflict and added an emergency clause. Acts of 1913, p. 724. Section 7204, as amended, with the words added by the amendment in italics and those omitted from the original section in brackets, reads as follows:

"Where the Attorney General is satisfied from his own investigation, or it is made to appear to him by the statement in writing of any reputable taxpayer of the State, that in consequence of the failure from any cause to assess and levy taxes, or because of any pretended assessment and levy of taxes upon any basis of valuation other than the true value in money of any property hereinafter mentioned *or because of any inadequate or insufficient valuation or assessment of such property, or undervaluation thereof,* or from any other cause, that there are overdue and unpaid taxes owing to the State, or any county or municipal corporation, or road district, or school district, by any corporation, (or) upon any property now in this State which belonged to any corporation at the time such taxes should have been properly assessed and paid, that it shall become his duty to at once institute a suit or suits in chancery in the name of the State of Arkansas, for the collection of the same in any county in which the corporation owing such taxes may be found, or in any county in which any part of such property as may have escaped the payment in whole or in part of the taxes as aforesaid may be situated, in which suit or suits the corporation owing such taxes, or any corporation (or person) claiming an interest in any such property as may have escaped taxation as aforesaid, shall be made a party defendant, and the Governor is authorized to employ any attorneys that may be necessary to assist the Attorney General in such suits; *provided, that this act shall be construed as retrospective as well as prospective in operation.*"

Section 7205 provides for constructive service where actual service can not be had.

Section 7206 provides that the complaint shall describe as nearly as may be the property on which said taxes have accrued, and that the State, counties, school districts and municipal corporations aforesaid shall have a lien on said property from the passage of this act, for the payment of said overdue taxes, to be enforced by suit as herein provided.

Section 7207 provides that upon final hearing the court shall determine the amount of said State, county, school district and municipal taxes, and the penalty and costs due on the same, if any, and to whom said taxes are payable, and shall decree payment thereof accordingly; that when for any reason any of the property has not been assessed, the court shall refer the matter of such assessment to the county assessor who shall make his assessment for the past year or years mentioned in the order of reference, and return the same into court; and provides for a like reference of the assessment of delinquent railroad property to the proper officer or commissioners who shall report their assessment to the court, and that the court shall have power to hear testimony and to change said assessment as justice and equity may require.

Section 7208 provides for the rendition of a decree declaring and enforcing the lien for such taxes by a sale of the property; and in case of a railroad, the lien shall be decreed against the whole line of the road, including the main line and sidetracks, switches, turnouts, improvements, stations, structures, rights-of-way, embankments, tunnels, cuts, ties, trestles, bridges, and all lands in the State belonging to such corporations; and that the taxes shall be paid within three months after rendition of decree, with a penalty of ten per cent per annum after default.

Section 7209 provides that the sale shall be made in the same manner as other sales in foreclosure of liens in chancery, and with like effect, and for a distribution of the funds owing the State, counties, etc., entitled thereto.

Section 7210 gives all parties interested in the property the right to redeem within one year from date of sale,

by paying into court the amount of the decree and penalty on same, at the rate of 25 per cent per annum.

Section 7211 provides for the execution of deed to purchaser if no redemption is made.

Section 7212 gives precedence to the suits and limits time for taking appeal to thirty days from date of the decree.

Section 7213 provides that the decree in the suit shall be for all taxes due the State, and to the counties, cities and other political subdivisions of the State, and that it shall not be confined to the taxes due in the county in which the suit is brought.

Prior to the passage of the act of 1913, the State, on the relation of the Attorney General, filed a suit in the chancery court of Crittenden County, against the Kansas City & Memphis Railway & Bridge Company to collect back taxes on its railroad and bridge property, alleging that it had not been adequately assessed for the years 1893 to 1910, inclusive.

A general demurrer to the complaint was sustained and the decree dismissing the action was affirmed by this court. *State ex rel. Atty. Genl.* v. *K. C. & M. R. & B. Co.*, 106 Ark. 248.

It was held that the statute only gave the State a remedy by way of review by the courts where the assessing boards or officers had proceeded on the wrong basis of valuation, in omitting some property or element of value, or in adopting the wrong basis of estimating value, and that it did not authorize a review whereby a mistake had been made in assessing value of property too low. The amendatory act of 1913 was passed shortly afterward, and the present suit was filed in the same chancery court against the same defendant, to recover the back taxes on the same property for the years 1893 to 1912, inclusive.

The complaint alleges that the defendant is a railroad corporation organized under the laws of Arkansas; that in 1892 it built a railroad and a bridge across the Mississippi River opposite Memphis, Tennessee; that one-half

of said property is situated in Crittenden County, Arkansas, in School District No. 8, and Road District No. 1; that the defendant now owns and has always owned said property in fee, and that it was subject to taxation in said county; that it was assessed in each of said years for taxation at less than one-sixth of its actual and true value; that the assessments upon which the defendant has paid taxes for each of said years has been upon an inadequate and insufficient valuation and upon an undervaluation thereof, and that there were overdue taxes owing by the defendant on said property of not less than $800,000. Prayer for decree ascertaining the true amount of taxes which should have been paid and for the recovery thereof.

A general demurrer to the complaint was sustained and the cause dismissed. Plaintiff appealed.

Wm. L. Moose, Attorney General, and *A. B. Shafer* and *C. H. Trimble,* Special Counsel, for appellant.

Rose, Hemingway, Cantrell, Loughborough & Miles, W. J. Orr, Moore, Smith & Moore and *W. F. Evans,* for appellee.

McGILL, Special J., (after stating the facts). The first contention in support of the demurrer to the complaint is that the act of 1913 should be so construed as to limit its retrospective effect to that feature of the amendment which restricts the remedy to property owned by a corporation at the time of the passage of the amendatory act, and, if not so limited, so as to confine its retrospective operation to the period between the passage of the act of 1911 and the act of 1913.

(1) The established rule is that all statutes are to be construed as having only a prospective operation, unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. 36 Cyc. 1203; *Fayetteville B. & L. Assn.* v. *Bowlin,* 63 Ark. 573; *Beavers* v. *Myar,* 68 Ark. 333; *Ely* v. *Holton,* 15 N. Y. 595; *N. Y. & O. M. R. R. Co.* v. *VanHorn,* 57 N. Y. 473; *Chew Heong* v.

United States, 112 U. S. 536; *Shreveport* v. *Cole,* 129 U. S. 36; *City Ry. Co.* v. *Citizens St. R. R. Co.,* 166 U. S. 557.

In the act of 1913 the purpose and intention of the Legislature that it should have a retrospective effect is expressly declared. But, because it does not specify that it is to apply to each separate provision, and on the assumption that it will otherwise impose additional burdens on the public and operate harshly and unjustly, it is insisted that it should be construed in the most limited sense of which the language used, in connection with the subject-matter and object of the statute, is susceptible.

The fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. 36 Cyc. 1106; *Brown* v. *Nelms,* 86 Ark. 368, 385.

The strict rule of construction contended for does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These should receive a more liberal construction, and should be given a retrospective effect whenever such seems to have been the intention of the Legislature. 36 Cyc. 1209.

(2) Taking into consideration the origin and history of the legislation on the subject, which is given in the opinion of the court in the suit instituted before the amendment of 1913, and the language of the different provisions, and particularly that provision which restricts the operation of the act to property "now in this State," that is, within the jurisdiction of the courts of the State at the time, we are of the opinion that the statute was intended to afford a remedy for the collection of back taxes; and that it looks backward, rather than forward; and that it is necessarily according to its language, retrospective, independently of any express declaration therein to that effect. To apply the rules of construction contended for would, in this case, defeat the plain purpose and intention of the Legislature. If it had been intended to restrict the retrospective operation of the act to the particular provision contended for, it would have been easy to use "di-

rect and appropriate language for the purpose." If the entire act is retrospective, there is no reason to believe that the Legislature intended to limit the right to recover on the ground of undervaluation to the single year of 1912, and it should not be so construed unless the fact that the act of 1913 purports in its title and enacting clause to be an amendment to section 1 of the act of 1911, makes it necessary that such construction should be given. Looking at the substance of the two acts, it appears that section 1 of the act of 1911 is a literal copy of section 7204 of Kirby's Digest, except the last five lines of section 7204 relating to the compensation to be paid to attorneys employed to assist the Attorney General. That part of it is embodied in section 2 of the act of 1911, and amended, as to the amount of such compensation. The act of 1913 only amends that portion of the original section 7204 which is included in section 1 of the act of 1911, and makes the first and only change in that part of the original act of 1887 which confers upon the Attorney General the right to sue for the recovery of back taxes.

(3) Amendments are to be construed together with the original act to which they relate as constituting one law. The old law should be considered, the evils arising under it, and the remedy provided by the amendment, and that construction of the amended act should be adopted which will best repress the evils and advance the remedy. An amended act is ordinarily to be construed as if the original statute had been repealed and a new and independent act in the amended form had been adopted in its stead. *Mondschein* v. *State,* 55 Ark. 389; 36 Cyc. 1164, 1165; *Cortesy* v. *Territory* (N. M.), 32 Pac. 504; *Callahan* v. *Jennings* (Col.), 27 Pac. 1055; *Dimpfel* v. *Beam* (Col.), 91 Pac. 1107.

(4) The object of the amendatory act of 1913 was to give a complete remedy for the recovery of back taxes due by a corporation upon any property then in the State, which belonged to any corporation at the time such taxes should have been properly assessed and paid. It takes away the right conferred by the orignal act to proceed

against property where the title had passed to an individual, although it had been owned by a corporation when the assessment was made and the taxes were payable, but extends the remedy to cases of inadequate or insufficient valuations or assessments or undervaluations of property, while under the original act the remedy was confined to cases of an omission of some property, or element of value, or where the wrong basis of valuation has been adopted.

In order to make the remedy complete it was not necessary to bring forward and re-enact the other sections of the original act. They relate only to the method of procedure, while the portion which was amended declares the right to maintain the suit.

(5) The amendment of the original act has the effect of bringing forward the unamended sections and making them a part of a complete act which operates retrospectively from the date of the last amendment, the same as if all prior acts had been repealed and a new and independent and complete act had been passed at that date.

See authorities above cited, and also, *Com. Sch. Dist.* v. *Oak Grove Sp. Sch. Dist.*, 102 Ark. 411.

Whether the statute can be given a prospective operation so as to give it a continuing effect, is a question not presented by the facts of this case, and need not be decided. The retrospective effect of the act is separable from its prospective effect.

(6) The second contention in support of the demurrer is that if the statute is retrospective, it violates the provisions of the State Constitution requiring equality and uniformity in taxation, and the first section of the Fourteenth Amendment to the Constitution of the United States, prohibiting a State from denying to any person the equal protection of the laws.

The contention is that the selection by statute of the property of corporations is an arbitrary classification based solely on ownership, and not upon any inherent difference in the character of the property; that it destroys

the uniformity and equality in taxation required by the State Constitution, and therefore results in a withdrawal from corporate owners of property of the equal protection of the laws, in violation of the Fourteenth Amendment. It seems to be conceded by the learned counsel for the appellee that it would not have been a violation of the State Constitution if the statute had required *all* property that had been undervalued to be assessed at its true value.

The object of the assessment is to ascertain and fix the value of property for taxation. The value is to be ascertained in such manner as the General Assembly may direct, provided, that such values shall be equal and uniform throughout the State, and that no one species of property shall be taxed higher than another species of property of equal value. Art. 16, section 5, Constitution.

It has been settled by repeated decisions that the State is allowed a wide discretion in the matter of classifying property for the purpose of taxation. No question is raised as to the validity of the laws that have been passed on that subject, under which the original assessments involved in the present case were made, but it is assumed that the validity of the statute now in issue must be tested by the same rules and principles that are applied to original statutes for the classification of property for taxation.

The statute providing for the separate classification of certain property of railroad corporations and its assessment by a State Board of Commissioners, while the other property of such corporations and the property of individuals are assessed by the county assessor, has been held not to be in conflict with the Constitution of the State. *L. R. & F. S. Ry.* v. *Worthen,* 46 Ark. 312; *St. Louis, I. M. & S. Ry. Co.* v. *Worthen,* 52 Ark. 529.

As a mere matter of classification, it would seem that appellee could not have complained if the statute had been limited to the property of railroads, and, if so, it could suffer no injury from the inclusion of the property of other corporations.

But we do not regard the statute as one classifying property for taxation. It makes no new classification of property for taxation, makes no changes in existing classifications, and does not provide for any new or additional levy of taxes, but only supplies a remedy for the collection of taxes past due under previous levies made under existing classifications.

In *Winona and St. Peters Land Co.*, v. *Minnesota,* 159 U. S. 526, it was held that a statute of Minnesota providing for the assessment and collection of back taxes on property which had escaped taxation by reason of having been omitted from the assessment, was not in conflict with the Fourteenth Amendment, and that even though the act could not be enforced as to personal property on account of a failure to provide for proper notice to the owner, it could be enforced against real property. The court said: "The case is different from that of an ordinary tax law in which there may be some foundation for the claim that the Legislature is expected to make no discrimination, and would not attempt to provide for the collection of taxes on one kind of property without also making provision for collection of taxes on all other property equally subject to taxation." It was further held that a difference in the mode of assessment of property which had escaped taxation from the general mode of assessment, did not deprive the property owner of any constitutional right.

In *Weyerhaueser* v. *Minnesota,* 176 U. S. 550, a statute of Minnesota which provided for a reassessment of property which had been grossly undervalued for past years, was held not to be in conflict with the Fourteenth Amendment.

In *Florida, C. & P. R. R. Co.* v. *Reynolds,* 183 U. S. 471, it was held that railroad companies were not denied the equal protection of the laws by a statute of the State of Florida which provided for the assessment for certain years of such railroad property as had escaped taxation for such years, without providing for the assessment of

taxes for those years on other property not previously assessed.

In each of these cases the Supreme Court of the State has declared the statute not to be in conflict with the State Constitution.

It is insisted that these cases are not in point, because the *Weyerhaueser* case is based on fraud, and the others on the omission of property from the first assessments.

It is true that the statute involved in the *Weyerhaueser* case applied only to gross undervaluations and that the State Supreme Court held that the evidence was sufficient to show bad faith and that the action of the assessor was a practical fraud, but its decision was based upon a broader principle. The court made with approval the following quotation from the opinion in *Street Railroad Company* v. *Morrow,* 87 Tenn. 406: "The Constitution and laws prescribed that all property should be assessed according to its value, and if by the misfeasance, or nonfeasance or mistake of the assessor, it is not assessed according to its value, but upon an arbitrary basis fixed by the assessor at far less than its value, why should the tax debtor escape simply because he has made payment?" The court then added: "So, in this case, part payment of a just tax does not render the law unconstitutional because it compels full payment of a tax according to the value of the property, whether such inadequate assessment was the result of misfeasance or nonfeasance of the assessor. When full payment according to a true valuation has been made by the owner, then he is protected by the provisions of the Constitution requiring equality and uniformity of taxation. To this requisite he must submit, because all property should be assessed and taxes paid according to a true valuation."

Nor is the decision of the United States Supreme Court in the same case based upon any distinction, from a constitutional standpoint, between an undervaluation that is gross or made fraudulently, and one that is less in degree or made by mistake or from error of judgment; or between an undervaluation and an omission of property

from assessment. It was expressly stated that a gross undervaluation, which was the only kind involved in the case, is within the principle applicable to an entire omission of property. It was declared that whether the property was omitted from assessment or grossly undervalued it thereby escaped payment of its just share of the public burden, and that if the owner of property had a remedy in equity to correct an excessive valuation, it would be strange if the State, against a gross undervaluation of property, could not in the exercise of its sovereignty give itself a remedy for the illegal deficiency, and that that was the effect of the statute.

The following was quoted with approval from the opinion of the State Supreme Court: "It (the statute) merely sets in motion new proceedings to collect the balance of the State's claim, and there is no constitutional objection in the way of doing this."

The same principles controlled in the Florida case. The court, after explaining the character of the obligation to pay taxes, said: "They are not cancelled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the State may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the State, and it is a matter of discretion with it to determine how far it will reach into the past to compel performance of this obligation."

In another part of the opinion, it is said: "If the State, as has been seen, has the power, in the first instance, to classify property for taxation, it has the same right of classification as to property which in past years has escaped taxation. We must assume that the Legislature acts according to its judgment for the best interest of the State. A wrong intent can not be imputed to it. It may have found that the railroad delinquent tax was large, and the delinquent tax on other property was small, and not worth the trouble of special provisions therefor. If taxes are to be regarded as mere debts, then the effort

of the State to collect from one debtor is not prejudiced by its failure to make a like effort to collect from another, and, if regarded in the truer light as a contribution to the support of Government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution."

The following are some of the other cases supporting these views: *Sturges* v. *Carter,* 114 U. S. 519; *Street Railroad Co.* v. *Morrow,* 87 Tenn. 406; *Smoky Mountain Land etc. Co.* v. *Lattimore,* 119 Tenn. 636; *County of Redwood* v. *Winona & St. Peter Land Co.,* 42 Minn. 181; *Anderson* v. *Ritterbusch* (Okla.), 98 Pac. 1002; *People* v. *Seymour,* 16 Cal. 332.

(7) It is further insisted that the action of assessors and supervising boards and commissions created by the general revenue law of the State for the assessment of property for taxation and for the correction of errors and irregularities, is judicial in its character and conclusive upon the State, except in cases of fraud, in the absence of a statute providing for a review by the courts, and that to set aside, by retrospective legislation, as to a limited number or class, the judicial acts of such tribunals, after they have become final, would be withdrawing from such persons or class the equal protection of the laws.

The following cases are cited to show the judicial character and conclusive effect of the acts of such tribunals. *Stanley* v. *Supervisors of Albany,* 121 U. S. 535; *State* ex rel. *Norwood* v. *K. C. & M. R. & B. Co.,* 106 Ark. 248; *Collier* v. *Board of Directors,* 106 Ark. 151; *Shibley* v. *Fort Smith & V. B. District,* 96 Ark. 410; *State* v. *Little,* 94 Ark. 217; *Memphis L. & T. Co.* v. *St. Francis Levee Dist.,* 64 Ark. 258; *Wells Fargo & Co.'s Express* v. *Crawford County,* 63 Ark. 576; *Ex parte Fort Smith & Van Buren Bridge Co.,* 62 Ark. 461; *C. B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585.

The rule established by these cases makes such action final only in the absence of any statute authorizing a review, and the argument against the constitutionality of

such a statute by reason of its being retrospective and failing to include all property, is answered, we think, by the authorities already cited.

In the *Weyerhaueser* case, it was urged that when the valuation and assessment of the property had gone through their regular course, and the taxes had been paid, the same result follows as from the satisfaction of a judgment in an ordinary civil action; that the matter had then become *res adjudicata,* and could only be attacked in a direct procedure for fraud. The Supreme Court of Minnesota said: "It is to be observed that this is not an attack upon the original assessment so as to have the amount then assessed and to have the taxes thereon then levied and paid declared void. To that extent the amount is recognized as legitimate and upheld."

* * * * * * * * * * * *

"The act does not assume to set aside the proceedings which have been already had, but which have resulted in the State collecting only a part of its claim. It merely sets in motion new proceedings to collect the balance of the claim."

The United States Supreme Court, in the same case, said that the objection that the first assessments are final against any power of review could not be sustained, citing the *Winona and St. Peter Land Co.* v. *Minnesota* case, 159 U. S. 526, to the same effect.

The same court said in the *Florida* case: "It will be perceived that there was no new levy of taxes. No act of the Legislature was passed imposing an additional burden upon the property of the State in general, or upon any particular property, but the case is one in which general levies having been made for the years named certain property which ought to have paid taxes under them, and thus contributed its share to the expenses of the State, failed to do so, and the effort is to compel that property to discharge its obligation. The objection is not that the property ought not during these years to have paid its proportion of the taxes, but that it ought not now to be compelled to pay such proportion because certain

other property was similarly situated, and no effort is made to compel payment from it."

The Supreme Court of Minnesota said in *County of Redwood* v. *Winona & St. Peter Land Co.*, 40 Minn. 512: "Such statutes are purely remedial in their nature, and only go to confirm existing obligations." * * * "The principle of all the cases is that the taxing power, when acting within its legitimate sphere, is one which knows no stopping place until it has accomplished the purpose for which it exists, viz., the actual enforcement and collection from every lawful object of taxation of its proportionate share of the public burdens; and, if prevented by an obstacle, it may return again and again until, the way being clear, the tax is collected."

In the case of *King* v. *Mullins*, 171 U. S. 404, the court said: "The judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property."

The Supreme Court of California said of an act of the Legislature providing for the collection of delinquent taxes for certain years: "It is difficult to see upon what principle the power of the Legislature to do this can be denied. The Legislature, representing the mass of political powers, is only restrained by express limitations or restrictions in the Constitution. We see no limitations or restrictions on this subject. No obligation of a contract is invaded; property is not taken for public use without compensation; nor is it taken without due course of law. The citizen is only made to pay what he owes, and he is made to pay it in the ordinary mode adopted for the legal coercion of other debts." * * *

And, again: "The exercise of the taxing power is a sovereign attribute. The mode of ascertainment and collection of the tax is a matter of legislative discretion. What the Legislature may do, as a general thing, it may do in its own way and at its own time. There is a general power to tax; there is no restriction of mode, nor is

there any limitation of time by the organic law. Unless restrained by the Constitution, the Legislature have plenary power over the subject. Upon what principle, then, can it be contended that the Legislature can not as well make a man pay his taxes when, from accident or oversight, or his own remissness, the time for payment has passed, or the mere mode of charging him has not been followed, as they could in the first instance direct the tax?

* * * * * * * * * * * *

"The question is, as to the mere power of the enforcement of a duty; and the exercise of the power may be made at any time, so long as the duty remains." *People* v. *Seymour,* 16 Cal. 332.

The only question involved in the case of *State* ex rel. v. *K. C. & M. R. & B. Co.,* 106 Ark. 248, was whether the statute prior to the amendment of 1913 gave the State a remedy by way of review in cases of mere undervaluation of property or only where the assessing boards or officers had proceeded on the wrong basis of valuation, in omitting some property or element of value, or in adopting the wrong basis of estimating value. What was said therein as to the finality of the acts of assessing boards and officers had relation to that issue. It was said to be the declared policy to treat their findings as final except where otherwise expressly provided by statute. No question was raised or decided as to the extent of the legislative power to grant a remedy by review where there had been a mere undervaluation.

(8) The acts of assessing officers and boards can not be considered as final in the sense that they are beyond the power of the Legislature to provide for correcting them either for fraud or errors of judgment.

"It may be that such a law will work inconvenience and annoyance to the citizen, but all tax laws are odious and vexatious. It is said the citizen ought to know when he is through with the tax gatherer, but he will know when he has paid his taxes on his property according to its value. He will know then that he is secure against re-

assessment, and the law will protect him." *Street Railway* v. *Morrow,* 87 Tenn. 406.

(9) The owner of property which has for any reason escaped payment of a part of its just share of taxation can not have a vested right to immunity from payment of the balance due. The immunity can exist only so long as there is no remedy for its collection. Such claim to exemption from payment is not a right at all, but rather the failure to collect is a wrong against the public. There is no direct constitutional prohibition against retrospective legislation, and "there is no such thing as a vested right to do wrong, and a Legislature, which in its acts not expressly authorized by the Constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, can not be charged with violating its duty or exceeding its authority." Chief Justice Parker, in *Foster* v. *Essex Bank,* 16 Mass. 245.

Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptious of judicial power. *Freeborn* v. *Smith,* 2 Wall. 160; *League* v. *Texas,* 184 U. S. 156.

With the justice, wisdom, or policy, or propriety of a statute, the courts have nothing to do if there is no infringement of some constitutional provision. These are matters for legislative determination and the enactment of the statute expresses and declares the legislative judgment. 26 A. & E. Enc. Law 569; *Com. Schl Dist.* v. *Oak Grove Sp. Schl. Dist.,* 102 Ark. 411.

It may be difficult for the reviewing courts to determine, after lapse of time, the true value of property alleged to have been undervalued, but this is not a constitutional objection to the act. The statute does not contemplate that any property will be made to bear any greater burden of taxation than it would have borne if it had been originally assessed at its proper value. It expressly provides that the court may hear testimony, and that it shall determine the amount due. Kirby's Digest, § § 7207, 7208.

It may not be possible to ascertain with certainty the exact value to be placed upon every piece of property so as to make it equal and uniform with the average valuation of all property. "Absolute equality and uniformity are seldom, if ever, attainable. *Shibley* v. *Ft. S. & V. B. Dist, supra; Stanley* v. *Supervisors of Albany,* 121 U. S. 535.

It must be presumed that the courts will give persuasive force to all original assessments fairly made, and will not set them aside on account of mere error in judgment without clear and satisfactory proof. This is demanded by sound policy and the natural justice of the case.

No question of innocent purchaser is presented by the facts of the case, as the appellee has at all times owned the property involved.

We conclude that the statute in controversy is not a statute for the classification of property for taxation. It was a legislative determination that property then within the jurisdiction of the State had in past years escaped the payment in whole or in part of its just proportion of the burden of taxation, by reason of not having been assessed and valued upon a wrong basis or by reason of having been undervalued, and that it was for the best interest of the State that a remedy should be provided whereby the amount which should have been assessed against certain property may be ascertained and the property forced to contribute the full amount of its proportionate share of taxation. We can not say that the failure to include within its terms individual as well as corporate property was an arbitrary discrimination against corporations. It can not be presumed that its enforcement will result in unequal taxation. It should rather tend to make it equal and uniform.

The payment of a part of the amount justly due did not release the tax debtor from his obligation to pay the balance. That one is compelled to pay what he justly owes while others are not sued, is not an infringement of any constitutional right, nor even a just cause of com-

plaint. To compel all to be sued might result in such a burden of litigation as to make it not worth while to sue any. This was a matter for the exercise of the legislative judgment and discretion.

The legislative power to provide for the collection of taxes remaining unpaid by reason of an insufficient assessment or a failure to assess, can not be made to depend upon the cause or reason for the insufficient assessment or omission to assess; nor upon whether the action complained of was actually or constructively fraudulent, or the result of a mere error of judgment; nor upon whether there was a gross undervaluation or an undervaluation in less degree; nor, upon whether the property escaped taxation entirely or only in part; nor whether the amount due is large or small.

Section 5, article 16, of the State Constitution, is satisfied by assessments and fixed methods of collection of taxes according to the same rate and proportionate valuation and applies to prospective statutes only. It has no application to statutes which only provide a remedy for the collection of taxes already past due. It was not intended to afford constitutional protection to the owner of property which has escaped taxation against the enforcement of his obligation unless all others similarly situated are compelled to pay.

While the general jurisdiction of courts of equity to correct errors in assessments is confined to cases of fraud or mistake, the power of the Legislature in that respect is not limited.

(10) The fact that no statutory remedy exists for the correction of an erroneous assessment at the time it is made does not preclude the Legislature from granting a remedy at a subsequent time. We are unable to find that the act in controversy violates any constitutional provision of either the State or Federal Constitution.

The complaint states a cause of action within the provisions of the statute, and it therefore follows that the chancery court erred in sustaining the demurrer thereto and in dismissing the suit.

The cause is reversed and remanded with instructions to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

WOOD, J., dissents.

SMITH, J., disqualified.

LANGSTON v. MATTHEWS & LAWTON.

Opinion delivered January 25, 1915.

MECHANICS LIENS—REPAIRS ORDERED BY LESSEE—LIABILITY OF OWNER.—One who does work on certain leased premises, at the request of the lessee, can not enforce a mechanic's lien against the property under Kirby's Digest, § 4970, where there was no agreement between the lessee and the owner, that the latter should pay for the repairs.

Appeal from Union Circuit Court; *W. E. Patterson*, Judge; affirmed.

STATEMENT BY THE COURT.

J. E. Langston instituted this action against W. H. Matthews and J. E. Lawton and C. B. Blase to enforce a mechanic and materialman's lien. The facts are as follows:

W. H. Matthews and J. E. Lawton rented to C. B. Blase a small frame house at four dollars per month to be used as a barber shop. The building in its condition at that time was suitable for use as a barber shop, and it was understood between the parties at the time that if any improvements should be made, they should be at the expense of the tenant. After Blase rented the place he made a contract with Langston to put in some water fixtures and to cover one side of the house with galvanized iron. The price agreed upon between Blase and Langston was $29. Lawton saw Langston at work on the building and said nothing to him about it. Blase failed to pay Langston for the work. After the work had been done, Blase became in arrears for his rent and the owners of the property let him off for the rent for one month because he had suffered certain misfortunes, and they were sorry for him.

The court rendered a personal judgment in favor of the plaintiff against Blase for the amount of the plain-

tiff's claim, but held that the plaintiff was not entitled to a mechanic or materialman's lien against the property. The plaintiff has appealed.

The appellant *pro se.*

1. The work done constituted permanent and irremovable fixtures, becoming a part of the realty, and if done with the knowledge of the appellees and accepted by them, etc., they are responsible under the statute. Kirby's Digest, § 4970; 63 Ark. 628; Tiedeman, Real Prop., § 3; 56 Ark. 60. They could not receive benefits under the contract, and then repudiate it. 70 Ark. 239.

2. Appellees are estopped to deny liability. 16 Cyc. 773, 774.

There exists an implied contract to pay for the work and materials on the *quantum meruit.* 27 Cyc. 56; 90 Ark. 472; 41 Neb. 195, 56 N. W. 548; 87 Me. 271; 32 Atl. Rep. 897; 71 Ark. 337; 19 Ark. 671.

Pat McNalley, for appellees.

1. A tenant can not create a mechanic's lien on leased property. 56 Ark. 360; 90 Ark. 472.

2. There was no implied agreement on the part of appellees to pay. Mere knowledge that a tenant is making some improvement on leased property which was not authorized by the lessor, is not sufficient to create a mechanic's lien. 27 Cyc. 56, 57, note 31; 15 Daly (N. Y.) 308; 125 N. Y. 706; 18 La. 70; 130 Ia. 42.

HART, J., (after stating the facts). Section 4970 of Kirby's Digest gives a mechanic's lien to every mechanic, builder, etc., who shall perform any work upon or furnish any material for any building or for repairing the same "under and by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor," upon complying with the provisions of the act.

The lien exists only by virtue of the statute, and it is conceded that the estate of the owner can not be subject to a lien for work done or materials furnished at the instance of the tenant unless the tenant may be regarded as the agent or trustee of the owner.

Counsel for the plaintiff relies for a reversal of the judgment upon the case of *Whitcomb* v. *Gans*, 90 Ark. 469, where it was held that where a lessor consents to the making of improvements by his lessee to be paid for by deductions from the rent the property will be subject to a mechanic's lien for the improvement. The reason is that the stipulation in the lease that the repairs might be made and the cost taken out of the rent is equivalent to making the lessee the agent of the lessor for the purpose of making the repairs.

In the case before us there was no contract between the landlord and tenant for repairs. It was optional with the tenant as to whether any repairs should be made, and if he should desire to make any they were to be made at his own expense. Therefore the tenant in making the repairs, acted for himself, and no lien, under the statute, will attach to the property of the lessor.

It is true the landlord made a reduction of four dollars in the rent, but this was done after the repairs had been made. There was no agreement beforehand to make the deduction, and it was made by the landlord because the tenant had suffered misfortunes and not because of the repairs.

It is true also that one of the owners of the property saw the plaintiff making repairs. But he did nothing whatever from which the plaintiff might have inferred that he consented to the making of the improvement and intended that the property should be bound therefor. Under these circumstances, the lessee acted for himself, and no lien attached.

The judgment will be affirmed.

HUFFMAN v. SUDBURY.

Opinion delivered March 8, 1915.

1. APPEAL FROM PROBATE COURT—AFFIDAVIT.—The filing of an affidavit is necessary in order to give the probate court jurisdiction to make an order granting an appeal.
2. APPEAL—AFFIDAVIT—EVIDENCE.—In order to show jurisdiction in the probate court to grant an appeal from one of its orders, it is not

essential that the affidavit for appeal appear in the record, but the fact that it was filed, so as to give the court jurisdiction to grant the appeal, may be established by other evidence.

Appeal from Mississippi Chancery Court, Chickasawba District; *Charles D. Frierson,* Chancellor; reversed.

J. T. Coston, for appellant.

1. The court erred in overruling the motion to strike the case from the docket. There being no affidavit for appeal in the record, the burden was on the defendant to show affirmatively not only that an affidavit was filed, but also that it was filed before the appeal was granted. 122 S. W. 489; 124 S. W. 1028; 92 Ark. 219; 93 Ark. 275.

2. There was sufficient evidence to entitle appellant to have the case sent to the jury on the question of Bugg's assumption of the notes.

W. D. Gravette and *Coleman, Lewis & Cunningham,* for appellee.

1. Appellant will not be permitted to raise an issue here that was not raised below. The ground alleged for dismissing the appeal was that no affidavit for appeal had been filed at all. He can not be heard to say that the affidavit, though actually filed, was filed after the appeal was granted. 79 Ark. 293; 96 Ark. 405; 104 Ark. 371; 105 Ark. 669; 92 Ark. 46.

2. The pretended judgment of the probate court was rendered at a place outside of the jurisdiction of the court, and at a time when the court was not in session, and is, therefore, void. 71 Ark. 226; 75 Ark. 415; 89 Ark. 85; 86 Ark. 591.

3. There was no evidence, to support the claim, and the court properly directed the verdict.

J. T. Coston, for appellant in reply.

The supplemental record can not be considered. The case can be tried here only upon the record before, and made by, the circuit court. 161 S. W. 1035; 110 Ark. 374.

McCULLOCH, C. J. This case originated in the probate court of Mississippi County, where appellant's intes-

tate, Carl Huffman, presented a claim against the estate of B. A. Bugg, deceased, to recover the sum of about nine thousand dollars. The claim was allowed by the probate court and the administrator appealed to the circuit court. While the case was pending in the circuit court, the claimant, Carl Huffman, died, and the cause was revived in the name of appellant as the administrator of the estate. Appellant filed a motion in the circuit court for dismissal of the appeal on the ground that no affidavit for appeal had been filed, which motion was overruled by the court, and on the trial of the case before a jury the court gave a peremptory instruction in appellee's favor. Judgment was rendered accordingly, and an appeal has been prosecuted to this court.

(1-2) The court heard oral testimony on the motion to dismiss the appeal, and found that an affidavit had been filed, though it was not found among the papers certified up by the clerk of the probate court. The filing of an affidavit is necessary in order to give the probate court jurisdiction to make an order granting an appeal. *Walker* v. *Noll,* 92 Ark. 148; *Tharp* v. *Bennett,* 93 Ark. 263. An appeal calls for a direct review of the whole record to ascertain whether or not jurisdiction is established, and therefore no presumption can be indulged. It is not essential, however, to the exercise of jurisdiction that the affidavit for appeal appear in the record, but the fact that it was filed so as to give the court jurisdiction to grant the appeal, may be established by other evidence. *Spybuck Drainage District* v. *St. Francis County,* 115 Ark. 591; 172 S. W. 893.

Since the transcript of the proceedings below was lodged in this court, appellee applied to the probate court for a *nunc pro tunc* order concerning the entry of the judgment and the appeal, and brought the record, including the evidence before the probate court, up to the circuit court by *certiorari,* and thence to this court in the same way. That record, however, was not before the circuit court when the case was pending there, and it can not be considered here. *Drainage District No.* 1 v. *Rolfe,* 110

Ark. 374. The circuit court heard testimony, as before stated, on the issue whether or not an affidavit had been filed, and a majority of the judges are of the opinion that there is sufficient evidence to sustain the court's finding that an affidavit for appeal in proper form was filed, and that the probate court granted the appeal upon that order. It will not serve any useful purpose to discuss in detail the evidence bearing on that issue. The question of the weight of the evidence in determining this question was with the trial court, and we are not at liberty to disturb the court's finding when there is sufficient evidence to sustain it.

B. A. Bugg owned a tract of land consisting of about two thousand acres in Mississippi County, and sold the same to Carl Huffman and William Hunter for the price of $21,400, of which $10,400 was paid in cash, and Huffman and Hunter executed notes to Bugg for the balance of $11,000, with interest. Huffman borrowed from Hunter the sum of $5,000 to use in paying his half of the cash payment of the purchase price, and executed his note to Hunter for that amount with interest, and also executed to Hunter a mortgage on his half of the land purchased from Bugg to secure the payment of said note. Subsequently, Huffman sold his interest in the land to Bugg and executed a quitclaim deed reciting a consideration of "$1 and other valuable considerations." The contention in this case on the part of the appellant is that Bugg agreed, as a part of the consideration, to assume payment of the $5,000 note executed by Huffman to Hunter, and that is the basis of the claim filed against the Bugg estate. Hunter sued Huffman on the note and recovered judgment for the amount thereof and interest, amounting in the aggregate to $9,322.41, and Huffman paid that amount to Hunter in satisfaction of the judgment. Huffman then filed this claim against the estate of Bugg, who had died in the meantime, to recover the amount so paid out, alleging that Bugg had entered into a contract to assume and pay off the debt to Hunter as a part of the consideration for the quitclaim deed. Huffman's deposition was given in

the case, and was used in the trial in the probate court, and he also testified orally. That testimony was offered in the trial in the circuit court, but the court excluded all the statements which related to transactions between Huffman and Bugg. This was done pursuant to the terms of our statute which provides in actions "by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party." Kirby's Digest, § 3093. It is not insisted here that there was any error in thus excluding that testimony. We are of the opinion, however, that there was enough testimony to warrant a submission to the jury of the question whether or not Bugg agreed, as a part of the consideration for the conveyance from Huffman to him, to assume and pay off the note to Hunter. One of the witnesses testified that Bugg told him (witness) that he had assumed the payment of the note to Hunter for $5,000. The precise words of the deceased, as related by the witness, are as follows: "He went out of it like he went into it; he went into it on paper and went out of it on paper, and I assumed his notes." This statement was made by Bugg, according to the testimony of the witness, in relating the details of the transaction whereby Bugg purchased the interest of Huffman. We think it warranted a submission of the question of the contract to the jury, and that the court erred in taking the case away from the jury by a peremptory instruction. It was competent to establish the contract by parol testimony, and no rule of evidence was violated by proving the contract in that way. *J. H. Magill Lumber Co.* v. *Lane-White Lumber Co.*, 90 Ark. 426.

For the error in thus taking the case away from the jury by a peremptory instruction, the judgment is reversed and the cause remanded for further proceedings.

MAUNEY v. MILLAR.

Opinion delivered March 29, 1915.

1. MINES AND MINERALS—LEASE—RIGHT OF LESSOR.—Plaintiff leased certain diamond lands to defendant, and claimed them on the ground that defendant fraudulently entered into the lease. *Held*, instructions that if these facts were true that the jury should find for the plaintiff, were sufficient.

2. MINES AND MINERALS—GENERAL VERDICT—SPECIAL FINDING.—Under Kirby's Digest, § 6208, answers to special interrogatories will overthrow a general verdict; special findings that a defendant did not secure a lease with intent to defraud the lessor, and that defendant has complied with the terms thereof, will overturn a general verdict for the lessor, based on the fraudulent procurement of the lease and noncompliance with its terms.

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

W. C. Rodgers, J. C. Pinnix and *Steel, Lake & Head*, for appellants.

1. If the defendants got possession of the mine in bad faith and for the purpose of injuring or defrauding the plaintiff in his property rights, he was entitled to a verdict, and the court erred in refusing to so instruct the jury. Fraud vitiates every transaction. 32 N. Y. 275; 1 Hun 303; 48 N. Y. S. 130; 1 Ind. App. 293; 42 Ia. 81; 93 Ind. 480.

2. The court erred in refusing to instruct the jury that if the defendants, in procuring the lease, did not intend to perform the duties required of them by law under the lease, they would not be permitted to assert a right to any of the diamonds claimed by the plaintiff. 52 Ark. 30-44; 22 Ark. 517-521.

4. The lease contract did not give to the lessee any right to wash or treat dirt for diamonds from any other mine than the Mauney mine. The court, therefore, should have instructed the jury that if they found that the lessees intended, in getting this lease, to wash dirt and material from the Kimberlite mine, and not with the intention and for the purpose of washing for diamonds in good

faith, etc., toward the plaintiff, their verdict should be for the plaintiff.

5. It is clearly the law that where one party to a contract refuses to perform its terms and requirements, the other party is thereby released from carrying it out, and the court should have instructed the jury to that effect. 88 Ark. 343-350; *Id.* 422; 38 Ark. 174-178; 65 Ark. 320; 105 Ark. 166-171; 99 Ark. 193-197; 97 Ark. 167-173; 41 Ark. Law Rep. 492-494.

McRae & Tompkins, for appellees.

The court's instruction is a clear statement of the issues in the case, and is correct. The instructions asked by the appellant were either not applicable or were covered by the instruction given by the court.

The special findings of the jury establish the fact that there was no fraudulent purpose of not complying with the lease, and also that the appellees had complied with it. Therefore, this being a suit in replevin, and the lease being valid, the action can not be maintained, because appellants were not entitled to possession of the partnership diamonds. 82 Ark. 244.

Had there been all manner of fraud in appellees' minds when they entered into the lease, not communicated to appellants, nor relied upon by them in making the contract, it would not have avoided the contract. 97 Ark. 265; 95 Ark. 131.

SMITH, J. Appellant was the plaintiff in the court below in an action to recover the possession of fifty-nine diamonds in the rough taken from the mine of appellant by appellee. The diamonds were small and in their rough condition were worth only the sum of $101. The complaint alleged, among other things, that in April, 1912, appellee procured a lease from appellant on certain diamond-bearing lands, and that it was procured for the fraudulent purpose of discrediting the mine and to keep appellant in the dark as to the value of the large diamonds discovered, to stifle the business of mining, to depress the value of the land and buy it for a minimum price. That appellees and their associates never intended to develop

the mine in good faith, but intended to defraud appellant out of the output of the mine, and to deprive him of the profits thereof. In short, the complaint alleged fraud in the inception of the lease. It also alleged numerous failures on the part of the lessees to comply with the terms of the lease, whereby it was cancelled. Under the terms of the lease appellant was to have one-fourth of the diamonds recovered and appellees three-fourths, with a proviso that either party had the right to fix the price, and, when so fixed, the other could buy at the price agreed upon.

Under the lease appellees were required to make quarterly reports to appellant showing the number and quality of the diamonds which had been mined, and reports had been made showing that a total of 867 diamonds had been mined; and it was further stipulated that appellant should have access to the mine at all times for the purpose of inspecting appellees' operations; and appellant offered proof tending to show that this right had not been freely accorded to him, and that appellees had in fact secured more diamonds than had been reported. It was also provided in the lease that appellees should treat a minimum of 10,000 loads of material each year, and as much more as could be reasonably done; and it was urged that this requirement of the lease had not been observed. Appellant also offered proof to show that appellees washed dirt for diamonds from another mine at the plant located on appellant's land, and that this action was in violation of the terms of the lease, in that it resulted in the possibility of confusion in the output of the two mines and limited the quantity of earth which could be treated from appellant's mine.

The court, of its own motion, gave the following instruction:

"No. 1. This is a replevin suit in which the plaintiff, M. M. Mauney, seeks to recover a lot of fifty-nine diamonds which he claims to be the owner of and entitled to the immediate possession of the same.

"In order for the plaintiff to recover in the replevin suit, the burden is upon him to prove by a preponderance of the testimony that he is the owner and entitled to the immediate possession of the property.

"The defendant holds the diamonds under the lease which was executed between them and the plaintiff, and were mined and washed under that lease and under that lease contract which provides that the plaintiff shall be entitled to one-fourth of the diamonds and the defendant entitled to three-fourths of them, and the plaintiff seeks to recover the diamonds and claims to be the owner of the entire lot on the ground that the defendant procured the lease by means of false and fraudulent representations, and for the purpose of getting possession of the diamond property and discrediting it and ultimately buying it up for a nominal consideration, and that they had no intention to honestly and faithfully carry out the lease contract at the time they entered into it, and further alleged that the defendant has not, in good faith, complied with the terms of that contract, and that these diamonds were mined in furtherance of that alleged false and fraudulent intent with which it is alleged that they entered into the contracts originally.

"Now, if you believe from a preponderance of the testimony, or greater weight of the testimony, that the defendant did procure the lease by means of false and fraudulent representations, with the intent to get possession of the property and to discredit it and to conceal the real value of the diamonds taken, with the false and fraudulent intent to acquire the ownership of the property for less than its value, and that they mined these diamonds in furtherance of this false and fraudulent intent, and that they have not substantially complied with the terms of the contract, you would find for the plaintiff the diamonds or their value which is testified to be in the neighborhood of one hundred dollars.

"If you fail to find these facts by a preponderance of the evidence, then your verdict would be for the defendants.

"The burden is upon the plaintiff to prove by a preponderance of the testimony that the contract was procured by means of fraud by false and fraudulent representations, and that the defendants had no real intention of carrying it out in good faith and that they have not carried it out, and that the diamonds were mined with that false and fraudulent intent."

At the request of appellant, the court gave an instruction upon the credibility of witnesses and the weight of evidence; but refused to give instructions requested by appellant which were substantially to the following effect: That the jury should find for appellant if they believed from the evidence that appellee got possession of the Mauney mine in bad faith, and for the purpose of injuring or defrauding appellant's property rights. And that they would find for appellant if they found that appellee in procuring the lease did not intend to perform the duties required of him by law under the lease. And that they should find for appellant if they found that appellees were washing dirt for diamonds which was taken out of any other mine than appellant's. And that they should find the lease void if they found that appellees were not complying with it. The court refused all of these instructions, and appellant excepted to the action of the court in each instance in refusing to give his requested instruction.

Over appellant's objection the court submitted to the jury the following interrogatories:

"1. Was the lease entered into by the defendants with the fraudulent purpose of not complying with its terms?

"2. Have the defendants failed to comply with the terms of the lease?"

And each of these interrogatories was answered by the jury in the negative. Yet, notwithstanding that fact, the jury returned a verdict for appellant for the diamonds, or their value. Upon motion of appellees, the court rendered judgment in their favor notwithstanding the general verdict of the jury.

We think the court committed no error in refusing the instructions requested by appellant. The instruction given by the court correctly and fairly submitted the issues involved to the jury, and, in view of the nature of this action, stated the law as favorably to appellant as could have been done. The special finding of the jury would, of course, prevail over the general finding. Section 6208, Kirby's Digest. And this special finding is, of course, conclusive of the fact that the lease was not void because of fraud in its procurement, on the one hand, nor through any failure to comply with it, on the other; and the judgment of the courst must, therefore, be affirmed.

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

Opinion delivered April 5, 1915.

1. RAILROADS—PERSONAL INJURY ACTION—UNCONTRADICTED TESTIMONY.—In an action for damages growing out of personal injuries, when the testimony of the engineer and fireman is reasonable and uncontradicted, the jury has no right arbitrarily to reject.
2. VERDICT—BASIS OF—DUTY OF JURY.—Juries are not permitted to rest a verdict purely upon speculation; 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 upon which liability is predicated, before a verdict will be permitted to stand.

Appeal from White Circuit Court; *J. M. Jackson*, Judge; affirmed.

STATEMENT BY THE COURT.

The appellee, in her own behalf and as administratrix of the estate of James Belcher, deceased, and in behalf of Viola and Esther Belcher, minors, instituted this suit against the appellant, alleging that plaintiff's intestate was sitting upon the ends of the crossties upon which defendant's track was laid a short distance from the town of Kensett; that defendant's servants negligently ran a train at a high rate of speed over said track without ring-

ing the bell or blowing the whistle, and without keeping a lookout; that the train ran over and so badly injured James Belcher that he only lived for the space of about two hours.

The defendant denied the allegations of negligence and set up the affirmative defense of contributory negligence on the part of plaintiff.

The defendant's track for a quarter of a mile north and for a mile or a mile and a half south of the station of Kensett was perfectly straight and level.

The proof tended to show on behalf of the plaintiff that the deceased Belcher had walked down the track of defendant about half a mile from Kensett, had crossed a trestle on the track and was seen sitting on the track facing toward the south some time before the train came which struck him. The tracks there at that point ran north and south and Belcher had his left side and back toward the way the train came; his side was turned toward the north; the guard rails on the ties of the trestle were about eight inches wide and four inches thick and were laid flat upon the ties, and each tie notched in it, leaving about two inches sticking out; it was a bright, clear day, and there was nothing to obstruct the view. It was shown by several witnesses that if the engineer and fireman had been keeping a lookout they could have seen Belcher, if he was sitting on the track at the time, from a mile to a mile and a half before they got to him. One of the witnesses on behalf of the plaintiff testified as follows:

"You can not place a man on that trestle and place a man on the track with half an eye that could not see him; I know right where this man was sitting on the end of the ties; I could have seen him; I saw one of my shoats on the track for a mile below the depot this morning; the shoat was away from the track and walking around about twelve or fourteen feet from the track."

This witness was asked the following question: "You don't know what a man could see from his position in the cab?" and answered: "No, sir; but I know that I could

surely see a man on the trestle." He was further asked, "You mean standing up?" and answered, "No, sir; lying down."

There was also testimony on behalf of the appellee tending to prove that the train that injured Belcher was an extra train running at a time when no trains were operated or expected over the road, and that the train at the time did not ring the bell or blow the whistle as it approached the crossing; and that the train was running about thirty to thirty-five miles an hour when it passed the depot.

The testimony of the appellant, on the other hand, tended to prove that the regular signals were given by blowing the whistle and ringing the bell as the train approached the public crossing at Kensett, and that the engineer and fireman were keeping a lookout all the time until they passed the town of Kensett; that when they first discovered a man on the track, the train was about two hundred feet from him. The engineer stated: "I could not see him any sooner than I did; I saw him rise up, that is how I come to know somebody was there; just as soon as I saw it was a man, I went to the emergency brake, shut off the steam, sounded the emergency whistle and tried to get him to move so he would not get struck; there was nothing else that I could have done to avoid injuring him; the man was ten or fifteen feet from the end of the trestle, the trestle is about fifty-six feet long, there is a dump board at each end of the bridge to keep the dirt from washing down under the bridge about sixteen inches high, and extends about four inches above the ties; it extends up to the ends of the bridge, and this man was sitting on the first tie off the end of the bridge and his legs and body were down below the dump board." The witness then indicated to the jury how the man was sitting, stating: "He was leaning over this way, and that would leave his back about level with the top of the bridge, all I could see was just the top of his back; I just saw it was a white object; he had no coat on and it looked just about like a piece of paper; I kept a constant lookout

through the town of Kensett and up to the time I discovered Mr. Belcher, and did all in my power to avoid injuring him after I discovered him." This witness then testified that he accompanied one Williams and Jim Winn and showed them where and how Belcher was sitting for the purpose of enabling them to make tests to show how far witness could see a man. The fireman's testimony corroborated that of the engineer. He was asked if there was anything except the dump board to prevent him from seeing Belcher, and answered that there was a guard rail on top of the trestle about two and a half inches above the dump board and about five inches above the tie that the man was sitting on; that the guard rail was six inches thick and mortised in the ties about an inch; witness was seated about seven feet above the level of the tie that Belcher was sitting on; the guard rail prevented witness from seeing a part of his body; witness stated: "The way Belcher was sitting there, with his feet down in the hole, you could see just the top of his back."

It was stated by witnesses on behalf of appellant that a train of the size of the train that injured Belcher running at a speed of twenty-five miles an hour could only be stopped in 700 feet from the time efforts were made to stop it. Witnesses who made tests under substantially the same conditions as were shown to exist at the time Belcher was injured testified corroborating the testimony of the engineer and fireman to the effect that a man sitting on the track, in the position in which they stated that Belcher was sitting on the day he was injured, could not be seen by the engineer and fireman in the cab of the engine until they had approached to within a distance varying from 375 to 209 feet.

One of the witnesses on behalf of the appellee testified as follows: "There was no reason why a man sitting on the trestle a quarter of a mile south of the depot could not be seen from the top of this rise, half a mile north of the depot; there is nothing in the way to obstruct the view if the engineer had been looking." Other witnesses who testified substantially to the same effect, tes-

tified on cross-examination that they had never been in a cab and did not know whether a man, in the position that the engineer and fireman described Belcher as being in at the time of his injury, could be seen or not.

It was shown in rebuttal by the appellee that on the day that Belcher was injured, he was wearing a light blue shirt and a white hat.

The appellant asked the court to direct the jury to return a verdict in its favor; the court refused and submitted the issues to the jury upon instructions given at the instance of the plaintiff, to which no exceptions were saved. The jury returned a verdict in favor of appellee in the sum of $5,000, and from a judgment for that sum, this appeal has been duly prosecuted.

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

The amended lookout statute does not make the carrier liable for failure to discover the peril of a person on the track in all cases. Recognizing the physical limitations upon the ability of the engineer and fireman to discover persons upon the track, the Legislature in the enactment merely required that they exercise "reasonable care" to discover persons in danger. Here the testimony of the engineer and fireman was clear, consistent and probable and showed that they were keeping the lookout required by law and that they could not and did not discover Belcher until it was too late to prevent the injury. The jury could not arbitrarily disregard their testimony and base a verdict upon what was at best mere conjecture. 113 Ark. 353; *St. Louis, I. M. & S. Ry. Co.* v. *Enlow,* 115 Ark. 584; 101 Ark. 532; 109 Ark. 214.

S. Brundidge, Jr., for appellee.

The duty of the carrier is to keep a constant lookout for persons and property, etc. The "reasonable care" required is to prevent injury after discovering the peril. As to whether or not appellant's employees were negligent in the matter of keeping the lookout was a question for the jury under the evidence and proper instructions,

and that question has been decided adversely to appellant. 165 S. W. 951; *Id.* 949. There was no occasion for speculation or conjecture in arriving at this verdict.

WOOD, J., (after stating the facts). The appellant contends that the court erred in not granting its prayer for a directed verdict. This court has held in several cases that where the testimony of the engineer and fireman is reasonable and uncontradicted, the jury have no right arbitrarily to reject it. *St. Louis, I. M. & S. Ry. Co.* v. *Humbert,* 101 Ark. 532, and cases there cited. It is also a well established doctrine, often recognized by this court, that juries will not be permitted to rest a verdict purely upon speculation, that 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 upon which liability is predicated, before a verdict will be permitted to stand. *St. Louis, I. M. & S. Ry. Co.* v. *Enlow,* 115 Ark. 584; *Midland Valley Rd. Co.* v. *Ennis,* 109 Ark. 206. See also *St. Louis, I. M. & S. Ry. Co.* v. *Hempfling,* 107 Ark. 476; *St. Louis, I. M. & S. Ry. Co.* v. *Owens,* 103 Ark. 61; *Russell* v. *St. Louis S. W. Ry. Co.,* 113 Ark. 353; *Biddle, Recr.,* v. *Jacobs,* 116 Ark. 82. Counsel for appellant cite and rely upon some of these cases, but they have no application to the facts of this record; for the reason that here there was a conflict in the testimony, and the jury accepted the testimony on behalf of the appellee. Giving this testimony the strongest probative force, it was sufficient to warrant a finding that, if the engineer and fireman had been keeping the lookout required by law, they could have discovered Belcher's peril in time to have prevented injury to him by the exercise of ordinary care after discovering his peril. True, the engineer and fireman testified roundly that they were keeping a lookout and that, on account of the position which Belcher had assumed on the track, they were unable to discover that he was a human being, and in a perilous situation, in time to stop the train before the same ran upon him; but the testimony of the wit-

nesses for the appellee was sufficient to warrant a finding to the contrary.

It is unnecessary to discuss the evidence in detail; the facts as set forth in the statement speak for themselves. It can not be said that the jury arbitrarily disregarded the testimony of the engineer and fireman. Their verdict had substantial evidence to rest upon in the testimony of witnesses on behalf of appellee, and was not a mere matter of conjecture or speculation. The case, upon the facts of this record, is ruled by the recent case of *St. Louis, I. M. & S. Ry. Co.* v. *McMichael,* 115 Ark. 101, 171 S. W. 115, rather than by the ones cited by appellant.

The court, therefore, did not err in refusing appellant's prayer for a directed verdict, and the judgment is affirmed.

APPENDIX

I.

IN MEMORIAM

HENRY CLAY CALDWELL

Remarks of George B. Rose on presenting the resolutions of the Little Rock Bar on the death of Judge Henry Clay Caldwell.

It is my privilege to present to this Court the resolutions of the Little Rock Bar on the death of Judge Henry Clay Caldwell. They are as follows:

RESOLUTIONS OF THE LITTLE ROCK BAR ASSOCIATION ON THE DEATH OF JUDGE HENRY CLAY CALDWELL.

Judge Caldwell was born in Marshall County, Virginia, on September 4, 1832. This county has since his birth become a part of West Virginia.

In 1837 he moved with his parents to Iowa, which was then on the extreme western frontier, and where the population consisted largely of Indians. Judge Caldwell's father was a farmer by occupation, and the boy received only the education to be had in the local public schools. At an early age he began the study of law, and in 1852, at the age of nineteen, he was admitted to practice. He speedily made his mark in his profession, and four years later he was elected prosecuting attorney, an office which he held until he was elected to the Iowa Legislature in 1859. He served two terms in the Legislature, and at the outbreak of the Civil War he was made a major in the Third Iowa Cavalry. He served with distinction, and was the colonel of his regiment when in 1864 he was appointed by President Lincoln to be the judge of the District Court of the United States for the Eastern District of Arkansas. This position he occupied until the Circuit Courts of Appeal were created in 1890, when he was appointed presiding judge of the Circuit Court of Appeals for this circuit. He held that place until 1903, when, on account of advanced years and ill health, he found it necessary to retire.

He then made his home in Los Angeles, California, where the mild climate restored his strength, and where he continued to reside until his death on the 15th of February, 1915.

In 1854 he married Miss Harriet Benton, a member of a family which contributed several men of great distinction in national affairs. Mrs. Caldwell has survived him, together with a son and two daughters, and several grandchildren.

Judge Caldwell was a great lawyer and a great judge. His mind was powerful and his sense of justice strong. It is doubtful whether any man ever lived who had a greater contempt for technicalities or a firmer determination to do substantial justice. He was rarely deceived as to the essential right of a controversy, and he drove on toward it with tremendous vigor, casting aside the old technicalities as Samson broke his bonds. His knowledge of law was vast, and especially was he familiar with the Federal decisions. As a judge he was distinguished for the preference that he gave to personal rights over property rights. In this respect he was a great legal reformer; and his views, which were deemed revolutionary at first, have now met with general acceptance.

He was distinguished for his achievements in the field of law reform. Many of our most beneficent statutes and constitutional provisions, such as our homestead and exemption laws, our reformed code of procedure and our laws for the protection of married women, owe their adoption to his efforts. His heart was as big as his brain, and it always went out to the weak, the poor and the oppressed.

He was truly a friend of the people. In his attitude toward them he was very much like Mr. Lincoln, with the same confidence in their rectitude and ultimate good sense, the same sympathy for their sorrows and aspirations. It was the rights of the people at large that were always uppermost in his mind in passing on any question of public policy, and he never allowed his court to be used as the instrument of rapacious wealth.

The bar of Little Rock has been conspicuous for the kindly feelings which its members have entertained toward one another and for its high standard of professional ethics. Among its reputable members writings are unnecessary. The plighted word is as good as the sealed bond. This is in large measure due to Judge Caldwell's influence. He always insisted that contests should be conducted on the highest plane, and let it be distinctly understood that the man who was recreant to his word could not practice in his court.

In his relations to the bar Judge Caldwell was admirable. He was cordial and democratic in his manners, and every worthy practitioner in his court knew that he had in him a friend. How strongly he was attached to our bar here we realized particularly after his elevation to the circuit bench. When an Arkansas lawyer appeared in

his court his face would light up, and the moment that the court adjourned he would take him into his chambers, and treat him as a long lost brother. He really loved his bar, and was loved by them in return.

In view of the distinguished talents, the great public services and the eminent virtues of Judge Caldwell, be it resolved:

1. That in the death of Judge Caldwell there has passed away a great constructive jurist, a judge of spotless integrity and high ideals, a public spirited citizen and a true friend of the people, while his family have lost a devoted husband and father.

2. That we rejoice that he was spared until he had the opportunity to complete his life's great work, and to make a lasting impression upon the jurisprudence of his country.

3. That his name should be held in perpetual reverence among us for the important reforms in law and procedure that he inaugurated, for his devotion to the well-being of our people and for his long and distinguished career upon our Federal bench.

4. That we extend to his bereaved family our profound sympathy in their great affliction.

5. That a copy of these resolutions be transmitted to his widow, and that they be presented to the Supreme Court by Mr. Geo. B. Rose, and to the United States District Court by Mr. John M. Moore.

G. B. ROSE,
JOHN M. MOORE,
J. W. HOUSE,
MORRIS M. COHN,
C. C. WATERS,
W. C. RATCLIFFE,
JOHN W. BLACKWOOD,
W. L. TERRY,
Committee.

After presenting the above resolutions, Mr. Rose addressed the Court as follows:

It is safe to say that no man ever did more for Arkansas than Judge Caldwell; indeed, I have heard my father say that no one had ever done so much.

He came among us as an enemy, leading a regiment of cavalry to subdue our land; but he waged war upon a high plane, fighting ruthlessly the forces in the field, while maintaining strict discipline and seeing that no wrong was done to the weak and the defenseless.

In 1864, President Lincoln offered him the choice of a brigadier general's commission or a place upon our Federal bench. He hesitated, for he loved his military career; but finally he accepted the judgeship. When he mounted the bench he was a young man of thirty-two, tall and powerfully built, with a great head thickly covered with

blonde hair, and with a full, tawny beard, which in moments of deep feeling he had the habit of shaking in a truly leonine way.

The first impression that he made was unfavorable.

Our courts had built up an elaborate system of technicalities perhaps without example in the history of jurisprudence. The judge sat chiefly as the referee of a fencing match between the members of the bar. Every now and then he would say, "A hit, a palpable hit;" and so the fight would go on until one or the other had disarmed his adversary. In this elaborate process the rights of the litigants were rarely thought of.

This whole system was abhorrent to Judge Caldwell's nature. He brushed their technicalities aside like cobwebs in the path of justice. He directed the amendment of all defects in the pleadings, and insisted on a trial on the merits right then and there. The bar, which had been brought up to regard Chitty on Pleadings as being almost as sacred as the Bible, stood aghast; and most of them looked upon him as a barbarian who knew nothing of their delicate art, and cared less.

It was also difficult for our people to realize the new status of the negro. After having known him only as a slave they could not recognize his position as a free man with equal rights before the law; and Judge Caldwell's strong insistence that the guaranties of the Fourteenth Amendment should be observed, gave offense to many. Still, his evident unwillingness to enforce the Confiscation Acts endeared him to not a few.

It was not long, however, till he had an opportunity to show what manner of man he was. In 1868 the Reconstruction Acts were passed. Our people were disfranchised, and our government was turned over to a lot of northern men, who ruled us by the help of our former slaves. Justice in the State courts became mostly a mockery. Then the great heart of Judge Caldwell, which was always with the unfortunate and the down-trodden, turned to our people. Throughout the South the Federal judges were too often the willing tools of our oppressors, issuing midnight orders without notice, and enforcing them with Federal bayonets. But Judge Caldwell stood for our rights like a rock in the raging sea. If any man could get into his court, he could get justice.

In 1874 the Brooks-Baxter war broke out. Judge Caldwell was an ardent Republican; but he rejoiced in the opportunity to end the reconstruction rule, and he threw all his great influence on the side of Governor Baxter, and was largely instrumental in securing his recognition by the National Government.

Then we thought that our troubles were at an end. We adopted our present Constitution, and our new government started out, overwhelmed with debts, but strong in popular support. Throughout the South the same struggle for liberty was going on. To the majority of

the northern people, ignorant of the true situation, it looked like a new rebellion. President Grant sent to Congress a message setting out that a reign of terror existed in Arkansas, demanding that our State government be overthrown and the reconstruction regime reinstated. Congress appointed an investigating committee, composed of implacable enemies of the South. Then Judge Caldwell shielded us from destruction. Day and night he labored with the committee in our behalf. He took the bitterest of them to stay at his own home, where he might be under his own constant influence. Finally he wrung from them a report favorable to our government, and we were saved. From that time Judge Caldwell was recognized by all as a friend of our people, and his place was secure in their hearts.

But great as were his services in the political field, they are overshadowed by his work as a constructive jurist. He was one of the great constructive jurists of our country. He was not content with the administration of the law. He insisted on reforming its defects.

I have already spoken of his reform in the administration of justice. He had a boundless contempt for technicalities, and a resolute determination that every case in his court should be tried on the merits. If a defect in pleadings was discovered, he not merely permitted, but he directed its amendment. Under his strong hand the vast edifice of technicalities, which had been built up with such perverse ingenuity, went to pieces like a house of cards. And he labored not merely by example but by precept to instill into our bar a feeling that cases should be tried on their merits alone. When a law school was established here he took the chair of pleading and practice, and year after year he lectured to our young men, urging them to cast away the dry husk of technicalities and to go straight to the kernel of right and justice. Through his influence Arkansas has passed from the most technical State in the Union to the one where technicalities are least regarded. My father has told me that in the old days not one case in ten went off on its merits. Now it is hard to find in our reports a case that goes off in any other way. Perhaps only one of your honors ever had the pleasure of appearing in Judge Caldwell's court; but it is his great soul that guides your deliberations today.

When Judge Caldwell came among us married women had no rights. When a woman married her personal property went absolutely to her husband, who also acquired complete dominion over her real estate as long as he lived. The richest heiress after her marriage had not a penny that she could call her own, and the woman who worked had no claim to the earnings of her own labor. Judge Caldwell was instrumental in securing the passage of our admirable laws for the protection of married women, which are as liberal as any in the country.

He was a gallant gentleman, fond of the society of ladies, and entertained a high opinion of their intelligence and virtues. He was always a believer in their right to the ballot. While he lived with us there was no sentiment on that subject that he could foster; but one of the proudest moments of his life was that when in his home by the western sea he took Mrs. Caldwell by the hand, and exclaimed, "Come, my fellow citizen, let us go and vote," and led her to the polls.

When he went upon the bench the prime function of courts was to protect property rights. It was not realized that the ownership of property imposed duties. Personal rights were almost always subordinated to rights of property. Judge Caldwell stood firmly for personal rights as being supreme. At first he was looked upon as a disturber of the established order, and principles which are now universally accepted were considered revolutionary. But by the vigor of his arguments and the fundamental human justice of his positions, his opinions gradually won their way until they are now generally conceded to be the law.

Before his time our railroads were merely counters with which the predatory rich played their juggling game. Their stocks were nearly always issued without consideration to the takers of the bonds, who allowed the companies to contract enormous debts, which they then swept away by a foreclosure. The men who toiled in the construction of the railroad, or furnished the materials to build it, or who had been injured in its operation, were left unpaid, while the courts turned the property back unincumbered to the men who, if they had paid for their stock, as they should have done, would have held no bonds. This crying iniquity Judge Caldwell put an end to in the Eighth Circuit; and his views, which were at first deemed anarchical, have become statutory enactments in many of the states, and have received the sanction of the United States Supreme Court. And this reform, which saves to the honest people of the land millions of dollars every year, was only one of many efforts on his part to uphold the sacredness of personal rights. It would not be just to say that he supported the poor against the rich. It was not a question of poverty or riches. He was the champion of those personal rights that go to make a man free, independent and self-respecting as against the rights of property which the courts of old deemed alone worthy of consideration. The spirit of the old common law was manifest in its rule that a man might testify when the life of his son or his father or mother was at stake, for such merely human affections would not deter him from telling the truth; but if he was interested in the controversy to the extent of five cents he was incompetent, for no man could be expected to tell the truth against his financial interests. Against this mercenary aspect of the ancient law Judge Caldwell waged a long and singularly successful war. The predatory rich have by no means been put to

flight; but few have done so much as Judge Caldwell to loosen their grip upon our throats.

The Constitution of 1868 forbade the passage of any law limiting the rate of interest. The consequence was that the most atrocious usury was practiced. The people were so impoverished by the Civil War and so overwhelmed with debt that the few who had money could exact anything for its use. Four per cent a month was the customary rate. The usurers fattened like vultures upon the land. He who fell into their clutches soon saw that he must abandon all hope. The rapacious maw of usury devoured all their possessions. As long as the Constitution of 1868 was in force Judge Caldwell was powerless. But he was active in getting the usury provision inserted into our present Constitution. After its adoption usury still flourished for a time. Foreign corporations, representing the predatory rich, loaned large sums at ten per cent, exacting a brokerage fee of twenty per cent, attorney's fees and other items that left little for the borrower. Judge Caldwell prepared and put through our act allowing the debtor to bring suit to vacate usurious mortgages; and the sharks retreated with heavy loss.

In the old days a man could mortgage not only the crop of the current year, but all the crops that he might ever plant. The result was that when an unprincipled landlord or merchant got his tenant or customer to mortgage his crops, he had him in his power. He always managed to have something to carry over from year to year, and the unhappy debtor, having a mortgage upon his crop, could get no one else to supply him. Judge Caldwell justly denominated these mortgages. "Anaconda Mortgages," and aroused such a sentiment against them that the Legislature passed our act forbidding the mortgaging of any crop beyond those of the current year.

Before the adoption of the Constitution of 1868, there were only the most scanty exemptions allowed to insolvent debtors. We had advanced but a step beyond the stage of civilization when men were imprisoned for debt. Judge Caldwell was active in securing the liberal homestead and exemption privileges of the Constitution of that year, and the still more liberal provisions of the Constitution of 1874; and he always gave to these provisions a most liberal interpretation. It was his boast that no man's home had ever been stolen in his court.

He was always the bitter enemy of the demon Alcohol. He spoke and agitated against it when he was but a voice crying in the wilderness. His big heart went out to all in trouble; but for one class of offenders he had no mercy—the men engaged in the clandestine manufacture and sale of liquor, particularly when it was in prohibition territory. I wish that he might have lived to see prohibition universal in the State that he loved so well.

Under the common law the servant assumed all the risks of the business. No one could ever give any good reason why the consequence of industrial accidents should fall on the poor laborer, who had only his hands with which to support his wife and children, but such was the law. This law Judge Caldwell had to administer; but he relaxed its severity as far as possible; and the principles that he advocated are now being gradually enacted into employer's liability statutes, which secure to the injured employee a fair compensation, and remove the constant source of friction between master and servant, while protecting corporations against the outrageous verdicts that are now so common and eliminating the enormous fees of lawyers who prosecute damage suits on a contingent basis.

Judge Caldwell was admirable in his relations to the bar. They were all his friends. He was personally interested in them all, sharing their sorrows and their joys. He was companionable and easy of approach, a favorite guest at all their gatherings. He insisted always on the highest standards of professional conduct; and he was held in such reverence that the most reckless dared not be caught in an unprofessional act in his court.

In the trial of cases he was never passive. His powerful mind was always on the alert, seeking to get at the truth. He would ask questions; he would suggest the reformation of defective pleadings; he would enter actively into the investigation. Few witnesses who sought to prevaricate could withstand the shaking of his leonine head and the point blank questions which he propounded. Sometimes he would get aroused to the point where he would express himself to counsel with excessive warmth; but his great heart bore no malice, and when he descended from the bench it was with extended hand and a smile which none could resist.

I suppose that there was never a judge sitting at *nisi prius* who had so few jury trials in his court. Everyone was entitled to a jury in a case at law; but rarely was one demanded. This was partly because the litigants knew that they would get from Judge Caldwell the same substantial justice which they hoped for at a jury's hands, and partly because his personality was so dominating that the jury was merely the mouthpiece of his views.

Though Judge Caldwell's early opportunities were so limited he was far from being uncultivated. He was a constant reader, particularly of history and other matters cognate to his chosen profession; and he expressed himself with great vigor and admirable precision. His judicial opinions are as excellent in their style as in their substance.

He was essentially a big man, with a big body, a big brain and a big heart. He took a large view of all questions. The only non-penal statute that I ever knew him to construe strictly was our cut-throat

statute for calling in county warrants. To this he gave a very strict construction for the protection of the innocent creditors; and this court has had the wisdom to adopt it. He was often in advance of his times, but never behind them, and fortunately he lived to see the judgment of the world accept the views, which were deemed revolutionary when first expounded by him.

His love of justice amounted to a passion. I have often heard him say that the law was just, and that when injustice was done in its name, it was because those who administered it had not gone deep enough into its essence, but had followed some one rule too far; not realizing that in the infinite complexity of human affairs every rule of law is subject to modification by other rules equally obligatory.

There were many things that Judge Caldwell did for our upbuilding which I have not time to dwell upon. He truly loved the people of Arkansas, and when he retired from the bench he would gladly have returned to pass his closing years in our midst. It was unfortunate that he could not; for he would have been a great influence for good. But he could not stand our winters. Though born and reared in the North, he loved the sunlight. Our summers he never found too hot; but in winter he suffered always with colds and the grippe. This finally compelled his retirement from the bench, and led him to make his home in the perpetual sunshine of southern California. Here he purchased a house with a garden and orchard, and in cultivating his flowers and vegetables and tending his fruit trees he found renewed strength and health. He enjoyed the well earned leisure of his declining years in fullest measure. He made friends there; but his old friends from Arkansas always remained closest to his heart, and when one of them came to see him, it was an occasion of rejoicing. When, on March 26, 1914, the time arrived to celebrate the sixtieth anniversary of his marriage with the admirable woman whom he had chosen in his early youth and had loved through so many years, he made in his eighty-second year the long journey back to Little Rock, that the festival might take place in what had always remained his heart's true home. Here he received such an ovation as still further endeared Arkansas to his heart; and it was his wish and the wish of his family that his body should find its last resting place among the people whom he had loved so much and whom he had served so long, with such commanding ability and such devotion to duty. Arkansas will guard his body as one of her most precious possessions; and when the time comes to fill the vacant niches in this splendid Capitol with the statutes of the men who have served her well, let us hope that his will be among the first that will be erected.

In conclusion I must say that I feel that I owe more to Judge Caldwell than to any man except my father; and I should like to be able to lay upon his tomb an immortal wreath, or at least such a noble tribute as Judge Hemingway paid in this court to my father's memory.

Unhappily I have not the talent for the task; but his services to this State were so great that the bald enumeration that I have made of a part of them should suffice to keep his memory forever green in the hearts of our people.

At the conclusion of these remarks, the Chief Justice responded on behalf of the court.

II.

OPINIONS NOT REPORTED.

Milligan *v.* State; appeal from Independence Circuit Court; Ernest Neill, Special Judge; affirmed February 8, 1915; *per* Kirby, J.

Steward *v.* Hackler; appeal form Crawford Chancery Court; W. A. Falconer, Chancellor; affirmed February 8, 1915; *per* McCulloch, C. J.

Barnett *v.* Gentry; appeal from Hot Spring Circuit Court; W. H. Evans, Judge; affirmed February 8, 1915; *per* McCulloch, C. J.

Bishop-Babcock-Becker Co. *v.* Levinson; appeal from Pulaski Circuit Court, Second Division; Guy Fulk, Judge; reversed February 15, 1915; *per* Smith, J.

Bonner *v.* Campbell; appeal from Searcy Chancery Court; T. H. Humphreys, Chancellor; affirmed February 22, 1915; *per* Wood, J.

Slater *v.* Alford; appeal from Mississippi Circuit Court, Chickasawba District; J. F. Gautney, Judge; reversed February 22, 1915; *per* Wood, J.

Blue *v.* Blue; appeal from Cross Chancery Court; Edward D. Robertson, Chancellor; affirmed February 22, 1915; *per* McCulloch, C. J.

Givens *v.* Grimmett; appeal from Lafayette Circuit Court; Jacob M. Carter, Judge; affirmed March 1, 1915; *per* Wood, J.

American National Insurance Co. *v.* Schlosberg; appeal from Jefferson Chancery Court; John M. Elliott, Chancellor; reversed March 1, 1915; *per* Kirby, J.

Massey *v.* Southern Lumber Co.; appeal from Phillips Circuit Court; J. M. Jackson, Judge; affirmed March 8, 1915; *per* McCulloch, C. J.

Mullett *v.* Clarendon Electric Light and Ice Co.; appeal from Monroe Circuit Court; Eugene Lankford, Judge; reversed March 8, 1915; *per* Hart, J.

Cureton *v.* State; appeal from Pulaski Circuit Court, First Division; Robert J. Lea, Judge; affirmed March 8, 1915; *per* Smith, J.

St. Louis, I. M. & S. Ry. Co. *v.* Smith; appeal from Faulkner Circuit Court; Eugene Lankford, Judge; affirmed March 8, 1915; *per* Smith, J.

Morrison Milling Co. *v.* S. & S. Flour Mills Company; appeal from White Circuit Court; J. M. Jackson, Judge; reversed March 15, 1915; *per* Hart, J.

Arthur *v.* State; appeal from Miller Circuit Court; George R. Haynie, Judge; affirmed March 15, 1915; *per* Hart, J.

Byrd *v.* Byrd; appeal from Scott Chancery Court; W. A. Falconer, Chancellor; affirmed March 22, 1915; *per* McCulloch, C. J.

Frazier *v.* McHaney, Receiver; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; reversed March 22, 1915; *per* Wood, J.

St. Louis S. W. Ry. Co. *v.* Burnett; appeal from Prairie Circuit Court; Eugene Lankford, Judge; modified and affirmed March 22, 1915; *per* Wood, J.

McCollum *v.* Moore; appeal from Clay Chancery Court, Eastern District; Edward D. Robertson, Chancellor; affirmed March 22, 1915; *per* Wood, J.

Mulkey *v.* Britt, appeal from Mississippi Chancery Court; Charles D. Frierson, Chancellor; reversed March 22, 1915; *per* Kirby, J.

Jackson *v.* Smith; appeal from Mississippi Circuit Court, Osceola District; W. J. Driver, Judge; affirmed March 22, 1915; *per* Smith, J.

Gilmore *v.* State; appeal from Nevada Circuit Court; George R. Haynie, Judge; affirmed March 29, 1915; *per* Smith, J.

III.

CASES DISPOSED OF ON MOTION.

F. C. Lewis *v.* The State of Arkansas for the use of Luxora Special School District No. 2, *et al.;* appeal from Mississippi Circuit Court, Osceola District; W. J. Driver, Judge; appeal dismissed on appellee's motion February 15, 1915, for failure of appellant to lodge transcript in this court within the time allowed by law; *per curiam.*

L. Hall *et al. v.* Road District No. 2, Prairie County; Prairie Circuit Court, Northern District; Eugene Lankford, Judge; appeal dismissed for non-compliance with Rule 9, March 1, 1915; *per curiam.*

INDEX

ACKNOWLEDGMENTS:

falsity of certificate of, how proved. *Polk* v. *Brown*, 321.
presumption of truth of, sufficiency of evidence to overthrow. *Id.*

ADMINISTRATION:

right of widow to renounce under a will. *Jameson* v. *Jameson*, 142.

ADVERSE POSSESSION:

title may be acquired against the remainderman of an estate tail, when. *LeSieur* v. *Spikes*, 366.
right of grantor of two of several heirs of deceased to set up title by adverse possession as against other heirs. *Wilson* v. *Storthz*, 418.
on the issue of adverse possession, the burden is always on the party who asserts it. *Newman* v. *Peay*, 579.

AGENCY:

an undisclosed principal may sue on any contract, not under seal, made by his agent in his behalf. *Massachusetts Bonding & Insurance Company* v. *Higgins*, 372.

ANIMALS:

liability for injury to animal on account of leaving food in a dangerous place. *Buckeye Cotton Oil Mill* v. *Horton*, 1.

APPEAL:

apportionment of costs where a judgment improperly apportioning a reward is reversed. *Chambers* v. *Ogle*, 242.
a court can not enter an order granting an appeal *nunc pro tunc*, when no such order was in fact made by the court. *Chicago Mill & Lumber Co.* v. *Drainage Dist. No.* 15, 292.
who may prosecute an appeal to the Supreme Court. *Frazier* v. *McHaney, Receiver*, 394.
waiver of right of appeal by litigant by accepting benefits under a decree. *Mathis* v. *Litteral*, 481.

APPEAL—*Continued.*

right of second mortgagee who purchased the property at a foreclosure sale under the first mortgage, to appeal from that part of the decree declaring his mortgage to be the junior. *Id.*

on an appeal from the county to the circuit court, the cause is tried *de novo*, and the circuit court has the same discretion as the county court has in the same matter. *Carpenter* v. *Leatherman*, 531.

appeal from probate court; filing affidavit; how proved. *Huffman* v. *Sudbury*, 628.

APPEAL AND ERROR:

in prosecution for bigamy the error of permitting the introduction of an unauthenticated marriage certificate, held harmless, when. *McNeill* v. *State*, 8.

reversal for insufficiency of evidence. *Fidelity-Phenix Fire Insurance Co.* v. *Friedman*, 71.

effect of error on the face of the record. *The McCall Co.* v. *Smith*, 118.

questions of the sufficiency of the evidence or the correctness of an instruction, can only be presented by bill of exceptions properly filed. *McLaughlin* v. *State*, 154.

time for filing bill of exceptions; effect of clerical misprision. *Nelms* v. *State*, 188.

errors not set out in the motion for a new trial, will not be considered on appeal. *The Railways Ice Co.* v. *Howell*, 198.

oral testimony in a chancery case may be preserved, how. *Phillips* v. *Jokische*, 221.

a verdict supported by substantial evidence will not be set aside although it appears to be against the preponderance of the evidence introduced. *Surridge* v. *Ellis*, 223.

discretion of trial court in the matter of requiring the jury to make a special finding. *Id.*

where damages have been erroneously assessed, the error may be cured, how. *Id.*

a decree will be affirmed when the chancellor has reached the proper conclusion, although the reasoning of the lower court was at fault. *Dicken* v. *Simpson*, 304.

opinion of witness as to value of land overflowed, when erroneously admitted, is not prejudicial error, when. *Jonesboro, L. C. & E. Rd. Co.* v. *Ashabranner*, 317.

an order quashing the service of summons is not a final order from which an appeal will lie. *Harlow* v. *Mason*, 360.

practice where a motion to quash service is granted. *Id.*

APPEAL AND ERROR—*Continued.*

when the court sustains a demurrer to a complaint, the plaintiff may elect to amend his complaint, or to rest and permit final judgment to be rendered, dismissing the complaint, and then appeal. *Davis* v. *Receivers St. Louis & S. F. Rd. Co.*, 393.

there can be no appeal from an order of the court sustaining a demurrer when the court renders no final judgment. *Id.*

the order of a trial court sustaining a demurrer is not a final judgment, but is interlocutory merely. *Id.*

right of jury to arbitrarily disregard uncontradicted testimony. *St. Louis, I. M. & S. Ry. Co.* v. *Spillers*, 483.

where plaintiff has pled the statute of frauds, and duly saved exceptions to the overruling of an objection to the introduction of testimony tending to take the contract out of the operation of the statute, it will be held that the issue of the statute may be reviewed on appeal. *Storthz* v. *Watts*, 500.

where all instructions given, state the law as a harmonious whole, there is no error where each instruction fails to carry qualifications which are explained in others. *St. Louis, I. M. & S. Ry. Co.* v. *Blaylock*, 504.

appellant may not assume inconsistent positions in instructions requested without abandoning one of them. *Id.*

a party will be held to have waived the error in the court's ruling which he invited the court to make. *Id.*

an instruction erroneously given at the request of the appellee is not ground for reversal where a similar instruction was given at the request of the appellant. *Pine Bluff, Sheridan & S. Ry. Co.* v. *Leatherwood*, 524.

erroneous submission of issue of permanent injury in personal injury action held to be harmless, when. *Id.*

effect of request by both sides for a directed verdict. *Ozark Diamond Mines Corporation* v. *Townes and Garanflo*, 552.

duty to, and effect of failure to ask a correct instruction. *Newman* v. *Peay*, 579.

sufficiency of evidence, how brought in issue; same as to correctness of instructions. *McLaughlin* v. *State*, 154.

APPROPRIATIONS: See LEGISLATIVE APPROPRIATIONS.

ARCHITECTS:

where a building committee enters into a contract with an architect in excess of their authority, the architect can not recover on the contract, when. *Swearingen* v. *Bulger & Son*, 557.

ASSAULT WITH INTENT TO KILL:

proof of crime, where assault is made with a deadly weapon. *Allen* v. *State*, 432.
specific intent to kill, without malice. *Id.*
elements of crime of. *Id.*

ATTACHMENTS:

after goods are sold under an attachment and the funds are in the hands of the custodian to whom the court has ordered them paid, an interpleader is not entitled to a judgment against the plaintiff in the attachment suit for the value of the property. *Maloney, Receiver* v. *Jones-Wise Commission Co.*, 180.
interpleader in an attachment suit is entitled to what judgment. *Id.*
liability of surety on attachment bond. *Id.*

ATTORNEY AND CLIENT:

attorney can not be made a party to the litigation because of his right to fees and lien upon the proceeds of a judgment in his client's favor. *St. Louis, I. M. & S. Ry. Co.* v. *Blaylock*, 504.
attorney may not compel client to continue litigation. *Id.*
right of client to dismiss cause of action at will. *Id.*
right of attorney to fees where cause is settled out of court, or dismissed on the motion of the client. *Id.*

ATTORNEY'S FEES:

lien for. *St. Louis, I. M. & S. Ry. Co.* v. *Blaylock*, 504.
right to, where litigation is dismissed upon motion of client. *Id.*

BANKRUPTCY:

jurisdiction of bankrupt courts. *Maryman* v. *Dreyfus* 17.
jurisdiction to render personal judgment. *Id.*
right of creditor to proceed against bankrupt in the State court. *Id.*
legal effect of the allowance of a creditor's claim by the referee. *Id.*

BASTARDY:

mother as witness; corroboration; non-access of husband; presumption. *Kennedy* v. *State*, 113.
same, same. *Liles* v. *State*, ex rel *Johnson*, 408.

BENEFIT INSURANCE:

constitution and by-laws of fraternal order are part of a contract of insurance therewith. *Sovereign Camp Woodmen of the World* v. *Israel*, 121.

BENEFIT INSURANCE—*Continued.*

change of beneficiary. *Id.*
beneficiary has vested interests in a policy, when no provision is made for a change of beneficiary. *Knights of Pythias of North America, etc.*, v. *Long*, 136.
right of insured to change beneficiary, where, after he has taken out a policy the order provides that such a change may be made. *Id.*
irregularities in change of beneficiary, who may complain. *Id.*
who may be beneficiary, limitations upon. *Supreme Tribe of Ben Hur* v. *Gailey*, 145.
where a fraternal order seeks to avoid payment of a benefit policy on the ground that deceased had no heirs, the burden of proof is upon the order. *Id.*

BIGAMY:

in a prosecution for, the second marriage constitutes the *corpus delicti*, and must be proved, how. *McNeill* v. *State*, 8.
the first marriage proved, how. *Id.*
in a prosecution for, letters of husband are admissible, when. *McNeill* v. *State*, 8.

BILLS AND NOTES:

total failure of consideration is a good defense to a suit on a bill or note. *Ozark Diamond Mines Corporation* v. *Townes and Garanflo*, 552.
note given for purchase of stock, liability on, where stock depreciates in value. *Id.*

BILL OF EXCEPTIONS:

the transcript of the evidence taken by the court stenographer is available on appeal only when made a part of the bill of exceptions. *Mullett* v. *Morris*, 377.
duty of court stenographer to file with clerk a transcript of certain proceedings. *Id.*
litigating party may be required to pay stenographer for the preparation of a bill of exceptions, when. *Id.*
bill of exceptions signed by counsel under Act 218, p. 192, Public Acts of 1911, is binding upon whom. *State* v. *Smith & Longan*, 384.

BILLS OF LADING:

effect of endorsement and delivery of a bill of lading. *Maloney, Receiver* v. *Jones-Wise Commission Co.*, 180.
transfer of, effect, rights of transferee. *Id.*

BRIDGES:

right of drainage district to require county to pay for a bridge, the erection of which is made necessary by the construction of the ditch. *Western Clay Drainage District* v. *Clay County*, 334.

BURGLARY:

sufficiency of indictment charging the crime of. *Davis & Thomas v. State*, 296.
variance between indictment and proof as to name of person whose house was burglarized. *Id.*
sufficiency of evidence to convict. *Id.*

CARRIERS:

liability under Federal Employer's Liability Act for injury to employee. *St. Louis S. W. Ry. Co.* v. *Anderson*, 41.
hauling empty cars held to be interstate commerce, when. *Id.*
liability for damages to shipment of fruit for failure to furnish car properly iced. *St. Louis, I. M. & S. Ry. Co.* v. *Tilby*, 163.
measure of damage for same. *Id.*
injury to baggage; measure of damages. *Kimball* v. *Goldman*, 446.
a common carrier is an insurer of goods entrusted to it for carriage for all losses except those caused by *vis major*. *Jonesboro, L. C. & E. Rd. Co.* v. *Dunavant*, 451.
liability for injury to freight where negligence and *vis major* concur in producing the injury. *Id.*
liability for special damages for failure to make prompt delivery of freight. *Id.*
right of railroad to require passengers on trains to pay for both the part of the journey to be traversed, and that already traversed. *Chicago, R. I. & P. Ry. Co.* v. *Watkins*, 488.

CIRCUIT COURTS:

effect of trial of case in the second division of the circuit court for the second circuit where the cause was not especially assigned to that division by the act creating that division. *Merideth* v. *Matthews*, 442.

CITY ORDINANCES:

construction of ordinance relating to speed of certain horseless vehicles within the city limits; same held inapplicable to street railways. (Sec. 19 Campbell & Stevenson's Digest of the Ordinances of Little Rock). *Pankey* v. *Little Rock Ry. & Elec. Co.*, 337.

CLOUD ON TITLE:

equity will interpose to prevent the execution of a deed which it would cancel as a cloud if it were executed. *Maynard* v. *Henderson*, 24.

CONFESSIONS:

admissible in criminal action, when. *Rawlings* v. *State*, 539.

CONFLICT OF LAWS:

the alienation, transmission and descent of real estate is governed by the laws of the state in which the land is situated. *Tate* v. *Dinsmore*, 412.

sale of land in Arkansas under trust deed executed in California. *Id.*

inheritance is governed by the *lex rei sitae*. *Wilson* v. *Storthz*, 418.

CONSPIRACY:

effect of acquittal of one of two co-conspirators. *State* v. *Smith & Longan*, 384.

on the trial of two defendants on a charge of conspiracy both were acquitted; the State appealed; where the judgment in favor of one is affirmed, that in favor of the other must be affirmed also. *Id.*

CONSTITUTIONAL LAW:

laws relating to preservation of game and fish. *Jonesboro, L. C. & E. Rd. Co.* v. *Adams*, 54.

an act declaring a certain city to be a city of the second class held unconstitutional. *Cotten* v. *City of Benton*, 190.

validity of passage of constitutional amendment. *Hildreth* v. *Taylor*, 465.

declarations of presiding officers of the two houses of the General Assembly as affecting the validity of the passage of a constitutional amendment. *Id.*

amendment to the Constitution under the initiative; publication of notice; number of votes to adopt. *Id.*

majority vote under the initiative and referendum. *Id.*

CONTINUANCES:

discretion of court where continuance is asked on the ground that a material witness is absent. *Fidelity-Phenix Fire Insurance Co.* v *Friedman*, 71.

absence of counsel in pursuance of an agreement that a cause be continued; discretion of a trial court. *Pekin Cooperage Co.* v. *Doughton*, 410.

CONTRACTS:

where a contract provided for the forfeiture of the contract for the sale of the land, if the purchaser neglected to pay taxes, the contract will not be forfeited where the purchaser paid taxes before the second Monday in May of the year in which they were payable. *Oliver* v. *Scott*, 275.

payment of purchase money note by instruction to a bank officer; effect of failure of bank officer to make proper entries. *Id.*

sale of chattels; breach as to time; counterclaim. *Merideth* v. *Matthews*, 442.

lease of land, renewal by oral agreement. *Storthz* v. *Watts*, 500.

oral contract of lease, payment of rent, statute of frauds. *Id.*

breach of contract to purchase chattel; right of vendor to augment damages after breach. *Williams* v. *Moore*, 535.

breach of contract to purchase manufactured article. *Id.*

liability of infant for breach of promise of marriage. *Davie* v. *Padgett*, 544.

failure or want of consideration is a defense or a defense *pro tanto* in an action between the parties, but inadequacy of consideration does not in law constitute a defense. *Ozark Diamond Mines Corporation* v. *Townes and Garanflo*, 552.

consideration for sale of corporate stock held to fail, when. *Id.*

failure of consideration, total or partial, occurs when the consideration, good and sufficient, at the time the agreement is made, by some breach of contract, mistake or accident, has afterward failed. *Id.*

failure of consideration may be shown by parol. *Id.*

liability of church on contract of building committee in excess of the authority given. *Swearingen* v. *Bulger & Son*, 557.

personal liability of agent who makes a contract in excess of his authority; knowledge of the other contracting party. *Id.*

immoral consideration; sexual connection, promise of marriage. *Davie* v. *Padgett*, 544.

COST BOND:

who may act as surety on cost bond of non-resident plaintiff. *Kansas City S. Ry. Co.* v. *Miller*, 396.

COSTS:

where a judgment improperly apportioning a reward is reversed. *Chambers* v. *Ogle*, 242.

CRIMINAL LAW:

where there is a conviction of first degree murder and the jury was not properly instructed as to the lesser degrees of the crime,

CRIMINAL LAW—*Continued.*

where the evidence would warrant a conviction for a lesser crime, the judgment will be reversed. *King* v. *State*, 82.

criminal statutes will be strictly construed. *State* v. *Simmons*, 159.

admissibility of evidence of acts done by deceased immediately after he was shot; same as to statements. *Cantrell* v. *State*, 233.

admissibility of dying declaration. *Id.*

the admissibility of proof of a conspiracy to commit murder is a preliminary question to be passed upon by the court. *Id.*

duty of prisoner against whom a fine has been assessed to pay the same although he is subsequently released. *Wilson* v. *Chaney*, 287.

liability on note given to sheriff in payment of a fine. *Id.*

a conviction may be had upon circumstantial evidence only, when. *Davis & Thomas* v. *State*, 296.

admissibility of proof of the commission of other crimes. *Id.*

effect of variance between indictment and proof in a prosecution for the crime of burglary. *Id.*

elements of crime of assault with intent to kill. *Allen* v. *State*, 432.

arrest for commission of a crime done in the presence of an officer. *Id.*

necessity for warrant in order to arrest a person illegally selling liquor. *Id.*

uttering forged instrument; evidence sufficient to convict. *Rawlings* v. *State*, 539.

a confession, unless made in open court, will not warrant a conviction, unless accompanied by other proof that the offense charged was committed. *Id.*

CRIMINAL PROCEDURE:

consolidation for one trial of more than one charge against one defendant. *Silvie* v. *State*, 108.

effect of failure to prove the kind of money obtained in a prosecution for obtaining money under false pretenses; duty of court to instruct. *Id.*

sufficiency of indictment charging embezzlement. *Id.*

on the trial of two defendants on a charge of conspiracy, both were acquitted; the State appealed; where the judgment in favor of one was affirmed, that in favor of the other must be affirmed also. *State* v. *Smith & Longan*, 384.

where several indictments against one defendant are consolidated, it will be presumed that he consented to the same. *Drifoos* v. *State*, 491.

COUNTY WARRANTS:

may be called in for registration, when; effect of failure to bring in, when called. *Cole* v. *Schoonover*, 254.

DAMAGES:

a judgment for $600 will be reduced to $200 where the finger of an infant passenger on a railroad train was injured, but where the finger sustained no permanent injury, nor substantial disfigurement. *St. Louis S. W. Ry. Co.* v. *Wynnegar*, 47.

conversion of standing timber. *Bradley Lumber Co.* v. *Hamilton*, 127.

measure of damages in action against carrier for failure to furnish car properly iced for the shipment of perishable fruit. *St. Louis, I. M. & S. Ry. Co.* v. *Tilby*, 163.

in action for wrongful death due to negligence, an excessive verdict will be reduced. *The Railways Ice Co.* v. *Howell*, 198.

physical discomfort suffered in waiting for a train, growing out of defendant telegraph company's failure to promptly transmit a message, is not an element of damage. *Western Union Telegraph Co.* v. *Holder*, 210.

elements and measure of, for overflow of land. *Surridge* v. *Ellis*, 223.

where damages have been erroneously assessed, the error may be cured, how. *Id.*

proof of value of land; evidence of an offer to purchase. *Jonesboro, L. C. & E. Rd. Co.* v. *Ashabranner*, 317.

breach of contract to purchase chattels, measure of damage. *Merideth* v. *Matthews*, 442.

damages to baggage, measure of. *Kimball* v. *Goldman*, 446.

erroneous submission of issues of permanent injury in personal injury action held to be harmless error, when. *Pine Bluff, S. & S. Ry. Co.* v. *Leatherwood*, 524.

DEBT:

a debtor paying money to his creditor has the right to direct the application of his money to such items or demands as he may choose. *Harrison* v. *First National Bank of Huntsville*, 260.

a previous application of funds to the payment of certain debts, may be changed by agreement between the debtor and creditor. *Id.*

payment of note as discharge of surety thereon; right to change payment. *Id.*

DEEDS OF TRUST: See MORTGAGES.

held to be a mortgage in legal effect. *Tate* v. *Dinsmore*, 412.

foreclosure, appraisement, sale and redemption under. *Id.*

DEEDS:

jurisdiction of equity to enjoin the execution of a deed. *Maynard* v. *Henderson*, 24.
effect of a grant to "M. and to her natural heirs." Same held to create an estate tail. *Id.*
description of land, "fractional" defined. *Graysonia-Nashville Lumber Co.* v. *Wright*, 151.
a deed will be construed as a mortgage when. *Dicken* v. *Simpson*, 304.
contracts will be construed in equity as mortgages rather than as sales, when. *Id.*
when a deed and contract are drawn contemporaneously, they will be construed as constituting a mortgage, when. *Id.*
presumption of validity of an acknowledgment to a deed, how overcome. *Polk* v. *Brown*, 321.
one entering upon the possession of land under a deed of conveyance to him, is presumed to occupy and intend to claim only the interest named in the conveyance. *Wilson* v. *Storthz*, 418.
presumption where a deed fails to recite the interest intended to be conveyed. *Id.*
effect of deed of two of several co-tenants. *Id.*

DEFINITIONS:

equitable waste defined. *O'Kane* v. *O'Kane*, 33.
"modification" defined as used in by-laws of fraternal insurance order. *Knights of Pythias of North America, etc.* v. *Long*, 136.
description of land, "fractional" defined. *Graysonia-Nashville Lumber Co.* v. *Wright*, 151.

DESCENT AND DISTRIBUTION:

right of widow to renounce under a will. *Jameson* v. *Jameson*, 142.
inheritance is governed by the *lex rei sitae*. *Wilson* v. *Storthz*, 418.
illegitimate children may inherit, when and how. *Wilson* v. *Storthz*, 418.

DRAINAGE DISTRICTS:

right of petitioners to appeal from an unfavorable order of the county court relative to the formation of. *Collins* v. *Stewart*, 4.
boundaries of may be extended, when. *Mudd* v. *St. Francis Drainage District*, 30.
validity of assessment not subject to collateral attack. *Id.*
validity of assessment upon benefits. *Id.*
right of appeal from order of county court organizing a drainage district is lost, when. *Chicago Mill & Lumber Co.* v. *Drainage District No.* 15, 292.

DRAINAGE DISTRICTS—*Continued.*

right of drainage district to require the county to pay for a bridge, the erection of which was made necessary by the construction of the ditch. *Western Clay Drainage District* v. *Clay County*, 334.

ELECTION OF REMEDIES: See REMEDIES; see also SALES.

ELECTIONS:

electioneering near polling place, statute prohibiting applies only to general elections. *State* v. *Simmons*, 159.

application of general election laws to primaries. *Id.*

EMBEZZLEMENT:

sufficiency of indictment charging crime of. *Silvie* v. *State*, 108.
allegation of ownership. *Id.*
nature of proof required of the State. *Id.*

EQUITABLE WASTE:

defined in *O'Kane* v. *O'Kane*, 33.
right of life tenant to cut ornamental trees. *Id.*

EQUITY JURISDICTION:

continuing jurisdiction of equity in a matter of divorce as to the custody of a child. *Andrews* v. *Andrews*, 90.

ESTATE TAIL:

grant to M. and to her natural heirs; the estate thereby created passes, how; interest of M's husband. *Maynard* v. *Henderson*, 24.

a conveyance to "A. and the legal heirs of her body" held to create an estate for life with remainder in fee to the heirs of the grantor's body living at the time of her death. *LeSieur* v. *Spikes*, 366.

death of grantee of estate tail without issue living. *Id.*

right of grantor to defeat the estate of remaindermen, where he has granted an estate tail. *Id.*

life tenant may grant away what estate. *Id.*

the statute of limitations runs against the remainderman of an estate tail, when. *Id.*

adverse possession. *Id.*

ESTOPPEL:

effect of acquiescence of citizens in the taking over of a light and water plant by the municipality. *Town of Augusta* v. *Smith*, 93.

nature and extent of such an estoppel. *Id.*

EVIDENCE:

proof of hand-writing, who is competent to identify the hand-writing of another. *McNeill* v. *State*, 8.

in a prosecution for bigamy, letters written by the defendant to his wife are admissible, when. *Id.*

where validity of the first marriage in a bigamy prosecution is in issue, the letters of the husband to the wife are admissible. *Id.*

in homicide prosecution evidence of exclamations of deceased admissible as part of *res gestae*. *Stevens* v. *State*, 64.

nature of exclamations when admitted as part of *res gestae*, is question for the jury. *Id.*

right of husband to testify as agent of wife. *Fidelity-Phenix Fire Insurance Co.* v. *Friedman*, 71.

charge for service by public service corporation, admissibility of evidence of previous charges. *Donnell* v. *Brockman*, 132.

in a homicide case evidence of acts and of dying declarations of the deceased are admissible, when. *Cantrell* v. *State*, 233.

the admissibility of proof of a conspiracy to commit murder is a preliminary question to be passed upon by the court. *Id.*

uncontradicted evidence; right of jury to disregard. *St. Louis, I. M. & S. Ry. Co.* v. *Belcher*, 638.

motive may be proved by evidence of other crimes, when. *Davis & Thomas* v. *State*, 296.

admissibility of evidence which tends to prove the commission of a crime other than that laid in the indictment. *Id.*

a conviction may be had upon circumstantial evidence only, when. *Id.*

damage to land by overflow; opinion of owner. *Jonesboro, L. C. & E. Rd. Co.* v. *Ashabranner*, 317.

privileged communications to a physician. *Kansas City S. Ry. Co.* v. *Miller*, 396.

privilege is not waived, when. *Id.*

in personal injury action admissibility of testimony of person as to conditions, where he observed the same under substantially the same conditions as those existing when plaintiff was injured. *St. Louis, I. M. & S. Ry. Co.* v. *Kimbrell*, 457.

testimony relating to an accident in a personal injury action, will not be regarded as uncontradicted, when. *Id.*

EVIDENCE—*Continued.*

rules of corporation, admissibility of evidence of interpretation thereof, by employee. *St. Louis, I. M. & S. Ry. Co.* v. *Blaylock*, 504.

the maker of a note may show as against the payee, or other person standing in the same situation, that the consideration has failed. *Ozark Diamond Mines Corporation* v. *Townes and Garanflo*, 552.

EXEMPTIONS: See REMEDIES.

right to schedule in action for breach of contract where the seller elected to sue, instead of bringing replevin. *Bowser Furniture Co.* v. *Johnstn*, 496.

FACTORS AND BROKERS:

lien of factor on goods of his principal. *Maloney, Receiver* v. *Jones-Wise Commission Co.*, 180.

FEDERAL EMPLOYER'S LIABILITY ACT: See NEGLIGENCE; INTERSTATE COMMERCE; CARRIERS.

FINES:

duty of sheriff to collect. *Wilson* v. *Chaney*, 287.
effect of release on duty to pay. *Id.*
liability on note given in payment of. *Id.*

FIRE INSURANCE:

meeting of adjusters held to constitute notice of fire loss. *Fidelity-Phenix Fire Insurance Co.* v. *Friedman*, 71.
binding effect of statements in proof of loss. *Id.*
where insured held policies in several companies judgment may be rendered, how. *Id.*
attorney's fees in action to collect on a policy for fire insurance will not be allowed when the amount recovered is less than the amount sued for. *Id.*

FORGERY:

uttering forged instrument, evidence sufficient to convict. *Rawlings* v. *State*, 539.

GAME AND FISH:

interstate shipment of game under the Federal Act. *Jonesboro, L. C. & E. Rd. Co.* v. *Adams*, 54.

FORGERY—*Continued.*

shipment of game from Arkansas into Illinois; duty of carrier to protect the consignment from seizure in Illinois. *Id.*
right of State to preserve, what laws to that effect may be enacted. *Id.*
power of Legislature to make laws applicable to one portion of the State and not to another. *Id.*
basis of legislative right to pass laws regulating the sale of and preservation of game and fish. *Id.*
Act 397, page 1131, Acts 1909, providing for the shipment of game out of certain territory in Mississippi County held void. *Id.*
rights of nonresident land owner to hunt and fish in this State. *State* v. *Stokes*, 192.
effect of grant to nonresident of right to hunt and fish on certain land. *Id.*

GUARANTY AND SURETYSHIP: See SURETYSHIP.

HOMICIDE:

distinction between first and second degree murder; first and second degree murder defined. *King* v. *State*, 82.
duty of court to instruct as to single degree of homicide. *Id.*
duty of court to instruct as to all degrees of homicide. *Id.*
where there has been a confession all the evidence connected therewith is admissible. *Id.*
adequacy of the instructions in a homicide case. *Cantrell* v. *State*, 233.

HOMESTEAD:

creditors may not complain against the conveyance by the owner of his homestead. *Baker* v. *Hudson*, 492.
effect of failure to assert right of; right thereafter to assert same in subsequent proceedings. *Id.*

IMPROVEMENT DISTRICTS:

act creating, which authorizes assessments upon benefits and not upon the value of the property, held constitutional. *Mudd* v. *St. Francis Drainage District*, 30.
boundaries of may be extended, how. *Id.*
validity of assessment can not be attacked collaterally. *Id.*
control of by municipal corporation. *Town of Augusta* v. *Smith*, 93.

INDICTMENT:

forgery; variance between indictment and proof. *Rawlings* v. *State*, 539.

INFANTS:

defendant may waive incapacity of infant to bring suit in his own name. *Davie* v. *Padgett*, 544.
objection to incapacity to sue may be waived, how. *Id.*
a judgment in a suit brought in the name of an infant is not void, when the defect constitutes error which calls for reversal only when taken advantage of in apt time. *Id.*
judgment against infant, effect of failure to have guardian appointed. *Id.*
the contract of an infant is not absolutely void, but is only voidable at the instance of the infant himself. *Id.*

INITIATIVE AND REFERENDUM:

what matters legislated upon by a city council may be referred. *Hodges, Secretary of State*, v. *Board of Improvement of Waterworks Improvement District No. 22 of Texarkana*, 266.
validity of passage of constitutional amendment under the initiative and referendum. *Hildreth* v. *Taylor*, 465.
the Governor is without power to veto an initiative measure. *Id.*
majority vote, necessity for. *Id.*

INSTRUCTIONS:

duty to, and effect of failure to ask a correct instruction. *Newman* v *Peay*, 579.

INSURANCE: See BENEFIT INSURANCE.

effect of retention of policy; express refusal to accept in any form. *Gray* v. *Blackwood*, 100.

INTERSTATE COMMERCE:

carrier held to be engaged in, when. *St. Louis S. W. Ry. Co.* v. *Anderson*, 41.
hauling empty cars from one State to another is interstate commerce, when. *Id.*

JUDGMENTS:

a judgment by confession or consent can not be appealed from. *The McCall Co.* v. *Smith*, 118.
a judgment will be treated as rendered on confession or consent, when. *Id.*

LANDLORD AND TENANT:

duty of landlord under a lease to deliver manual possession to a tenant. *Little* v. *Hudgins*, 272.
duty of tenant to take possession and pay rent from the beginning of the term. *Id.*

LEASES:

reservation of right to cancel upon the happening of certain events stipulated in the lease; subsequent legislation. *Wertheimer* v. *Citizens Bank Building*, 50.
oral contract of renewal is not within the statute of frauds, when; substantial part performance of the terms of renewal contract. *Storthz* v. *Watts*, 500.

LEGISLATIVE APPROPRIATIONS:

can not be made except for necessary expenses of government except by two-thirds majority in each house. *Belote* v. *Coffman*, 352.
creation and maintenance of departments of government. *Id.*
appropriation for exhibition of State's resources at a National exposition. *Id.*

LEGITIMACY: See BASTARDY.

presumption, wedlock. *Kennedy* v. *State*, 113.

LEGISLATURE:

all laws of the State must be passed by bill and a concurrent resolution of both houses of the General Assembly can not be used to enact a law. *Dickinson, State Auditor* v. *Johnson*, 582.
contingent expenses of legislative committee appointed to serve after adjournment of session. *Id.*

LIMITATIONS:

the statute runs against the remainderman of an estate tail, when. *LeSieur* v. *Spikes*, 366.

LIQUOR:

right of officer to arrest for crime of illegally selling whiskey; necessity for warrant. *Allen* v. *State*, 432.
arrest where crime is committed in the presence of an officer; what will be construed as the presence of an officer. *Id.*

LOCAL IMPROVEMENT:

control of by municipal corporation. *Town of Augusta* v. *Smith*, 93.
control of property acquired by local assessment. *Id.*
acquiescence of citizens in the act of a municipal corporation in the purchase of a light and water plant, treated as an estoppel, when. *Id.*

MASTER AND SERVANT:

liability for unauthorized tortious act of servant. *St. Louis, I. M. & S. Ry. Co.* v. *Robinson*, 37.
liability of railroad for negligent act of its call boy while riding a bicycle in the course of his employment. *Id.*
liability of master for injury to servant under the Federal Employer's Liability Act, and under the Safety Appliance Act; effect of contributory negligence on the same. *St. Louis S. W. Ry. Co.* v. *Anderson*, 41.
duty of master to furnish his servant with a safe place in which to work; test of the degree of care required of the master. *Railways Ice Co.* v. *Howell*, 198.
duty of one employee to warn another of danger. *Id.*
liability of master for injury to employee from one of two concurrent causes. *Id.*
appointment and authority of a foreman is a question for the jury, when. *Id.*
a servant is not bound by the rules of the master which are not brought to his attention. *Kansas City S. Ry. Co.* v. *Miller*, 396.
injury of servant while in the act of violating a rule of the master. *St. Louis, I. M. & S. Ry. Co.* v. *Blaylock*, 504.
abrogation of rule by master, where continual violations thereof are permitted. *Id.*
violation of rule by servant as constituting contributory negligence. *Id.*
interpretation of rules of master by employee. *Id.*
ambiguous rule of master, will be construed, how. *Id.*
duty of servant to inspect appliances for defects; injury to locomotive fireman by bursting hose pipe. *Pine Bluff, S. & S. Ry. C.* v. *Leatherwood*, 524.

MECHANIC'S LIENS:

a contract to construct a house carries with it the obligation to deliver the house free from liens. *Massachusetts Bonding & Insurance Co.* v. *Higgins*, 372.
liability of surety on bond of building contractor to discharge mechanic's liens. *Id.*
work done on leased premises at lessee's request. *Langston* v. *Matthews*, 626.

MINES AND MINERALS:

lease of mine; rights of lessor; fraud. *Mauney* v. *Miller*, 633.

MORTGAGES:

a deed will be construed as a mortgage, when. *Dicken* v. *Simpson*, 304.
collection of rents by mortgagee in possession. *Id.*
appraisement and sale of mortgaged property. *Tate* v. *Dinsmore*, 412.
deed of trust held to be a mortgage in legal effect. *Id.*
right of redemption after sale. *Id.*
tender of amount required to redeem it in one year from date of sale. *Id.*
foreclosure of mortgage covering Arkansas land and executed in California. *Id.*
who may redeem. *Id.*
right of second mortgagee to appeal from a decree declaring his mortgage to be junior to that of a first mortgagee, where he purchased the property at a sale under a foreclosure of the first mortgage. *Mathis* v. *Litteral*, 481.

MUNICIPAL CORPORATIONS:

control of local improvement district by city council. *Town of Augusta* v. *Smith*, 93.
estoppel of citizens of, by acts. *Id.*
purchase of light and water plant; estoppel of citizens to object. *Id.*
a special act declaring a certain city to be a city of the second class held unconstitutional in *Cotten* v. *City of Benton*, 190.
right of one water improvement district which supplies a portion of a city with water, to sell water to a second district which supplies water to other portions of the same city. *Armour* v. *City of Fort Smith*, 214.
a citizen and user of water in a city may maintain an action to compel a water company to comply with its contract with the city. *Walton* v. *Proutt, Receiver*, 388.

NEGLIGENCE:

injury to animal; leaving food that will attract animal to place of danger. *Buckeye Cotton Oil Co.* v. *Horton*, 1.
contributory negligence operates in diminution of damages in action under Federal Employer's Liability Act. *St. Louis S. W. Ry. Co.* v. *Anderson*, 41.
violation of Safety Appliance Act, injury to employee, effect of contributory negligence. *Id.*

NEGLIGENCE—*Continued.*

where injury is due to defective appliances, question of contributory negligence is for the jury, when. *Id.*
injury resulting from operation of train, statutory presumption of negligence on the part of railway company. *St. Louis, I. M. & S. Ry. Co.* v. *Blaylock*, 504.

NEW TRIAL:

lack of diligence in discovering evidence. *Fidelity-Phenix Fire Ins. Co.* v. *Friedman*, 71.

OBTAINING MONEY UNDER FALSE PRETENSES:

sufficiency of indictment charging. *Silvie* v. *State*, 108.
necessary proof. *Id.*

OVERFLOW OF LAND:

elements of damage. *Surridge* v. *Ellis*, 223.
measure of damages. *Id.*
proof of damages from overflow. *Jonesboro, L. C. & E. Rd. Co.* v. *Ashabranner*, 317.

PARENT AND CHILD:

custody of child; right of father. *Andrews* v. *Andrews*, 90.
custody of child of divorced parents. *Id.*

PARTNERSHIP:

liability of a retiring partner; no duty to give notice of his retirement. *Raywinkle* v. *The Southern Coal Co.*, 283.
the probate court has no authority to adjust accounts between a decedent and his surviving partner. *Luke* v. *Rhodes*, 600.
right to settlement of partnership accounts, barred by three year statute of limitation, when. *Id.*

PLEADING AND PRACTICE:

an order quashing service of summons is not a final order from which an appeal will lie, when. *Harlow* v. *Mason*, 360.
practice where a motion to quash service is granted. *Id.*
the transcript of the evidence taken by the court's stenographer is available on appeal only when made a part of the bill of exceptions. *Mullett* v. *Morris*, 377.
duty of court stenographer with reference to filing a bill of exceptions. *Id.*

PRINCIPAL AND AGENT:

duty of one who deals with an agent to ascertain the extent of his authority. *Hadley Milling Company* v. *Kelley*, 173.

liability of principal for acts of agent done within the apparent scope of his authority. *Id.*

authority to sell does not imply authority to collect the purchase price, when, *Id.*

authority to an agent to collect does not include authority to collect in anything except current funds. *Id.*

acceptance of commercial paper in satisfaction of a debt due a principal. *Id.*

personal liability of agent who exceeds his authority, where the party with whom he deals has knowledge of the facts. *Swearingen* v. *Bulger & Son*, 557.

PUBLIC SERVICE CORPORATIONS:

electricity; minimum charge to the public; readiness of company to serve. *Donnell* v. *Brockman*, 132.

RAILROADS:

injury to infant passenger in custody of parents by letting seat fall on its finger. *St. Louis S. W. Ry. Co.* v. *Wynnegar*, 47.

liability for act of conductor in ejecting passenger from train. *Hager* v. *St. Louis, I. M. & S. Ry. Co.*, 311.

injury to passenger entering train by negligently moving same. *St. Louis, I. M. & S. Ry. Co.* v. *Williams*, 329.

speed of train as determining issue of negligence. *St. Louis, I. M. & S. Ry. Co.* v. *Kimbrell*, 457.

duty of traveler at railroad crossing. *Id.*

right of jury in an action against a railroad company for personal injuries, to arbitrarily disregard the uncontradicted testimony of the railway's employees. *St. Louis, I. M. & S. Ry. Co.* v. *Spillers*, 483.

injury to trespasser on track, where proper lookout has been maintained. *Id.*

right of railroad to require passenger on train to pay both for parts of journey already traversed and to be traversed. *Chicago, R. I. & P. Ry. Co.* v. *Watkins*, 488.

after passenger has been lawfully ejected for failure to pay fare, he may not again become a passenger on the same train without paying what is due. *Id.*

injury to employee by operation of train; statutory presumption of negligence. *St. Louis, I. M. & S. Ry. Co.* v. *Blaylock*, 504.

interpretation of rules by employee. *Id.*

injury from violation of rule, liability of railroad company. *Id.*

personal injuries; uncontradicted testimony. *St. Louis, I. M. & S. Ry. Co.* v. *Belcher*, 638.

REAL ESTATE BROKERS:

right of to commission matures, when. *Moore* v. *Moss*, 593.

RAPE:

sufficiency of indictment and evidence. *McLaughlin* v. *State*, 154.

RELEASE:

where a release from liability is in writing it is the duty of the court to construe the same. *Pine Bluff, S. & S. Ry. Co.* v. *Leatherwood*, 524.

plaintiff is bound by an unambiguous release, where there was no fraud in its procurement. *Id.*

construction of a written release should not be left to the jury. *Id.*

REPLEVIN:

exemptions can not be schedules in an action in replevin under Kirby's Digest, § 6868. *Bowser Furniture Co.* v. *Johnson*, 496.

breach of contract of sale of chattel with reservation of title, right or seller to bring replevin. *Id.*

REMEDIES:

election of. *Bowser Furniture Co.* v. *Johnson*, 496.

where appellant has the alternate remedy to bring replevin, or affirm a sale and recover a money judgment, and he elects the latter remedy, the appellee will be permitted to schedule his exemptions. *Id.*

REMOVAL OF CAUSES:

right of State court to refuse to transfer. *Kansas City S. Ry. Co.* v. *Miller*, 396.

right of defendant railway to remove cause of action brought by employee for an injury received while disconnecting a steam line on an interstate train. *Id.*

REVENUE:

right of Legislature to provide for the collection of back taxes, which for any reason, have not been paid. *State, ex rel Moose, Attorney General* v. *Kansas City & M. R. & B. Co.*, 606.

REWARDS:

for the arrest and conviction of the criminal. *Chambers* v. *Ogle*, 242.

right of an officer who is acting in the discharge of his duties to collect a reward. *Id.*

REWARDS—*Continued.*

arrest by an officer outside of the State. *Id.*
right of person who merely gives information as to a criminal's identity without entering into the enterprise, to claim reward. *Id.*
where several persons join in capturing a criminal they will be held to be acting in a joint enterprise and entitled to share in the reward. *Id.*
right to refund of expenses out of reward offered. *Id.*
costs where a judgment improperly apportioning a reward is reversed. *Id.*

SALES:

time of delivery in contract to purchase chattels. *Merideth* v. *Matthews*, 442.
in action for breach of contract of sale, right of purchaser to set up seller's failure to deliver the goods on time, by way of counterclaim. *Id.*
breach of contract to purchase, measure of damages. *Id.*
where property is sold with reservation of title the vendor may elect between his remedies, either to bring replevin, or to affirm the contract and sue for the purchase money. *Bowser Furniture Co.* v. *Johnson*, 496.
breach of contract to purchase manufactured article. *Williams* v. *Moore*, 535.
breach of contract to purchase chattel; right of vendor to augment damages after breach. *Id.*

SCHOOL DISTRICTS:

the county court has a discretion in carving a new school district out of an old district, when. *Carpenter* v. *Leatherman*, 531.

SHERIFFS:

duty to collect a fine assessed against a prisoner. *Wilson* v. *Chaney*, 287.
duty to collect unpaid fines imposed during the incumbency of his predecessor in office. *Id.*

STATE GOVERNMENT:

State laws must be passed by bill and not by concurrent resolution of both houses of the Legislature. *Dickinson, State Auditor* v. *Johnson*, 582.
the investigation into the management of the various institutions of the State and the departments of the State government, is a legitimate function of the Legislature. *Id.*

STATE GOVERNMENT—*Continued.*

a legislative committee to investigate State institutions after the adjournment of the session, may be constituted only by a bill enacting a law to that effect. *Id.*

power of Legislature to continue committees after adjournment of the session, appointed before adjournment, by concurrent resolution. *Id.*

under the Constitution the expenses of a committee appointed by the Legislature to make certain investigations, can be paid only after the passage of a bill making the specified appropriation. *Id.*

STATUTE OF FRAUDS:

oral contract for renewal of lease is not within, when. *Storthz* v. *Watts*, 500.

STATUTES:

borrowed construction. *Hildreth* v. *Taylor*, 465.

construction of constitutional amendment which is almost literally taken from a similar amendment in another State. *Id.*

will be construed as having a prospective operation only, except when the intention of the Legislature is clearly expressed to the contrary. *State, ex rel Moose, Attorney General* v. *Kansas City & M. R. & B. Co.*, 606.

construction of amending statutes. *Id.*

STATUTES CITED:

KIRBY'S DIGEST:

Chap. 15, p. 295 186
29 327
57 161
§ § 3, 72 and 74 143
492 ..... 115, 409
553-560 337
735 ..... 29, 370
959-964 404
1091 290
1175 255
1177 255
1188 362
1329-36 383
1414 to 1450 5
1428 295
1487 ..... 5, 295

KIRBY'S DIGEST—*Continued.*

1493 6
1588 439
1844 112
2125 441
2229-33 542
2385 543
2638 429
2684 34
2699, 2711 144
2706 144
2711-12 144
2823 160
3093 632
3095 80
3098 405
3599 193
3601 193
3618-20 58

STATUTES CITED—*Continued.*

KIRBY'S DIGEST—*Continued.*

4457 514
4458, 4462 513
4536 76
4924 469
5056 371
5416-18 416
5420 417
5675 .....95, 215
6021 547
6093-96 547
6208 638
6228 395

KIRBY'S DIGEST—*Continued.*

6591 489
6620 393
6773 517
6868 499
5803 144
7083-87 282
7095 295
7191-3 290
7204-13 607
7543-4 533

MANSFIELD'S DIGEST:

§ 5181 499

OTHER ACTS:

Acts 1866-67, No. 35 431
1873, Act April 20 (adding additional territory to Little Rock) 191
1877, Act March 9 (defining boundaries of Little Rock) .. 191
1887, Act April 8, § 2 533
p. 33 607
1905, St. Francis Dr. Act (amended 1909 and 1911) 31
Act May 11 77
1907, Act No. 368 334
1909, (ratifying Augusta L. & W. Plant) 95
Act 279 295
Act 293 513
Act 397, p. 1131 58
1911, Public Acts, p. 582 468
Act 415, p. 361 282
Act May 30, 1911, p. 324 607
Act 138, § 6 445
1913, Act 59, p. 180 53
p. 724 608
Act 13 216
Act 135, p. 563 271

ACTS OF CONGRESS:

Revised Statutes U. S., § 906 10
Employer's Liability Act, April 26, 1908, Fed. Stat. Ann. 1909, Sup., p. 584 42
Acts of Congress May 25, 1900 (Lacey Act) 56
Bankruptcy Act of 1867 23
Bankruptcy Act of 1898, p. 20 20

STATUTES CITED—*Continued.*

CONSTITUTION OF ARKANSAS OF 1874:

Art. 2, § 18 59
5, 19, 21, 22 588
5, 23 589
5, 29 592
5, 30 359
5, 31 355
6, 16 587
7, 28 337
7, 33 6
10, ... 359
11, ... 358
16, 5 615
19, 22 473
19, 27 272
Amendment No. 10 ..... 271, 472
Amendment No. 14 467

CONSTITUTION OF U. S.:
Amendment No. 14 615

ACTS OF OTHER STATES:
Kansas, Laws of 1897, Chap. 11 591
Tennessee, Shannon's Comp. Laws, § 4163 429
Illinois, Laws of 1911, p. 462 315
Missouri, Rev. Statutes, § 9782 252

ORDINANCES OF LITTLE ROCK, ARK.:
Campbell & Stevenson's Digest, § 914 343

STENOGRAPHER (COURT): See BILL OF EXCEPTIONS. See also PLEADING AND PRACTICE.

STREET RAILWAYS:

duty to ring gong upon approaching street crossings. *Pankey* v. *Little Rock Ry. & Elec. Co.*, 337.
duty to ring gong at point where streets join, as well as at public crossings. *Id.*
injury to person at street crossing, negligence, duty of jury to determine the relation between the injury and the defendant's failure to comply with a city ordinance. *Id.*
reciprocal duties and rights of all persons using the public streets. *Id.*
duty of motorman to keep car under control in order to avoid injuring persons on the streets, *Id.*

STREET RAILWAYS—*Continued.*

duty to sound alarm. *Id.*

presumption where person injured by being struck by a street car, was driving on the left side of the street. *Id.*

injury to person on track, issue of contributory negligence for the jury, when. *Id.*

SURETYSHIP:

liability of surety on an attachment bond. *Maloney, Receiver* v. *Jones-Wise Commission Co.*, 180.

the rule of *strictissimi juris* is not applicable to the contracts of surety companies which are engaged in business for profit. *Massachusetts Bonding and Insurance Co.* v. *Higgins*, 372.

rights and liabilities of surety companies are governed by the laws of insurance. *Id.*

a surety contract is enforceable although made for the benefit of an undisclosed principal. *Id.*

contract of suretyship on a building contract, held to cover unsatisfied mechanic's lien. *Id.*

liens on a building are covered by the contractor's surety bond, when. *Id.*

TELEGRAPH COMPANIES:

liability for mental anguish, for failure to deliver interstate message. *Western Union Telegraph Co.* v. *Simpson*, 156.

recovery for mental anguish growing out of failure to deliver interstate message. *Western Union Telegraph Co.* v. *Holder*, 210.

right of telegraph company to classify messages and charge different rates therefor. *Id.*

physical discomfort suffered in waiting for a train, growing out of defendant's failure to promptly transmit a message, is not an element of damage. *Id.*

TAXATION:

collection of back taxes due by a corporation. *State, ex rel Moose, Attorney General* v. *Kansas City & M. R. & B. Co.*, 606.

construction of statutes giving a remedy for the collection of back taxes. *Id.*

collection of back taxes where former assessment was erroneous. *Id.*

right of Legislature to provide for correcting the acts of assessing boards and officers, for fraud or errors of judgment. *Id.*

collection of back taxes where property has escaped taxation altogether. *Id.*

TAX DEEDS:

insufficiency of description. *Graysonia-Nashville Lumber Co.* v. *Wright*, 151.

TELEPHONE COMPANIES:

failure to furnish service; issue of company's good faith or willfulness. *Hill* v. *Southwestern Tel. & Tel. Co.*, 104.

TIMBER:

damages for conversion of standing timber. *Bradley Lumber Co.* v. *Hamilton*, 127.
value of standing timber when converted, how arrived at. *Id.*
conversion of standing timber, damages and interest. *Id.*

TRESPASS:

necessity for title or possession to support an action. *Graysonia-Nashville Lumber Co.* v. *Wright*, 151.

TRIAL:

challenges of jurors where two causes of action are consolidated for purposes of trial. *Fidelity-Phenix Fire Insurance Co.* v. *Friedman*, 71.
effect of both asking instructed verdict only. *Supreme Tribe of Ben Hur* v. *Gailey*, 145.
jury will not be required to bring in a special finding where there is only one issue to be found by them. *Surridge* v. *Ellis*, 223.
discretion of court in matters of misconduct of a juror. *Id.*
argument of counsel as to conduct of accused in a criminal case. *Davis and Thomas* v. *State*, 296.

TRUSTS:

where a husband does business in his wife's name, and the property was also in her name she will be held to hold the same in trust for her husband, when. *Hubbard* v. *McMahon*, 563.
where there is a presumption that a wife holds property in trust for her husband, the same may be overthrown, how. *Id.*

VERDICT:

validity of, in action involving a boundary, when indefinitely drawn. *Newman* v. *Peay*, 579.
basis of; duty of jury. *St. Louis, I. M. & S. Ry. Co.* v. *Belcher*, 638.

WARRANTS: See COUNTY WARRANTS.

WASTE: See EQUITABLE WASTE.

WATER COMPANIES:

a citizen and user of water in a city may maintain an action to compel a water company to comply with its contract with the city. *Walton* v. *Proutt, Receiver*, 388.

WATER IMPROVEMENT DISTRICT:

right of one water district which supplies a portion of a city with water to sell water to a second water district which supplies water to other portions of the same city. *Armour* v. *City of Fort Smith*, 214.

WILLS:

where a will is made devising land to A., providing that A. take care of the testator during the remainder of her life, and thereafter the testator deeded the property to B., the deed will not be set aside, A. having done nothing for the testator's support. *Black* v. *Hill*, 228.

admissibility of evidence to explain the intention of he testator, *Wilson* v. *Storthz*, 418.

WITNESSES:

how impeached for making contradictory statements. *Stevens* v. *State*, 64.

husband may testify as agent for his wife, when. *Fidelity-Phenix Fire Insurance Co.* v. *Friedman*, 71.