ARKANSAS REPORTS

VOL. 118

CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

MARCH, 1915, to MAY, 1915

JAMES V. JOHNSON
REPORTER

PUBLISHED
BY THE
STATE OF ARKANSAS
1916

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

APR 24 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

Ahrens (Hamburg Bank *v.*) 548
Ainsworth (Calhoun *v.*) 316
Alexander and Moore (State *v.*) 357
Arkansas Land & Lumber Co. *v.* Secrist 561
Arkansas Lumber Company (Burbridge *v.*) 94
Avery (Swepston *v.*) 294

B

Baker (St. Louis, I. M. & Sou. R. Co. *v.*) 69
Baldwin, *ex parte* 416
Bankers Surety Co. *v.* Watts 492
Biddle *et al.*, Receivers of St Louis & S. F. Rd. Co. *v.* Riley 206
Bills (State *v.*) 44
Bliss-Cook Oak Co. (St. Louis, I. M. & S. Ry. Co. *v.*) 323
Bounds (Plumlee *v.*) 274
Brown (Monroe County *v.*) 524
Burbridge *v.* Arkansas Lumber Co. 94
Burns & Billington (Great Southern Fire Ins. Co. *v.*) 22
Burrus *v.* Butt 335
Butt (Burrus *v.*) 335

C

Calhoun *v.* Ainsworth 316
Cassady *v.* Norris 449
Chicago, Rock Island & Pac. Ry. Co. *v.* Foster 409
——— *v.* Mizell 153
——— *v.* Owens 467
——— *v.* Pearce 6
——— *v.* Thomas 406
Citizens Bank of Mammoth Spring *v.* Commercial National Bank of Chicago 497

Cobb (Kansas City Sou. Ry. Co. *v.*) 569
Coke (St. Louis, I. M. & Sou. Ry. Co. *v.*) 49
Columbian Woodmen, Eminent Household of (Howle *v.*) 226
Commercial National Bank of Chicago (Citizens Bank of Mammoth Spring *v.*) 497
Conqueror Trust Co. *v.* Reves Drug Co. 222
Cox *v.* Road Improvement District No. 8, Lonoke County 119
Crain (Western Union Tel. Co. *v.*) 13
Cumbie (St. Louis, I. M. & Sou. Ry. Co. *v.*) 478

D

Dague (St. Louis, I. M. & Sou. Ry. Co. *v.*) 277
Daniels *v.* Little Rock Packet Co. 330
Davis *v.* State 31
Dent *v.* Peoples Bank of Imboden 157
Desha Bank & Trust Co. *v.* Quilling 114
Dunman *v.* Raney 337

E

Eichelman (St. Louis, I. M. & Sou. Ry. Co. *v.*) 36
Eminent Household of Columbian Woodmen (Howle *v.*) 226
Engler (Henley *v.*) 283
Erwin (St. Louis, I. M. & Sou. Ry. Co. *v.*) 580
Ex parte Baldwin 416

F

Fleischer *v.* Wappanocca Outing Club 287
Fluke *v.* Sharum 229
Foohey Dredging Co., Timothy J. *v.* Mabin 1
Fort Smith Pure Milk Co. (Yowell *v.*) 448
Foster (Chicago, R. I. & Pac. Ry. Co. *v.*) 409
Friedman (Haglin *v.*) 465

G

Graysonia-Nashville Lbr. Co. *v.* Saline Development Co. 192
Great Southern Fire Ins. Co. *v.* Burns & Billington 22
Green *v.* Holzer 533

H

Haglin *v.* Friedman 465
Hall *v.* Waters 427
Hamburg Bank *v.* Ahrens 548
Hankins *v.* State 419
Hatfield Special School Dist. *v.* Knight 432
Henley *v.* Engler 283
Hill *v.* Kavanaugh 134
Hittson (Osborne *v.*) 349
Holiman *v.* Roush 255
Holzer (Green *v.*) 533
Home Fire Insurance Co. *v.* Wilson 442
House (Malvern & Camden Ry. Co. *v.*) 473
Howle *v.* Eminent Household Columbian Woodmen. 226
Hudgins *v.* Schultice 139
Hudgins Produce Co. (St. Louis, I. M. & Sou. Ry. Co. *v.*) 398
Hutt *v.* Smith 10
Hydrick *v.* St. Louis, I. M. & Sou. Ry. Co. 402

I

Ingram (St. Louis, I. M. & Sou. Ry. Co. *v.*) 377
Isbell-Brown Co. *v.* Stevens Grocer Co. 17

J

Jackson (St. Louis, I. M. & Sou. Ry. Co. *v.*) 391
Jones *v.* Jones 146
Jonesboro Trust Co. *v.* Nutt 368

K

Kahn *v.* Wilhelm 239
Kansas City Sou. Ry. Co. *v.* Cobb 569
——— *v.* Livesay 304
Kavanaugh (Hill *v.*) 134
Knight (Hatfield Special School Dist. *v.*) 432

L

LaCotts *v.* LaCotts 558
Lewis *v.* Pearson Co. 271
Little Rock Packet Co. (Daniels *v.*) 330

Livesay (Kansas City Sou. Ry. Co. *v.*) 304
Lovewell (Simonson *v.*) 81
Lowe (Southern Lumber Co. *v.*) 355

M

Mabin (Timothy J. Foohey Dredging Co. *v.*) 1
Madding *v.* State 506
Malvern & Camden Ry. Co. *v.* House 473
Malvern, City of (Robinson *v.*) 423
Means *v.* State 362
Meffert *v.* Meffert 582
Mena, City of *v.* Tomlinson Brothers 166
Mizell (Chicago, R. I. & Pac. Ry. Co. *v.*) 153
Monroe County *v.* Brown 524
Moore *v.* Morris 516
Moore and Alexander (State *v.*) 357
Morris (Moore *v.*) 516
Mulkey (Western Union Telegraph Co. *v.*) 201

N

Norris (Cassady *v.*) 449
Nutt (Jonesboro Trust Company *v.*) 368

O

Osborne *v.* Hittson 349
Owens (Chicago, R. I. & Pac. Ry. Co. *v.*) 467

P

Paul (St. Louis, I. M. & Sou. Ry. Co. *v.*) 375
Pearce (Chicago, R. I. & Pac. Ry. Co. *v.*) 6
Pearson Co. (Lewis *v.*) 271
Peoples Bank of Imboden (Dent *v.*) 157
Plumlee *v.* Bounds 274
Poinsett Lumber & Manufacturing Co. *v.* Traxler ... 128
Polk *v.* Stephens 438

Q

Quilling (Desha Bank & Trust Company *v.*) 114

R

Raney (Dunman *v.*) 337
Reece *v.* State 310
Reves Drug Co. (Conqueror Trust Co. *v.*) 222
Riley (Biddle *et al.*, Receivers St. Louis & S. F. Rd. Co. *v.*) 206
Road Improvement District No. 8, Lonoke County (Cox *v.*) 119
Robinson *v.* City of Malvern 423
Rodgers (St. Louis, I. M. & Sou. Ry. Co. *v.*) 263
Roush (Holiman *v.*) 255

S

St. Louis, I. M. & So. Ry. Co. *v.* Baker 69
——— *v.* Bliss-Cook Oak Co. 323
——— *v.* Coke 49
——— *v.* Cumbie 478
——— *v.* Dague 277
——— *v.* Eichelman 36
——— *v.* Erwin 580
——— *v.* Hudgins Produce Co. 398
——— (Hydrick *v.*) 402
——— *v.* Ingram 377
——— *v.* Jackson 391
——— *v.* Paul 375
——— *v.* Rodgers 263
——— *v.* Smith 72
——— (Smith *v.*) 291
——— *v.* Starbird, Admr. 485
St. Louis & San Francisco Rd. Co., Receivers of, *v.* Riley 206
Saline Development Co. (Graysonia-Nashville Lbr. Co. *v.*) 192
School District No. 22 *v.* Traywick 597
Schultice (Hudgins *v.*) 139
Secrist (Arkansas Land & Lumber Co. *v.*) 561
Shands *v.* State 460
Sharp & White (Southwestern Telegraph & Telephone Co. *v.*) 541
Sharum (Fluke *v.*) 229

Simonson *v.* Lovewell 81
Skarda *v.* State 176
Sloan *v.* Williams 593
Smith (Hutt *v.*) 10
Smith *v.* St. Louis, I. M. & So. Ry. Co. 291
Smith (St. Louis, I. M. & So. Ry. Co. *v.*) 72
Southern Lumber Co. *v.* Lowe 355
Southwestern Telegraph & Telephone Co. *v.* Sharp & White 541
Starbird, Admr. (St. Louis, I. M. & S. Ry. Co. *v.*) .. 485
State *v.* Alexander & Moore 357
——— *v.* Bills 44
——— (Davis *v.*) 31
——— (Hankins *v.*) 419
——— (Madding *v.*) 506
——— (Means *v.*) 362
——— (Reece *v.*) 310
——— (Shands *v.*) 460
——— (Skarda *v.*) 176
——— *v.* Wilson 360
Stephens (Polk *v.*) 438
Stevens Grocer Co. (Isbell-Brown Co. *v.*) 17
Swepston *v.* Avery 294

T

Thomas (Chicago, R. I. & Pac. Ry. Co. *v.*) 406
Tomlinson Brothers (City of Mena *v.*) 166
Traxler (Poinsett Lumber & Manufacturing Co. *v.*) . 128
Traywick (School District No. 22 *v.*) 597

W

Wappanocca Outing Club (Fleischer *v.*) 287
Waters (Hall *v.*) 427
Watts (Bankers Surety Co. *v.*) 492
Western Union Telegraph Co. *v.* Crain 13
——— *v.* Mulkey 201

Wilhelm (Kahn *v.*) 239
Williams (Sloan *v.*) 593
Wilson (Home Fire Insurance Co. *v.*) 442
Wilson (State *v.*) 360

Y

Yowell *v.* Fort Smith Pure Milk Co. 448

TABLE OF CASES
CITED BY THE COURT

A

Alexander *v.* Board of Directors of Crawford County Levee Dist., 97 Ark. 322 303
Allen *v.* Bland, 168 S. W. 35 (Tex.) 515
Allesina *v.* London & Liverpool & Globe Ins. Co., 45 Ore. 441, 2 Am. & Eng. Ann. Cas. 284 30
Aluminum Company *v.* Ramsey, 89 Ark. 522 ..... 346 and 385
American Jobbing Assn. *v.* Wesson, 92 Ark. 287 20
American Mercantile Exchange *v.* Blunt, 102 Me. 128, 120 Am. St. Rep. 463, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 10 Am. & Eng. Ann. Cas. 1022 246
Arkadelphia Lumber Co. *v.* Smith, 78 Ark. 505 62
Ark. & La. Ry. Co. *v.* Stroude, 77 Ark. 109 473
Arkansas Mutual Fire Ins. Co. *v.* Claiborne, 82 Ark. 150 446
Arkansas Natural Gas Co. *v.* Miller, 105 Ark. 477 566
Arkansas Southern Ry. Co. *v.* German National Bank, 77 Ark. 482. 20
Arnold *v.* Arnold, 170 S. W. 486, 115 Ark. 32 588

B

Baker *v.* Hudson, 117 Ark. 492 560
Baker *v.* State, 58 Ark. 513 359
Baldwin *v.* Williams, 74 Ark. 317 239
Bank of Midland *v.* Harris, 114 Ark. 344, 170 S. W. 67 137
Bank of Monette *v.* Hale, 104 Ark. 388 225
Barrett *v.* State, 1 Wis. 156 418
Bauschka *v.* Western Coal & Mining Co., 95 Ark. 477 63
Baxter *v.* Little, 6 Metc. 7 320
Beard *v.* State, 79 Ark. 293 313
Beebe Stave Co. *v.* Austin, 92 Ark. 248 237
Bell *v.* Old, 88 Ark. 105 262
Bell *v.* Phillips, 116 Ark. 167, 172 S. W. 864 123
Bise *v.* United States, 144 Fed. 374, 7 Am. & Eng. Cas. 165 46
Black *v.* Special School Dist. No. 2, 116 Ark. 472, 173 S. W. 846 138
Blackstone *v.* Standard Accident Ins. Co., 3 L. R. A. 486 228
Bloom *v.* Franklin Life Insurance Co., 97 Ind. 478 228
Board Dir. Crawford County Levee Dist. *v.* Crawford County Bank, 108 Ark. 419 303
Board Directors Jefferson County Bridge Dist. *v.* Collier, 104 Ark. 425 ..... 127 and 302

Board of Improvement *v.* Brun, 105 Ark. 65 123
Bobo *v.* State, 40 Ark. 224 ..... 503 and 597
Boles *v.* Kelley, 90 Ark. 29 123
Bothell *v.* Fletcher, 94 Ark. 100 225
Bowen *v.* State, 100 Ark. 232 514
Bowen *v.* Stewart, Admr., 128 Ind. 507 418
Boyle *v.* State, 110 Ark. 318 361
Brady *v.* Irby, 101 Ark. 573 237
Brennisen *v.* Pennsylvania Railroad Co., 100 Minn. 102 400
Brown *v.* Nelms, 86 Ark. 368 522
Brown *v.* State, 109 Ark. 373 366
Brownfield *v.* Dudley E. Jones Co., 98 Ark. 495 20
Bullock *v.* Neal, 42 Ark. 278 356
Burton *v.* Chicago Mill & Lbr. Co., 106 Ark. 296 127
Butler *v.* Board Directors Fourche Drainage Dist., 99 Ark. 100 125

C

Carter *v.* Gray, 79 Ark. 273 200
Cate *v.* Cate, 53 Ark. 484 588
Cessill *v.* State, 40 Ark. 503 364
Charter Oak Life Ins. Co. *v.* Rodel, 95 U. S. 232 228
Chicago & E. Rd. Co. *v.* Flexman, 103 Ill. 546 396
Chicago, Kansas & Western Rd. Co. *v.* Pontius, 157 U. S. 209 388
Chicago Mill & Lumber Co. *v.* Johnson, 104 Ark. 67 132
——— *v.* Osceola Land Co., 94 Ark. 183 560
Chicago, Rock Island & Pac. Ry. Co. *v.* Brown, 111 Ark. 288 396
——— *v.* King, 104 Ark. 215 407
——— *v.* McDermott, 106 Ark. 170 293
——— *v.* Moss, 89 Ark. 187 155
——— *v.* Williams, 101 Ark. 436 415
Choctaw, Oklahoma & Gulf Rd. Co. *v.* Jones, 77 Ark. 367 271
Citizens Bank *v.* Commercial Bank, 107 Ark. 142 504
——— *v.* ———, 118 Ark. 497 596
Citizens National Bank *v.* Berry, 53 Kan. 696, 37 Pac. 131 164
City of North Vernon *v.* Voegler, 103 Ind. 314 405
Cochran *v.* Chetopa Mill & Elevator Co., 88 Ark. 343 22
Collins *v.* Bluff City Lumber Co., 86 Ark. 202 198
Columbia County Bank *v.* Emerson, 86 Ark. 159 372
Commercial Fire Insurance Co. *v.* Belk, 88 Ark. 506 446
Commonwealth *v.* Tuey, 8 Cush. (Mass.) 1 89
Continental Gin Co. *v.* DeBord, 123 Pac. 159 457
Cordes *v.* Miller, 39 Mich. 581, 33 Am. Rep. 430 246
Couch *v.* Adams, 111 Ark. 604 12
Cox *v.* Road Improvement Dist., 118 Ark. 119 301
Craig v. Smith, 74 Ark. 364 273
Crowe *v.* House of Good Shepherd, 56 N. Y. Supp. 223 464
Crutcher *v.* C., O. & G. Rd. Co., 74 Ark. 358 407

Cumbie *v.* St. Louis, I. M. & S. Ry. Co., 105 Ark. 406.....480 and 489
Cunningham *v.* State, 115 Ark. 392, 171 S. W. 885.....139 and 185
Curtiss *v.* Rochester & Syracuse Rd. Co., 20 Barber (N. Y.) 282.... 405

D

Daley *v.* Boston & A. R. Co., 16 N. E. 690..... 388
Darrah *v.* State, 90 N. W. 1123..... 47
Davey *v.* State, 99 Ark. 547..... 180
Davis *v.* Miller, 14 Grat. 1 (Va.)..... 320
Desha County *v.* Newman, 33 Ark. 788..... 529
Dixon *v.* State, 29 Ark. 165..... 35
Dooly *v.* Hanover Fire Ins. Co., 58 Am. St. Rep. 26..... 30
Dorris *v.* Warford, 124 Ky. 768, 14 Am. & Eng. Ann. Cas. 602..... 346
Dow *v.* City of Ballard, 28 Wash. 87, 68 Pac. 176..... 145
Dunn *v.* State, 2 Ark. 229.....35 and 313
Dutton *v.* Million, 169 S. W. 1184, 114 Ark. 330..... 554

E

Earl *v.* Harris, 99 Ark. 112..... 104
Edmonds *v.* State, 34 Ark. 720..... 35
Ellis *v.* State, 119 N. W. 1110, 20 L. R. A. (N. S.) 444..... 186
El Paso & N. E. Ry. Co. *v.* Gutierrez, 215 U. S. 87..... 8
Eminent Household Columbian Woodmen *v.* Howle, 109 Ark. 400.. 227
Ensign *v.* Coffelt, 102 Ark. 568..... 372
Euclid Ave. National Bank *v.* Judkins, 66 Ark. 489..... 237
Exchange National Bank *v.* Little, 111 Ark. 263..... 322

F

Farmers & Merchants Ins. Co. *v.* Mickel, 72 Neb. 123, 9 Am. & Eng. Ann. Cas. 993..... 30
Farrell *v.* State, 111 Ark. 187..... 46
Fenton *v.* Collum, 104 Ark. 624..... 524
Ferguson *v.* McLain, 113 Ark. 193, 168 S. W. 127..... 122
Ford *v.* Ford, 100 Ark. 518..... 217
Foss *v.* Whitehouse, 48 Atl. 109..... 405
Freel *v.* State, 21 Ark. 212..... 35
Fuller *v.* State, use Craighead County, 112 Ark. 91..... 530

G

Gaines *v.* Summers, 50 Ark. 322..... 199
Gaither *v.* Campbell, 94 Ark. 329..... 560
Gaston *v.* Gordon, 208 Mass. 265..... 253
Gee *v.* Hatley, 114 Ark. 376..... 389
Georgia Home Insurance Co. *v.* Holmes, 65 Am. St. Rep. 611..... 30
German-American Insurance Co. *v.* Humphrey, 62 Ark. 348..26 and 446
——— *v.* Harper, 75 Ark. 98..... 446
Gibson *v.* Inman Packet Co., 111 Ark. 521..... 21
Glen Falls Ins. Co. *v.* Michael, 74 N. E. 964, 8 L. R. A. (N. S.) 708.. 27
Goddard *v.* Grank Trunk Ry. Co., 57 Me. 202..... 396

Goodrum Tobacco Co. *v.* Potts-Thompson Liquor Co., 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. (N. S.) 498 252
Graham *v.* Thrall, 95 Ark. 562 309
Graham and The Title Guaranty & Surety Co. *v.* United States, 231 U. S. 474 495
Grassy Slough Drainage Dist. *v.* National Box Co., 111 Ark. 144 ... 127
Green *v.* Maddox, 97 Ark. 398 199
Gregory *v.* Slaughter, 8 L. R. A. (N. S.) 1228 515
Greil Bros. *v.* Mabson, 60 So. 876, 179 Ala. 444 248
Gulf, Colorado & Santa Fe Ry. Co. *v.* McGinnis, 228 U. S. 173 267
Gunn *v.* Thompson, 70 Ark. 500 291

H

Haley *v.* Haley, 44 Ark. 429 588
Hall *v.* Cox, 104 Ark. 303 152
Halley *v.* State, 108 Ark. 224 35
Hanover Fire Ins. Co. *v.* Bohn, 58 Am. St. Rep. 719 30
Harbison *v.* Hammons, 113 Ark. 120, 167 S. W. 849 557
Harnwell *v.* White, 115 Ark. 88 123
Hatfield Special School Dist. *v.* Knight, 112 Ark. 83 433
Heart *v.* East Tennessee Brewing Co., 121 Tenn. 69, 19 L. R. A. (N. S.) 964, 113 S. W. 664 247
Hershy *v.* Baer, 45 Ark. 240 503
Hershy *v.* Latham, 46 Ark. 550 237
Hicks *v.* Lush, 19 Ark. 692 441
Hill *v.* State, 100 Ark. 373 313
Hilliard *Ex Parte*, Hilliard *v.* Hilliard, 50 Ark. 34 337
Hoff *v.* Hoff, 48 Mich. 281, 12 N. W. 160 588
Hogg *v.* Thurman, 90 Ark. 93 237
Holt *v.* State, 91 Ark. 576 514
Home Insurance Co. *v.* Driver, 87 Ark. 171 26
——— *v.* Scales, 15 So. 134 447
Home Fire Ins. Co. *v.* Wilson, 109 Ark. 324 443
Hooper *v.* Mueller, 158 Mich. 595, 123 N. W. 24 245
Hope Spoke Co. *v.* Maryland Casualty Co., 102 Ark. 1 254
Horsley *v.* Hilburn, 44 Ark. 458 276
Houston Ice & Brewing Co. *v.* Keenan, 99 Tex. 79, 88 S. W. 197 252
Howard *v.* State, 72 Ark. 586 35
Hudson *v.* Stillwell, 80 Ark. 575 13
Humble *v.* German Alliance Insurance Co., 85 Kan. 140, 116 Pac. 472, Am. & Eng. Ann. Cas. 1912, D. 630 30

I

Indiana & Arkansas Lumber & Mfg. Co. *v.* Eldridge, 89 Ark. 361 ... 198
Indianapolis Traction & Terminal Co. *v.* Kinney, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711 385
Insurance Company *v.* Seaver, 19 Wallace 531 227

J

Jamieson *v.* Indiana Natural Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652 246
Jefferson County *v.* Hudson, 22 Ark. 595 528
Johnson *v.* Great Northern Ry. Co., 18 L. R. A. (N. S.) 480 387
Jones *v.* Jones, 107 Ark. 402 146
Josey *v.* State, 88 Ark. 270 20

K

Kansas City & Memphis Ry. Co. *v.* Huff, 116 Ark. 461, 173 S. W. 419 386
K. C. S. Ry. Co. *v.* Leslie, 112 Ark. 305 267
Keith *v.* Wheeler, 105 Ark. 323 152
Kimball *v.* Marshall, 44 N. H. 465 174
Kinnanne *v.* State, 106 Ark. 286 364
Kinsworthy *v.* Austin, 23 Ark. 375 291
Kirst *v.* Street Improvement Dist., 86 Ark. 21 ..... 123 and 303
Kluska *v.* Yeomans, 103 Pac. 819 219
Knauff *v.* National Cooperage & Woodenware Co., 99 Ark. 137 291
Koen *v.* Miller, 105 Ark. 152 321
Kraft *v.* Smothers, 103 Ark. 269 133

L

Lackey *v.* Fayetteville Water Co., 80 Ark. 108 173
LaCotts *v.* LaCotts, 109 Ark. 335 559
Lancaster Insurance Co. *v.* Monroe (Ky.), 39 S. W. 434 30
Langford *v.* State, 98 Ark. 327 421
Lee *v.* State, 114 Ark. 310, 169 S. W. 963 362
Less Land Co. *v.* Fender, 173 S. W. 407, 119 Ark. 21 127
Liddell *v.* Bodenheimer, 78 Ark. 364 ..... 503 and 597
Lincoln County *v.* Simmons, 39 Ark. 485 528
Liston *v.* Chapman & Dewey Land Co., 77 Ark. 116 ..... 109 and 198
Little *v.* Arkansas National Bank, 113 Ark. 72, 167 S. W. 75 557
Little Rock & Fort Smith Ry. Co. *v.* Eubanks, 48 Ark. 460 61
Lord *v.* City of Anoka, 36 Minn. 176 175
Louisville & Nashville Rd. Co. *v.* Melton, 218 U. S. 36, 47 L. R. A. (N. S.) 84 385
L. & N. Ry. Co. *v.* Daniel, 122 Ky. Rep. 256, 91 S. W. 691 220
Lourance *v.* Lankford, 106 Ark. 470 ..... 503 and 596
Lyons *v.* Green, 68 Ark. 205 383

Mc

McCarter *v.* Neil, 50 Ark. 188 456
McClellan *v.* State, 62 Ark. 609 35
McDonnell *v.* Improvement District, 97 Ark. 341 123

McKenzie *v.* Murphy, 24 Ark. 159 374
McVay *v.* State, 104 Ark. 629 418
McWhorter *v.* Andrews, 53 Ark. 307 7

M

Magneau *v.* City of Freemont, 27 Am. St. Rep. 436, 9 L. R. A. 786 .. 175
Mammoth Vein Coal Co. *v.* Bishop, 113 Ark. 585, 168 S. W. 1086 319
Martin *v.* O'Bannon, 35 Ark. 62 322
Martin *v.* Gregory, 86 Ark. 281 239
Mary *v.* State, 5 Mo. 71 312
Mayfield Woolen Mills *v.* Lewis, 89 Ark. 488 274
Melton *v.* St. Louis, I. M. & S. Ry. Co., 99 Ark. 435 .....431, 503, 596
Merriam *v.* Bayley, 1 Cush. 77, 48 Am. Dec. 591 441
Michigan Central Rd. Co. *v.* Vreeland, 227 U. S. 59 270
Midland Valley Rd. Co. *v.* J. A. Fay & Eagan Co., 89 Ark. 342 20
——— *v.* Hale, 86 Ark. 484 400
Miles *v.* Monroe, 96 Ark. 531 237
Miller *v.* Fraley, 23 Ark. 735 522
Miller *v.* Mattison, 105 Ark. 201 199
Minnesota & Dakota Cattle Co. *v.* Atchison, Topeka & Santa Fe Ry. Co., 210 U. S. 1, 15 Am. & Eng. Ann. Cas. 70 389
Moore *v.* La. & Ark. Ry. Co., 99 Ark. 235 396
Morris *v.* State, 102 Ark. 513 180
Mott *v.* Southern Railway Co., 42 S. E. 601 386
Mullins *v.* Columbia County Bank, 87 Ark. 555 372
Murphy *v.* Citizens Bank, 84 Ark. 100 597
Murray *v.* Galbraith, 95 Ark. 199 86
——— *v.* ———, 86 Ark. 50 86
Murray *v.* New York Life Ins. Co., 96 N. Y. 614 227

N

Needham *v.* Matthewson, 81 Kan. 340, 19 Am. & Eng. Ann. Cas. 146, 26 L. R. A. 274 441
Newton *v.* Mutual Benefit Life Ins. Co., 76 N. Y. 426 228
Newton *v.* Warren Vehicle Stock Co., 116 Ark. 393, 173 S. W. 819 .. 104
Norfolk & Western Ry. Co. *v.* Earnest, 229 U. S. 114 269
Norfolk & West. Ry. Co. *v.* Holbrook, 235 U. S. 625 270

O

O'Byrne *v.* Henley, 161 Ala. 620, 23 L. R. A. (N. S.) 496, 50 So. 83 248
O'Neill *v.* Potvin, 13 Ida. 721, 93 Pac. 20 457
Orendorff *v.* Terminal R. Assn. of St. Louis, 92 S. W. 148 388
Ozan Lumber Co. *v.* Biddie, 87 Ark. 587 385
——— *v.* Union County National Bank of Liberty, 207 U. S. 251 373

P

Page *v.* Chase Co., 79 Pac. 278 145
Parkview Land Co. *v.* Road Improvement Dist. No. 1, 92 Ark. 93 .. 301
Parsel *v.* Barnes & Bro., 27 Ark. 261 529
Parsons, Rich & Co. *v.* Freeman P. Lane, 97 Minn. 98, 7 Am. & Eng. Ann. Cas. 1144 27
Pattison *v.* Smith, 94 Ark. 588 290-457
Patton *v.* Cruce, 72 Ark. 421 86
Pekin Stave Co. *v.* Ramey, 108 Ark. 483 65
Pelts *v.* State, 3 Blackf. 28 48
Penny *v.* Atlantic Coast Line Rd. Co., 32 L. R. A. (N. S.) 1209 396
Perkins *v.* Ogilvie, 131 S. W. (Ky.) 200 144
Phoenix Ins. Co. *v.* Public Parks Amusement Co., 63 Ark. 187 26-446
Pine Bluff *v.* Levi, 90 Ark. 166 458
Pine Bluff & Ark. River Ry. Co. *v.* Washington, 116 Ark. 179 395
Pinson *v.* Cobb, 113 Ark. 28 225
Powers *v.* Woolfolk, 111 S. W. 1187 (Mo.) 320
Prescott & Northwestern Ry. Co. *v.* Thomas, 114 Ark. 56, 167 S. W. 486 217-471
Pryor *v.* Pryor, 88 Ark. 302 592
Pulaski County *v.* Lincoln, 9 Ark. 326 313

Q

Queen of Arkansas Ins. Co. *v.* Bramlett, 103 Ark. 1 31
——— *v.* Milham, 102 Ark. 675 31

R

Railway Company *v.* Clark, 59 Ark. 491 71
——— *v.* Davis, 54 Ark. 389 63
——— *v.* Sweet, 60 Ark. 550 219-270
Rector *v.* Board of Improvement, 50 Ark. 116 303
Rhea *v.* Planters Mutual Ins. Co., 77 Ark. 57 26
Rice *v.* School Dist. No. 20, 109 Ark. 125 598
Road Improvement Dist. *v.* Glover, 89 Ark. 513 125-300
Roberts & Schaffer Co. *v.* Jones, 82 Ark. 188 418
Roberts Cotton Oil Co. *v.* Grady, 105 Ark. 53 20

S

St. Louis & North Arkansas Rd. Co. *v.* Bratton, 93 Ark. 234 503-597
St. Louis & San Francisco Rd. Co. *v.* Conarty, 106 Ark. 421 267
——— *v.* Coy, 113 Ark. 265 218
——— *v.* Fithian, 106 Ark. 491 217
——— *v.* Hill, 79 Ark. 76 63
——— *v.* Keller, 90 Ark. 308 9-482
——— *v.* Kilpatrick, 67 Ark. 47 396

St. Louis, I. M. & S. Ry. Co. *v.* Andrews, 79 Ark. 437 63
——— *v.* Baker, 118 Ark. 69 293
——— *v.* Barnett, 65 Ark. 255 471
——— *v.* Bright, 109 Ark. 4 3
——— *v.* Brown, 97 Ark. 505 156
——— *v.* Carter, 93 Ark. 589 346
——— *v.* Carter, 111 Ark. 272 89
——— *v.* Coolidge, 73 Ark. 112 400
——— *v.* Cumbie, 101 Ark. 172 482
——— *v.* Cumbie, 118 Ark. 478 489
——— *v.* Devaney, 98 Ark. 83 88
——— *v.* Dowgiallo, 82 Ark. 289 396
——— *v.* Evans, 94 Ark. 324 577
——— *v.* Freeman, 89 Ark. 331 61
——— *v.* Furlow, 89 Ark. 404 482
——— *v.* Hesterly, 228 U. S. 702 267
——— *v.* Hix, 101 Ark. 90 448
——— *v.* Holman, 90 Ark. 555 271
——— *v.* Hook, 83 Ark. 584 576
——— *v.* Hoshall, 82 Ark. 387 5
——— *v.* Hydrick, 109 Ark. 231 404
——— *v.* Osborne, 95 Ark. 310 44-574
——— *v.* Owens, 103 Ark. 61 271
——— *v.* Pape, 100 Ark. 269 400
——— *v.* Ramsey, 96 Ark. 37 353
——— *v.* Taylor, 84 Ark. 42 155
——— *v.* Thurman, 110 Ark. 188 61
——— *v.* Transmier, 106 Ark. 530 42
——— *v.* Tuohey, 67 Ark. 209 43
——— *v.* Vann, 98 Ark. 145 271
——— *v.* Waldrop, 93 Ark. 42 71
——— *v.* Webster, 99 Ark. 265 67
——— *v.* Williams, 108 Ark. 387 217
——— *v.* Wilson, 70 Ark. 136 578
——— *v.* Woods, 96 Ark. 311 471
——— *v.* York, 92 Ark. 554 43
St. Louis Southwestern Ry. Co. *v.* Anderson, 117 Ark. 41 270
——— *v.* Knight, 81 Ark. 429 578
——— *v.* Morris, 76 Ark. 542 5
——— *v.* Mulkey, 100 Ark. 71 136-388
——— *v.* White Sewing Machine Co., 69 Ark. 431 383
St. Louis Southwestern Ry. Co. of Texas *v.* Thornton, 103 S. W. 437 388
St. Peters Lit. Assn. *v.* Webb, 31 Ark. 140 322
Satterwhite *v.* State, 82 Ark. 64 347
Schultz *v.* State, 33 L. R. A. (N. S.) 403 513
Schwartz *v.* Erie Rd. Co., 106 S. W. (Ky.), 1188 401
Scroggin *v.* Ridling, 92 Ark. 630 291

Seaboard Air Line Ry. *v.* Horton, 233 U. S. 492, 58 L. Ed. 1062...308-386
Sellers *v.* State, 93 Ark. 313..... 427
Shibley *v.* Fort Smith & Van Buren Bridge Dist., 96 Ark. 410...127-302
Shirey *v.* Whitlow, 80 Ark. 444..... 13
Shirk *v.* Pulaski County, 4 Dillon, 209..... 532
Silvie *v.* State, 117 Ark. 108..... 35
Simpson *v.* Talbot, 72 Ark. 185..... 503
Skillern *v.* Baker, 82 Ark. 86..... 131
Smith *v.* Improvement District, 108 Ark. 141..... 123
Smith *v.* State, 79 Ark. 25..... 514
Soard *v.* Western Anthracite Coal & Min. Co., 92 Ark. 502..... 385
South Omaha National Bank *v.* Boyd, 79 Ark. 215..... 238
Southern Express Co. *v.* Owens, 146 Ala. 412, 9 Am. & Eng. Ann. Cas. 1143..... 280
Southwestern Telegraph & Telephone Co. *v.* Danaher, 102 Ark. 547 545
State *v.* Ark. Brick & Mfg. Co., 98 Ark. 129..... 556
——— *v.* Campbell, 188 Ann. Cas. 236..... 516
——— *v.* Hakon, 129 N. W. 234..... 422
——— *v.* International Harvester Co., 79 Ark. 517..... 273
——— *v.* Johnson, 38 Ark. 568..... 359
——— *v.* Myers, 38 Pac. 296..... 191
——— *v.* Perkins, 101 Ark. 358..... 530
——— *v.* Sakowski, 90 S. W. 435 (Mo.)..... 49
——— *v.* Salmon, 115 S. W. 1106 (Mo.)..... 187
——— *v.* Shove, 96 Wis. 1, 70 N. W. 312, 37 L. R. A. 142, 65 Am. St. Rep. 17..... 186
——— *v.* Smith, 91 Ark. 1..... 180
——— *v.* Taylor, 64 So. 740..... 181
——— *v.* Ward, 48 Ark. 36..... 36
——— *v.* Warner, 60 Kan. 94, 55 Pac. 312..... 185
——— *v.* Watson, 216 Mo. 420, 115 S. W. 1011..... 513
——— *v.* Welty, 118 Pac. 9..... 182
——— *v.* Winstandley, 57 N. E. 109..... 180
State *ex rel.* Parker *v.* Smith, 22 Minn. 218..... 174
State, use Izard Co., *v.* Hinkle, 37 Ark. 532..... 528
State Mutual Ins. Co. *v.* Latourette, 71 Ark. 242..... 446
Steelman *v.* Atchley, 98 Ark. 294..... 118
Stephans *v.* Shannon, 43 Ark. 464..... 198
Stewart *v.* Simon, 111 Ark. 358..... 467
Stinson *v.* Shafer, 58 Ark. 110..... 356
Swan *v.* Benson, 31 Ark. 728..... 199

T

Taylor *v.* Taylor, 232 U. S. 363..... 267
Teller *v.* Boyle, 132 Pa. 56..... 253
Templeton *v.* Equitable Mfg. Co., 79 Ark. 456..... 20
Texarkana & Fort Smith Ry. Co. *v.* Anderson, 67 Ark. 123..... 578

Tharp *v.* State, 99 Ark. 188 513
Tillar *v.* Henry, 75 Ark. 446 152
Tilson *v.* Gatling, 60 Ark. 118 372
Toledo, etc., Ry. Co. *v.* Slavin, 236 U. S. Rep. 457 67
Turman *v.* Sanford, 69 Ark. 95 522
Turner *v.* State, 61 Ark. 359 46

U

United States *v.* McMullen & Other Admrs., 222 U. S. 460 495
U. S. Fidelity & Guaranty Co. *v.* Smith, 103 Ark. 145 238

V

Vail *v.* Pacific R. R. Co., 63 Mo. 230 401
Valentine *v.* State, 108 Ark. 594 514

W

Wait *v.* Stanton, 104 Ark. 9 496
Wallace *v.* Pennsylvania Rd. Co., 52 L. R. A. 35 43
Warner *v.* Bacon, 8 Gray, 397 405
Watkins *v.* Griffith, 59 Ark. 344 123
Watson *v.* Wolff-Goldman Realty Co., 95 Ark. 18 276
Webster *v.* Carter, 99 Ark. 458 554
Western Union Tel. Co. *v.* Ivy, 102 Ark. 246 16
——— *v.* Johnson, 115 Ark. 564, 171 S. W. 859 17
Whitby *v.* Baltimore C. & A. Ry. Co., 54 Atl. 674 76
White *v.* Minneapolis & R. R. Ry. Co., 111 Minn. 167 401
Williams *v.* Cantwell, 170 S. W. 250, 114 Ark. 542 464
——— *v.* State, 65 Ark. 159 274
——— *v.* Uzzell, 108 Ark. 241 595
Wimberly *v.* State, 90 Ark. 514 388
Wilson *v.* Shocklee, 94 Ark. 301 199
——— *v.* White, 82 Ark. 407 139
Wolfe *v.* State, 107 Ark. 33 364
Wood *v.* Drainage Dist., 110 Ark. 416, 161 S. W. 1057 2
Woodson *v.* Prescott & N. W. Ry. Co., 91 Ark. 388 43

Y

Yancey *v.* Batesville Telephone Co., 81 Ark. 486 545
Yelvington *v.* Short, 111 Ark. 253 104

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

TIMOTHY J. FOOHEY DREDGING COMPANY *v.* MABIN.

Opinion delivered March 29, 1915.

1. DRAINAGE DISTRICTS—OVERFLOW—LIABILITY OF CONTRACTOR.—The contractors who do the work upon a drainage district, are not liable for overflow caused by the improvement, except for negligence or unskillfulness in constructing the improvement.
2. APPEAL AND ERROR—INSTRUCTIONS—EFFECT OF SPECIFIC OBJECTION.—The rule that a request for a correct instruction is tantamount to a specific objection to an erroneous one, does not apply when there has been a specific objection upon different grounds. A specific objection to an instruction amounts to a waiver of all other objections to it.
3. INDEPENDENT CONTRACTOR—NEGLIGENCE.—An independent contractor is liable only for unskillfulness or negligence in his work which results in an injury to a third party, but he can not escape liability on the ground that the method of construction which he employed, and which resulted in damage to the plaintiff was necessary for his own convenience in finishing his work in the time fixed by the contract.
4. DRAINAGE DISTRICTS—OVERFLOW—LIABILITY OF CONTRACTOR.—A contractor constructing a drainage ditch, can not escape liability for damages to plaintiff's land by overflow, on the ground that the act causing the overflow was done at the direction of the district engineer, in the absence of a showing that the act done was a necessary part of the work, it appearing that it was done for the contractor's convenience.

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

S. L. Gladish, for appellant.

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

McCULLOCH, C. J. This is an action instituted by appellee to recover damages resulting from alleged negligence of appellant in damming up a drainage ditch so as to cause water to overflow lands rented by appellee for the year 1912, and to prevent the planting and cultivation of crops. There was a drainage ditch known as the Wilson ditch which ran along the boundary of lands in question, but another drainage district was formed to enlarge and extend that ditch, and the commissioners let the contract to appellant to do the work. It is alleged that in doing the work, the Wilson ditch was dammed up and kept in that condition for several months, and that as a result, the lands rented by appellee from Lovell were overflowed. This occurred in June, 1912, and it is claimed that the greater portion of the land was rendered wholly unfit for cultivation, and prevented the planting of crops, and that a certain amount of crops of corn, which had been planted and were being cultivated to maturity, were destroyed. The court submitted the case to the jury upon instructions concerning the measure of damages, which permitted the jury to assess damages based upon the rental value of the lands which could not be planted or cultivated on account of the alleged overflow, and upon the actual value of immature crops which were destroyed by the overflow. The jury returned a verdict in favor of appellee, and assessed the damages in the sum of $600.

(1) It is contended that the testimony is not sufficient to sustain the verdict, but we are of the opinion that there is enough testimony to warrant a finding that the damming up of the ditch was not a necessary part of the construction work which appellant had undertaken to do, that it constituted an act of negligence, and that it caused the overflow which damaged appellee in the planting and cultivation of his crops. The law of the case was declared in *Wood* v. *Drainage District,* 110 Ark. 416, 161 S. W. 1057, and in the case of *Timothy J. Foohey Dredging*

Company v. *Lovewell, supra.* In the last case we said that "a drainage district, or other public agency of that kind, is not liable for negligence in constructing a contemplated improvement, and that the contractors who do the work are not liable except for negligence or unskillfulness in constructing the improvement." The court gave several instructions, telling the jury that appellant was not liable unless the damming up of the ditch constituted an act of negligence on the part of the appellant, and caused the damage to the crops.

It is true that the court gave two instructions, at the instance of appellee (instructions Nos. 1 and 6), which omitted any reference to negligence in the construction of the ditch, and made the right of appellee to recover depend solely on the damming up of the ditch and the consequent overflow of the land, but appellant failed to make appropriate objections to those instructions. The objections were specific and based on other grounds. The court gave other instructions, at the request of both parties, submitting the question of negligence, and doubtless if the omission of that issue from the two instructions mentioned above had been called to the attention of the court, they would have been cured, but appellant contented itself with specific objections based upon entirely different grounds from that, and thereby waived the defect in the instructions.

(2) Counsel invoke the rule, stated in many of our cases, to the effect that a request for a correct instruction is tantamount to a specific objection to an erroneous one. *St. Louis, I. M. & S. Ry. Co.* v. *Bright,* 109 Ark. 4. That rule does not apply, however, where there has been a specific objection upon different grounds, for that is an affirmative act which constitutes a waiver of all other objections. Where a party specifically objects to an instruction, it in effect says to the court that all other objections are waived, and it would be permitting a party to take advantage of his own mistake for him to set forth another defect as reversible error.

(3) It is insisted, however, that the court erred in refusing to give instruction No. 4, which, it is said, conformed to the law as stated in *Wood* v. *Drainage District, supra,* and which reads as follows: "You are further instructed that the defendant had a contract to dig ditches in Ditch District No. 12, that they were under bond to complete the same within a certain specified time set out in the contract, that they were operating on the right-of-way of said Ditch District No. 12, and if you find that it was necessary to construct said dam across the Wilson ditch in order to enable the defendant to build the ditches in Ditch District No. 12 under their contract, and that said dams were not negligently constructed, or constructed in such a manner, as to cause the water to flow upon the defendant's land and thereby destroy his crop or prevent him from making a crop under ordinary circumstances, you will find for the defendant." That instruction does not, we think, state the law correctly, and was calculated to mislead the jury, therefore, the court was right in refusing to give it. It was perhaps intended as an attempt to conform to the rule in previous cases, but it goes further and in effect informs the jury that if it was necessary for appellant to dam up the ditch in order to perform its contract within the time limit specified therein, there would be no liability. That is not the law. An independent contractor is not liable except for negligence or unskillfulness in the performance of his work, and if he confines himself to a skillful performance of the work he has contracted to do, he is not responsible for damages which necessarily result from the construction of the work. He can not, however, escape liability merely on the ground that the method of construction was necessary for his own convenience in performing the contract. Now, the contract in this case shows that there was a time limit for its performance, but appellant could not justify itself, for damages inflicted, solely on account of that feature of the contract. In other words, it could not assume an obligation which of itself would justify the doing of an injury to some one else. If the instruction had been con-

fined solely to the issue as to whether or not the damming of the ditch was an essential part of constructing the work contemplated by the organization of the district, it would have been correct and should have been given. The jury might have understood from it that the mere fact that it was necessary to construct the dam across the Wilson ditch in order to comply with the contract within the time specified constituted a defense.

(4) It is also contended that the court erred in refusing to give the following instruction: "6. You are further instructed that if the dam so constructed across the Wilson canal was built under the direction and supervision of the engineer in charge of Drainage District No. 12, and if you further find that said engineer was acting under the supervision and at the instance of the commissioners in charge of the said Drainage District No. 12, you will find for the defendant." We think the court was correct in refusing to give this instruction, for, if the damming up of the ditch was not a necessary part of the construction contemplated in the contract, but was merely done for the convenience of the contractor in performing the contract within the time specified, it is no justification to show that the work was done under the direction of the engineer and the commissioners. There must be some remedy in the law for injury done to one's property, and the drainage district itself was not liable for any injury done except that which resulted necessarily from the construction of the improvement. Any injury that resulted from unskillfulness in the construction of the improvement necessarily falls on the one who was guilty of the misconduct.

There was objection to the instructions on the subject of the measure of damages, but we find that those instructions conform to the rules laid down by this court in other cases. *St. Louis S. W. Ry. Co.* v. *Morris,* 76 Ark. 542; *St. Louis, I. M. & S. Ry. Co.* v. *Hoshall,* 82 Ark. 387. The evidence was sufficient to justify the assessment made by the jury, when measured by those standards.

Affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* PEARCE.

Opinion delivered March 29, 1915.

CARRIERS—PERSONAL INJURIES—LIMITATION UPON LIABILITY IN ADVANCE.—A., upon entering the employ of defendant railroad company, signed an agreement that he would give thirty days' notice of any claim for damages he would make against said company caused by personal injuries received while in the defendant's employment. *Held,* the contract was inoperative and without effect.

Appeal from Perry Circuit Court; *G. W. Hendricks,* Judge; affirmed.

Thos. S. Buzbee and *Jno. T. Hicks,* for appellant.

The court erred in sustaining the demurrer to the special defense set up by appellant. This stipulation in the contract of employment is reasonable and just in its operation, is not inhibited by law, and is not against public policy. 82 Ark. 353; 63 Ark. 335; 67 Ark. 410; 89 Ark. 404; 90 Ark. 308; 80 Ark. 534; 94 Tenn. 94; 68 S. W. 549; 142 S. W. 826; 21 Wall. (U. S.) 268; 3 Wall. 107; 17 *Id.* 357; 7 *Id.* 386; 54 Ark. 222, 223; 111 Ark. 102.

Many of the States have given approval to such an agreement by enacting laws requiring injured employees to give written notice to their employers of the time, place, cause, manner and extent of their injuries, etc. Mass., Rev. Laws, C. 106, § 71; N. Y., Consol. Laws, C. 31, art. 14; Kansas, Acts 1905, C. 341; Texas, Rev. Stat. 1895, art. 3379. See, also, 97 S. W. 459; 173 Fed. 612; 182 Fed. 492; 95 N. E. 503; 112 Pac. 136.

J. H. Thompson and *Carmichael, Brooks, Powers & Rector,* for appellee.

The contract relied upon by appellant as a special defense is void.

(1) It is inhibited by the Federal Employers' Liability Act of 1908. 232 U. S. 248; 203 U. S. 1; 229 U. S. 146; *Id.* 156; 233 U. S. 492; 219 U. S. 549; *Id.* 186; 223 U. S. 1; 22 C. C. A. 264; 76 Fed. 439; 55 S. C. 152; 2 Labatt, M. & S., § § 1921, *et seq.;* 35 App. D. C. 230; 224 U. S. 603. We think the last case cited is decisive of the question presented here. See, also, 131 Ia. 340; 215 U. S. 87.

(2) The contract is void under the State Employers' Liability Act. Acts 1911, Act No. 88; 209 Mass. 607.

(3) It is void as against public policy. 48 Ark. 460; 21 Wall. 268; 10 Biss. 486; 8 Fed. 782; 44 Am. Rep. 630; 226 U. S. 509; 227 U. S. 639; 91 Ark. 97; 111 Ark. 102.

(4) The provision as to notice is unreasonable.

McCULLOCH, C. J. The plaintiff, while working in the service of defendant railway company (being engaged at the time in interstate commerce), received personal injuries caused by the negligent acts of one of his fellow-employees, and this is an action against the company to recover damages. There was a verdict in favor of the plaintiff, assessing a small sum as damages, and the defendant appeals. The record fails to show that the bill of exceptions was filed within the time allowed by the trial court, and there is therefore nothing presented here for review which concerns the proceedings at the trial below.

The court sustained a demurrer to one of the paragraphs of the answer, and, as the record entry of the lower court shows that exceptions to that ruling were saved, the appeal itself brings up that ruling for review. *McWhorter* v. *Andrews,* 53 Ark. 307. In the paragraph to which the court sustained a demurrer, the defendant pleaded the following clause in the contract of employment entered into between plaintiff and defendant when the former took service with the latter about three years before the alleged injury occurred.

"In further consideration of such employment, I agree for myself, my heirs, executors, administrators, legal representatives or any other person or persons claiming through or under me, that if while in the service of said company, I sustain any personal injury or injuries for which I shall or may make claim against the company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to the superintendent of the division upon which I shall be at the time of such injury or injuries, and if any such injury

or injuries shall result in my death for which claim shall or may be made for damages, that my heirs, executors, administrators, legal representatives or other person or persons that may make such claim will give such notice in writing within thirty days after my death, any and all of which notices shall state the time, place, manner, causes, extent and nature of my injury or injuries, or of my death, as the case may be, and the claim made therefor; and the failure to give written notice of any such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of said injury or injuries or death."

The question whether such a provision in a contract of employment, with respect to notice of injury, is, in the absence of a statute, binding in an action to recover damages resulting from a negligent act of the master's servants has not heretofore been presented in any of the courts of the country, so far as we are advised. It seems, therefore, to be a question of first impression. Counsel for plaintiff contend that the contract is in conflict with the act of Congress fixing and regulating the liability of a railroad to its employees—the statute known as the Employers' Liability Act. The plaintiff's injury occurred while he was engaged in interstate commerce, and the rights of the parties are controlled entirely by that statute. If the provisions of the contract are found to be in conflict with the act, of course, it is without force.

The point seems to be settled by a decision of the Supreme Court of the United States in the case of *El Paso & N. E. Ry. Co.* v. *Gutierrez,* 215 U. S. 87. That was an action instituted in the courts of the State of Texas against a railroad company to recover for injuries sustained by the servant of the company in New Mexico, then a territory, where there was a statute which provided that no action for injuries, inflicting death, caused by any person or corporation in the territory, could be maintained unless the person claiming damages should within ninety days after the infliction of the injuries, and thirty days before

commencing suit, serve upon the defendant an affidavit giving particulars as to the injuries complained of, etc.

The injury in that case occurred in June, 1906, after the passage of the first Employers' Liability Act, which was held by the Supreme Court of the United States to be unconstitutional, except in its application to the District of Columbia and the territories. The Texas court declined to give effect to the statute of the territory where the injury occurred and allowed a recovery without compliance with the terms of that statute. That judgment was affirmed by the Supreme Court of the United States. The court held that the Federal Employers' Liability Act superseded the statute of New Mexico, and that the Texas court was correct in disregarding it. Now, the point of that decision, so far as it applies here, is that if the first Employers' Liability Act superseded territorial statutes on this subject, the last Employers' Liability Act, which applies to all persons working in the service of railroads in interstate commerce, likewise supersedes any State legislation on the subject; and it necessarily follows that if other legislation is thus superseded and set at naught, contracts between the parties are also without force. We think that conclusion is correct upon principle.

Counsel for the defendant rely upon decisions to the effect that the Federal statute fixing the liability of carriers of freight does not invalidate contracts requiring notice of loss or damage. *St. Louis & S. F. Rd. Co.* v. *Keller,* 90 Ark. 308. That, however, is a different question, for in that class of cases, the suit is upon the contract itself, and it has been held that the provision about notice is a reasonable regulation which is not in conflict with the Federal statute. A suit for personal injuries is not, however, a suit upon the contract of employment, which is entirely collateral to the question of liability. If the suit was based upon the contract between the parties, then any reasonable regulation, not amounting to an exemption of liability, would be valid. But any contract made between the parties in advance of the accrual of the cause of action, and concerning a subject-matter which is not the

basis of the cause of action which subsequently accrues, necessarily amounts to an attempt to fix the terms of liability in advance, and is inoperative. Such provision is an attempt to read into the statute, which expressly governs the matter of the liability, something which is not found in the statute itself, and is therefore invalid.

The judgment of the circuit court is affirmed.

HUTT v. SMITH.

Opinion delivered March 29, 1915.

ADVERSE POSSESSION—RECOGNITION AFTER STATUTORY PERIOD.—When A. claims title to land by adverse possession, mere recognition of B.'s original ownership of the land, after the running of the statutory period giving A. title by limitations, will not divest A.'s acquired title.

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

G. G. Pope, for appellant.

1. The record title in plaintiff being conceded, the defendant had the burden of proving all the essential elements of an adverse possession of such character as would overthrow this title and establish his own. 57 Ark. 97; 59 Ark. 626; 65 Ark. 422; 79 Ark. 109; 163 S. W. 783. The possession should not only be accompanied by the adverse intent so as to fix the character of the original entry, but also continuous and unbroken during the statutory period so as to leave no doubt on the mind of the true owner, not only who the claimant was, but that it was his purpose to deprive the owner of his land. 43 Ark. 464; 49 Ark. 266; 57 Ark. 97; 60 Ark. 553.

Possession which is without color of title will not be extended by construction. The doctrine of adverse possession is to be construed strictly, and can not be made out by inference, but only by clear and positive proof. 1 Am. & Eng. Enc. of L. (2 ed.), 887.

2. Instruction 8, given on appellee's request, is erroneous in that it is in direct conflict with instruction 3, given for the appellant, and entirely changes the burden of proof from the defendant to the plaintiff. Moreover, it ignores the principle of law that constructive possession follows the legal title in the absence of actual possession adverse to it. 110 Ark. 576; 37 Pa. Sup. Ct. 496; 49 Ark. 270.

Henry Moore, Jr., for appellee.

1. The jury found that the defendant had held the land adversely for the statutory period of seven years. The evidence in support of the verdict is conclusive, and the verdict will not be disturbed.

2. Possession, if once shown to be open and notoriously adverse, is presumed to continue so until the contrary is shown. 67 Ark. 85.

3. Where a person takes possession of land under the belief that he owns the same, where he encloses the land and holds it continuously for the statutory period under such belief of ownership, his possession is adverse and will divest the title of the former owner. 83 Ark. 76; 87 Ark. 626; 92 Ark. 323; 100 Ark. 75; 100 Ark. 557.

McCULLOCH, C. J. This is an action instituted to recover possession of a tract of land containing about eight acres, and the claimant shows a clear record or paper title. The defendant claims title only by adverse possession for the statutory period of limitations, and the case was tried before the jury on that issue. The verdict was in favor of the defendant, and the plaintiff appealed.

The plaintiff owns a farm in Little River County, and the defendant owns one adjoining his on the south. The land in controversy is, and has been for twenty years before the commencement of this action, inclosed with the defendant's farm, but is in fact situated within the boundaries described in plaintiff's title deeds. The defendant shows that as far back as the year 1890, the land in controversy was in cultivation, and inside of the fence of his grantors. The undisputed proof is that the defendant's grantors and tenants occupied the land and cultivated it

up to this fence, which was supposed to be on the boundary line. Defendant purchased the farm in the year 1904, which was about six years before the commencement of this action. The farm owned by the defendant is known as the Deloney farm, and he purchased it from the Deloney heirs. Testimony adduced by the plaintiff tends to show that in the year 1903, Mr. Jobe, the husband of one of the Deloney heirs, recognized the superiority of plaintiff's title, and agreed to pay rent on the disputed strip of land, the tract of land in controversy. This, however, is contradicted by the testimony of Jobe himself. The court submitted the issue to the jury upon the claim of adverse possession, and we think there is enough testimony to establish title by limitations. The evidence on the part of the defendant shows that the land was actually occupied and cultivated by defendant's grantors from the year 1890 down to the present time, and the jury were warranted in finding that possession was adverse, and not in subordination to the title of the true owner. The charge of the court on this issue conforms to the law on the subject as declared by this court in many decisions. The most recent one is the case of *Couch* v. *Adams,* 111 Ark. 604.

Error is assigned in giving, at the plaintiff's request, the eighth instruction, which reads as follows: "Possession, if once shown to be openly and notoriously adverse, is presumed to continue so until the contrary is shown." In other instructions the jury were told that the burden rested on the defendant to establish his title by adverse possession by a preponderance of the evidence. We think the proof in this case does not leave open any question of presumption, and that the instruction on that subject was not prejudicial, even if it was erroneous. We will not, therefore, undertake to decide whether or not the instruction was correct. The jury necessarily passed upon the question of the character of defendant's possession. That was expressly submitted to them by other instructions, and they were told that unless the possession was adverse

to all claimants, and not in subordination to the title of the true owner, the verdict should be for the plaintiff.

Now, there was, according to the evidence, no change in the character of the plaintiff's possession, except that some testimony tended to show recognition of the plaintiff's claim by Mr. Jobe in the year 1903. That, however, was thirteen years after the adverse possession began, and the possession of the Deloneys had therefore ripened into title by limitations. Mere recognition at that time would not divest the title already acquired by limitations, and proof of recognition of the title by Jobe was only competent for the purpose of showing the character of possession prior to the lapse of time necessary to give title. *Shirey* v. *Whitlow,* 80 Ark. 444; *Hudson* v. *Stillwell,* 80 Ark. 575. But, inasmuch as the character of possession had not, according to the uncontradicted testimony changed for thirteen years, and the jury having found that it was hostile, there was no ground for finding that it had ceased to be such before it ripened into title. There are other questions presented, not of sufficient importance to discuss. We find no prejudicial error in the record, and the judgment is therefore affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* CRAIN.

Opinion delivered March 29, 1915.

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—DUTY OF PLAINTIFF.—When plaintiff receives a message telling of the illness of a member of his family, and a reply message sent by him to ascertain the condition of his relative was undelivered because the addressee lived outside the free delivery limits of the telegraph company, and the defendant company apprised plaintiff of these facts, it will be held that a duty rested upon plaintiff to make further efforts to communicate with his relations, and when he failed to do so, he will be barred from a recovery against the defendant for damages growing out of defendant's failure to deliver his message.

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

George H. Fearons and *Martin, Wootton & Martin,* for appellant.

There can be no recovery in this case because the message was interstate, and because appellee's own negligence would preclude a recovery, even if the Arkansas mental anguish statute were not void as to interstate messages. *Western Union Tel. Co.* v. *Brown,* U. S. Sup. Ct., June 22, 1914; 171 S. W. (Ark.) 859; 54 S. W. (Ky.) 825; 102 Ark. 246.

C. Floyd Huff, for appellee.

HART, J. Clever Crain instituted this action against the Western Union Telegraph Company to recover damages for mental anguish alleged to have been sustained by reason of the negligence of the defendant in failing to deliver a telegram from him to his sister, requesting that she notify him of his mother's condition. The jury returned a verdict for the plaintiff, and the defendant has appealed. The facts are as follows:

On the 28th day of June, 1912, the plaintiff, Clever Crain, was working at the Kentucky Club in Hot Springs, Arkansas, and between 7 and 8 o'clock P. M. on that day he received the following telegram:

"Appleby, Texas, June 28, 1912.

"Clever Crain, 331 Laurel Street, Hot Springs, Ark.

"Come home at once. Your mother is very low. Be sure and come.

"Denis Crain."

Denis Crain was a brother of the plaintiff. Plaintiff at once telephoned the defendant company to send him a messenger boy, and soon afterward a messenger boy called at his residence and plaintiff told him he wanted to send a message to Appleby, Texas, and wanted to pay the charges. The messenger boy told him the message would cost forty cents, and that it would cost fifty cents to deliver the message out from Appleby, and that it would be delivered the next morning. The evidence of defendant tended to show that the messenger boy had no authority to contract for the delivery of the message outside of its

delivery limits at Appleby. The plaintiff then sent the message sued on, which is as follows:

"Kitty Crain, Appleby, Texas.

"Send word at once of condition, unable to come, though if worse, will try; can not leave for connection until Sunday morning.

"Clever Crain."

Appleby is a small town of between two and three hundred inhabitants, and Kitty Crain, a sister of the plaintiff, lived about three or three and a half miles from that place. The family of the plaintiff had lived there many years, and was well known in the town of Appleby.

The message sued on was delivered to the defendant company at its office in Hot Springs on the afternoon of June 28, which was Friday. On Saturday, June 29, at 1:50 P. M., the following message was delivered at plaintiff's home:

"Hot Springs, Arkansas.

"Your night letter 28th, Crain signed same, undelivered. Party in country three miles. Copy mailed."

The message was delivered to the plaintiff's wife, and was given to him on his return home that evening. After the receipt of this message, plaintiff did not wire his sister, and did not pay any further attention to the matter. His mother died on Monday, the first day of July, 1912, between 6 and 7 o'clock in the morning. She was buried on the following Tuesday between 2 and 3 o'clock in the afternoon.

The residence of the plaintiff's family in the country was outside the free delivery limits of the telegraph company's office at Appleby, and the telegram sent by the plaintiff was placed in the postoffice at Appleby, and was received by Kitty Crain at her home on Tuesday, July 2, between 8 and 9 o'clock A. M. The mail service leaves Appleby between 7 and 7:15 o'clock A. M., and passes the home of the Crains between 8 and 9 o'clock each morning, except Sunday.

Plaintiff could have left Hot Springs on any day at 7:15 A. M. and arrived at a station within three miles of

his mother's home in Texas between 1 and 2 o'clock A. M. on the next morning. Under the facts and circumstances adduced in evidence, we do not think the plaintiff was entitled to recover.

Under the principles of law announced in the case of *Western Union Tel. Co.* v. *Ivy,* 102 Ark. 246, if the plaintiff, after he received the notice on Saturday, the 29th day of June, that his message had not been delivered because the addressee lived in the country, failed to exercise that degree of care to ascertain the condition of his mother before her death or burial that an ordinarily prudent person would have used under similar circumstances, his failure to use such diligence contributed directly and proximately to his failure to see his mother before her death or to be present at her burial, and the jury should have found for the defendant.

The message received by the plaintiff from his brother on June 28, told him to come home at once, that his mother was very low, and to be sure to come. This message on its face told him that his mother's condition was hopeless and indicated that there was very little possibility of her recovery.

The plaintiff states that he did not start at once because his laundry was out, and on that account it was not convenient for him to go; and that the season at Hot Springs was about ended, and he did not wish to return. On this account, he contends, he sent the message sued on to ascertain more definitely her condition. Even when he received the message on the next day, saying that his message was undelivered because the addressee lived in the country, he did not make any effort whatever to communicate with his sister again, but relied on the delivery of his first message. He knew from the message his brother had sent him that his mother's death was imminent; yet he waited for an answer to his message, knowing that it had not been delivered. Under these circumstances, reasonable minds must have come to the conclusion that, notwithstanding the defendant might have been negligent, the mental anguish of the plaintiff might have

been avoided by the exercise of reasonable diligence and ordinary care on his part, and his failure to exercise such care and diligence will bar a recovery under the facts of this case.

The plaintiff paid for the transmission of the message sued on, but no recovery of that money is asked. The defendant company denied any liability. Therefore, under the authority of the *W. U. Tel Co.* v. *Johnson,* 115 Ark. 564, 171 S. W. 859, the judgment of the court below is reversed and the cause dismissed.

ISBELL-BROWN COMPANY *v.* STEVENS GROCER COMPANY.

Opinion delivered March 29, 1915.

1. SALE OF CHATTELS—SHIPMENT OF FREIGHT—DELAY—REMEDY OF PURCHASER.—As soon as the vendor of property delivers the same to a carrier, consigned to the vendee, the title passes to the vendee, and for any delay in shipment the vendee's remedy is against the carrier.
2. SALES—TITLE TO GOODS SHIPPED—BILL OF LADING—SHIPPER'S ORDER.—As between seller and purchaser the title to goods shipped under a bill of lading in favor of the seller or his agent, with a draft attached, the goods not to be delivered until the draft is paid, does not pass to the buyer until he has complied with the conditions.
3. SALES—TITLE—DELAY IN SHIPMENT—SHIPPER'S ORDER.—When goods are consigned to shipper's order, and bill of lading sent to a bank, with instructions that it be not delivered until the attached draft was paid, and there was an unreasonable delay on the part of the carrier in delivering the goods; *held,* there was no absolute sale and the goods were at the risk of the consignor until delivered to the consignee, and the consignee will not be liable for refusing to accept the same, where by the terms of the contract prompt delivery was a part of the contract of sale.

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

STATEMENT BY THE COURT.

In February, 1913, the Isbell-Brown Company, a corporation doing business at Grand Ledge, Michigan, through its agent, the Munn Brokerage Company, of Lit-

tle Rock, Arkansas, called on the Stevens Grocer Company of Newport, Arkansas, and obtained from it the following order:

"Lansing, Michigan, February 25, 1913.

"Isbell-Brown Company.

"Order No. 3486.

"Have this day sold to Stevens Grocer Company of Newport, Arkansas, 125 bags, H. P. Pea Beans at $2.43 bus.; quality equal to sample No. 593; 125 bags, Pea Beans, at $2.33 bus., quality equal to sample No. 594. Freight prepaid to Newport, Arkansas. Shipment, prompt. Terms: Draft with B. L. payable upon arrival and examination of goods.

"Stevens Grocer Company, Purchaser.

"Duplicate to Munn Brokerage Co., Broker.

"Sales Confirmation.

"Term shipment; prompt shipment is a shipment in ten days. Time is to count from the time of receiving complete shipping instructions, not including day of sale, Sundays or holidays, at place of shipment."

Within the time specified the Isbell-Brown Company shipped a car of beans of the kind and quality described in the order to Newport, Arkansas, and obtained a bill of lading therefor from the railroad company to which the beans were delivered. The Isbell-Brown Company paid the freight and consigned the beans, "To the order of the Isbell-Brown Company, Newport, Arkansas; notify Stevens Grocer Company."

The draft for the purchase price of the beans was attached to the bill of lading which was then sent to a bank at Newport for collection. When the beans arrived at Newport, the Stevens Grocer Company refused to accept and pay for the same, and the Isbell-Brown Company resold the shipment and received therefor $1,519.38, which was the best price obtainable at the time, and which was $116.87 less than the price specified in the order.

This action was instituted by the Isbell-Brown Company against Stevens Grocer Company to recover the de-

ficiency, and also to recover the expense of the resale of the beans. The facts above set out were proved at the trial, and it was also shown on the part of the defendant that there was an unreasonable delay in the transportation of the beans, and that the price of the beans had fallen when the car in question arrived at Newport, and that on this account it refused to accept and pay for the beans.

The court told the jury that the only question for it to determine was whether or not there was an unreasonable delay of the shipment in transporting it from Grand Ledge, Michigan, to the defendant, and in the arrival of the beans at Newport, Arkansas. The jury found that there was an unreasonable delay in the shipment from Grand Ledge, Michigan, to Newport, Arkansas. Whereupon the court rendered judgment in favor of the defendant, Stevens Grocer Company. The plaintiff, Isbell-Brown Company, has appealed.

Ira J. Mack, for appellant.

The delivery of the beans by the appellant to the carrier on March 4, 1913, fulfilled the contract on its part as to shipment. 35 Cyc. 2016; 7 Words & Phrases, § 6489, and cases cited. It is sufficient answer to appellee's contention that there was no delivery on the part of appellant because it took a bill of lading to its order, and did not ship direct to appellee, to say that the terms of the order was draft with bill of lading payable on arrival and examination of the goods, whereby it was agreed that the title to the goods was to remain in appellant until the draft was paid. The bill of lading represents the property, and when attached to a draft, the title to the property passes with the draft. 79 Ark. 356.

Jones & Campbell, for appellee.

Delivery of goods to a common carrier, *consigned to the purchaser,* is delivery to the purchaser. 51 Ark. 133; 67 Ark. 135. But that is not the case here. The shipment was consigned to appellant, at Newport, Ark., notify Stevens Grocer Company. The purpose of appellant to re-

tain title and right of possession of the beans is manifested by the way in which delivery was made to the common carrier. 64 Ark. 169; Burdick on Sales, § 3; 98 Ark. 495; 77 Ark. 482; 123 U. S. 727; 89 Ark. 342.

HART, J., (after stating the facts). (1) It is the settled law in this State that as soon as a vendor delivers property to a carrier consigned to a vendee, the title passes to the vendee and for any delay in shipment, the vendee's remedy is against the carrier. *Brownfield* v. *Dudley E. Jones Co.,* 98 Ark. 495; *Roberts Cotton Oil Co.* v. *Grady,* 105 Ark. 53; *Templeton* v. *Equitable Mfg. Co.,* 79 Ark. 456.

In the last mentioned case, Templeton & Adams, merchants in Arkansas, purchased some jewelry from the Equitable Manufacturing Company. There was an unreasonable delay in the arrival of part of the goods purchased and on that account the purchasers refused to accept any of the goods. The seller sued for the contract price of the goods, and recovered judgment. The judgment was affirmed because the goods were consigned to Templeton & Adams, and the court held that the title to the goods vested in them when they were delivered at the shipping point to the railroad company properly consigned to them, pursuant to the contract of purchase.

(2) Here, the facts are essentially different. The goods were consigned to "shipper's order," at Newport, Arkansas, and the order contained this clause: "Terms: Draft with B. L. payable upon arrival and examination of goods." As between seller and purchaser, it is a general rule that the title to goods shipped under a bill of lading in favor of the seller or his agent with a draft attached does not pass to the buyer until he has complied with the conditions. See case notes to 5 Am. & Eng. Ann. Cases, 263, and 2 L. R. A. (N. S.) 79.

The rule has been recognized by this court. See *Arkansas Southern Railway Company* v. *German National Bank,* 77 Ark. 482; *Josey* v. *State,* 88 Ark. 270; *Midland Valley Rd. Co.* v. *J. A. Fay & Eagan Co.,* 89 Ark. 342; *American Jobbing Assn.* v. *Wesson,* 92 Ark. 287.

In the case before us the seller consigned the goods to itself at Newport, and sent the bill of lading with draft attached to a Newport bank with directions that the bill of lading was not to be delivered to the purchaser until the payment by it of the draft. In this way the bill of lading was used as a symbol of the property to express the seller's intention as to the conditions upon which the property should be delivered.

(3) According to the testimony of the defendant, there was an unreasonable delay in the arrival of the car of beans at Newport, and on this account, it refused to accept the beans or pay the draft. Hence there was no absolute sale of the goods, and the goods were at the risk of the consignor until delivered to the consignee. We think this is the effect of our previous decisions.

In the case of *Templeton* v. *Equitable Manufacturing Company,* to which reference has been made above, the court said that while a bill of lading is both a receipt and a contract, and is a muniment of title, yet it had no influence in that case, as the goods were not sent to shipper's order, but were consigned directly to Templeton & Adams. Continuing, the court said the case turned simply on whether the show case was delivered to Templeton & Adams at Alliance, Ohio, when there delivered to the common carrier, and held that it was because the contract stipulated for an absolute sale of the goods. For this reason, a recovery of the purchase price of the goods was sustained.

So, too, in the case of the *American Jobbing Association* v. *Wesson, supra,* the court held that where goods are consigned to shipper's order, there is no delivery at the time and point of shipment, and that the contract is executory.

In the case of *Gibson* v. *Inman Packet Co.,* 111 Ark. 521, it was held that the delivery of goods by the seller to a common carrier consigned to the purchaser is in effect a delivery to the consignee, and that on this account the consignor has no right of action for the loss or injury of the goods. The court said that the rule had its origin in

the theory that the parties by such delivery intended to pass title to the property, but where the contrary intention is shown, the rule does not apply.

It follows that the seller having consigned the goods to shipper's order, and having neither endorsed nor transferred the bill of lading to the buyer, and the draft being made payable after the arrival and examination of the goods, the latter did not have any title to the goods until the conditions prescribed by the seller had been complied with by it; and the goods having been delayed in transportation an unreasonable length of time. By the express language of the contract, the terms were "draft with B. L. payable upon arrival and examination of the goods." Under this provision of the contract, the buyer had a right to rescind the contract of sale, and the remedy of the seller or consignor should have been against the railroad company for its failure to deliver the goods within a reasonable time. *Cochran* v. *Chetopa Mill & Elevator Co.*, 88 Ark. 343. We also think this rule follows from the principles of law announced in our own cases cited above.

To the same effect, see 3 Hutchinson on Carriers (3 ed.), § 1318; Mechem on Sales, vol. 2, § 1195.

The judgment will be affirmed.

GREAT SOUTHERN FIRE INSURANCE COMPANY *v.* BURNS & BILLINGTON.

Opinion delivered March 29, 1915.

1. FIRE INSURANCE—CONDITIONS IN POLICY—KNOWLEDGE OF INSURED—WAIVER.—Where a policy of fire insurance contained a stipulation that the same was to become void if the property was then or would become subject to a mortgage, and the insured had no knowledge of such a condition, the same being printed on the back of the policy, the insurance company will be held to have waived the condition.

2. FIRE INSURANCE—FAILURE TO PAY—PENALTY.—Plaintiff suffered a loss by fire, and agreed with the adjuster of the company in which he held a policy as to the amount of damage sustained. Later the

company denied all liability. *Held,* plaintiff having recovered judgment for the amount sued for was entitled to attorneys' fees and penalty under the statute.

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

Allen Hughes and *W. W. Hughes,* for appellant.

1. There was a chattel mortgage on the rice insured, which the proof of loss admits. No agreement with respect to the mortgage was indorsed upon the policy, hence, under the provision in the contract, the policy was void, even if the mortgage had been satisfied before the loss. 62 Ark. 348.

2. The same result follows where the mortgage covers an undivided interest only. 71 Ia. 119; 32 N. W. 20; 88 Mich. 94; 50 N. W. 100; 19 Cyc. 758; 1 May on Insurance, § 291a.

3. It is the duty of the insured to know what his contract is, and he will be held to a knowledge of the conditions of his policy. The fact of his not having *seen* the policy will not excuse a want of such knowledge, in the absence of proof of an adequate reason for not seeing it. 71 Mich. 414; 39 N. W. 571; 15 Am. St. Rep. 275; 89 Tex. 404; 34 S. W. 915; 31 S. W. 566.

The law presumes that the parties contemplated insurance in usual form, under the standard policy, containing such conditions and limitations as are usual in such cases. 56 Pa. St. 256; 94 Am. Dec. 65; 76 Ia. 609; 41 N. W. 373; 94 U. S. 621; 50 O. St. 549; 22 L. R. A. 768; 35 N. E. 1060; 32 Minn. 458; 21 N. W. 552; 121 N. Y. 454; 8 L. R. A. 719; 24 N. E. 699; 106 Ala. 522; 17 So. 708.

4. There was no waiver. Where no inquiry is made and the insured says nothing, the acceptance of the policy carrying the standard stipulation as to incumbrances binds the parties. 2 Clement on Insurance, 155, 199; Ostrander on Insurance, § 26; 1 May on Insurance, § 294C; 63 Ark. 187; 13 Am. & Eng. Enc. of L. (2 ed.), 228; 68 Ill. App. 637; 168 Ill. 309; 106 N. W. 485; 71 N. W. 755; 89 Tex. 404; 40 L. R. A. 358; 105 Ia. 379; 31 S. W. 566; 85

Wis. 193; 59 S. E. 369; 86 Ala. 189; 55 Md. 233; 10 Fed. 232; 65 Fed. 165; 68 Mo. 127; 79 Mo. App. 1; 98 Ga. 464; 37 S. W. 1013; 82 Miss. 674; 136 Ala. 670; 32 Conn. 21; 115 N. Y. 279; 3 L. R. A. 638; 64 Ia. 101; 100 Ga. 97; 96 Ala. 508; 22 N. E. 229; 136 Ia. 674; 105 Ia. 379; 162 Fed. 447.

5. It was erroneous to adjudge a penalty and attorney's fee against appellant. On the day the judgment was rendered, plaintiffs, having originally sued for $4,500, amended the complaints reducing the demands to $3,413.34, and averring that more had never been demanded, which averment the face of the pleadings shows is untrue. There was no basis for the allowance of penalty and attorney fee. 92 Ark. 378; 93 Ark. 84.

Hawthorne & Hawthorne, N. F. Lamb and *Archer Wheatley,* for appellee.

1. Under the facts and circumstances shown in this record, a chattel mortgage existing at the time the policy is issued will not avoid the policy. If no inquiry is made by the agent of the insurer, and no misrepresentation made by the insured, any provision of the policy with reference to existing mortgages will be deemed to have been waived. The decided weight of authority sustains this view. 5 L. R. A. 430; 80 N. W. 807; 48 N. W. 798; 10 W. Va. 507; 22 Gratt. 854; 30 N. W. 31; 82 Pac. 166; 57 Pac. 62; 62 N. W. 857; 100 N. W. 130; 12 Mont. 474; 62 N. W. 913; 47 N. W. 536; 39 N. E. 534; 10 N. W. 91; 18 Atl. 397; 67 N. W. 775; 17 N. W. 726; 71 N. W. 463; 59 N. E. 309; 74 N. E. 964; 79 N. E. 905; 94 N. E. 779; 101 N. E. 843; 147 N. W. 618; 20 S. W. 900; 13 S. E. 77; 24 S. E. 393; 43 N. J. L. 300; 69 Pac. 253; 127 U. S. 399, 32 L. Ed. 196; 8 How. 235, 12 L. E. 1061; 89 Fed. 932; 23 So. 183; 78 Pac. 392; 44 S. E. 896; 74 N. W. 269; *Id.* 270; 90 N. Y. 16; 107 Pac. 292; 141 Pac. 243; 19 Atl. 77; 47 N. W. 587; 53 N. W. 727.

2. Appellees were entitled to the penalty imposed by the court. The only demand ever made of appellant before suit was filed or afterwards, was for the amounts

mentioned in the amendments to the complaints, and for these amounts judgment was rendered. 102 Ark. 675.

HART, J. J. L. Burns and M. F. Billington, partners, as Burns & Billington, instituted this action against the Great Southern Fire Insurance Company to recover on two policies of fire insurance. The policies covered certain rice belonging to the insured, and no question is raised as to the amount recovered. At the time the contract of insurance was made, there was a chattel mortgage on the rice which was executed by Billington. Doctor Burns procured the policies of insurance sued upon. An application was made to Freeze & Cole, insurance agents, who occupied offices in the same building adjoining those of the insured. The policies were issued upon the oral application of Doctor Burns, and no inquiry was made by the insurance agents as to the condition of the title of the property, or as to whether or not there was any mortgage upon it. The insurance agents selected the company in which the insurance was to be written, and kept the policies in their safe until after the fire occurred. The insured paid the premiums at the time the policies were issued, and it was only when they were making out the proof of loss that the insurance company ascertained that there was a chattel mortgage on the property insured, and upon that ground they refused payment. The policies were in the standard form and contained a provision that they were made and accepted subject to conditions and stipulations printed on the back thereof. Among the provisions printed on the back is the following:

"This entire policy, unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void, * * * if the subject of insurance be personal property, and be or become encumbered by chattel mortgage."

It is admitted that Doctor Burns knew there was a chattel mortgage on the rice at the time he applied for the insurance, and that he did not make any disclosures concerning it because he was not asked about it, and did not know that it was material to the risk. He never read

the policies after they were issued, and neither he nor his partner knew that the policies contained the clause above quoted until after the loss had occurred.

Defendant requested the court to instruct the jury to return a verdict in its favor. This the court declined to do, and, over the objections of the defendant, instructed the jury to return a verdict in favor of the plaintiffs. From the judgment rendered, the defendant has duly prosecuted an appeal to this court.

Counsel for the defendant contends that the plaintiffs by accepting the policies of fire insurance containing the clause providing that they "shall be void if the property is or becomes encumbered by a chattel mortgage," are charged with notice of the condition, and are bound thereby; on the other hand it is contended by counsel for the plaintiffs that where a policy is issued by an insurance company without a written application, the company must be held to have waived the condition of the policy as to encumbrances by chattel mortgages.

The precise issue raised by the appeal has never been decided by this court. In the case of *Rhea* v. *Planters Mutual Ins. Co.,* 77 Ark. 57, and that of the *Home Insurance Company* v. *Driver,* 87 Ark. 171, and other cases, this court has held that where there is a warranty against encumbrances, the insurer is protected by a condition against encumbrances inserted in the policy.

So, too, in the case of *German American Insurance Co.* v. *Humphrey,* 62 Ark. 348, the court held that where a policy of fire insurance provides that it shall be void if the property insured afterward becomes encumbered by a mortgage, the giving of a mortgage on the property renders the policy void. In that case, however, the court said that there is a marked difference between a waiver of conditions made before and those made after the issuance of the policies.

In the case of *Phoenix Insurance Co.* v. *Public Parks Amusement Co.,* 63 Ark. 187, the court held that a condition against encumbrances is waived by the acts of the agents of the insurer who, having authority to waive con-

ditions, and knowing that the property was encumbered, attached to the policy permits for additional concurrent insurance upon which additional policies were issued.

The decisions of the courts of last resort of the various States are in irreconcilable conflict upon the question of whether, under the circumstances detailed above, the policy was invalid from the beginning because of the anti-mortgage clause. It is insisted by counsel for the defendant that the policies sued on were the standard form now in common use, and that the insured was required to disclose the nature and extent of his interest in the property because this was a matter which would largely influence the insurance company in taking or rejecting the risk and estimating the premium; that the clause in question was inserted in the policies by the insurance company, and that the insured was bound by the terms of the policies when they accepted them; that under the facts disclosed by the record, there could be no waiver of the conditions of the policies; and that the conditions inserted in the policies were just as binding on the insured as would have been conditions inserted in any other contract.

A leading case sustaining their contention is that of *Parsons, Rich. & Co.* v. *Freeman P. Lane,* 97 Minn. 98, 7 Am. & Eng. Ann. Cases 1144. In that case the court cites and discusses many of the cases on both sides of the question.

Glen Falls Insurance Co. v. *Michael* (Ind.), 74 N. E. 964, 8 L. R. A. (N. S.) 708, is a leading case sustaining the position assumed by the plaintiffs, that where the insurer issues a policy upon an oral application without making any inquiries as to the nature of the title of the property, it will be presumed to have written the policy on its own knowledge, and, hence, to have waived the condition which would have invalidated the policy.

We have carefully examined several of the leading cases on both sides of the question, and, it being a new one in this State, we are at liberty to decide it in accordance with what we think to be the better rule, and that

which we deem to be the more reasonable and more in accord with a spirit of fairness and justice.

It is true, as contended, that the policies were in the standard form, but the condition upon which the policy is now sought to be invalidated was not in the body of the policy, but was printed upon the back thereof. It is also true that a contract of insurance, like any other contract, should be given force and effect according to its terms; but it is equally well settled that provisions in the printed forms inserted by the insurance company for its own benefit may be waived. Forms for insurance policies are usually prepared by the insurance companies for general use and without reference to particular cases. The insured has little voice in framing the terms of his insurance, and none whatever in preparing the form of the policy issued. He must accept the policy as it is prepared and tendered to him by the insurance company.

As a rule, the insured has no knowledge of the necessity of disclosures which long experience has taught insurance companies are necessary for their protection, or of what disclosures are important or material. In ordinary contracts of importance, the terms are agreed upon after careful consideration and discussion by the contracting parties and contracts are usually prepared in duplicate and carefully examined by the parties before they are signed.

As we have already seen, insurance contracts are prepared by the insurance company, and the terms used are the result of long experience on their part of things necessary to guard their interests. It is not the custom of fire insurance companies to place the policy to be issued by it before the person whose property is to be insured prior to its delivery to him. He has no opportunity to examine the many printed conditions and stipulations contained on the back of the policy until he has paid the premium for the insurance and the policy has been delivered to him. Under such circumstances, it ought not to be said that he was bound by the conditions and stipulations

in the policy declaring that the policy should be void if there was any encumbrance against the property where he had no knowledge of such condition, and was not aware that the giving of a mortgage on the property insured in any way affected the risk.

(1) In this case, the anti-mortgage clause was not in the body of the policy, but was in the printed conditions on the back of the policy along with numerous other conditions and stipulations concerning which no inquiry was made by the agents of the insurance company. The policies sued on were issued upon an oral application, and the agents of the insurance company made no inquiries of the plaintiffs concerning liens or encumbrances on the property. No stipulations or statements in reference thereto were made by the assured, and they had no knowledge that such information was material, or that the policies subsequently issued would contain any provision in reference thereto.

They were not aware that if the insurance company knew that any mortgage had been given on the property, it would decline the risk. They paid, and the agents of the insurance company received the premium, and the property was destroyed by fire during the life of the policies, and before the plaintiffs had any notice whatever of the anti-mortgage clause in the policy or that such condition would invalidate the policy if there was a mortgage on the property when the policy was issued. The agents who issued the policies had authority to waive conditions in the policy.

No question is raised, but that the loss was an honest one, and none but that the plaintiffs are entitled to recover the amount for which judgment was given if the defendant was liable. Under such circumstances, to urge the conclusion that the anti-mortgage clause avoided the policies would be to impute to the insurance company a fraud intended to deceive the assured by issuing policies not binding as contracts of insurance, although it re-

ceived and accepted therefor the premiums, knowing that the assured believed the contracts to be valid.

The defendant asked for a directed verdict, and no other instructions were asked by it. The effect of a directed verdict would have been to hold that the contract of insurance was void from the beginning, and that the policies never in fact had any force or validity because of the anti-mortgage provisions inserted therein by the insurance company without the knowledge of the insured. If that view should be adopted, the insurance company would not only have wrongfully received and accepted the premium from the assured, but would have also misled them into the belief that their property was insured when in fact it was not. So, we think the court was justified, under the circumstances, in finding that the insurance company had waived the anti-mortgage provision in the policies. *Allesina* v. *London & Liverpool & Globe Ins. Co.,* 45 Oregon 441, 2 Am. & Eng. Ann. Cas. 284; *Farmers & Merchants Ins. Co.* v. *Mickel,* 72 Neb. 123, 9 Am. & Eng. Ann. Cas. 993; *Humble* v. *German Alliance Ins. Co.,* 85 Kan. 140, 116 Pac. 472, Am. & Eng. Ann. Cas., 1912 D. 630; *Lancaster Ins. Co.* v. *Monroe* (Ky.), 39 S. W. 434; *Dooly* v. *Hanover Fire Ins. Co.* (Wash.), 58 Am. St. Rep. 26; *Hanover Fire Ins. Co.* v. *Bohn* (Neb.), 58 Am. St. Rep. 719; *Georgia Home Ins. Co.* v. *Holmes* (Miss.), 65 Am. St. Rep. 611; 3 Cooley, Briefs on Insurance, 2630, 2631.

The complaint in this case, as originally filed, asked for the amounts named in the face of the policies, $2,000 on one, and $2,500 on the other. After the fire, plaintiffs had a conference with the adjuster of the insurance company, and arrived at the amount of the losses which was agreed upon at $1,517.04 upon one policy and $1,896.30 on the other. After this had been agreed upon, the agents of the insurance company found out that a mortgage existed on the property at the time the policies were issued, and on this account refused payment. As soon as plaintiffs discovered the mistake in their original complaint,

they filed an amendment thereto in which they asked judgment for the amount which had been agreed upon between them and the agents of the insurance company. They recovered judgment for this amount.

(2) Under this state of facts, it is insisted by counsel for the insurance company that the plaintiffs are not entitled to the attorney's fees and penalty provided for under the Acts of 1905, but we do not agree with them in this contention. Soon after the original complaint was filed, it was amended and judgment was asked for the amount which had been agreed upon between the plaintiff and the adjuster of the insurance company as the amount of loss sustained by reason of the fire. Judgment was recovered against the insurance company for this amount. If the insurance company had desired to avoid the penalty and attorneys' fee provided for by the statute, it should have offered to confess judgment for the amount sued for in the amended complaint. It did not do so; on the other hand, it denied all liability under the policy. The plaintiffs having recovered the amount sued for in the amended complaint, the court properly allowed the attorney's fee and penalty provided for by the statute. *Queen of Ark. Ins. Co.* v. *Milham,* 102 Ark. 675; *Queen of Ark. Ins. Co.* v. *Bramlett,* 103 Ark. 1.

The judgment will be affirmed.

DAVIS v. STATE.

Opinion delivered March 29, 1915.

1. CRIMINAL LAW—SPECIAL GRAND JURY—DISCRETION OF COURT—PRESUMPTION.—When a special grand jury has been summoned, under Kirby's Digest, § 2219, after the discharge of the regular grand jury, it is not necessary for the court to specify the reason for summoning the same in its order, and this court will presume, in the absence of a showing to the contrary that the condition existed, required by the statute authorizing such order.

2. CRIMINAL LAW—CONSOLIDATION OF SEPARATE CASES—OBJECTION BY DEFENDANT.—The trial court is without authority, as against the ob-

jection of the defendant, to order the consolidation of separate cases under different indictments for the purpose of trial.

3. CRIMINAL LAW—CONSOLIDATION OF CASES.—Act 339, Acts 1905, does not give authority to a trial court to consolidate different criminal cases, over the defendant's objection, for the purpose of trial.

4. CRIMINAL LAW—FORMER JEOPARDY.—Defendant was indicted for the crime of selling liquor without a license at 124 S. Main St., the proof showed a sale only at 120 S. Main St., thereafter defendant was indicted for selling liquor at 124, 122 and 120 S. Main St. *Held*, a plea of former jeopardy was unavailing.

Appeal from Craighead Circuit Court, Jonesboro District; *J. F. Gautney*, Judge; reversed.

STATEMENT BY THE COURT.

Four indictments were returned against C. H. Davis by the regular grand jury at the November term of the Craighead County Circuit Court, for violating the liquor laws, charging him with operating a blind tiger at 124 South Main Street, Jonesboro, Ark. Two of the indictments being returned November 17, and two on the 23d, the cases were consolidated by consent, and five witnesses testified, and from their testimony it appeared that the liquors were illegally sold in a room at 120 South Main Street, Jonesboro.

The State then withdrew the submission of the cases over appellant's objection, and the court denied a motion for a verdict directed in his favor. The regular grand jury having been discharged, a special grand jury was summoned by an order of court duly made in proper form, which returned ten indictments against appellant, charging him with running a blind tiger in the buildings at 120, 122 and 124 Main Street, Jonesboro, Ark.

Appellant moved to quash these indictments on the ground of his having been placed in former jeopardy, and the court directed the jury to find for him as to all sales alleged to have been made at Nos. 124 and 122 South Main Street, holding that there was a variance between the indictments charging the offenses to have been committed at 122 and 124 South Main Street, and the proof showing

the sales to have been made in the room back of and adjoining 120 South Main Street.

The State moved the consolidation of all the cases, which was done, over appellant's objection, and he was convicted in each of them by the jury after hearing the testimony, and brings this appeal from the judgments of conviction.

Hawthorne & Hawthorne, N. F. Lamb and *Archer Wheatley,* for appellant.

1. Appellant's motion to quash the indictments should have been sustained. The conditions for calling a special grand jury prescribed by section 2219, Kirby's Digest, did not exist. All the information on which the last indictments were returned was possessed by the court and prosecuting attorney before the regular grand jury was dismissed. Section 2219 of Kirby's Digest is nothing more than an emergency statute. The offense was not discovered or committed after the regular grand jury had been discharged, and a proper showing was offered to bring this case within the rule in 72 Ark. 586.

2. The court erred in consolidating the ten causes over the objection of appellant. Act No. 339, Acts 1909, does not apply to criminal actions. Section 2231, Kirby's Digest, alone is applicable. The court has held that the provisions of this section constitute a strict limitation upon the right. 32 Ark. 203; 33 Ark. 176; 36 Ark. 55; 45 Ark. 62; 71 Ark. 82. Though it is not reversible error, it is bad practice to permit a defendant to be tried upon two indictments charging separate offenses. 32 Ark. 609; 71 Ark. 108; 104 Ark. 317; 108 Ark. 224; 110 Ark. 226; 3 L. R. A. (N. S.) 412, and case note.

3. The court erred in not sustaining appellant's plea of former jeopardy. Jeopardy attaches when a jury has been legally empaneled and imprisonment may beimposed as part of a judgment. Sections 5140, 5141, Kirby's Digest, under which the indictments were had, provide that imprisonment may be assessed as a part of the penalty.

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

1. Appellant's motion to quash the ten indictments was properly refused. The court's finding of fact in the trial below shows that there was a fatal variance between the allegations in the four indictments, and the proof on the part of the State. Therefore, the case was brought within the provisions of section 2219 of Kirby's Digest, permitting a special grand jury to be empaneled.

2. The court did not err in consolidating the ten cases for trial over the objection of appellant. The parties therein, the subject-matter, and the evidence were the same, and appellant was not prejudiced by consolidating the cases. The statute provides that persons jointly indicted for *misdemeanors* may be required to stand trial at the same time.

3. The court did not err in failing to sustain appellant's plea of former jeopardy. The indictments in the last cases were for violations on different days, and the sales were made to different persons, from those set out in the first indictments returned. Because of the fatal variance between the proof and the allegations of the indictment, the first cases were withdrawn from submission before verdict and judgment, hence no jeopardy. 1 Bish. Cr. Law, § 121; 16 Ark. 568; 48 Ark. 36.

KIRBY, J., (after stating the facts). It is conceded that the testimony is sufficient to support the verdicts of the jury, but insisted that the court erred in summoning a special grand jury, in consolidating the cases for trial over appellant's objection, and denying his plea of former jeopardy.

The law provides, section 2219, Kirby's Digest, that the court, after the discharge of the regular grand jury, may in its discretion by an order entered of record, direct the summoning of a special grand jury.

(1) The record shows that an order was made by the court directing the summoning of the special grand jury, and it was a matter within the discretion of the court, and this court will presume in the absence of a

showing to the contrary that the condition existed required by the statute authorizing such order, which it was not necessary to specify therein. See *Dunn* v. *State,* 2 Ark. 229; *Freel* v. *State,* 21 Ark. 212; *Edmonds* v. *State,* 34 Ark. 720; *Dixon* v. *State,* 29 Ark. 165; *Howard* v. *State,* 72 Ark. 586.

(2) It is next urged that the court erred in consolidating the cases for trial over appellant's objection, and this contention must be sustained. This court, in *McClellan* v. *State,* 32 Ark. 609, and *Halley* v. *State,* 108 Ark. 224, condemned the practice of consolidating separate cases under different indictments for the purpose of trial, and held that the court was without authority against the objection of the defendant to order the cases to be tried together, and it has also been held that if the record is silent as to whether there was objection by the defendant to the consolidation of the cases, that he is held to have waived the irregularity and can not complain of the error. *Silvie* v. *State,* 117 Ark. 108.

The statute provides that an indictment must charge but one offense, except in designated cases where certain offenses not including violations of the liquor laws may be included in one indictment. Kirby's Digest, § § 2230, 2231. But for this limitation upon the exercise of the trial court's inherent power as it existed at common law, authorizing the consolidation of misdemeanor cases for trial upon the theory that the different offenses could be charged in one indictment, it could be done, notwithstanding the objection of the defendant. It is true there is much good reason for requiring the consolidation for trial of misdemeanor cases, and especially where the offenses charged are of a like kind or class, and against the same defendant, but it must continue to address itself to the Legislature for effecting improvement in our criminal procedure rather than to the courts, which are bound by existing laws.

(3) It was not the purpose of Act 339 of the Acts of 1905, authorizing the consolidation of "causes of a like nature or relating to the same question," to give the trial

court authority to consolidate different criminal cases over the defendant's objection for the purpose of a trial, and the court erred in ordering the cases consolidated over appellant's objection.

(4) We find no error in the denial of the plea of former jeopardy, the court having sustained it as to the charges for violations of the law by sales made at Nos. 122 and 124 South Main Street, and denied it as to all the charges of offenses committed at No. 120; it appearing from the testimony on the trial of the first indictments that all the sales were made in the room of the building designated as 120 South Main Street, and there being a fatal variance between the offenses charged to have been committed in said indictments, and the proof made, there could have been no former jeopardy since the appellant could not have been convicted of any of the offenses charged under the last indictments upon said first trial. *State* v. *Ward,* 48 Ark. 36.

The court having erroneously consolidated the cases over the defendant's objection, the judgments must be reversed and the cases remanded for a new trial unless the Attorney General elects within fifteen days to take a judgment of conviction in one case only. Since all the offenses were alleged to have been committed at the same place, the place being a necessary allegation in charging such offenses and the testimony introduced in support of all the charges could have been used to secure a conviction of one which would operate as a bar to any further prosecution for any of such sales, it may be considered a trial for one offense only, if the Attorney General elects to treat it so, otherwise, the judgments are reversed, and the causes remanded for a new trial.

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

Opinion delivered March 29, 1915.

1. RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.—Plaintiff was injured by being struck by a moving train while attempt-

ing to cross defendant railway's tracks at a public crossing. Defendant plead plaintiff's contributory negligence. *Held*, in instructing the jury, it was error to tell the jury that plaintiff was not a trespasser and had the lawful right to be upon the track at the time of his injury, and that the jury should have been permitted to say whether or not appellee was guilty of contributory negligence in driving upon the railroad track.

2. RAILROADS—PUBLIC CROSSINGS—DUTY OF CARE.—A duty rests upon railroads to exercise reasonable and ordinary care to observe travellers about to cross its tracks at highway crossings, and it must refrain from doing any heedless or unnecessary act calculated to frighten the teams of travellers rightfully approaching crossings.

3. RAILROADS—PUBLIC CROSSINGS—DUTY OF TRAVELLER.—A duty rests upon a traveller approaching a public railway crossing not to unnecessarily or negligently place his horse in a position where he may become frightened by the escape of steam or by other noises which engines necessarily make even when they are being operated with due care.

4. RAILROADS—INJURY TO TRAVELLER AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—Plaintiff's horse becoming frightened at the escape of steam from an approaching locomotive, while plaintiff was attempting to cross the tracks at a public crossing, plaintiff jumped from his wagon sustaining injuries. *Held*, the question of plaintiff's contributory negligence in jumping from the wagon, should have been submitted to the jury. It was a question of fact for the jury whether plaintiff's act was a negligent one under the circumstances of the particular case.

5. NEGLIGENCE—IMPENDING DANGER—CONTRIBUTORY NEGLIGENCE.—When one acts in an emergency in the presence of an impending danger he is not held to the exercise of that degree of care which would be exacted of him if there was an opportunity for reflection and the formation of a deliberate judgment.

6. DAMAGES—PERSONAL INJURIES—LOSS OF EARNINGS AND BUSINESS—EVIDENCE.—In an action for damages caused by personal injuries, on the question of damages, it is competent to prove plaintiff's capacity for and disposition to work and any special qualification which plaintiff has which tends to increase his earning capacity; but evidence tending to show loss of profits resulting to invested capital and from the labor of plaintiff's partner, when plaintiff's injury occasioned no impairment of the earning capacity of either, is inadmissible.

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

STATEMENT BY THE COURT.

On the 8th day of June, 1914, appellee, in company with his business associate, one George Brown, drove over to the cattle pens at the foot of East Sixth Street, Little Rock, and after remaining there for about an hour, they started on their return home, driving west on said street in a one-horse wagon, Brown doing the driving. When they approached the point where the switch tracks of appellant cross said street, they saw a switch engine backing north over the crossing, pushing two cars, and going at a rapid rate. They stopped some forty or fifty feet from the crossing, and waited until the switch engine and cars had cleared the crossing, and had gone some distance north, when they started to drive across, the way being apparently clear. The evidence is conflicting as to the occurrences thereafter, and as to the manner and cause of appellee's injury; but his evidence, and that offered in his behalf, tends to establish the following facts: That when the wagon reached the third, or middle, track of the switch over the crossing, and the horse had his forefeet on the track over which the engine was traveling, the engine, after having kicked the two cars on to a switch, suddenly reversed and started back toward the crossing with great noise and puffing of steam. This frightened their horse and caused him to jump and turn suddenly to the south on the track in an attempt to run in that direction. Brown was doing all he could to prevent the horse from running away. The engine continued to approach the crossing from the north, puffing steam and making much noise, which tended to increase the fright of the horse, which continued to plunge and jerk the wagon and caused the wheels to slide along the side of the rail until the wagon had gotten off the street and down the track to where the rails stood some six or eight inches above the ground. The engine kept bearing down on them with its accompanying noise, and when appellee saw it was within a very short distance of the wagon, he started to get out of it, when the horse jerked the wheel of the wagon upon and over the rail of the track, and threw ap-

pellee out of the wagon, and very seriously injured him. Appellee further offered evidence tending to show that the operatives of the engine knew of his presence at the crossing, and of his evident intention to cross over, and further that as the engine approached them, those in charge of it saw appellee's situation and danger, and appellee testified that the man sitting on the right of the engine, who was evidently the engineer, appeared to be amused at the situation.

Upon the other hand, appellant pleaded contributory negligence and offered evidence tending to show that the switch engine was approaching this crossing as appellee commenced driving across the tracks, and that there was no unusual escape of steam or other noise, and that as soon as it appeared that the horse was frightened, the engine was stopped, but that the horse continued to plunge thereafter, when appellee became frightened and jumped out of the wagon, when, by remaining in it he would probably have avoided receiving any injury.

Appellee was permitted to show that he and his partner formed a partnership in September, 1911, to engage in the butcher and grocery business, and that with a capital of only $700 invested, they had, within the twenty months preceding appellee's injury, earned a net profit in their business of between eight and eleven thousand dollars, in addition to the meat and groceries which the respective families of the partners had used. And appellee was further permitted to show that an inventory was again taken in June, 1914, about twelve months after he was injured, from which it appeared that there was a net profit of only $2,000 for the thirteen months subsequent to the first inventory.

At the request of appellee, the court gave an instruction numbered 1, which reads as follows:

"You are instructed that plaintiff and his companion, Brown, were not trespassing but in the exercise of a lawful right in attempting to cross the tracks of defendant's railroad at the alleged public crossing in the city of

Little Rock, and it was the duty of defendant's servant in charge of its engine on said tracks to exercise reasonable care and precaution to discover plaintiff's presence on or in close proximity to said tracks and to avoid frightening his horse and injuring plaintiff; and if you find from the evidence that while plaintiff and his said companion, Brown, were attempting to drive over said tracks at said public crossing, and, while in the exercise of ordinary care for their safety, the engineer in charge of one of defendant's engines on said track near to the place where plaintiff and his said companion were attempting to cross, negligently drove said engine down toward and so near to and upon plaintiff and his horse with such rapidity and with such accompanying noises as to frighten said horse and thereby cause plaintiff to be injured, then the defendant is liable, and you will find for the plaintiff." Instruction numbered 3, which reads as follows, was also given.

"You are instructed that if you believe from the evidence that plaintiff was in the face of great, imminent and threatening danger to himself, and that such danger was caused by the negligence of the servants of the defendant in charge of its said engine, and in an attempt to escape said danger he jumped from the wagon in which he was riding, or in an effort to jump from same was thrown out, and injured, he was not thereby guilty of any negligence contributing to his injury that will bar his recovery in this action, even though you further find that if he had remained seated in the wagon he would not have been hurt."

Other instructions were given, to which exceptions were duly saved. But the action of the court in giving the two instructions set out above, and in permitting appellee to prove the earnings of his business, are the only questions in the case which we regard as of sufficient importance to discuss.

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

1. The court erred in permitting plaintiff to testify as to his earnings before and after the injury. 58 N. Y. 391, 201 Pa. St. 384; 52 Hun. 111; Anderson's Law Dictionary, 390; 177 Pa. St. 1; 93 Mass. 76; 95 Mich. 209; 128 Ill. 549; 21 Ark. 431; 56 Am. Rep. 28; 78 Wis. 89; 23 Am. St. 393; 54 Wis. 208; 41 Am. Rep. 19.

2. Instruction No. 2 was erroneous in this: It in effect told the jury that the plaintiff had the right-of-way. That is not the law. 80 Ark. 169; 36 Ark. 607; 77 Ark. 174; 64 Ark. 535; 3 Elliott on Railroads, § 1264; 2 White, Per. Inj. on Railroads, § 886; 39 Kan. 485; 128 N. C. 26; 122 Wis. 287; 114 Ga. 386.

3. Instruction No. 3 is erroneous in this: That it does not submit to the jury the question of contributory negligence of the plaintiff. 67 Ark. 209; 91 Ark. 388; 92 Ark. 554.

Robertson & De Mers, for appellee.

1. There was no error in permitting plaintiff to testify as to the earnings of the business before and after receiving the injury. 13 Cyc., p. 142; 63 Ark. 495; 8 Am. & Enc. of Law, p. 626; 63 Tex. 381; 8 N. E. 817.

2. There was no error in giving instruction No. 2 at request of plaintiff. 69 Ark. 133; 106 Ark. 533; 60 Ark. 409; 77 Ark. 174; 89 Ark. 270; 99 Ark. 226.

3. Instruction No. 3 was in accord with the law. 78 Ark. 431; 84 Ark. 246; 102 Ark. 505.

SMITH, J., (after stating the facts). (1) We think the court should not have given appellee's instruction numbered 1. It was not applicable to the issue in this case. It was not contended that appellee was a trespasser, and his right to cross the railroad tracks at the public crossing was not denied. But this right, of course, was not an absolute one. Under this instruction the jury might well have inferred that appellee had the right-of-way and that there was, therefore, no question as to his contributory negligence for the consideration of the jury.

The rights of the traveler and of the railroad at public crossings are reciprocal and have been discussed in many decisions of this court, and were correctly stated in the trial below in other instructions given to the jury, but these instructions are in conflict with this instruction numbered one. The jury should have been permitted to say whether or not appellee and his companion were guilty of contributory negligence in driving upon the railroad track and should not have been told that appellee was not a trespasser and had the lawful right to be upon the track at the time of his injury. In the recent case of *St. Louis, I. M. & S. Ry. Co.* v. *Transmier,* 106 Ark. 530, the court discussed the reciprocal duties of the traveler and the railroad at a public crossing, in which case it was said (after citing a number of cases on this subject):

(2) "The doctrine of those cases is that 'the duty of railroads is to exercise reasonable and ordinary care to observe travelers about to cross at a highway crossing' and it should refrain from doing any heedless or unnecessary act calculated to frighten teams of travelers rightfully approaching crossings."

(3) This duty the railroad must perform under all circumstances, but the duty also rests upon the traveler not to unnecessarily or negligently place his horse in a position where it may become frightened by the escape of steam, or other noises, which engines necessarily make, even when they are being operated with due care.

(4-5) We think, too, that the third instruction given at the request of appellee was erroneous. Under this instruction, the jury was not permitted to pass upon the question of appellee's contributory negligence in jumping from the wagon. This question of fact should have been passed upon by the jury. Had appellee remained in the wagon he would not have been hurt, yet the fact that he jumped and was injured did not, as a matter of law, constitute contributory negligence. Where one acts in an emergency, in the presence of an impending danger, he is not held to the exercise of that degree of care which would be exacted of him if there was an opportunity for

reflection and the formation of a deliberate judgment. It is not necessarily a question as to whether one choice of conduct proves more hazardous than another would have been; but the question is whether or not the choice in fact made was a negligent one under the circumstances of the particular case, and this is a question of fact for the jury and not one of law for the court. *St. Louis, I. M. & S. Ry. Co.* v. *Tuohey,* 67 Ark. 209; *Woodson* v. *Prescott & N. W. Ry. Co.,* 91 Ark. 388; *St. Louis, I. M. & S. Ry. Co.* v. *York,* 92 Ark. 554.

The authorities are conflicting upon the right to prove the loss of profits to the business of an injured party occasioned by his inability, because of his injury, to give personal attention to his business. The case of *Wallace* v. *Pennsylvania Rd. Co.,* 52 L. R. A. 35, involved this question, and there is an extensive case note which reviews a great many authorities upon the subject. In the case cited the court said:

"Profits derived from capital invested in business can not be considered as earnings, but in many cases profits derived from the management of a business may properly be considered as measuring the earning power. This is especially true where the business is one which requires and receives the personal attention and labor of the owner."

The business of the plaintiff in that case was that of operating a boarding house, and it was shown that by reason of her injury she was thereafter unable to conduct that business. Appellee's business was not destroyed, and this is not a suit for damage done to that business or for any loss of profits sustained by the owners.

(6) It is permissible always to prove one's capacity for and disposition to work, and any special qualifications which one has which tends to increase his earning capacity may be shown. And it was, therefore, competent here to show what appellee's duties were in connection with his business; what his qualifications were for discharging those duties; what the services of one

similarly qualified would have been worth to this business; and the extent to which appellee had been rendered unable to discharge his customary duties. A somewhat similar question was involved in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Osborne,* 95 Ark. 310, and the rule to be observed in these cases was there discussed. But we think one suing for losses to his business should not be permitted to go further than was there authorized; and we conclude, therefore, that the court improperly admitted the evidence tending to show the accumulated profits of appellee's business. These profits resulted in part from invested capital and in part from the labor and services of a copartner, and the injury sued for has occasioned no impairment of the earning capacity of either, and appellee should have been permitted to show nothing more than the decreased value of his own services.

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

STATE *v.* BILLS.

Opinion delivered April 19, 1915.

RECEIVING STOLEN GOODS—INTENT—ALLEGATIONS IN INDICTMENT.—An indictment charging the crime of receiving stolen goods, which alleges only that the receiving was done feloniously and does not set out that it was done "with intent to deprive the true owner thereof;" *held* defective.

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

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

The case turns upon the meaning of the word "feloniously" used in describing the defendant's action in receiving and having in his possession the stolen property. We submit that all the elements of knowingly receiving stolen property are alleged in the indictment, and that

it would amount to mere repetition to say that he received it with the intent to deprive the true owner of it, after it had been alleged that he feloniously received it. 95 Ark. 321; 94 Ark. 215; 111 Ark. 180; 94 Ark. 65.

No brief filed for the appellee.

SMITH, J. The indictment in this cause contains two counts; the first alleges the larceny of the property there described, and the second count charges appellee with receiving the property, knowing it to have been stolen. The charging part of the second count is as follows:

"On the 8th day of October, 1914, said person named in the caption hereof, did unlawfully, feloniously and knowingly receive into and have in his possession 423 pounds of meat of the value of fifty dollars, the property of St. Louis, Iron Mountain & Southern Railway Company, a corporation, all of which property had prior to the said time been stolen, and the said person named in the caption hereof, at the time of receiving and taking said personal property into his possession, well knew that the same had been stolen, against the peace and dignity of the State of Arkansas."

A demurrer was interposed and sustained to this second count, and the State has appealed.

The defect complained of is that the indictment failed to allege that the property was received "with the intent to deprive the true owner thereof." This indictment was returned under section 1830 of Kirby's Digest, which reads as follows:

"Whoever shall receive or buy any stolen goods, money or chattels, knowing them to be stolen, with intent to deprive the true owner thereof, shall, upon conviction, be punished as is, or may be, by law prescribed for the larceny of such goods or chattels in cases of larceny."

It is contended upon behalf of the State that the criminal intent to deprive the true owner of his property is charged by the use of the word "feloniously," and in support of this contention we are cited to cases which hold that the word "feloniously" in an indictment signi-

fies an intent to commit a crime. *Farrell* v. *State,* 111 Ark. 187; *Turner* v. *State,* 61 Ark. 359. But while the use of the word "feloniously" does impute an unlawful intent to commit a crime, its use can not supply the omission of the allegations essential to constitute a charge of the commission of the particular offense.

There are a number of cases which hold that the allegation that the property was received with the intent of depriving the true owner thereof is not essential; but, so far as our attention has been called to them, those decisions were rendered in States whose statutes on that subject do not contain the language found in our statute. In 34 Cyc. 520, under the title of "Prosecution and Punishment for Receiving Stolen Goods," the following statement of the law is found:

"3. Intent. It is sufficient to charge a wrongful receiving without specifying the intent to defraud the owner, where such intent is not mentioned in the statutory provision."

A number of cases are cited in support of the text. But, in the note to the text quoted, it is said that the rule is otherwise where the statute specifies the fraudulent intent, and a number of cases are cited in support of this note.

Among the cases cited in support of the text quoted from Cyc. is that of *Bise* v. *United States,* 144 Fed. 374, 7 Am. & Eng. Ann. Cas. 165. In that case it was complained that the trial court erroneously overruled a demurrer, and a motion in arrest of judgment, challenging the sufficiency of the indictment on the ground that it was not therein alleged that the stolen property was received without the consent of the owner or with the intent to deprive him of its use and benefit. Judge Van Deventer, speaking for the Court of Appeals of this circuit, said:

"The complaint can not be sustained. The statute defining the offense does not in terms make it an element thereof that the stolen property shall be received without

the consent of the owner or with intent to deprive him of its use and benefit; and, while the statute is manifestly not designed to punish one who with lawful intent receives stolen property, as where he receives it with the consent of the owner, or for his use and benefit, we think the words 'unlawfully, feloniously' as used in the indictment mean that the act which they characterize proceeded form a criminal intent and evil purpose and thus exclude all color of right and excuse for the act."

But it will be noted that the opinion calls attention to the fact that the statute defining the offense under which the indictment was drawn, does not make it an element thereof that the stolen property was received without the consent of the owner, or with the intent to deprive him of its use or benefit.

In the case of *Darrah* v. *State,* 90 N. W. 1123, the syllabus is as follows:

"An information drawn under section 116 of the Criminal Code of Nebraska, which charges that the defendant bought and received property, knowing it to have been stolen, but which fails to allege that he bought or received it with intent to defraud the owner, is defective in substance, and will not support a conviction."

In the opinion in that case it was said: "It is a cardinal rule of criminal pleading that all the elements of a statutory crime must be set out in the language of the statute, or in other language of equivalent import. If any element is omitted, the indictment or information is fatally defective. In this case it was alleged that the property was bought and received with knowledge of the fact that it had been stolen, but that is not equivalent to alleging that it had been bought and received with the intent to defraud the owner. The two expressions are not identical in meaning. They are used by the Legislature to convey distinct ideas. Both were contained in section 116 as originally adopted. When the section was amended the words 'knowing the same to be stolen or taken by robbers' were left out. But in the definition of

the crimes covered by sections 115, 117 and 117a of the Criminal Code, guilty knowledge and fraudulent intent are still retained as descriptive elements. * * * The indictment did not charge the particular intent with which the act was done, but did allege that the defendant feloniously bought, received, and concealed the property, knowing it to have been stolen. The court held that the offense denounced by the statute was not pleaded, and reversed the sentence. The Supreme Court of Indiana, in *Pelts* v. *State,* 3 Blackf. 28, having before it the precise question here considered, reached the conclusion that an indictment which alleged knowledge of the theft, but failed to allege a fraudulent intent, was defective in substance. A somewhat extended examination of the books has not brought to light a single case which may be cited to sustain the information."

See, also, cases cited in the note to 34 Cyc. 520, and also 42 Century Digest, title "Receiving Stolen Goods," section 10.

So far as our examination has extended the statutes of most States on this subject do not contain the phrase "with the intent to deprive the true owner thereof," and the decisions of the courts of those States to the effect that such an allegation is unnecessary are of no authority in this State on that subject. Our statute does contain this language. It is an essential part of the offense and must be proved to sustain a conviction, and it follows, therefore, that an indictment which omits the allegation is defective.

Receiving stolen property is a statutory offense, and there is more or less difference in the statutes of the various States defining this crime.

In Bishop's Directions and Forms, § 915, it is said: "The pleader should bear in mind that this (receiving stolen property), is a statutory offense, even when viewed as accessorial to a common-law felony. So that every indictment for it is on some statute, which, as in other like cases, must be covered by the allegations. And the cau-

tion, so often given under other titles, is repeated here, that, as the statutes of our States differ, no pleader should draw an indictment until he had laid before him those of his own State, and the decisions thereon of his own court."

In the case of *State* v. *Sakowski,* 90 S. W. 435, an indictment was held sufficient which alleged that defendant feloniously and fraudulently bought and received goods from the thief, knowing the same to have been stolen, without further alleging that the defendant received the goods with the intent to deprive the owner thereof. But in holding this indictment good the Supreme Court of Missouri said: "The offense is purely a statutory one, and the General Assembly in defining it have not made it a constituent element of the crime that the receiver should receive the same with the intent to deprive the owner thereof."

It follows, therefore, that the demurrer was properly sustained, and the judgment of the court below is therefore affirmed.

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

Opinion delivered April 5, 1915.

1. EVIDENCE—CROSS-EXAMINATION—DISCRETION OF COURT—PERSONAL INJURY ACTION.—In a personal injury suit, it is proper for the court to refuse to permit further cross-examination of a physician who was a witness, as to technical matters relating to the injury, when the witness had already been thoroughly interrogated on the points involved.
2. TRIAL—REMARKS OF TRIAL JUDGE—SPECIFIC OBJECTION.—The trial court stopped counsel for appellant in his cross-examination of a witness with the remark, "we are not interested in that matter and it is not material to the case;" *held,* since it was not improper for the court to stop counsel, if appellant wished to predicate error upon the particular remark of the court, he should have objected thereto specifically.
3. EVIDENCE—CONDITION OF RAILROAD BRIDGE.—In an action for damages for personal injuries caused by the collapse of a railway

bridge, when the bridge was reconstructed, after the accident, with the same timbers that were used in it before the same, evidence that the timbers were rotten five months after the accident is admissible as showing the condition of the bridge at the time of the accident.

4. MASTER AND SERVANT—INJURY TO SERVANT—STRUCTURAL DEFECT.—It is the duty of a master to exercise ordinary care to furnish its servant with a safe place in which, and with safe appliances with which, to do his work, but where an injury results from a defect that is not structural, then, in order to render the master liable, it must first appear that he knew, or by the exercise of care should have known of such defect.

5. MASTER AND SERVANT—MASTER'S DUTY OF CARE.—A railroad company will be liable for damages resulting from the use of a defective rail, if by the exercise of ordinary care, the defect could have been discovered, regardless of the length of time the rail had been used.

6. EVIDENCE—SUBSEQUENT REPAIRS AND CHANGES IN CONSTRUCTION.—Although it is error, in a personal injury action to admit testimony to the effect that after an accident there was a change in the appliance or in the manner of construction and operation of the structure or appliance causing the injury, it is not error, where the injury was caused by the collapse of a railway bridge, to permit plaintiff to show the manner in which temporary braces were used in reconstructing the bridge, which were not used in its original condition.

7. RAILROADS—INJURY TO EMPLOYEE—CONCURRENT CAUSES.—When under the pleadings and evidence plaintiff was injured by the concurrent causes of a defective rail and bridge, an instruction will be held erroneous, which omits the issue of either one of the two concurrent proximate causes.

8. RAILROADS—INJURY TO EMPLOYEE—DAMAGES.—In an action for damages for personal injuries, evidence held sufficient to show defendant to have been negligent and to warrant a verdict for $25,000 damages.

9. MASTER AND SERVANT—FEDERAL EMPLOYER'S LIABILITY ACT.—Although a complaint in a personal injury action does not state facts sufficient to make the Federal Employer's Liability Act applicable, this court would treat the same as applicable if the evidence showed that plaintiff, at the time of his injury, was engaged in interstate commerce.

10. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.—A new trial will not be granted on the ground of newly discovered evidence, when appellant before the trial, could have discovered the same

by the exercise of reasonable diligence, and could have developed at the trial, all that was later claimed to be newly discovered evidence.

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

STATEMENT BY THE COURT.

Appellee sued appellant for personal injuries, alleging that appellant maintained its railroad track upon a bridge constructed over Lost Chain Bayou; that the bridge was constructed of wood and timbers, with wooden bents about fourteen feet apart, placed on mud sills which were placed on the surface of the ground below water which was about two or three feet deep; that the bridge was improperly constructed, the bents and sills not being properly braced for the safe running of trains and locomotives thereon; that by reason of such improper construction, it was of insufficient strength; that the rails, especially at the west end, were old, defective and insufficient; that they were not of sufficient weight, and were insecurely fastened and braced; that the ties were unsound; that the defective condition of the bridge was well known to the appellant; that on March 20, 1914, appellee was in the employ of the appellant as conductor, and was in charge of its train; that the train consisted of about twenty cars, together with the caboose and engine; that the cars were loaded with gravel and ballast; that while the train was passing over the bridge above mentioned at ordinary speed, a defective rail broke and the bridge collapsed, causing the train to fall a distance of twelve or fifteen feet; that the appellee was in the caboose at the time performing his duties as conductor, and was thrown to the floor and received serious and permanent injuries which he described. The prayer was for damages in the sum of $35,000.

Appellant answered, denying specifically the allegations of negligence alleged in the complaint, and the allegations as to the injuries and resulting damages, and set up that the plaintiff assumed the risk.

The testimony on behalf of the appellee tended to show that on March 26, 1914, the appellee was conductor on a train such as described in his complaint, and that while passing over the bridge over what is known as Lost Chain Bayou, the bridge collapsed, precipitating the caboose, with other cars, into the bottom of the bayou, and causing the injuries of which the appellee complains.

The bridge was constructed of heavy pine timber, and the track laid on top of this bridge timber. The bridge did not have any cross braces lengthwise with the bridge from bent to bent. It would not be as strong without these lengthwise braces as with them. The bridge was built three or four years before the accident of March 26, 1914.

One witness who got there within an hour after the bridge fell, stated as follows: "I noticed the broken rail; it looked like it had been an old, rusty break along the side and underneath the rail, it did not extend to the top of the rail." This witness was shown exhibit "C," and asked "if that is the way a railroad bridge of this kind should be constructed," and answered, "Yes, that picture shows that the braces run lengthwise from bent to bent." Witness stated that it had been about twenty-five years since he worked as a bridge carpenter. At the time of giving his testimony, he was a day laborer.

Another witness on behalf of the appellee testified that he was a civil engineer, and had seen the appellant's bridge at Lost Chain Bayou several times. Witness was on the bridge about two months before it fell. He was about half-way across when he saw a gravel train coming. He got on the end of a cap while the train passed. The bridge shook so it scared witness, and he started to jump off, but the water kept him from it. Witness, after the accident, noticed a broken rail, but did not examine it closely. It wasn't cracked or anything, but just a fresh break.

The appellee testified that he was conductor on the train which at the time of the accident was running about twelve miles an hour. He was sitting at the end of the

caboose, and all at once was thrown "like dynamite and landed out in the middle of the floor about twelve or fifteen feet on his right hip." It knocked the breath out of him for quite a time. After about six hours, a caboose and engine came and took plaintiff home to McGehee. Appellee then tells about his being sent to St. Vincent's Infirmary at Little Rock, and about his treatment there; and details the nature of his injuries and sufferings, which will be referred to in the opinion.

The appellant reserved exceptions to certain rulings of the court in the admission of testimony and in refusing certain of its prayers for instructions, which we will note in connection with the other assignments of error in the opinion.

The jury returned a verdict in favor of the appellee in the sum of $25,000, and this appeal seeks to reverse the judgment entered in his favor for that sum.

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

1. The court erred in refusing to permit cross-examination of Doctor Marshall with reference to the origin of the nerve that affects the bowel movement, and in refusing to permit appellant to interrogate the witness further on this point.

The questions as to the origin of the nerves which control the rectum and bladder and scrotum, and as to the effect of a displacement of the vertebrae which control the nerves of these organs, was vitally important. The remarks made by the court were calculated to prejudice the jury against the defense which appellant was endeavoring to establish.

2. The court erred in admitting the testimony of the witness Bankston with reference to the condition of the bridge at a time subsequent to the injury. 48 Ark. 460.

3. Instruction 8 requested by appellant should have been given. No instruction given by the court called attention to the necessity of proving that the defect in the rail must have been known to the defendant, or must have

been of such character that it should have been known. 78 Ark. 505; 79 Ark. 437; 95 Ark. 477; 54 Ark. 389.

4. The testimony tended to show that the proximate cause of the wreck and of plaintiff's injury was the breaking of a rail, and not any defective condition of the bridge, and that if the train had remained upon the track, the wreck and resulting injury would not have occurred. The ninth instruction therefore should have been given. 79 Ark. 76.

5. Appellant was entitled to an instruction to the effect that proof of subsequent repairs of the bridge in a particular method was inadmissible to establish negligence in the original construction of the bridge. 70 Ark. 179; 79 Ark. 388; 78 Ark. 147; 82 Ark. 555; 89 Ark. 586; 105 Ark. 205; 108 Ark. 483. The court therefore erred in refusing to give instruction 11.

6. There was no testimony tending to prove negligence in using the size of rails employed in the place where the accident occurred, and the court erred in refusing to give appellant's thirteenth request for instruction.

7. It was error to refuse to give instruction 16. The court's sixth instruction was a general one to the effect that the employee assumes the risks of injury ordinarily incident to the employment, whereas, the 16th instruction requested is more specific and reaches the essential point involved in the case. It should have been given. 80 Ark. 438; *Id.* 454; 82 Ark. 499; 87 Ark. 531; 90 Ark. 247; 98 Ark. 17; 96 Ark. 206.

8. Instruction 17 should have been given. The testimony of the doctors with reference to the history of the case, as given them by the plaintiff and his attending physician, was inadmissible, and the jury should have been told that those statements were incompetent to prove plaintiff's condition, etc. 108 Ark. 394.

9. The evidence is insufficient to support the verdict. There is no testimony which tends to prove that the bridge was in a defective condition at the time of the accident, nor is there any testimony which tends to prove that the rail was cracked in such a way that it should have

been seen upon reasonable inspection. In the absence of such testimony, there was no case to submit to the jury.

Hoeppner & Young, for appellee.

1. The court was right in not permitting appellant to further cross-examine Doctor Marshall with reference to the origin of the nerve that affects the bowel movement. The character of examination which counsel was pursuing could have only one effect, and that was to confuse the jury.

2. The testimony of Bankston that he examined the bridge, or some timbers in it, subsequent to the injury, was not for the purpose of showing the condition of the bridge at the time of the accident, but was in rebuttal of testimony on the part of appellant to the effect that after the accident the bridge was rebuilt of the same timbers, etc., and that these timbers at the time of rebuilding were sound and in first-class condition. His testimony was admissible.

3. The court's instructions No. 4 and others, already given, covered the same matters as requested by appellant in its eighth instruction; hence there was no error in refusing to give it.

4. The court properly refused to give instruction 9, requested. That instruction improperly assumes that the collapse of the bridge was caused solely by a rail breaking, when in fact it is alleged and proved that the bridge was improperly constructed. The decision relied on by appellant, 79 Ark. 76, is rendered inapplicable by the act of March 8, 1911.

5. There was no error in refusing instruction 11. It was not claimed by plaintiff that longitudinal braces were necessary, and the introduction of any such testimony was purely incidental and explanatory of the methods used in rebuilding the bridge. No objection was made to the testimony, nor exceptions saved. 82 Ark. 555.

6. The thirteenth instruction was properly refused. The testimony as to the size of the rails was a mere incident in the testimony, and was brought out by appellant's

witnesses. The size of the rail had nothing to do with the case.

7. The question of assumption of risk was fully covered by the court's sixth instruction, and instruction 16 requested by appellant, which improperly assumes that the sole cause of the accident was the breaking of the rail, was properly refused.

8. The evidence did not warrant the giving of instruction 17. No "history of the case" was related to the doctors. They got the symptoms from Coke, and on these symptoms gave their opinions as experts as to the result, and they did not testify as to the cause of the accident, and whether or not it was caused by a broken rail, rotten timbers or the improper construction or maintenance of the bridge. 108 Ark. 387, and cases cited.

9. The testimony supports the verdict. It shows that the bridge collapsed when the train was passing over it, and that the plaintiff, through no fault of his, was seriously and permanently injured. It shows also that the rails were too light and that at least one of them "had an old rusty break along the side and underneath the rail."

WOOD, J., (after stating the facts). (1) Appellee's complaint contains the following allegations as to his injuries: That "on being thrown to the floor as aforesaid, plaintiff sustained serious and painful injuries to his right hip, legs, arms, head, body, spine, spinal cord and dislocation of one of his vertebra, resulting in a curvature, and as a consequence, the nerves, muscles and tissues in the region of such dislocation are permanently injured." That "plaintiff also sustained severe and painful injuries to his kidneys, bladder and entire nervous system, and said injuries are permanent and lasting." That "during all of this time, plaintiff has suffered great and excruciating pain and will continue to do so throughout his life." Appellee testified that by reason of his injuries he had lost control of his bowels and bladder and was rendered impotent.

Doctor L. L. Marshall, a witness for appellee, testified that he was a physician and surgeon, and had treated the appellee for the injuries he sustained since about the 2d or 3d of June, 1914. He stated that, by reason of the displacement of the nerves caused by the dislocation of one of the vertebra, appellee had lost control of his bladder and bowels and genital organs. He described minutely the human vertebrae, together with the ligaments and muscles which hold them together, and the effect that the tearing of these muscles and the nerve pressure in a certain region of the back, which he pointed out, would have on the organs lying in the pelvic region, or lower cavity of the body. After minutely describing the anatomy of the human back, his testimony proceeded as follows:

"It would seem from his general condition that the sacral plexus of nerves is involved directly in front of this backbone or pudic nerve, a great and small sciatic nerve and its branches which control the lower limbs, the perineal nerves. In each one of these backbones, there is a hole on each side where the nerves from the cord come through, and where they come through in this fifth lumbar vertebra and from the dorsal vertebrae, they go to form a plexus—the nerves coming together form a net-work. Off this network of nerves, come the different nerves that go down to the legs and to the genital organs and into the rectum, and these nerves that come off this plexus subdivide and branch out like the branches of the trees, some governing some certain muscles and others other muscles."

The cross-examination proceeded as follows:

Q. Do the nerves affecting the different parts of the body all come from the same vertebrae?

A. Oh, no.

Q. Which vertebrae, for instance, would those nerves come from that affect the rectum or bowel movement?

A. This plexus is formed by the nerves that come out of the dorsal vertebra.

Q. Which one is the dorsal vertebrae?

A. There are seven cervical and twelve dorsal. The first dorsal would be the eighth vertebra, and they give out nerves which join all the way down—and five of the lumbar vertebra which follow it—and nerves come through each of the lumbar vertebra, and these nerves come in together to form a plexus where the nerve fibres all join to form this plexus, and off this plexus come the other nerves.

Q. I want to find from which of the vertebra this nerve eminates that affects the bowel movement?

A. Well, it comes from this plexus of nerves.

At this point, the court remarked: "We are not interested in that matter; it is not material to this case. Let's stop the discussion of that point."

The appellant duly excepted to the ruling of the court and its first ground of the motion for a new trial is as follows:

"That the court erred in holding of its own motion upon cross-examination of the plaintiff's witness, Dr. L. L. Marshall, that testimony relative to the emanation of the nerve that affects the bowel movement was immaterial and irrelevant to this case, and in refusing to permit defendant to further interrogate the witness on this point."

The court did not err in refusing to allow further cross-examination of Doctor Marshall. The last question asked the witness on cross-examination showed that the purpose was to ascertain "from which of the vertebra this nerve emanates that affects the bowel movement," but the appellant had already ascertained this fact by other questions propounded to the witness. The witness had already been asked which vertebrae the nerves came from that effected the bowel movement, and had answered that they came "out of the dorsal vertebrae." The witness, with great minuteness and with technical terminology, had described and pointed out the various ligaments, muscles, bones and nerves of the human back, and had pointed out and explained in detail the region of the back where appellee was injured. The expressions

used in his testimony show that he was demonstrating before the jury by pointing out on appellee's back, or the back of some one used for the purpose of the demonstration, the particular vertebra or backbone that was dislocated. He showed that this was the 21st vertebra from the top, or what was technically known as the second lumbar vertebra or system of bones constituting the spinal column. He explained that when the ligaments and muscles binding the joints of the backbone together were turned loose, allowing these joints to slip, the entire nervous system of the pelvis, or cavity where the intestines lie, would be affected, and that such was the condition of appellee as the result of the injury he received. The testimony of other physicians on behalf of appellee corroborated the testimony of Doctor Marshall as to the particular vertebra or backbone that was dislocated, and as to the effect such dislocation had upon the nerves controlling the organs in the pelvis. A more extended examination of the witness on cross-examination was not called for, and it was within the discretion of the court to stop the examination at that point. The doctors used such terms as "this vertebra," "these backbones," "nerve pressure in this region of the back," "these nerves," etc., showing that they were demonstrating before the jury the particular portions of the body of appellee that were affected by his injury; and to have continued further interrogatories along this line on the cross-examination would have been useless, and could have had no other effect than to confuse and mislead the jury by a superabundance of scientific and professional terms, of which the ordinary juror has no knowledge. The only purpose that appellant could have had in extending the investigation along this line would have been to show that the appellee's witnesses were mistaken in their conclusions as to the effect that would be produced by a dislocation of what they designated as "the second lumbar vertebra," or mistaken as to such vertebra being dislocated. The appellant introduced its expert witness, Doctor Smith, who had examined the appellee when he was brought to the hospital on the sec-

ond day after he received his injury, and who described, with the same technical terminology, the nature and character of his injuries, and the results thereof as he ascertained them. The effect of his testimony was to show that if there had been a dislocation of the second lumbar vertebra such as was described by the witnesses for the appellee, and a consequent pressure on what the doctors call the "inguinal" and the "pudic" nerves, the results would have been not only such as that described by the witnesses to that point for the appellee, but if there had been a complete displacement such as they described, there would have been a total paralysis from that point down. The testimony of the expert witness for appellant was to the effect that there was no such paralysis and loss of sensation as would have been the case had the second lumbar vertebra been dislocated as the result of the injury in the manner described by the expert witnesses who testified on behalf of the appellee. Thus, the doctors testifying for the respective parties differed as to the results of the injury which the appellee received, and the jury accepted the testimony of the witnesses for the appellee rather than the appellant, which it was their province to do. But the appellant was not prejudiced by the ruling of the court in closing the cross-examination in the manner indicated, because it was evident that nothing further would be elicited that had not already been testified to, and appellant had proceeded far enough to enable it to bring out the points which it might desire to controvert.

(2) The appellant contends that the remarks made by the court "were calculated to prejudice the jury against the defense." The court in making its ruling should not have stated, "we are not interested in that matter, and it is not material to this case." But no specific objecion was made to these remarks, the appellant only excepted generally to the ruling of the court. As the court's ruling in stopping the cross-examination was not erroneous, it was the duty of the appellant, if it desired to predicate error upon the particular remarks in which the

ruling was couched, to call attention to such remarks by specific objection.

(3) The appellee's injury occurred on March 26, 1914. The trial was had on August 29, 1914. Witness Bankston was permitted to testify, over the objection of appellant, that on the 17th day of August, 1914, he examined the timbers of the bridge with reference to their soundness and "noticed the uprights were rotten where they sat on the mud-sill." He "picked up a rod, and in one instance shoved it clear through." Before this testimony was introduced, witnesses had testified on behalf of appellant that after the accident, the bridge was rebuilt of the same timbers with which it was originally constructed, and that these timbers at the time of the rebuilding were "sound and in first-class shape." The testimony of Bankston was strictly in rebuttal of the above testimony on behalf of appellant, as it tended to show that the timbers were not sound, and in first-class condition at the time the bridge was rebuilt. Moreover, the testimony was competent as tending to prove that timbers in the bridge at the time of the accident were unsound. In *St. Louis, I. M. & S. Ry. Co.* v. *Thurman,* 110 Ark. 188-194, a defective track was alleged to be the cause of the accident. In that case we held that "evidence is admissible of the condition of the track before and at a time five months after the accident, in order to show the condition of the track at the time the accident occurred." See, also, *Little Rock & F. S. Ry. Co.* v. *Eubanks,* 48 Ark. 460-474; *St. Louis, I. M. & S. Ry. Co.* v. *Freeman,* 89 Ark. 331. That principle rules here. We said in *Railway Co.* v. *Thurman, supra,* "It would be unreasonable to conclude that railroad ties that were in first-class condition at the time the wreck occurred could deteriorate so rapidly as to be rotten within five months thereafter. It might be said as a matter of common knowledge that such is not the nature of railroad ties. It would take longer than five months for the disintegration of the timber out of which railroad ties are made." The same may be said of the timber con-

stituting uprights with which railroad bridges are constructed.

Appellant complains because the court refused its eighth prayer for instruction, which told the jury that "it must appear that the rail which was cracked was the same rail that broke," and, "even if you should find this by a preponderance of the evidence, it must further appear that the defendant knew of the existence of this defect, or, by the exercise of ordinary diligence, could have known—that is to say, it must appear from a preponderance of evidence that this rail had remained in the track in a defective condition for such a great length of time that the defendant's servants could not now be heard to say that they did not know it."

One of the witnesses for the appellee testified: "I noticed the broken rail; it looked like it had been an old, rusty break along the side and underneath the rail, it did not extend to the top of the rail."

(4-5) It was also shown that the bridge had been constructed only three or four years previous to the accident. While the testimony on behalf of the appellant tended to show that the break in the rail was a fresh one, and the rail was not defective, still, the testimony of appellee, taken in connection with the testimony for appellant on this point, made it an issue for the jury as to whether or not the defect in the rail was a structural one, and therefore such a defect as the master knew, or should have known when the rail was first laid. As was said in *Arkadelphia Lumber Co.* v. *Smith,* 78 Ark. 505-511: "The jury might reasonably have inferred from the evidence that the defect in the track was made by the construction of it, and not by usage, and that it was the proximate cause of the accident and injury. In that event, the appellant was chargeable with notice of the defect, and liable to its employees injured on account thereof without any previous notice or knowledge of the same." But even if there were no evidence to warrant a finding that a defect in the rail was structural, the appellant's eighth prayer was still calculated to mislead the jury, and therefore

erroneous. It is the duty of the master to exercise ordinary care to provide the servant a safe place in which, and safe appliances with which, to do his work, but where the injury to the servant results from a defect that is not structural, then, in order to render the master liable, it must first appear that he knew, or by the exercise of ordinary care should have known, of such defect. See *Bauschka* v. *Western Coal & Mining Co.*, 95 Ark. 477, and cases cited. *St. Louis, I. M. & S. Ry. Co.* v. *Andrews,* 79 Ark. 437-439; *Ry. Co.* v. *Davis,* 54 Ark. 389-393. The above idea was correctly embodied in the prayer, but in explaining its meaning, it erroneously told the jury that "it must appear from a preponderance of the evidence that the rail had remained in the track in a defective condition for such a great length of time that the defendant's servants could not now be heard to say that they did not know it." The vice in this part of the instruction is in the use of the words "such a great length of time." This language was argumentative and misleading. If ordinary diligence could have discovered that the rail was in a defective condition, even though it had been used but a very short time, it would be sufficient to fix liability for negligence in not maintaining the track in a safe condition. The test was whether, by the exercise of ordinary care, the defect could have been discovered, regardless of the length of time that the rail had been used.

The court refused appellant's prayer No. 9, which is as follows:

"It is immaterial in this case whether the bridge, itself, was properly constructed and maintained, unless it appears from a clear preponderance of the evidence that if it had been constructed with reasonable care, it would not have fallen after the rail broke."

The court did not err in refusing the above prayer, for the reason that the appellee alleged, and there was testimony tending to prove, that the injury was the result of two concurrent proximate causes; that is, a defective rail and bridge. The case of *St. Louis & San Francisco R. R. Co.* v. *Hill,* 79 Ark. 76, relied on by the learned coun-

sel for the appellant is not applicable, for the reason that there the evidence tended to show that the sole and independent proximate cause of the injury was the derailment of the train, and that there was no negligence in the construction or maintenance of the bridge which collapsed only after the derailed train ran upon it.

(6) Appellant's prayer No. 11 is as follows: "The fact that longitudinal braces were put on this bridge in rebuilding or repairing it can not be considered by you as evidence of its defective condition before, whatever may be your opinion as to the reason why they were put on—that is to say, the only question which you can now consider is whether or not the defendant was in the exercise of ordinary care in maintaining the bridge as it was at the time of the injury."

One witness for the appellee testified that "he did not think the bridge would have fallen if there had been enough braces from one bent to another." He was shown a photograph taken after the accident, and after the bridge had been repaired. This photograph showed that the braces were lengthwise from bent to bent. The witness testified, without objection on the part of appellant, that the photograph showed "the way a railroad bridge of this kind should be constructed."

The appellant contends that, in the absence of the above instruction, the jury might have inferred that, because these braces were put on the bridge subsequent to the accident, and while the same was being repaired or rebuilt, the appellant was negligent in not using such braces in the original construction of the bridge. But the testimony of all the witnesses concerning this, on behalf of the appellant, showed that the longitudinal braces were used not because they were thought to be necessary in the permanent construction of the bridge in order to make it safe, but they were simply used as a temporary expedient while the bridge was undergoing repairs or rebuilding. This testimony on the part of appellant was not controverted by the appellee. This court has often ruled that it is reversible error to permit testimony to the effect that

after the accident happened, there was a change in the appliance or in the manner of construction and operation of the structure or appliance causing the injury. *Pekin Stave Co.* v. *Ramey,* 108 Ark. 483, and cases cited. Under the above rule, testimony can never be held prejudicial where it merely shows that the change made after the accident happened was only during the temporary repair or reconstruction of the structure or appliance, and that there was no permanent alteration in the manner of construction or use of the appliance or structure. The *rationale* of the rule is that the master in making the change, does not thereby admit that the use or construction of the appliance or structure at the time the injury occurred was negligent. Since the uncontradicted proof shows that the longitudinal braces were used, not because the master deemed same necessary for the proper permanent construction of the bridge, but were only used for the purpose of repairing or rebuilding the bridge, there could not be any inference of negligence because the longitudinal braces were not in use when the accident happened, and, therefore, no prejudice could have resulted from such testimony and from the refusal of the court to grant appellant's eleventh prayer.

(7) The latter paragraph of the prayer was also erroneous, because it told the jury that the only question they could consider was whether or not the defendant was in the exercise of ordinary care in maintaining the bridge. This ignored the issue as to the defective rail which appellee alleged was a concurrent proximate cause of his injury.

The court did not err in refusing to tell the jury that they "should not consider the size of the rails as evidence of negligence on the part of the defendant." The evidence as to the size of the rails was developed incidentally on cross-examination of witnesses for appellant who, on the direct examination, had testified in regard to the broken rail. The rail, its size, weight and strength, were all relevant to the issues, and it was proper to inquire concerning same. And especially was it not prejudicial

error to elicit such facts after appellant's witness had testified on the direct examination as to the "size and condition of the rails on that bridge." Such facts were developed by the appellant, itself, on the direct examination and the appellee had the right to cross-examine on the same line that the appellant had pursued in its direct examination.

In its sixteenth prayer, appellant sought to have the court tell the jury that "unless the breaking of the rail was due to the fault and carelessness of the defendant in failing to discover defects which caused it to break," it was one of the hazards which the appellee assumed. The court did not err in refusing this prayer, for the reason already shown in connection with the discussion of other instructions, that it limited the inquiry to the defective rail as the sole proximate cause of the injury, and ignored the alleged defective condition of the bridge as a concurrent proximate cause of appellant's injury. Moreover, the court fully and correctly defined the issue of assumed risk and declared the law applicable thereto in its instruction No. 6.*

Appellant contends that the court erred in refusing to tell the jury, in the latter clause of instruction No. 17, that "insofar as the opinion of the doctors in this case is formed from a history of the case as given them by the plaintiff, you should not allow it to influence your own judgment in considering the facts as given you by the plaintiff himself."†

*6. When a man enters the service of another, he is deemed in law to have assumed all the risks of injury which are ordinarily incident to the employment in which he is engaged; and if he is injured by an accident which is ordinarily incident, and liable to occur in such service, then the master is not liable. But such servant does not assume the risk of any injury which may occur from the negligence of the master or of his fellow servants (Reporter).

†17. You are instructed that so-called expert or opinion testimony is permissible under the rules of law, but is of the lowest and most uncertain and unsatisfactory character, and should be received and considered by the jury with the highest degree of caution. It is your duty to carefully consider their statements as to the method and means of obtaining the information on which they arrive at their opinion, and you should only give credence to their opinion, if you consider it at

Even if this clause, considered as a separate proposition of law, would have been correct, it was but the concluding portion of a long and argumentative instruction on the weight of the evidence which the court very properly refused.

(8) The appellant contends that the evidence is not sufficient to sustain the verdict. The testimony on behalf of appellee, which we have set out, when given its strongest probative force in his favor was sufficient to warrant the jury in finding that the appellant was negligent in that it failed to exercise ordinary care to maintain its track and bridge in a safe condition, which resulted in the injury of which appellee complains. The evidence likewise was sufficient to sustain the verdict as to the amount of damages. The verdict was not excessive. See *St. Louis, I. M. & S. Ry. Co.* v. *Webster,* 99 Ark. 265-81.

(9) The contention that the act of Congress of April 22, 1908, is applicable here, was not raised in the trial court, and for that reason will not be considered for the first time on this appeal. Neither the pleadings nor the evidence raised this question. Although the complaint does not state facts sufficient to make the Federal Employers' Liability Act applicable, we would treat same as applicable if the evidence showed that appellee at the time of his injury was engaged in interstate commerce. See *Toledo, etc., Ry. Co.* v. *Slavin,* 236 U. S. Rep. 457. But here the allegations of the complaint and the evidence are only to the effect that appellee was running the train loaded with gravel and ballast from Arkansas City to Halley. These are stations a few miles apart on appellant's branch line in Arkansas.

---

all, in proportion to the thoroughness or uncertainty of the information on which they base it. You are further instructed that you are not bound by their opinions at all, further than it may coincide with your own judgment of the matters about which they give opinion, and that it would be your duty to reject all such testimony as does not agree with your own judgment, or as may appear to you not to have been formed from correct information of the best character obtainable. You are further instructed that insofar as the opinion of the doctors in this case is formed from a history of the case as given them by plaintiff, you should not allow it to influence your own judgment in considering the facts as given you by the plaintiff himself (Reporter).

(10) After the adjournment of the August term of the court at which the trial was had and the judgment entered, appellant, on the 4th day of December filed its motion to vacate the judgment and grant a new trial, in which it set up that since the trial of the cause: "Defendant has learned that at the time of the trial the plaintiff and his attorneys had in their possession x-ray pictures of plaintiff, taken by Doctor McGill, showing that plaintiff had not been injured as he claimed to be, and that he had been advised by Doctor McGill that he had suffered no permanent injury," etc.; that the plaintiff positively refused to permit defendant to take x-ray pictures of his person, and that while it had heard that x-ray pictures had been made of the plaintiff, it also understood that they were to have been introduced as evidence in the case, and it expected to have the opportunity of examining them in the case, and that the plaintiff and his attorneys "failed and refused to introduce them in evidence," etc. The appellee, in response to the motion, denied these allegations, and set up that Dr. W. F. Smith knew of the x-ray pictures taken by Doctor McGill, as shown by his testimony at the trial. He further set up that Doctor McGill made x-ray plates for plaintiff's own use, but that after appellee received the x-ray pictures, they were so dim he could tell nothing about them; that had the defendant so desired, it could have made plaintiff a witness, and introduced those plates or pictures in evidence, etc.

Evidence was heard on behalf of the appellant and appellee on the trial of this motion, and the court overruled the same, and an appeal has been lodged from such final order. It is sufficient to say, in regard to this appeal from the court's order, overruling appellant's motion and refusing to vacate the judgment, that the court did not abuse its discretion. The facts developed on the hearing of the motion were sufficient to justify the court in its ruling.

At the original trial, Dr. W. F. Smith, the chief surgeon for appellant, was a witness, and he testified fully in regard to these x-ray pictures and as to what they

showed. His testimony discloses that he saw the pictures on the second day of June, the day after they were taken, that the plaintiff brought them to him in person, and told him that Doctor McGill had taken them. One of the attorneys for the appellant, who conducted the trial, states that he found that "there was a reference to the x-ray pictures taken by Doctor McGill in the investigation, but that it entirely escaped his knowledge until after the trial, and that he understood at the time that the x-ray pictures which had been taken had been taken by either Doctor Marshall or Doctor Austin.

The above facts alone were sufficient to warrant the court in overruling appellant's motion and entering an order refusing to vacate the judgment, for these facts show appellant did not exercise proper diligence. They show that appellant had discovered, before the trial or by proper care could have discovered the existence of the x-ray pictures, and that by the exercise of reasonable diligence, it could have developed at the trial all that it now claims as newly discovered evidence. The testimony of the appellee on the motion to vacate tended to support the allegations of his response, and it was a matter resting largely within the discretion of the court, and the court, as above stated, did not abuse its discretion, but was fully warranted in its finding.

There is no reversible error in the record, and the judgment must, therefore, be affirmed.

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

Opinion delivered April 5, 1915.

RAILROADS—OVERCHARGE OF FARE—INTENTION.—Under § 6620, of Kirby's Digest, imposing a penalty upon railroads for charging a passenger a greater compensation than is allowed by law, a railway company is subject to a penalty only when its agent intentionally charges a passenger an excessive fare.

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

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

A carrier is not liable for the statutory penalty for making an overcharge for a passenger's fare which was due to an error or mistake on the part of the carrier's agent. 58 Ark. 490; 106 Ark. 599; *Id.* 170; 54 Misc. (N. Y.) 163; 155 App. Div. 798.

J. C. Ross, for appellee.

The question whether the auditor intentionally made the overcharge was submitted to the jury in all the court's instructions. That the overcharge was intentional was made a condition to recovery by the instructions. There was sufficient evidence to put the case to the jury, and their verdict should be final. This court has frequently held that carriers of passengers are liable for overcharges. 60 Ark. 221; 93 Ark. 42.

HART, J. The plaintiff, J. C. Baker, sued the St. Louis, Iron Mountain & Southern Railway Company to recover the statutory penalty under section 6620 of Kirby's Digest, for charging and collecting a greater rate for transportation than that provided by statute. He recovered judgment, and the railroad company has appealed.

On April 4, 1914, the plaintiff got on one of defendant's passenger trains at Perla. The train auditor came around to collect tickets, and the plaintiff told him that he wished to go to Traskwood. The auditor collected 28 cents for his fare, and gave him a receipt therefor. This was more than he was by the statute allowed to collect.

On the part of the railroad company it was shown that the auditor turned in the stub from which he had torn the receipt to the railroad company; that twenty-eight cents was a greater rate than he was allowed to charge from Perla to Traskwood, but that it was the amount to be charged from Perla to Haskell, a station a few miles beyond Traskwood. The auditor stated that he thought the plaintiff asked to pay his fare from Perla to Haskell, and for that reason charged him twenty-eight cents. He said that if he had understood that the plaintiff

only wanted to go to Traskwood, that he would only have collected the amount provided by law for passage to that station.

Under section 6620 of Kirby's Digest, imposing a penalty upon railroads for charging a passenger a greater compensation than is allowed by law, a railroad company is subject to a penalty only where its agents intentionally charges a passenger an excessive fare. *Railway Co.* v. *Clark,* 58 Ark. 491; *St. Louis, I. M. & S. Ry. Co.* v. *Waldrop,* 93 Ark. 42.

Therefore, we think, under the undisputed evidence, the court should have directed a verdict in favor of the railroad company. The auditor testified that he understood that the plaintiff wanted to go to Haskell, and that he charged him the fare to that station, and that he would not have charged him twenty-eight cents if he had understood that the plaintiff was only going to Traskwood. He said that he did not see the plaintiff again after he collected his fare, and the plaintiff admitted that the auditor did not see him again, and did not see him get off the train at Traskwood.

The auditor issued the plaintiff a receipt for cash fare and turned in the stub from which the receipt was torn to the company. This shows that he accounted for the fare taken. His own testimony that he did not intentionally make an overcharge is reasonable and consistent and is corroborated by the fact that he charged the plaintiff the exact amount of the fare from Perla to Haskell, the station to which the auditor understood the plaintiff wished to go. There is no fact or circumstance in the case tending to show that the auditor intentionally made an overcharge.

It follows that the court should have directed a verdict for the defendant, and for the error in not doing so, the judgment will be reversed, and, inasmuch as the case has been fully developed, the plaintiff's cause of action will be dismissed.

It is so ordered.

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

Opinion delivered April 5, 1915.

1. RAILROADS—DUTY TO MAINTAIN PUBLIC CROSSING.—It is the duty of every railroad company to properly construct and maintain crossings over all public highways on the line of its road in such manner that the same shall be safe and convenient to travellers, so far as it can do so without interfering with the safe operation of the road.
2. RAILROADS—DEFECTIVE CROSSING—INJURY TO TRAVELLER.—Plaintiff was injured while attempting to drive over defendant's tracks at a public crossing. *Held*, under the evidence the jury was warranted in finding that the defendant was guilty of negligence in not repairing the crossing, and that the plaintiff was free from contributory negligence.
3. RAILROADS—PUBLIC CROSSINGS—DUTY TO MAINTAIN.—It is the duty of a railroad company to use ordinary care to keep public crossings over its tracks in a reasonably safe condition for persons traveling over them.
4. DAMAGES—PERSONAL INJURIES—PERMANENCY.—In an action for damages growing out of personal injuries, the evidence held sufficient to warrant the submission to the jury of the issue of the of the permanency of plaintiff's injuries, and that a verdict of $5,000 damages was not excessive.

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

STATEMENT BY THE COURT.

J. H. Smith sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages for injuries alleged to have been sustained by him while driving over its railroad at a public crossing. He alleges that his injuries were caused by the negligence of the defendant in maintaining the crossing. The facts are as follows:

Near plaintiff's home in Independence County, there is a public road which crosses the defendant's line of railroad. The public road does not run straight across the railroad, but approaches it at a sharp angle, so that in driving across from north to south, the right wheel of a vehicle will go over the rail before the left one gets to it. During the first part of April, 1914, Smith, in a two-horse

wagon loaded with five or six hundred pounds of rock, drove upon this crossing from the north side. When his wagon wheels passed over the south rail, the wheels, on account of the defective condition of the crossing, dropped into a rut and plaintiff was thrown against the front end of his wagon, the lower part of his abdomen striking the dashboard of the wagon with great force. Smith made an effort to rise, and just as he got up, the rear wheels of the wagon fell into the rut, and he fell backwards, striking his back with great violence against the load of rock in the wagon. He said there were no crossing planks on the inside of the rails, and that the ties there were exposed; that the planks on the outside of the rail, on the south side of the crossing, had been raised up to the level of the top of the rail by the dirt which had been worked under it by vehicles passing over the crossing; that just beyond the planks, or about two feet from the rail, there was a drop of twelve or fourteen inches; that vehicles crossing the railroad had a tendency to pull the dirt out of place and work it up under the plank next to the rail, and in this way had created the rut; and that he drove on the crossing without any knowledge of its defective condition and was driving in the place usually traveled by wagons crossing there.

Other witnesses for the plaintiff stated that they had gone over this crossing about the time plaintiff was injured, and that there were no planks on the inside of the rail, and very little dirt, and that the ties were exposed between the rails. One of the witnesses said that he took a level about two and a half feet long, and measured it from the rail on the south side of the crossing two and a half feet, and that from there was a sheer drop of eleven and one-half inches. He said that he had had experience in constructing railroad crossings, and that one should be constructed with planks on both the inside and the outside of the rails, and that the space between the rails, if planks were not used, should be filled with stone and dirt; that where the crossing is slanting, as was the case here, the planks should slant with the crossing, and that the

fill of dirt should come up level with the top of the planks, and make a shoulder extending out a foot and a half or two feet which should slope down. He said the crossing in question was not constructed in this manner, and that the hole on the south side had been caused by wagons passing over the crossing and pulling dirt away.

Other witnesses testified that there was a drop of twelve to fourteen inches, or more, at the place where the plaintiff said he was injured.

The defendant company adduced testimony tending to show that the crossing was constructed in a safe and proper manner, and that it was not defective at the time plaintiff was injured. Other witnesses introduced by the defendant testified that after the accident, the plaintiff told them that he had been injured at a bad place in the public road some distance away from the crossing, and not upon the right-of-way of the railroad company. The plaintiff, however, denied that he had made these statements to the witnesses. Other testimony will be referred to in the opinion.

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

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

1. Instruction 1, given by the court, is erroneous. From it the jury might understand that if the crossing was in a defective condition, and plaintiff was injured by reason of such condition without negligence on his part, defendant is liable. In effect, it makes the railroad company an insurer of travelers against injury by reason of the defective condition of crossings.

2. The court's eighth instruction upon the measure of damages authorized the jury to consider, among other elements of damages, whether, "as a result of the injuries, the plaintiff has to any extent been permanently injured." Aside from Doctor Stevens, no other medical witness testified that the injuries were permanent, and he had not had opportunity to make such an examination as

would justify him in asserting that plaintiff's injuries would be permanent. 106 Ark. 186.

3. The verdict is excessive. There is no proof that appellee's injuries are permanent, and the difference between his earning capacity before the injury and after, is not so great as to justify a verdict for the large amount awarded.

4. The court ought to have directed a verdict for the defendant. The testimony does not establish that the alleged defective condition of the crossing had existed for such a length of time that the defendant could have had its attention called to it, and it does not appear that defendant had any notice of such defective condition. 28 Cyc. 1384, and cases cited in note 99; 20 L. R. A. (N. S.) 689, and cases cited.

H. L. Ponder and *Ira J. Mack,* for appellee.

1. Instructions are to be considered as a whole. When that is done in this case, it becomes apparent that instruction 1 is not open to the objection made by appellant. 100 Ark. 107, 119; 109 Ark. 231, 240; *Id.* 575; Thompson on Trials (2 ed.), § 2407.

2. There was testimony on which to base the court's instruction with reference to permanent injury, and it will be noted that under the instruction it was necessary for the jury to find from the evidence that there was permanent injury before they could consider that as an element in the award of damages. 13 Cyc. 144; *Id.* 217. If there was any error in the instruction, it should have been pointed out by specific objection. 97 Ark. 358; 65 Ark. 255; 109 Ark. 31; 100 Ark. 283; 101 Ark. 316; 102 Ark. 316.

3. The verdict is not excessive. The jury, under the testimony would have been warranted in returning a much larger verdict.

HART, J., (after stating the facts). (1) It is strongly insisted by counsel for the defendant company that the evidence was not sufficient to warrant the verdict. The law applicable to cases of this kind is clearly stated in the Am. & Eng. Enc. of Law (2 ed.), volume 8, p. 363, as follows: "It is the duty of every railroad company

properly to construct and maintain crossings over all public highways on the line of its road in such manner that the same shall be safe and convenient to travelers, so far as it can do so without interfering with the safe operation of the road."

On the same page the author states: "The duty of the railroad to construct and maintain crossings over public highways is a matter usually regulated by statutory enactment. And a failure to regard such statutory requirements will render the railroad company liable for all injuries from such neglect of duty." See, also, Acts of Arkansas, 1905, page 116.

On page 366 of the volume of the Encyclopedia of Law, above cited, the author said: "An embankment constructed as a necessary approach to a railroad track is in legal contemplation a part of the crossing, and should comply with the provisions regulating crossings in general."

Again, at page 374, it is said: "The duty of the railroad company to repair and restore a highway is a continuing one, and commensurate with the increasing necessity of the public, and so, where the enlargement of a city or increased travel upon streets has rendered the crossing as originally restored inconvenient or dangerous, it is the duty of the company to adapt it to the public needs."

To the same effect, see *Whitby* v. *Baltimore, C. & A. Ry. Co.* (Md.), 54 Atl. 674; Elliott on Railroads, volume 3, § § 1115, 1176.

Under the principles of law above announced, which are in accord with the decisions of the courts of last resort of most of the States, we think there was sufficient evidence to warrant the verdict. Of course, the testimony of the defendant tended to show that the crossing was properly constructed, and that it was not defective, but the testimony introduced by the plaintiff was in direct conflict with the testimony of the defendant. According to the testimony of the plaintiff's witnesses, the crossing was in a defective condition. They stated that there were no inside planks to the crossing, and that the ties were exposed

to view by reason of no dirt or stone having been placed there to bring the crossing up to a proper level. They said that on the south side of the crossing, the plank which had been put on the outside of the rail had come up to the top of the rail by reason of dirt having worked under it, and that one of the ends of this plank was not nailed down. They further said that a little beyond the plank, or about two feet from the rail, there was a sheer drop variously estimated by the witnesses from ten to fourteen inches. The plaintiff testified that he did not know of this defective condition of the crossing, and that when his front wheels fell into the depression, he was thrown from the spring seat in the wagon with great violence against the dashboard, and that when he raised himself, the rear wheels of the wagon fell into the depression, and he was thrown back on to the rocks with which his wagon was loaded.

(2) If the condition of the crossing was as described by the plaintiff and his witnesses, the jury was warranted in finding that the defective condition of the crossing had existed for such a length of time that the defendant was aware of it. Besides, one of the witnesses for the plaintiff testified that he had been crossing there twice a week for several weeks about that time, and that the defective condition of the crossing existed for some time prior to the accident. Under these circumstances, the jury was warranted in finding that the defendant was guilty of negligence, and that the plaintiff was free from contributory negligence.

It is next insisted by counsel for the defendant that the court erred in giving instruction numbered 1, which is as follows:

"If you find from the evidence that the plaintiff was injured while attempting to pass with his wagon at a public crossing placed by defendant over its railway, and that the crossing was in a defective condition at the time by reason of the negligence of the defendant, and that the injury to plaintiff, if any, was caused by such defective crossing, and that the plaintiff exercised ordinary care

and prudence in attempting to cross over the crossing, then you will find for the plaintiff."

(3) No specific objection was made to this instruction. It was the duty of the railroad company to use ordinary care to keep the crossing in a reasonably safe condition for persons traveling over it, and it is the contention of counsel for the defendant that the instruction under consideration ignored this rule of law. The instruction is not aptly drawn, but we do not think it is open to the objection now made to it. When the court used the language "that the crossing was in a defective condition at the time by reason of the negligence of the defendant," it evidently meant that the negligence of the defendant consisted in failing to use ordinary care to keep the crossing in a reasonably safe condition for travel. In instructions given at the request of the defendant, the court told the jury that the railroad company does not insure the safety of persons crossing over its tracks at a public crossing, but the law only required it to use ordinary care to keep the crossing on the public highway over its tracks in a reasonably safe condition for travelers having occasion to use it. If counsel for the defendant thought the instruction susceptible to the meaning now contended for, they should have made a specific objection to it, and, no doubt, the court would have changed the language used in it to meet the objections. Not having done so, they are not in an attitude to complain. The instructions given at the request of the defendant are not contradictory to the instruction complained of, but are explanatory of it. Therefore, we do not think the court erred in giving the instruction complained of.

It is also contended by counsel for the defendant that there is no testimony to warrant the finding of the jury that the plaintiff was permanently injured, and that on this account, the court erred in instructing the jury on permanent injuries. We do not agree with them in this contention. The plaintiff was injured on the 9th day of April, 1914, and the trial of the case was had on the 13th day of October, 1914. At the time the plaintiff was in-

jured he was fifty-five years old, and never had any serious sickness. He then weighed about 140 pounds, and his weight at the time of the trial was 122 pounds. He was ruptured and severely injured in his back. Plaintiff stated that since the accident, any noise or excitement bothers him, and that he is not able to sleep well; that before the accident he was able to do a great deal of both mental and physical labor; that he had been foreman of a construction gang, and that since his injury, it is difficult for him to read or to make figures; that he seems to see two objects; that his back still hurts him; that he has frequent headaches; and that he has suffered continuously with his back since the injury occurred.

A physician who examined him testified that he had a double inguinal hernia, and that from the history of the case, he was of the opinion that it was caused by the injury; that the hernia is a permanent injury unless the plaintiff has an operation performed, some of which are successful, and some of which are not; that in the great majority of cases an operation is successful, and the patient is practically well of the rupture in six months if he takes care of himself and avoids any heavy lifting or strains, which would have a tendency to bring it back.

The physician also stated, with reference to his injury in the back, the following: "His back injury, based on the number of cases I have seen, treated and observed, and from what I have read on the subject, it is my experience, if a man hurts his back badly once, he complains with it the rest of his life, when he does hard work, or there is a change in the weather. While he might get better under proper treatment, still he may suffer the rest of his life. As to the neurasthenic condition he has, the nervous trouble, I do not think any one ever dies from that. It is a functional trouble, and the majority of them get well under proper care and treatment. Sometimes a recovery takes place in six months. Some recover in a few months, some in six months and others it takes years. There is no way of telling how long it would take in any individual case. Each case is a case

of itself. Some cases, if treated properly, will get well rapidly, while in some cases the patient will linger for months, and some never get well."

The physician stated that the plaintiff was suffering from traumatic neurasthenia and nervous condition caused by the shock or fright.

(4) Evidence adduced by the defendant tended to show that the injuries of the plaintiff were not permanent but the jury were the judges of the weight of the evidence and the credibility to be given to the witnesses; and we think the testimony adduced by the plaintiff was sufficient to warrant the court in giving the instruction on permanent injuries. The physician specifically stated that, in his opinion, the injury to his back was permanent and that his rupture was permanent unless he was operated upon, and that an operation was not successful in all cases.

Finally it is insisted by counsel for the defendant that the damages awarded by the jury were excessive. The jury returned a verdict for the plaintiff for $5,000. Under the facts and circumstances adduced in evidence we can not say that that amount was excessive. The physician who testified in favor of the plaintiff said that an operation for hernia would cost from two hundred and fifty to five hundred dollars and that one couldn't do much work for six months thereafter; that, as to his neurasthenic condition, he might get well in about six months, or it might take years, and that some never get well; that the probable expense of treatment for his nervous trouble would be from $25 to $50 a week, depending upon the place he went to for treatment; that it was necessary for him to have complete rest to cure his trouble; that the older a person is the worse the trouble is and the longer it will take for the patient to recover; that the plaintiff's headache, backache and eye trouble are all symptoms of his nervous troubles; that he should be taken to a sanitarium and should stay there at least six months, and that it might require years to cure him.

The plaintiff testified that he has not been able to do any work since the injury and that he was capable of earning, as foreman of a construction gang, an occupation which he was well qualified to fill, the sum of $100 per month; that he was a farmer and owned a farm, and that his services as manager of the farm were worth $50 per month. Taking into consideration the time lost between the date of the injury and the time of the trial, and six months, the least possible time within which the physician gave him to recover, it would require at least $600 to compensate him for his services. The jury might have found that it would cost him $2,000 for a surgical operation and expenses at the sanitarium, even if he should be cured. This would leave him less than $2,500 for his pain and suffering which he had endured and was likely to endure in the future and for permanent injuries which the jury might have found under the testimony he had received. Under these circumstances it can not be said that the verdict was excessive.

We have carefully examined the record and find no prejudicial error in it. Therefore the judgment will be affirmed.

SIMONSON v. LOVEWELL.

Opinion delivered April 5, 1915.

1. LIBEL AND SLANDER—PRINTED ARTICLE—LIBEL PER SE.—An article published in a newspaper, charging plaintiff with dishonesty while holding a public office, held libelous *per se*, and the evidence held sufficient to sustain a verdict in plaintiff's favor.
2. TRIAL—PROVINCE OF JUDGE AND JURY—ADMONITION OF JUDGE—VERDICT.—The province of the court and jury in the trial of a cause is distinct and separate and the object of a jury trial is to get the free judgment of the jurors upon the facts in dispute; and the fundamental question to be determined in testing the language used by the court in admonishing the jury to reach a verdict is to determine whether the language used by the judge was calculated to coerce the jury, either by threat or by persuasion, into an unwilling verdict.
3. TRIAL—VERDICT—ADMONITION OF COURT.—When a jury is unable to agree upon a verdict, it is error for the trial judge to charge

them in such a way as to impress the minority with the idea that it is their duty to yield their judgment to the majority.

4. LIBEL AND SLANDER—COMPENSATORY DAMAGES.—In an action for libel, in awarding compensatory damages, the jury may consider all the evidence in the case and if it finds that prior to the publication of the article sued on, that plaintiff bore the reputation of being a defaulter, or that his reputation for morality was bad, the jury may consider these facts in mitigation of damages.

Appeal from Crittenden Circuit Court; *J. F. Gautney,* Judge; reversed.

J. T. Coston, for appellant.

1. The admissions of plaintiff and the uncontradicted evidence show the *truth* of the publication, and the cause should be reversed and dismissed. 97 S. W. 55; 58 Ark. 105; 2 Atl. 524; 98 Pac. 286. The communication was privileged. 125 N. W. 272. It was not libelous *per se.* 46 Ia. 533; 60 *Id.* 251; 78 Kan. 711; 28 Minn. 162; 113 N. C. 203; 64 Tex. 354, and many others.

2. There is an irreconcilable conflict between instructions 11 and 15. 159 S. W. 34; 65 Ark. 66; 25 Cyc. 530, 418; 51 Atl. 709; 51 S. W. 872; 41 *Id.* 528; 20 N. H. 561; 27 Ind. 528; 81 S. W. 275; 20 So. 707.

3. Instruction 19 invaded the province of the jury and should not have been given, after the jury failed to agree. 115 S. W. 153; 8 Cush. 1; 164 U. S. 492; 196 *Id.* 307; 122 N. W. 322; 11 How. Pr. 260; 85 N. E. 138; 164 S. W. 719; 92 *Id.* 865, 1118; 58 Ark. 282; 84 S. W. 709; 85 N. E. 439; 1 S. E. 439; 73 *Id.* 759; 70 *Id.* 889; 147 Fed. 502; 103 S. W. 1189; 119 N. Y. Sup. 681; 41 Atl. 280; 29 N. E. 911; 10 N. W. 44; 90 S. W. 165; 80 N. Y. Sup. 582; 71 S. E. 799; 60 *Id.* 107; 196 U. S. 307; 70 S. E. 889; 73 *Id.* 759; 98 S. W. 145. It was error to inquire how the jury stood.

4. The verdict is excessive.

A. B. Shafer and *L. C. Going,* for appellee.

1. The article is libelous *per se.* 72 Ark. 421, 86 *Id.* 50; 95 *Id.* 207; 92 *Id.* 486; 105 *Id.* 254.

2. Instructions 11 and 15 are not conflicting.

3. The giving of instruction 19 was not reversible error. The court simply admonished the jury of the importance of an agreement if possible. 50 Ga. 53; 84 N. W. 906; 82 S. W. 569; 54 S. E. 255; 13 *Id.* 955; 10 *Id.* 233; 47 S. W. 1071; 36 Iowa, 1032, 9 S. E. 190. It was not injurious. 170 S. W. 993; 161 *Id.* 1052.

It is not improper to inquire how the jury stood. 196 U. S. 307; 70 S. E. 889.

4. The verdict is not excessive.

HART, J. This is an action by Jno. A. Lovewell against S. T. Simonson to recover damages for the publication of a certain alleged libelous article in the Luxora Commonwealth of March 19, 1910. The case was tried before a jury which returned a verdict for the plaintiff in the sum of $5,000 and from the judgment rendered the defendant has appealed. The article upon which the action of libel is based is as follows:

"WHO SHALL WE SELECT AS THE NEXT SHERIFF IS ONE OF THE MOST IMPORTANT QUESTIONS NOW BEFORE THE PEOPLE OF MISSISSIPPI COUNTY, IF NOT THE MOST IMPORTANT.

"(1) Shall it be C. B. Hall, who has in the short space of time in which he has had to prove himself, made one of the best and cleanest officers Mississippi County has ever known, and whose books are clean and whose settlements are right and up-to-date, or shall it be John Lovewell, who, after several terms in office and after ample opportunity to prove his worth and efficiency if it were in him, has proven his utter inefficiency and unworthiness and has abused and forfeited every right he may have had to the support, confidence and respect of the people of Mississippi County.

"(2) Instead of being the high-class gentleman to which he should have aspired and might easily have attained in his private life, he has forced upon and displayed before the people a record that has offended every sense of right thinking people. In fairness, what an example to the youth of our rapidly developing county to

confer such a conspicuous honor upon a man with such a record, and in effect to say to our sons, do likewise, and be honored. No, we could not so advise them for a hundred times the honor and compensation attached. Details are in disgusting abundance and reserve. Not for any fancied slight or dislike to the action of his friends and fellow county officers, should Mr. Hall lose one vote, but we should encourage a man who has made so excellent a record by strong support and re-election.

"(3) Even Mr. Hall's worst enemies have practically no foundation for their enmity, and it is clearly a distorted and perverted judgment that would lead to an endorsement of Lovewell's record in preference to Hall. The time has fully arrived when it is of urgent importance to support and encourage a worthy and competent official and endorse his record in the strongest way, which is by re-election.

"(4) Mr. Hall has taken a very impartial attitude in the matter of drainage, but the facts are that we should go forward with the improvement and development of our country in the most rapid and practical manner. Lovewell is the worst retarding influence we have. Men with the capital and ability to assist in this work do not care to come where the sheriff invites and encourages riot and disorder, even when the county court is in session, as we recently had a deplorable exhibition. True, this suits a few people we have yet with us, but happily their number is rapidly declining.

"(5) The land owner and even the humblest laborer should be for the early and full development of the country, and upon mature reflection all will be.

"(6) The construction of drainage ditches or districts eight and nine means the expenditure of many hundred of thousands of dollars which insures an advance in values of many hundreds of per cent above the assessment to the land owner, and the laborer will receive the greater bulk of the large expenditure for construction which will be followed by the expenditure of many hundreds of thousands of dollars immediately in the clearing

of lands which the poorer people of the county will receive. This will be followed by building of thousands of homes, barns, and thousands of miles of fences, small lateral ditches and good roads, all at an expenditure of hundreds of thousands of dollars, all of which will come to the hands and pockets of the laboring people and on to the merchant in payment of better and more food, clothing and furniture and for the payment on little homes and farms, then thousands of worthy and industrious people will come from other places where opportunities scarce exist and plow and gather most abundant crops from the lands that were formerly disgusting and malarious, disease breeding swamps and into which the doctor can not be induced to visit the poor man's family for a fee less than ten or fifteen dollars.

"(7) And yet the most that Lovewell's supporters seem to be able to say for him is that he has saved the poor people from this improvement and that he has been their friend, and How? By squandering and appropriating to his own uses the thousands of dollars of the people's money that should have been turned into the treasury of the county for the upbuilding of the county and the payment of the county's indebtedness, and we now experience an enormous raise in taxes made necessary very largely on account of the misappropriation of the county funds by the self-confessed benefactor of the county and friend of the people.

"(8) Here is one of the many comparisons which should cause the people to take notice. In the collection of the 1907 taxes Lovewell turned into the school fund $29,331.61. In the collection of the 1908 taxes on the same valuation, Hall turned into the school fund $36,686.34, or $7,354.73 more than Lovewell, as shown by the public records.

"(9) In the case of the County against Lovewell, just tried in the chancery court, Lovewell made no defense that he had appropriated the county's funds as charged, but that he was saved from prosecution by the three years' statute of limitation and the judge held only

that the three years' time was a bar to the prosecution. What a record with which to come before the people for re-election. The attorneys for the people immediately filed their transcript preparatory for an appeal to the Supreme Court.

"(10) The confidence man always poses as your friend and always will while getting his graft, and is usually conspicuous and busy with his advice to look out, for somebody else is trying to work a graft.

"(11) It would be far more pleasant and infinitely to the credit of the county if such records as this had never been made, though such records and their maker, who is entitled to no screening or support, should be brought into the light and given their due then buried forever, and newer and better men and records supplant them at the earliest opportunity.

"(12) Vote for C. B. Hall, who has nothing to cover up, and feel assured that your taxes will be used as they should."

Simonson admitted that he was the author of the article and caused it to be published.

(1) The article was libelous *per se*. *Patton* v. *Cruce*, 72 Ark. 421; *Murray* v. *Galbraith*, 86 Ark. 50; *Murray* v. *Galbraith*, 95 Ark. 199.

The record of the testimony in the case is voluminous and for the reason that the case must be reversed because the court erred in instructing or admonishing the jury upon the question of agreeing upon a verdict, we do not deem it necessary to abstract the testimony. It is sufficient to say that many witnesses were examined and that the testimony upon the question of the truth or falsity of the published article is in direct and irreconcilable conflict. Besides, upon a retrial of the case there may be additional and different testimony. We have carefully examined the record and are of the opinion that the testimony was sufficient to sustain the verdict.

After deliberating for some hours the jury returned into the court and reported that they were unable to agree upon a verdict. Thereupon the court said to the

jury, "Gentlemen, how do you stand?" and the foreman of the jury replied, "We stand nine to three." The court then of its own motion gave to the jury what is called instruction number 19, which is as follows:

"Gentlemen, under our laws and constitution we have only one method of settling disputed questions of fact, and that is by the verdict of a petit jury. The law requires that the verdict of the jury be the verdict of twelve men unless the parties otherwise agree to a less number. This agreement on the part of the parties to a lawsuit is rarely, if ever, obtained, so it is necessary in order to have a lawsuit finally disposed of that the jury render a verdict.

"It is not to be presumed that this case can ever be tried at any other time any better than it has been tried on this occasion, or that we will ever have another jury to try the case that will be any more honest or careful and painstaking than the jury we have at present. If you do not decide the case, it is left for some other jury to decide, and there is no reason why it should be done, if it can possibly be avoided.

"If, when you have discussed the case, you find that a large majority of the jury is for one side or the other, as the case may be and a few for the opposite side, then the minority ought to consider very carefully whether or not they are right and the others are wrong before they finally conclude to report a mistrial.

"You ought to discuss the matter among yourselves and endeavor as best you can to reach a conclusion. We make up our minds and opinions upon almost everything we experience in our lives from discussing those matters with other people. Very often we find people whose opinions upon a given state of facts are at variance with our own, and very often we find that our opinion is wrong and that of our neighbor is right. It is not to the discredit of any man that he may change his opinion, if, after a discussion, he ascertains that his opinion is wrong. This is not said to you for the purpose of changing your minds. No man ought to render a verdict in a case where

he conscientiously believes it is wrong; on the other hand, he ought to be reasonably sure he is right before finally concluding he will report a mistrial in a case.

"In the determination of this case you have very few questions to decide. The first is, was the publication true or false. If you find the alleged libel to be true, you will find for the defendant. If false, then the next question is the question of damages. These are the questions you have to decide.

"I am now going to ask you gentlemen to retire to your room and make another effort to reach an agreement. I do not do this because I have the power or authority to do it, but because I believe the jury should be given time and opportunity to reach an agreement. It is not to the discredit of the jury that it takes time to decide the suit. You may retire, gentlemen."

The language used by the court is assigned as error by counsel for the defendant.

Upon the question of how far the court may go in admonishing the jury of the necessity of agreeing upon a verdict, in the case of *St. L., I. M. & S. Ry. Co.* v. *Devaney,* 98 Ark. 83, the court said:

"In the conduct of the trial of causes the trial court is necessarily and rightfully vested with a large discretion. And, unless there has been a clear abuse or unwise exercise of that discretion, the appellate court should not interfere therewith. The trial judge should not make any remark to or in the hearing of the jury which would indicate his opinion as to the merits of the case or as to any fact involved therein. But he may properly admonish the jury as to the importance or desirability of their agreeing on a verdict. He should not by any word or act intimate that they should arrive at a verdict which is not the result of their free and voluntary opinion, and which is not consistent with their consciences; but still it is proper for the trial court to impress upon the jury the duty resting upon them to arrive at a decision. This court has said: 'It is entirely proper for a trial judge, at all stages of the deliberations of the jury, to make plain

the obligation resting upon them, if possible, to agree upon a verdict consistent with the facts and the concurring individual convictions of each juror.' "

In the case of the *St. Louis, I. M. & S. Ry. Co.* v. *Carter,* 111 Ark. 272, we said:

"The rule is well settled in this State that the trial court may detail to the jury the ills attendant on a disagreement and the importance of coming to an agreement. The trial judge should not, by threat or entreaty, attempt to influence the jury to reach a verdict. He should not, by word or act, intimate that they should arrive at a verdict which is not the result of their free and voluntary opinion, and which is not consistent with their conscience. He may, however, warn them not to be stubborn and to lay aside all pride of opinion and to consult with each other and give due regard and weight to the opinion of their fellow jurors."

(2) In that case we recognized it to be the doctrine of this court that the province of the court and jury in the trial of a case was distinct and separate, and that the object of jury trial is to get the free judgment of the jurors upon the facts in dispute; and the fundamental question to be determined in testing the language used by the court in admonishing the jury to reach a verdict in a given case is to determine whether or not the language used by the judge was calculated to coerce the jury, either by threat or by persuasion, into an unwilling verdict.

In the *Carter* case, *supra,* we did not approve or disapprove the instruction given in the case of *Commonwealth* v. *Tuey,* 8 Cush. (Mass.) 1. We, as well as other courts which have had occasion to discuss the subject, recognized the *Tuey* case as a leading case on the question, and pointed out that it is generally regarded as a case approaching the border line of telling the minority of a disagreeing jury to agree with the majority merely for the sake of an agreement. We held that the language used in the *Carter* case went further than that used in the *Tuey* case, and that the tendency of the court's remarks was to create an impression upon the minds of the minority that

they should yield to the majority of the jury. In the *Tuey* case, the language of the trial court which was regarded as objectionable is as follows:

"And, on the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

A comparison of the language used by the court in the case at bar, and that used in the *Tuey* case will show that the court went further in this case than did the court in the *Tuey* case. In the *Tuey* case, the court had instructed the jury that before it could convict, it must be convinced beyond a reasonable doubt of the guilt of the defendant. The court, in admonishing the jury, in effect, told them that a juror should consider whether a doubt in his mind was a reasonable one when it made no impression on the minds of a majority of the jury; and that, on the other hand, if the majority of the jury were for acquittal, the minority ought to seriously ask themselves whether they should distrust the weight or sufficiency of the evidence which failed to carry conviction to the majority.

The meaning of the language used by the court in that case was that if a minority of the jury differed from the majority, the minority should carefully consider the evidence for the purpose of determining whether their own opinion was correct. In other words, the language of the court was equivalent to telling the minority that it should consider and examine carefully evidence which

failed to carry conviction to a majority of the jury. It did not tell the minority that it should give more effect to the opinion of the majority than it did to its own opinion, which would have been in effect to tell them that they should weigh the opinion of the majority instead of weighing the evidence.

In the instant case, the court said to the jury: "If you do not decide the case, it is left for some other jury to decide, and there is no reason why it should be done, if it can possibly be avoided."

"If, when you have discussed the case, you find that a large majority of the jury is for one side or the other, as the case may be, and a few for the opposite side, then the minority ought to consider very carefully whether or not they are right, and the others are wrong before they finally conclude to report a mistrial.

"* * * This is not said for the purpose of changing your minds. No man ought to render a verdict in a case where he conscientiously believes it is wrong; on the other hand, he ought to be reasonably sure he is right before finally concluding he will report a mistrial in a case."

(3) In the case before us the language used was calculated to impress the minority of the jury with the idea that it was their duty to yield their judgment to the voice of the greater number. The court did not tell them to weigh the evidence as it did in the *Tuey* case, but in effect told them that they should give weight to the opinion of the majority. This was not within the province of the court.

The case before us was a civil case, and, under the instruction of the court, was to be determined by the jury according to where it should find was the preponderance of the evidence. The case had been on trial for several days. Numerous witnesses had been introduced and examined and cross-examined at length. The record of their testimony is very voluminous. There was a sharp and irreconcilable conflict in the testimony given by the witnesses. After the jury had deliberated some hours, it

returned into court and reported that it could not reach an agreement. The court at once asked them how they stood, and when told nine to three, it immediately used the language which is the basis of the assignment of error under consideration. We do not doubt but that the court was actuated by proper motives, both for the interest of the public, and for the litigants in the case. But we are of the opinion that under the circumstances, a fair and reasonable construction of the language used was calculated to impress upon the minority that their opinion was entitled to less weight than that of the majority of the jury. As we have already seen, each party, as a fundamental right, was entitled to have the issues of fact determined by a unanimous verdict which had the independent assent of each member of the jury, and we are of the opinion that the language of the court was calculated to impress on the minds of the jury that the minority should yield its opinion to the majority for the sake of an agreement in the case. The minority should not be required to yield to the majority unless from conscientious convictions that the majority are right. Therefore, we are of the opinion that the court erred in the language used, and that for this error, the judgment should be reversed.

Inasmuch as the judgment must be reversed for the error just indicated, we desired to call attention to two other instructions given by the court, numbered respectively, 11 and 15. They are as follows:

"11. In determining the amount of damages you will award to the plaintiff, in the event you find for the plaintiff, you have the right to take into consideration all of the evidence in the case, and if you find that prior to the publication of said article plaintiff's reputation for morality was bad, and that he further bore the reputation of being a defaulter, then you may consider such evidence in mitigation of any damages you may award the plaintiff by way of compensation."

"15. You are further instructed that the evidence relating to the circumstances under which a libelous article is published, may be considered by you in determining

whether the plaintiff is entitled to vindictive or punitive damages from the defendant, but must not be considered by you in determining the amount of compensatory damages; that is to say, such evidence is not competent to reduce or mitigate compensatory damages."

(4) It is claimed by counsel for the defendant that these instructions are in conflict. It will be noted that in instruction numbered 11, the court told the jury that in awarding compensatory damages, it had a right to take into consideration all the evidence in the case, and that if it found that prior to the publication of the article in question, the plaintiff bore the reputation of being a defaulter, or that his reputation for morality was bad, these facts might be considered by them in mitigation of damages. This instruction was correct, and no complaint is made by the defendant. The defendant does insist, however, that the instruction numbered 15 is in conflict with it because the court there told the jury that the evidence relating to the circumstances under which a libelous article is published may be considered in determining whether the plaintiff is entitled to punitive damages, but can not be considered in determining the amount of compensatory damages. Counsel for the defendant urges that the evidence relating to circumstances as used in the instruction includes evidence of the plaintiff's reputation for morality and the evidence that he bore the reputation of being a defaulter.

We do not think he is correct in this contention. The court evidently intended to use the word "circumstances" with reference to the facts leading up to the publication of the article and which caused its publication, and we do not think the court had in view the evidence relating to the plaintiff's reputation for morality or the evidence in regard to his being a defaulter. Therefore, we would not reverse the judgment on account of this assignment of error. The language of the instruction might have had a tendency to mislead the jury, and had counsel for defendant made a specific objection to it, doubtless the court would have changed it to obviate the objection of

defendant. We call attention to this matter now, so that the language of the instruction may be changed at the next trial should an instruction couched in the same language be presented to the court by the plaintiff, and should a specific objection be made to it by the defendant.

For the error in giving instruction numbered 19, the judgment will be reversed and the cause remanded for a new trial.

BURBRIDGE v. ARKANSAS LUMBER COMPANY.

Opinion delivered April 5, 1915.

1. TIMBER DEEDS—CONSTRUCTION.—Timber deeds, if their terms are not ambiguous, should be construed without the aid of testimony aliunde, and if the intention of the parties can not be ascertained from the written instruments, other evidence is admissible, in case of ambiguity to show what the meaning of the contracts is.
2. TIMBER DEEDS—REMOVAL OF TIMBER—REASONABLE TIME.—Where timber was deeded to appellees with the right to remove the same as expeditiously as possible, in determining the question of a reasonable time, it is proper to take into consideration the location of the land, its accessibility, the character and quantity of the timber thereon, the seasonableness of the weather, and the facilities obtainable for cutting and removing the timber, and all other conditions and circumstances which might affect the cutting and removing of the timber.
3. TIMBER—SALE OF—REMOVAL—EXPEDITIOUS REMOVAL.—Timber was deeded to appellees with the agreement that the same would be removed as expeditiously as possible. Some of the timber was many miles from appellee's mills, and could be reached only as appellees constructed railroads to the same. Appellees did not begin cutting timber on some of the tracts within ten years after the date of the contract. *Held*, the parties were aware of the conditions under which appellees had to work, and that as appellees were building railroads to the timber and were all the time running their mills at full capacity, and the time limited in the contracts for cutting the timber had not expired, that appellees were proceeding expeditiously under their contracts, which would be upheld, as against subsequent purchasers of the timber from the same grantors.
4. TIMBER—SALE—SALE TO AGENT.—Timber was sold to certain agents of appellee company, the vendors knowing that it was for the

use of the appellee company. *Held*, as against a subsequent vendee, to whom the original vendor later sold the timber, that appellee stood in the same position as if the timber had been sold directly to it.

5. TIMBER—CONTRACT OF SALE—REMOVAL.—Under a contract to cut and remove timber expeditiously, *held*, under the evidence that the vendee was proceeding with proper dispatch to remove the timber as expeditiously as possible.

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

STATEMENT BY THE COURT.

The title to timber on about 4,000 acres of land is involved in this controversy. Twenty separate suits were instituted against the appellees, the Arkansas Lumber Company, the Bradley Lumber Company and the Southern Lumber Company, independent lumber manufacturing corporations, with their mills located at Warren, Bradley County, Arkansas, to cancel and set aside as a cloud on their title to the lands, certain timber deeds in each one of which one of said lumber companies was grantee.

Six suits were brought against the Arkansas Lumber Company, nine against the Bradley Lumber Company and five against the Southern Lumber Company, and the cases involving the same questions were consolidated for trial.

The parties all claim from a common source of title, the grantors in the timber deeds to the different lumber companies having afterward conveyed the timber on the same lands to appellants and all the conveyances to the different corporations of the timber are by deeds substantially alike, except as to name of grantor, lands described, consideration paid and the term of years mentioned in the clause relating to the time allowed in which the timber could be cut and removed, one of which deeds is as follows:

TIMBER DEED.

This indenture, made this 1st day of April, A. D. 1905, by and between Eliza Green, party of the first part, unto and with the Southern Lumber Company, party of the second part.

Witnesseth, That said party of the first part being the owners, in fee simple, and in possession of the following lands, lying and being situated in Bradley County, Arkansas, towit (description). For and in consideration of the sum of (consideration), the receipt of which is hereby acknowledged, has this day granted, sold and conveyed unto said party of the second part and its lawful successors and assigns forever all the pine timber over twelve inches in diameter on said lands, and enough of the smaller timber for skid poles in removing said timber from the land.

It is agreed, That said party of the first part shall pay all taxes and assessments levied against said lands and keep the same free from all alienation and incumbrance, except such as may be subordinate and subject to this indenture; and that any failure by said first party to pay such taxes and assessments by the third day before the time for the payment of the same shall expire shall be construed to be an authority to the party of the second part to pay the same, for which a lien on said land may be declared as now by law given to agents and others paying taxes on lands of others at their request.

The party of the second part shall cut and remove said timber as expeditiously as possible, and it is agreed that unless it shall have removed all the same within a period of ..... years from the date hereof, that it shall be responsible for and pay to the first party the full amount of taxes assessed against said lands after the expiration of said period of ..... years from this date until such time as said timber is removed and said possession returned to said first party. The said second party shall have free and uninterrupted possession of said land during the terms of this indenture and for the

purpose herein set forth, and shall have free ingress and egress thereto and therefrom, with the right to build and operate tram or railroad onto or across said land for the purpose of transport or transporting the timber therefrom, or for transportation of timber belonging to or that may belong to said second party, and to this end shall be regarded as the holder of said land, to sue for and recover the same from all persons whatever, holding or attempting to hold the same; provided, that the said first party, its heirs or legal assigns, may retain such possession of said land, at all times, as shall not interfere with the right of the second party under this deed for the purposes aforesaid. * * *

It is further agreed, That whenever said timber shall have been removed, the party of the first part shall enter full possession of said land at once, whether the time for such removal be expired or not; provided, that all right of railroad herein granted shall be perpetual; said right-of-way not to be less than fifty feet wide, and may be used for a regular freight and passenger railroad.

And the said party of the first part does hereby covenant with the second party and its lawful assigns and successors that he will forever warrant and defend the title of said timber, and right-of-way, against all lawful claims whatsoever.

(Relinquishment of dower by wife.)

The period of greatest activity of buying timber and timbered lands by the defendant companies, and during which the deeds to the timber in controversy were executed, except for two or three tracts, was for the Bradley Lumber Company from 1902 to 1905, and for the Arkansas and Southern lumber companies from 1904 to 1909. The mills of the said companies upon which the timber was to be manufactured are all located at Warren in the northeast part of Bradley County.

The Arkansas Lumber Company started in 1901 with a mill of about 50,000 feet daily capacity, which was later

replaced with a mill of daily cutting capacity of 150,000 feet.

The Bradley Lumber Company mills, when first erected, had a daily capacity of 50,000 feet, but were afterward burned and replaced with a new mill with a daily capacity of 100,000 feet.

The mills of each company have been continuously operated to the limit of their full capacities from the time they were constructed until now, except during the time necessary to replace the plants of two of the companies that were destroyed by fire, one company's plant being twice destroyed; and frequently they have been run at night.

There is no question but that the lumber companies paid the market price of the timber at the time of its purchase and conveyance to them, and all the parties knew its distance from the mills and understood that it had to be cut and transported to the mills at Warren for manufacture over trams and logging railroads that were being and to be constructed, by the different lumber companies, from the mills to the timber.

At the time the mills were erected there were no railroads in Bradley County except the Iron Mountain, which ran east from Warren to Dermott, in Chicot County.

The most of the timber conveyed by the deeds involved herein was situated from twelve to twenty and thirty-five miles from Warren, the place of manufacture.

There was also in 1901 a logging road about three miles long, the Crandell & Levitt, running from Warren westward. It was later chartered as the Warren & Ouachita Valley Railway and extended to Banks in Bradley County, a station on the Chicago, Rock Island & Pacific Railroad, which was constructed through the county during 1906 and 1907 from the northwest border to the southeast, its nearest point to Banks being at Warren about sixteen miles distant.

There are some creeks, the Lagles, running north and south through Bradley County with low, flat banks and wide bottoms from one-half to one and a half miles, which are overflowed about half of the year, and constitute a natural barrier to the removal of logs from one side to the other, which it is not practical to do without the construction of a permanent log road.

L. J. Burbridge, one of the appellants, claims title to 2,795 acres of timber, under deeds executed in 1911 and 1912, from appellees' grantors for a recited consideration of one dollar in most of the conveyances, and the other appellants claim about 880 acres. The deeds conveying the timber to the Southern Lumber Company, now claimed by Burbridge, were executed from 1905 to 1909, and the shortest time mentioned in the clause granting the right to remove the timber is twenty-one years in a deed made in 1909; all the others designate thirty years except one which allows thirty-five years.

The deeds conveying the timber to the Arkansas Lumber Company, claimed also by Burbridge, were executed none earlier than 1904, none later than 1907, except one in March, 1912, which fixes the time of removal definitely at five years. The shortest time for removal of the timber recited in its other deeds is twenty years, and the longest is thirty years. The earliest date of execution of any conveyance of timber involved in this controversy to either the Southern or Arkansas Lumber Company is a deed from Hattie Edrington to the Southern Lumber Company executed December 12, 1901, reciting a period of twenty years for the removal of the timber, which was cut and removed in 1912.

None of the deeds executed to said appellees, the Arkansas Lumber Company and the Southern Lumber Company, conveying timber claimed by other appellants than L. J. Burbridge mention a shorter period of time for the removal of the timber than twenty years, nor longer than thirty years.

The procedure for railroad construction for transportation of the timber was to build a main line in the general direction of the larger bodies of timber and to build laterals, or logging spurs from it out into the timber on the different tracts, and cut and remove the timber over these laterals, spurs and the main line to the mills at Warren. The timber accessible, or that could be reached within a reasonable haul, was cut along one side of the logging spur, down and around the end thereof and back up the other side, so that the steel of which the logging spur was constructed could be taken up and laid in another direction either on the main line or other spurs, and thus, by continuous building of the main line and the laying, taking up and relaying the steel on the logging spurs, the companies were enabled to construct facilities to transport sufficient timber to keep the mills supplied with logs, proceeding all the while toward and into the timber.

The Bradley Lumber Company began to build its logging road in 1902 and to cut and remove such timber as it had upon its road and accessible to it. It had not cut or removed any timber from any lands in the immediate vicinity of the lands, the timber on which is involved in these suits, except in two instances, and in those the company had just reached and was preparing to cut and remove the timber when the suits were filed.

There was no railroad building in the county except by the lumber companies until 1906 and 1907, when the Rock Island was constructed through it. By the time that road was finished the Bradley Lumber Company's road had reached a length of about twelve miles south of Warren, and turned west toward a body of its timber in township 14, range 10. It was having trouble to get cars enough to ship out its lumber, and concluded to build across and make a junction with the Rock Island Railroad at Hermitage, which it did, and logged its mill from timber then gotten down in township 14. After forming the junction with the Rock Island, it facilitated the removal

and manufacture of its timber by getting trackage privileges from that road, and dropped down into township 15, range 10, below Hermitage, and built spurs out from the Rock Island, and during a part of 1908 and 1909 logged its mill from that locality. When the timber there was cut it went into township 17, range 10, made accessible by the use of trackage privileges on the Rock Island Railroad, which were denied after the close of 1910 on an order of the Interstate Commerce Commission, and logged its mill from that locality for a few months. It continued, during all this time, building its own main line south, so when it could use the Rock Island tracks no longer it would have its line sufficiently far south and near its timber to throw out logging spurs and get timber enough to keep its mill running constantly.

It would have reached and cut the timber on the lands of six of the parties to the suit within less than one year. It cut no timber west of the Lagles, never having operated on that side of the creeks. Its original plan was to cut its timber east of the Lagles and then across and it later decided to exchange, if possible, its timber lands on the west of the Lagles with the Arkansas and Southern Lumber Companies that were operating in that territory, for some of their timber accessible to its road, but had not been able to do this except to exchange small tracts of timber with said companies when they reached same in their operations. Just before the suits were commenced it had traded the timber on the Neal lands to the Arkansas Lumber Company, which was proceeding to cut it when the suits were commenced. It had not been able to effect the exchange of timber on the other lands, the filing of the suits preventing it. This company was not able to make any arrangements with either of the other appellee companies to use their log roads or logging spurs nor to have its timber hauled over them.

Early in 1902 the Southern and Arkansas Lumber Companies began reconstructing and extending the Crandell & Levitt road westward through their timber in the

north end of Bradley County, using it to transport logs to their mills, and cutting the timber as the road was extended.

In 1907 they had reached a point sixteen miles west from Warren, where Banks is now located. This road was chartered as the Warren & Ouachita Valley Railway, and connected at Banks with the Rock Island, which was constructed through the county in that year.

These companies then hauled their logs over the Rock Island Railway to Banks, its connection with their road, and removed some short time timber from lands sold the Rock Island for town sites, and the timber they had purchased in and around Vick on that road, which was the only timber they could reach at the time and keep their mills running.

In 1908 they began, jointly, the construction of a logging railroad, the Arkansas & Southern, from Banks in a southwesterly direction to their timber holdings on the west side of the county. This road was constructed for about twelve miles through territory in which neither of said appellees owned any timber, and no timber from any of the lands in controversy could have been removed by either of them upon a reasonable wagon haul sooner than the latter part of 1911, except from the Edrington tract, and the removal of that timber was postponed at the request of the husband and agent of appellant, who desired to cut and deliver it.

All the timber included in the suits of Edrington against said appellees is in township 16 south, ranges 9, 10 and 11 west; and the nearest tract in his suit against the Southern Lumber Company to its mill or its railroad or to any railroad at the time the timber was purchased and conveyed was a distance of over nineteen miles. The nearest tract involved in his suits against the Arkansas Lumber Company to its mill or any railroad at the time it was bought by that company was over eighteen miles. The nearest timber in the suits of the other appellants against the Southern Lumber Company to their mill or

any railroad was about fourteen miles distant when purchased, some of the other tracts being as far from the mill and railroad, when bought, as twenty-two miles. The nearest tract of timber involved in Burbridge's suits against the Arkansas Lumber Company to its mill plant or any railroad, when bought, was fourteen miles distant, and the farthest twenty-one miles.

Nearly all the timber claimed by appellants in the various suits against appellees at the time it was purchased by appellees was a virgin forest in a wilderness primeval.

Each of appellee companies have large holdings of timber and timbered lands of from seventy-five to eighty thousand acres.

The testimony on the part of appellants shows that it was possible for the lumber companies to have built their logging roads and spurs to the different tracts of timbered lands in controversy and cut and removed the timber after its purchase before the bringing of the suits, if they had built their roads directly to these tracts of timber without building them as they did, to reach all their timber in the most practical way, and without regard to the cost of such construction of facilities.

The court found that the appellees, the lumber companies, were proceeding in the removal of the timber in controversy within their rights under the conveyances thereof to them, and that the appellants were without right under their later conveyances to the timber, and decreed accordingly, and from this decree appellants bring this appeal.

Samuel Frauenthal and *E. E. Williams,* for appellants.

1. Both parties derive title from the same source. 109 Ark. 499. Where the time has expired under the terms of timber deeds within which to cut and remove the timber from the land the original grantor or his grantees may institute suit to cancel the deeds as a cloud upon the title. The failure or refusal to cut the timber within

the time specified in the deed is equivalent to an abandonment of it. 109 Ark. 499; 97 *Id.* 167; 169 S. W. 957. Where the conveyance specifies a particular time for the removal of the timber, the purchaser forfeits all right in the timber not removed within the time specified. 55 L. R. A. 513; 4 A. & E. Ann. Cas. 1047; 77 Ark. 117; 99 *Id.* 112; 111 *Id.* 253.

2. Where no time is mentioned the purchaser has a reasonable time in which to enter and cut and remove the timber. 77 Ark. 117; 78 *Id.* 408; 84 *Id.* 603; 91 *Id.* 292; 61 *Id.* 315; 70 *Id.* 123; 93 *Id.* 447. Inconvenience or hardships, or cost do not excuse a breach of condition. See cases, *supra,* and 104 Ark. 475.

B. L. Herring, Fred L. Purcell and *D. A. Bradham,* for appellees.

1. The time had not expired for the removal of the timber. 99 Ark. 112; 77 Ark. 116.

2. Where no time is named in a timber deed for the removal of the timber it means "a reasonable time." 77 Ark. 116; 78 *Id.* 408; 84 *Id.* 603; 91 *Id.* 292; 93 *Id.* 5; 99 *Id.* 112; 111 *Id.* 253.

What is a reasonable time is a question of fact under all the circumstances. 25 Cyc. 1554; 121 Ga. 882; 49 S. E. 831; 17 Cyc. 662 (10), 668-9; 93 Ark. 5; 13 *Id.* 116; 25 Cyc. 1553 (b).

3. The chancellor found that appellees had not had a reasonable time with proper dispatch to cut and remove the timber, and this finding is supported by the evidence.

KIRBY, J., (after stating the facts). Appellants insist that they are entitled to have the deeds to appellees cancelled as a cloud upon their title and recover the timber conveyed therein, within the authority of *Earl* v. *Harris,* 99 Ark. 112; *Yelvington* v. *Short,* 111 Ark. 253, and *Newton* v. *Warren Vehicle Stock Co.,* 116 Ark. 393, 173 S. W. 819.

The deeds conveying the timber to appellees all contain clauses requiring the removal thereof "as expedi-

tiously and possible," identical with those construed in the above causes, except as to the time mentioned, which was twenty, twenty-one, thirty and thirty-five years herein, and the additional clause, "It is further agreed that whenever said timber shall have been removed, the party of the first part shall enter full possession of said land at once, whether the time for such removal be expired or not."

In the first of those cases the time mentioned had expired, likewise in the second, while in the third it was not more than one-half expired, but in each of them there was a cessation of work after the timber was commenced to be cut and removed, and the excuse was the low price of the manufactured product caused by a financial panic and the inability of the company to continue operations. The failure in another instance to procure labor at all times when the weather conditions were favorable to the cutting and removal of the timber, and the removal of the mill, which was expected to be used in the manufacture of the timber, from its location near the timber in the Harris case. There has been no cessation of activity upon the part of any of appellees from the time they began the purchase of timber in Bradley County in the cutting, removal and manufacture of same. Each of said companies owns large tracts of timber and timbered lands from 75,000 to 80,000 acres, situate in different parts of the county, and all involved in this controversy, as the undisputed testimony shows, situated great distances from the mills where it was expected to be manufactured into lumber, as all the parties to the transaction knew, when the timber was sold, and the conveyances made.

They also knew that the timber was to be transported or carried to the mills over log railroads and trams to be constructed by the different lumber companies, each deed granting a right-of-way for such railroads and trams over the land on which the timber was conveyed for its removal and the transportation of other timber owned or after acquired by the grantee. There was only one log

road about three miles long in the county when most of the timber conveyances were made to appellees, and the Southern Lumber Company and the Arkansas, extended it westward, cutting their timber as they went, in the north end of the county, until they reached Banks, sixteen miles distant, a station on the Rock Island Railroad, which was constructed in 1907. These two companies then made arrangements with the Rock Island Railroad Company for trackage rights and hauled some timber from further down in the county, over its line and their own road, the Warren & Ouachita Valley Railroad. This was their only timber that could be reached during the time it was cut since it was necessary for them to construct a log road twelve miles through territory in which they had no timber in order to reach their other timber and this road was constructed during the two years the timber was hauled over the Rock Island line, shortly after which period their contract with the Rock Island was cancelled by the ruling of the Interstate Commerce Commission.

One of these mills had in the meantime increased its sawing or cutting capacity from 45,000 feet daily to 150,000. Immediately upon the completion of the twelve miles of road jointly by the Arkansas and Southern Companies, each began building from its terminus independent log railroads and spur tracks and cutting and removing its timber within reasonable hauling distance thereof. Neither of these companies had any right to, nor agreement for, the use of any of the facilities of the other company for the transportation of timber to its mills, except the joint arrangement of the Southern and Arkansas Companies over the Warren & Ouachita Valley Railroad and the Arkansas Southern, jointly constructed by them. All are rival concerns in their operations in the purchase of timber and manufacture of lumber in Bradley County and each was reaching its own timber with all dispatch consistent with the continuous operation of its mill plant at full capacity and the difficulties to be overcome in the

building of log railroads and cutting and removing the timber. The proof on the part of appellants shows that the timber upon these lands had been conveyed by deed to appellees more than ten years before the suits were brought, that none of it had been cut or removed from any of the tracts of land within that time and that each of said lumber companies had sufficient means and facilities at hand to have built roads and reached and removed the timber from these lands before the bringing of these suits, if they had constructed their railroads directly to this timber in the beginning, instead of as they were constructed to other lands, for the removal of timber therefrom and without regard to the practical operation of their plants and the extraordinary expense of doing so.

All the parties to the timber deeds knew the location of the mills, how the timber was to be carried to the mills for manufacture, and knew the facilities and lack of facilities for transporting it at the time of making the conveyances, and these facts were recognized when the conveyances were made as appears in the clause thereof, providing for the removal of the timber, each of which recites that unless it shall have been removed within a period of twelve, twenty, thirty or thirty-five years, as the case may be, that the lumber company shall pay the taxes on the land after the expiration of that period until such time as the timber is removed.

A like clause in the deed was construed in all three of the aforesaid cases, the court holding that the parties intended that the grantee should cut and remove the timber from the land as expeditiously as possible and that it was within their contemplation at the time of the execution of the deed, that it might take the grantees longer than the number of years recited therein from the date of the execution of the deed in which to cut and remove the timber, although he proceeded with the expedition required, that he was required to begin to cut and remove the timber promptly after the contract was made and should continue to do so as expeditiously as possible, until

it was all cut and removed. It was said in the Harris case:

"While this was considered essential, yet it was thought by the parties that, under the conditions and circumstances then surrounding the land and the removal of the timber therefrom, it might take the defendant longer than five years in which to cut and remove the same, though he proceeded with proper dispatch, and in that event it was agreed that he should have longer than five years in which to cut and remove the same; and, the length of time which he should have after the five years not being specified, defendant had a reasonable time after the five years in which to remove the timber if he proceeded during all such time as expeditiously as possible. The specification of five years was made, we think, only for the purpose of fixing the amount which the defendant should pay for the timber. * * * In any event, he was required to cut and remove the timber as expeditiously as possible, and he did not therefore have either five years or any other definite time in which to cut and remove the timber if he did not proceed continuously with all possible expedition from the date of the deed."

In *Newton* v. *Warren Vehicle Stock Co., supra,* it is said: "Upon the authority of those two cases we must hold that the contract in suit did not give absolutely and in all events any definite time for the removal of this timber. The purpose of this contract was to require the timber to be removed expeditiously, and sufficient time for that purpose was given. This might exceed ten years, or it might not require that length of time; but the right to cut and remove the timber expired when a reasonable time had been given for its expeditious removal."

The intention of the parties must be gathered from the written instrument executed, and it can not be done without all the words and provisions thereof are considered, as said in *Earl* v. *Harris,* 99 Ark. 112.

"In order to arrive at the intention of the parties as to the time in which the timber under this contract should

have been cut and removed, all parts of the above provision must be taken into consideration. No word should be treated as surplusage and disregarded, if any meaning which is reasonable and consistent with the other parts thereof can be given to it. This provision of the contract or timber deed should be construed, therefore, so that each part should take effect." (Citing cases.)

(1-2) The timber deeds, if their terms are not ambiguous, should be construed without the aid of testimony *aliunde,* and if the intention of the parties can not be ascertained from the written instruments, the other evidence is admissible in case of ambiguity then to show what the meaning of the contract was. There was no attempt made in this case to alter, vary or amend the terms of the written contracts by parol evidence, although the testimony introduced conduces to show that the parties to the deeds at the time they were executed knew the conditions surrounding the transaction and the conditions that must be met by the lumber companies in the removal of the timber and also its distance from the place of manufacture and the means and appliances that must be constructed to cut and remove it to the place of manufacture, and they under these circumstances wrote into each deed the term of years in which the timber was permitted to stand upon the land by the grantor without the payment of any tax by the grantee and all understanding as the court held in those three cases that the timber must be removed as expeditiously as possible, under the circumstances. In determining the question of a reasonable time, it was proper to take into consideration the location of the land, its accessibility, the character and quantity of the timber thereon, the seasonableness of the weather and the facilities obtainable for cutting and removing the timber, "and all other conditions and circumstances which might affect the cutting and removal thereof." *Earl* v. *Harris, supra; Liston* v. *Chapman & Dewey Land Co.,* 77 Ark. 116.

Certainly the clause in these deeds, not found in the deeds construed in the other cases, providing that "the grantor, whenever the timber from the lands shall have been removed, should enter into full possession of the land at once, whether the time for such removal be expired or not," means something and indicates that it was contemplated that the timber might be removed before the period mentioned expired. The recital of such definite period of time after the expiration of which the grantee was required to pay the taxes on the land if the timber had not sooner been removed, supports the court's announced views that the grantee was required to remove the timber, as expeditiously as possible, without regard to the time designated and that the parties contemplated that the timber might sooner be removed but that the whole time mentioned might be required for the purpose and a longer time even, notwithstanding the grantee was proceeding continuously and with all possible dispatch.

(3) The impossible is not required by law, nor expected to be performed. Men are reasonable creatures, and are not presumed to act otherwise in the business affairs of life. These appellees could not cut the timber upon these lands distant from their mills and remove it immediately after the deeds conveying it were made. It was impossible to do it under the conditions existing, so great was the distance intervening. They could not be expected to extend their railroads and use all their facilities to reach these lands as soon as they might possibly have been reached after the conveyance of the timber to them, without regard to the expense incident to doing so, and the consideration of the removal of their other timber nearer to the mills and more accessible, and the best method and the most practical, of reaching with proper dispatch and expeditiously cutting and removing it all. It is true no timber had been or could be removed from these lands, which were inaccessible under the circumstances, within ten years of the date of the execution of the conveyances. But it is also true that each appellee

had been all the while, from the time of their execution, increasing and extending its facilities for transportation of the timber, that each mill of each appellee had been running full time and cutting timber to the limit of its capacity, from the time of its construction and the capacity of one mill had been doubled and another trebled.

The court is of opinion that said appellees under the circumstances shown to exist, were proceeding with proper dispatch to remove the timber from these lands as expeditiously as possible within the meaning of the deeds of conveyance thereof, and that the reasonable time given for its removal by said conveyances had not expired and the trial court did not err in its decree, which is affirmed.

OPINION ON REHEARING.

KIRBY, J. Appellant insists, for rehearing, that the court in its opinion overlooked the fact that four certain tracts of these timber lands, towit: (1) West half of southwest quarter of section 31, township 15 south, range 11 west; (2) northeast quarter of northwest quarter of section 9, township 16 south, range 11 west; (3) southeast quarter of the southeast quarter of section 32, township 15 south, range 9 west; (4) north half of southeast quarter of northeast quarter of section 8, township 16 south, range 9 west, were conveyed by the owners to different individuals and by these grantors to the Bradley Lumber Company, and that the court's opinion stating that all the parties to the transaction knew when the timber was sold and conveyances made, that it was situated long distances from the place of manufacture and must be transported to the mills over log railways to be constructed by the different lumber companies, was not applicable to these particular tracts.

The testimony shows, however, that the timber upon these tracts of land was sold and conveyed to different agents of the Bradley Lumber Company purchasing timber, which fact was known to the grantors at the time of the conveyances of it and later by such agents transferred to the lumber company.

The first tract was conveyed by McNabb to O. F. O'Neil as the agent of the company, and Robertson said in his testimony, "I thought it belonged to the Bradley Lumber Company at the time I went to see it.

"Messrs. Neal and McNabb sold it to the Bradley Lumber Company before I got it."

The second tract in case No. 346, *Burbridge* v. *Bradley Lumber Company,* was likewise conveyed to said lumber company's agent, Gorman, the grantor, stated: "I sold O. F. Neal for the Bradley Lumber Company. He told me that."

The third tract in said suit also was sold by Hamilton to the company through T. E. Fike, its agent, and the adjoining forty was sold through C. B. Colvin, also representing the company. Hamilton stated in his testimony: "I said I sold one forty to it, Bradley Lumber Company, through Mr. Colvin and one through Mr. Fike."

The fourth tract was also included in this suit. The testimony shows it was purchased for the Bradley Lumber Company and that the grantors thereof knew the fact at the time of the conveyance, and for this tract, the original grantor made a second deed directly to the lumber company for an additional consideration in January, 1906.

(4) The original grantors of these tracts of timber and their grantees since the conveyance to the Bradley Lumber Company, are in no better position than if they had conveyed the timber at the time of the sale thereof directly to the lumber company itself, it being conveyed to the agents of said company by the grantors with knowledge that it was purchased for and to be conveyed to the lumber company.

It is insisted that a rehearing should be granted as to the tracts known as "the Ned McLain timber," in sections 22 and 28, township 15 south, range 9 west, for the reason that the testimony shows that the lumber company had built its spurs and cut the timber to within one-quarter of a mile of some of these lands; and after three or four months' cutting in the spring it took up this spur track

and extended its line further south and abandoned operation in the locality of this timber, when it could as well have moved it then as later. It is true the lumber company did have a track constructed sufficiently close to reach some of this timber in the spring of 1912 and was proceeding to do so, but the testimony shows that because of bad weather conditions, the ground got so soft as to render it impracticable to operate longer there at the time and it moved further down to higher ground. The mill, however, was burned in August and it took nearly all the remainder of the year to replace it, and the company had begun at the commencement of these suits another spur lower down on its road and had reached its location and would have removed it shortly, but for the suits. It had also arranged to exchange some of it with the other lumber companies which were ready and proceeding to remove it when the suits were filed and thereafter refused to carry out the contract.

(5) The lumber company ceased its operations in the vicinity of these lands that would have included the removal of the timber then, because of unfavorable weather conditions making it impracticable, which was followed shortly by the loss of its mill by fire, which curtailed its activity somewhat in the removal of timber, until the mill could be replaced, after which another spur track was constructed to the timber which would have been removed but for the bringing of the suits, and in view of these conditions, and considering that the time mentioned in the contract of sale, which the parties contemplated might be necessary to reach and remove the timber, was not more than one-half expired, we conclude, as announced in the first opinion that under the circumstances shown to exist relative to these particular lands the appellee was proceeding with proper dispatch to remove the timber as expeditiously as possible within the meaning of the deeds of conveyance thereof and before the reasonable time given for its removal by said conveyance had expired.

All the other matters raised by the motion were disposed of in the former opinion. The motion is accordingly denied.

DESHA BANK & TRUST COMPANY v. QUILLING.

Opinion delivered April 5, 1915.

LIMITATIONS—OVERDUE NOTE—CREDIT THEREON.—One Q. owed a note at appellant bank which was barred by the statute of limitations. Q. thereafter made a deposit in the bank. *Held*, the bank had the right to credit this deposit on the note, but the right to so credit the deposit did not toll the statute of limitations.

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

J. Bernhardt, for appellant.

1. Upon the allegation and proof by introduction of the note and Thane's deposition, which remains uncontradicted, that there was a payment made and credited on the note on December 1, 1910, it was conclusively established that the note was not barred. 5 Ark. 551; 28 Ark. 27.

2. As to the authority to make the credit: When the charge was made to Mrs. Quilling's account of $300, which was then credited on her note, she was notified of the fact, and never objected. This is uncontradicted. The proof shows not only tacit acknowledgment of the debt, but also of the right to make the credit. 91 Ark. 170, and cases cited. Moreover, under the condition of the account, the plaintiff had the right under the law to apply any surplus funds in its hands belonging to Mrs. Quilling on her note. 66 Ark. 73; 68 Ark. 399; 76 Ark. 76; 79 Ark. 393; 92 Ark. 245, and authorities cited; 57 Ark. 597; 91 Ark. 458.

John L. Ingram and *C. P. Harnwell*, for appellee, Cramer.

1. The statute bar attaches at the expiration of five years from the date of the note. Kirby's Dig., § 5069.

And equity will not decree the foreclosure of a mortgage where the note secured is barred. 77 Ark. 267.

Where the statute of limitations is pleaded, the burden of proof is on the plaintiff. 27 Ark. 343; 53 Ark. 96; 64 Ark. 26; 69 Ark. 311; 70 Ark. 598; 65 Ark. 311.

2. "An endorsement upon a note of part payment, made by the plaintiff, or in his behalf, is inadmissible to take the case out of the statute of limitations unless it be first shown by evidence *aliunde* to have been actually made and by authority, before the cause of action was barred, and consequently against the interest of the party making it." 9 Ark. 455.

To take the case out of the statute, it is essential to show by the evidence that an actual payment by Mrs. Quilling was made, or that the alleged credit was authorized by her. 10 Ark. 638; 12 Ark. 134; 11 Ark. 666; 22 Ark. 217.

Maude P. Quilling, pro se.

Adopts the brief of the intervener so far as applicable, states an account in her brief and contends for its correctness.

SMITH, J. The parties to this litigation had a great many business transactions and differ very widely in their depositions as to the net result of them all. The litigation was begun on August 26, 1912, at which time appellants filed a complaint, wherein it was alleged that appellee, Maude Price Quilling, had executed to H. Thane, trustee, a deed of trust on May 4, 1905, to secure a note for $3,000, and that on December 1, 1910, she had paid on this note the sum of $300, which payment had been endorsed on the note and also upon the margin of the recorded instrument. It was also alleged that Mrs. Quilling was further indebted to the bank in the sum of $2,900, evidenced by a note executed on September 9, 1908, by her and M. W. Quilling, Jr., her husband. It was also alleged that on February 20, 1908, the interest of Mrs. Myrtle Kimberlin, a sister of Mrs. Quilling, in the estate of her father, N. B. Price, deceased, was acquired by M.

W. Quilling, Jr., by purchase for $1,000, and the title to said interest was taken in the name of Thane as trustee, with the understanding at the time that this interest should become additional security for the $3,000 note. That the purchase price for this interest was advanced by the appellant bank and became a part of the indebtedness for which the $2,900 note was given. It was also alleged that on March 3, 1912, Mrs. Quilling executed a note to the bank for an additional loan of $100, and that there was an open account in favor of the bank for taxes and insurance advanced by the bank in the sum of $315.

The bank appears to have assumed control of the lands belonging to the Quillings and to have made various sales of lands and town lots and to have collected large sums as rents. Out of these transactions it is alleged that the Quillings were largely indebted to the bank and a foreclosure of the deed of trust was prayed. On the other hand, the Quillings say the bank is indebted to them in the sum of approximately $3,000, and judgment therefor was prayed.

On September 3, 1913, appellee Cramer filed an intervention in the nature of an answer and cross-complaint, in which it was alleged that the property upon which appellants claimed a lien was not the property of the Quillings, but had been acquired by his vendor under a foreclosure of a mortgage given by the Quillings, which would be junior to the bank's mortgage if that mortgage was unpaid, but prayed that the bank's mortgage be cancelled. This pleading filed by Cramer set out the transactions between the bank and the Quillings, and denied that any payment had been made on the $3,000 note, and alleged that the note was barred by the statute of limitations. It was further alleged that the conveyance to Thane, as trustee, by Mrs. Kimberlin was in fact a mortgage given to secure the purchase money which was borrowed from the bank, but it was denied that it was intended to secure any additional sum, and it was further alleged that by the deed from Thane, as trustee, executed

on May 9, 1913, to the Quillings, the bank released all liens of any sort against this interest.

The Quillings filed separate answers setting up substantially the same facts recited in the answer and cross-complaint of Cramer, but the details of their transactions with the bank were set up with greater particularity. It was alleged by them that the interest of Mrs. Kimberlin in her father's estate, which had been purchased for the benefit of M. W. Quilling, had been exchanged for other property in the city of Little Rock, over all of which the bank assumed control and collected the rents. They denied that they were indebted to the bank in any sum, but stated the fact to be that the bank would be largely indebted to them if proper credits for rents and proceeds of sales were given. They denied that any payment had been made on the $3,000 note and pleaded the statute of limitations against it.

A wide range was covered in the taking of the proof and the record before us is a voluminous one. There was no reference of the accounts to a master in the court below, with the result that all of the items in controversy below are controverted here. One of the principal questions of fact was the alleged credit of $300 endorsed on the $3,000 note. If there was no such credit, then this note was barred by the statute of limitations. At the time this credit was alleged to have been endorsed on the note the Quillings had an account with the bank. All funds belonging to either of them were kept as a single account and debits and credits were charged and given without reference to the source from which the credits came and checks were drawn in one name. It was testified on behalf of the bank that there was a credit of $371.68 to the Quilling account at the time the $300 credit was endorsed on the note. No direction from the Quillings for placing this credit on the note is asserted, but the bank claims to have taken this action because the note was past due and unpaid. Appellees denied that there was any such appropriation. On the contrary, they say

that on the date of the alleged credit the account stood overdrawn $156, and they say the statements of their accounts subsequently furnished them showed that this alleged credit on the note was not charged against their account.

The bank had the right to credit this deposit on the note, but this right to so credit the deposit did not toll the statute of limitations. It took the exercise of that right to accomplish that result. *Steelman* v. *Atchley,* 98 Ark. 294.

The court below found that the $3,000 note was barred by the statute of limitations; that the conveyance from Mrs. Kimberlin to Thane, as trustee, was intended to secure the bank for the purchase money advanced, and for that alone, and that that sum had been repaid. The court found that there was a balance due on the $2,900 note, and also a balance due on the open account, and rendered judgment accordingly, but decreed that said sums were not secured by any lien. As has been said, both parties appealed, and each undertakes to show that the chancellor was grossly in error, but without discussing the evidence in detail, which would serve no useful purpose, we announce the conclusion that the finding of the court below does not appear to be clearly against the preponderance of the evidence.

Since the trial of this cause in the court below, M. W. Quilling, Jr., has died, and the briefs discuss the right of appellant to hold an insurance policy on the life of Quilling, as collateral, and to apply the proceeds of the policy to the payment of any balance due the bank. No such issue was raised by the pleadings, and the question was not passed upon by the chancellor, and, while some testimony on the question appears in the record, the point was not fully developed, and for these reasons we decline now to pass upon that question, but leave it open for determination in appropriate future litigation.

The decree is affirmed.

COX v. ROAD IMPROVEMENT DISTRICT NO. 8 OF LONOKE COUNTY.

Opinion delivered April 5, 1915.

1. IMPROVEMENT DISTRICTS—PETITION—DESCRIPTION OF IMPROVEMENT.—The petition for the formation of an improvement district is jurisdictional, and its recitals must meet the recitals of the statute. The petition must make clear the improvement proposed, although details and plans may be worked out by the board, after the establishment of the district petitioned for.
2. IMPROVEMENT DISTRICTS—PETITION—UNCERTAINTY.—A petition for the formation of a road improvement district, which recites that it is proposed to improve *some* of the roads in the proposed district, is void, because of insufficiency and uncertainty of the description.
3. ROAD IMPROVEMENT—PUBLIC ROADS.—Road improvement districts can not be formed, and authorized to lay out and establish new public roads, and impose upon the county the duty of maintaining them.
4. ROAD IMPROVEMENT DISTRICTS—PETITION OF MAJORITY OF LAND OWNERS.—A road improvement district may be formed upon a petition of a majority only in numbers, of property owners within the proposed district.
5. IMPROVEMENT DISTRICTS—ROADS—ASSESSMENT OF TOWN PROPERTY.—The county court may include and assess town property for the purpose of building or improving roads out in the county, and outside the corporate limits of the town, the controlling test is whether the property in the town will be benefitted by the improvement.

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

STATEMENT BY THE COURT.

The Legislature of 1913 passed an act, numbered 212, applicable only to Lonoke and Prairie counties, wherein it created and defined the geographical limits of four road improvement districts, said districts being incorporated and respectively designated as Road Improvement Districts 1, 2, 3 and 4 of Lonoke County.

After creating these districts, section 1 of the act provides, beginning with subdivision F thereof, for the

organization of road improvement districts which may be desired in the future.

Proceeding under subdivision F of section 1, owners of lands lying in township 1 south, range 9 west, of Lonoke County, being more than ten in number, filed their petition with the clerk of the county court, praying for the creation of Road Improvement District No. 8. This proposed district embraced about 8,800 acres of land, and includes all lots and parcels of land within the limits of the incorporated town of Keo, in said township and county.

Appellants herein, remonstrants below, are owners of lands out in the township and some few are owners of lots in the incorporated town of Keo. At the date set for the hearing of the petition in the county court, remonstrants, thirty or more in number, filed their remonstrance, in which various objections were urged against the establishment of the proposed improvement district. After hearing the issues, the county court ordered and adjudged the creation of the district as petitioned for. Remonstrants perfected their appeal to the circuit court, where the cause was tried upon an agreed statement of facts, and after hearing the issues the circuit court affirmed the judgment of the court below. Remonstrants have appealed from that judgment.

The petition for the establishment of the improvement district recites that a plat, showing, generally, the location of the roads which it is proposed to improve, was filed with the petition as an exhibit thereto. But no such plat appears in the record. Upon the contrary, the cause was tried upon an agreed statement of facts, from which it appears that there was no designation of the roads which it was proposed to improve.

The agreed statement of facts is as follows:

"It is agreed by the parties hereto through their respective attorneys, that this cause now pending in this court on appeal from the Lonoke County Court may be

heard and decided upon the following statement, which contains all the facts involved in this cause, towit:

"That the petition asking for the creation of Road Improvement District No. 8 of Lonoke County, Arkansas, was filed in the Lonoke County Court on June 25, 1914, and after full compliance with the provisions relative to notices, etc., of Act 212 of the Acts of 1913, the same was acted upon by the county court, which, over the objection of remonstrants, entered an order on July 16, 1914, creating said district, whereupon proper affidavit stating causes for review was made by remonstrants and appeal granted; that said proposed district contains about eight thousand acres of land, the limits of which are properly defined, and that same is located in township one (1) south, range nine (9) west, Lonoke County, Arkansas; that the proposed district includes Keo, an incorporated town situated in said county, containing one hundred and sixty acres; that the purpose of the proposed Road Improvement District No. 8 is to improve some of the public roads within its limits, but no improvements are to be made within the corporate limits of Keo; that said petition praying for the creation of the said road improvement district contains the names of a majority of the owners of land within the proposed district, and a majority in land values, excluding the St. Louis Southwestern Railway right-of-way, but including same there is no majority in land values; that a majority of the owners of lands and land values in Keo signed the petition, but excluding from the petition the names of owners of land and land valuations in Keo, there is not a majority; that to pay for the improvement of said county roads within the district, all property lying within the district, including all property within the limits of the incorporated town of Keo, will be assessed under the order of the county court.

"That no ordinance has been passed by the town council of Keo, creating the district or assessing property within its limits to pay for the improvement of said county roads.

"Question: Under the above statement of facts should the judgment of the county court be affirmed or reversed?"

Dunaway & Chamberlin, for appellants.

1. The order of the court in establishing the district is void because of the insufficiency of the petition.

Chas. A. Walls and *Jas. B. Gray,* for appellee.

1. The order creating the district is valid.

SMITH, J., (after stating the facts). Subdivision F of section 1 of the act in question provides that hereafter, when ten or more owners of real property within a proposed improvement district shall petition the county court to establish a road improvement district to embrace a certain region, describing generally the region which it is intended shall be embraced within the boundaries of the proposed district, and shall file a plat with said petition upon which the boundaries of the proposed district are plainly indicated, showing the roads to be constructed, as nearly as practicable, it shall then be the duty of the county court to give notice by publication of the filing of this petition for the purpose of calling upon all property owners within the proposed district to appear on a designated day and show cause for or against the establishment of the district.

The first question which naturally arises is, Has this requirement been complied with? Various other questions are discussed in the respective briefs; but we find it unnecessary to consider those questions for the reason that the petition does not meet the requirements of the act under which the proceeding was had. The petition may describe the improvement contemplated in general terms and leave the plans for the future development of the board. *Ferguson* v. *McLain,* 113 Ark. 193, 168 S. W. 127; section 6 of Act 212 of Acts of 1913.

(1) There is not, of course, the same necessity for accurate descriptions of the roads which an improvement district embracing rural property is intended to improve

as there is for an accurate description of streets in a town or city; but the legal principles which govern in one case must be applied in the other. It is essential in both cases that there be no uncertainty about the improvement which it is proposed to make. All of the cases under our improvement district law treat the petition as jurisdictional, and hold that its recitals must meet the requirements of the statute. All of these decisions make it plain that there must be no uncertainty about the improvement proposed. The details and plans of the improvement may be worked out by the board of improvement after the establishment of the district petitioned for, but the discretion of the board is limited to carrying out the purpose of the petition. It is not contemplated that upon and after the establishment of the district there shall be any doubt about the improvement to be constructed. Otherwise, property owners might sign the petition under the apprehension that a certain road or street was to be improved, only to learn after the district had been established, and the plans had been approved, that they were mistaken or had been deceived. One of the purposes of requiring a petition in writing is to prevent such controversies. *Harnwell* v. *White,* 115 Ark. 88; *Kirst* v. *Street Imp. Dist.,* 86 Ark. 21; *McDonnell* v. *Imp. Dist.,* 97 Ark. 341; *Smith* v. *Imp. Dist.,* 108 Ark. 141; *Kraft* v. *Smothers,* 103 Ark. 269; *Bell* v. *Phillips,* 116 Ark. 167, 172 S. W. 864; *Board of Improvement* v. *Brun,* 105 Ark. 65; *Boles* v. *Kelley,* 90 Ark. 29; *Watkins* v. *Griffith,* 59 Ark. 344.

(2) The agreed statement of facts here recites that it is proposed to improve *some* of the roads in a district embracing 8,800 acres of land. To establish this district would clothe the commissioners with a roving commission which would be controlled only by their own discretion. The use of the word "some" implies that there are roads in the district which are not to be improved, and this record does not attempt to distinguish between the roads which are to be improved and those which are not to be improved. If such indefinite improvements could

be established, no petitioner could ever know, until after the district had been established, when his knowledge would prove unavailing, whether the road he thought would be improved was the one which was to be improved. In the very nature of things, the act in question did not contemplate that there should be any such uncertainty, and the order of the court in establishing the district is, therefore, void because of the insufficiency of the petition.

The judgment of the court below is, therefore, reversed, and this cause will be remanded with directions that the court vacate and set aside its order directing the establishment of the district.

ON REHEARING.

SMITH, J. Upon petition for rehearing it is now stipulated that there was no uncertainty about the roads to be improved; that the roads were accurately described in the petition for the establishment of the district, and upon the plats showing the proposed improvement, which were attached to and made a part of the petitions, and that the agreed statement was prepared for the purpose of shortening the record upon the appeal to this court. We are now asked to decide the case which the parties say was tried below.

Three grounds for reversal of the judgment of the lower court are presented and urged by appellants in this appeal. The first raises the question of the power of the Legislature to grant road improvement districts authority to build or construct roads which thereafter will become county roads. The second raises the question of the power of the Legislature to authorize the creation of road improvement districts based upon a petition containing the signatures of a majority in numbers only of the owners of land within the proposed improvement district. The third raises the question of the authority of the county court to include and assess town property for the purpose of building or improving roads out in the county and without the corporate limits of the town.

The proposed district embraces only a small part of Lonoke County. It appears from the agreed statement of facts that the district lies wholly within township 1 south, range 9 west, and does not include the whole of that township. No attempt is made to show that the roads to be improved are too numerous, diverse or independent, or too remote from each other, to be embraced in one district and sustained by local assessments. *Road Imp. Dist.* v. *Glover,* 89 Ark. 513.

We discuss the questions involved in the order of their presentation.

(3) It is first contended that the proceeding is void because its purpose is to authorize the construction of new roads. If such is its purpose, then the proceedings are void. In the case of *Road Imp. Dist.* v. *Glover, supra,* it was held that road improvement districts could not be formed and authorized to lay out and establish new public roads and impose upon the county court the duty to maintain them. The agreed statement, however, does not show any purpose to lay out and establish new roads and impose the burden of their maintenance on the county court; but it is recited that the purpose of the district is to improve certain of the public roads within the limits of the district. At another place in the agreed statement the roads are referred to as county roads, and we can not assume in the face of this stipulation that it is proposed to improve roads upon which the rights of the public have not already become fixed and the supervision and care of which has not already been assumed by the county court.

(4) The second ground of attack is that the petition does not contain a majority in value of the property owners, and that the Legislature can not authorize the establishment of an improvement district unless this assent is first secured. The act authorizes the creation of the proposed district upon the petition of a majority in value, acreage or numbers of the property owners, and it is agreed that a majority in number have signed the petition.

This question was considered in the case of *Butler* v. *Board of Directors Fourche Drainage Dist.,* 99 Ark. 100.

There an improvement district was established for the purpose of draining Fourche bottoms and certain contiguous territory. The boundary of the district included the whole of the city of Little Rock, and several adjoining townships outside of the city. As originally enacted, the act provided that the consent of a majority in value of the property owners should be secured. But the act was subsequently amended to dispense with this requirement, and it was insisted that this amendment rendered the act unconstitutional. The court did not take this view, however, and decided that the constitutional requirement that assessments on real property for local improvements in towns and cities shall "be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected" (article 19, section 27), does not forbid the creation in good faith of an improvement district lying partly within and partly without a city or town, without requiring the consent of a majority of the urban property owners within the district. In the opinion in that case it was said: "We are of the opinion that the above-quoted provision of the Constitution" (article 19, section 27, which requires the consent of the owners of a majority in value of the property adjoining the locality to be affected within the town or city in which the proposed improvement is located), "applies only to assessments for improvements purely local to a municipality, and not to local improvements covering wider territory, even though a part or all of the municipality be included therein. An improvement district like this, covering territory both in and out of a municipal corporation, does not fall within either the letter or the spirit of the constitutional provision. It is not a local improvement *in* a town or city, and therefore not within the letter of the constitutional prohibition. It is not within its spirit, for, there being no inhibition upon the creation of districts outside of cities or towns, there is no reason for construing the provision to mean that the consent of the property owners inside of the city or town must be obtained, whilst the wishes of the property owners in the

same district outside of the city or town may be ignored. It is obvious that the framers of the Constitution did not have in mind a provision which would operate upon lands in one part of an improvement district and not upon lands in other parts. The principle of uniformity would be violated if that be the proper construction of the provision, for many a local improvement, such as a drainage or levee district, affecting alike lands inside and outside of cities and towns, would be frustrated by the urban property owners withholding consent. Property outside of the city or town could not be taxed for the benefit of the property inside thereof, and thus the whole scheme would be defeated and suburban property left without means for improvement." See also *Less Land Co.* v. *Fender,* 119 Ark. 21, 173 S. W. 407; *Burton* v. *Chicago Mill & Lbr. Co.,* 106 Ark. 296; *Grassy Slough Drainage Dist.* v. *National Box Co.,* 111 Ark. 144; *Board of Dir. Jefferson County Bridge Dist.* v. *Collier,* 104 Ark. 425; *Shibley* v. *Fort Smith & Van Buren Bridge Dist.,* 96 Ark. 410.

(5) It is urged that the county court had no authority to include and assess property in the town of Keo, because no part of the improvement was to be constructed within the limits of that town, and for the further reason that the town council of Keo has exclusive jurisdiction over its streets. In answer to this contention, it may be said that the improvement district is not undertaking to take control of the streets of that town, and we need not decide, therefore, whether it could do so. Upon the contrary, one of the grounds of appellant's attack is that none of the streets of that town are to be improved, but that all revenues derived from the assessments against the property in the town will be expended on roads lying without its limits. But this fact can not defeat the district. It can only be considered in determining what benefits will be derived by property within the corporate limits. If no benefits are derived by the town property from the improvement, then no assessments can be levied against that property. But if there are betterments, as

that term has been defined in a number of cases, then the town property should pay its just pro rata of the cost of the improvement.

Many cases discuss the theory of such assessments, but we need not review them here, as no quetion is made as to the manner of assessing, nor of the amount of the assessment, but only as to the right to make any assessment, and the determination of that question is one of fact not presented by this record.

The judgment of this court heretofore rendered reversing this case will be set aside, and the judgment of the court below will be affirmed.

POINSETT LUMBER & MANUFACTURING COMPANY *v.* TRAXLER.

Opinion delivered April 5, 1915.

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.—Plaintiff was working in a saw mill, and was injured when another servant, standing within a few feet of plaintiff reversed certain levers, thereby causing the injury to plaintiff's hand. *Held*, it was the duty of plaintiff's fellow servant to look to see whether his act in reversing the levers would injure anyone, and a failure to do so, constituted negligence which would render the master liable should any injury result.
2. MASTER AND SERVANT—NEGLIGENT ACT OF FELLOW SERVANT—ASSUMED RISK.—One servant does not assume the risk of danger created by the negligent act of a fellow servant.
3. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENT ACT OF FELLOW SERVANT.—When a servant is injured by the negligent act of another servant caused by the latter's reversing a lever on a machine at which both were working, the master is not relieved from liability when the plaintiff could, by the exercise of ordinary care, have ascertained the fact that the fellow servant was about to reverse the levers.
4. APPEAL AND ERROR—OBJECTION TO TESTIMONY—WHEN MADE.—Where counsel for defendant after a witness had testified to certain incompetent facts, cross-examined the witness upon the same, it is then too late to move to exclude the testimony from the jury.

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

Allen Hughes, W. W. Hughes and *L. C. Going,* for appellant.

1. Barker's statement to appellee after the accident was not a part of the *res gestae,* but a mere narrative of a past event, not an explanation nor illustration of the cause or manner of the accident, and the court erred in refusing to exclude it. 105 Ark. 247.

2. Instruction 4 requested by appellant, should have been given. 100 Ark. 422; 104 Ark. 67.

3. The court erred in refusing to give instruction 9, requested by the appellant. While it is true that since the act of 1907 abolishing the common-law fellow-servant rule, the master may no longer avail himself of the defense that a plaintiff servant assumed the negligence of the fellow-servant to whose negligence the injury complained of is attributed, yet it is a rule not affected by that statute, that "the servant assumes all the ordinary risks of the service and all of the extraordinary risks, *i. e.,* those due to the master's negligence—of which he knows and the dangers of which he appreciates." And the act does not abolish the assumption of risk. 3 Labatt, Master & Servant, § 1166a; 83 Conn. 642, 78 Atl. 422.

Appellee, pro se.

1. Ordinarily objections to evidence must be interposed at the time it is sought to be introduced. 9 Enc. of Evidence 46.

If the testimony as to Barker's statements after the accident were inadmissible as a part of the *res gestae,* appellant waived the objection, not only by cross-examining the witness on the same point, without having moved to exclude, but also by waiting until other witnesses had been examined and appellee had rested his case, etc., before moving to exclude this testimony. 42 N. Y. 251; 12 Abb. Pr. 227; 2 Cyc. 697; 8 L. R. A. 61.

2. There was no error in refusing to give instruction 4, requested by appellant. The evidence shows that appellee was in the due performance of his duties, and was not himself negligent, but the negligence was that of a fel-

low-servant who was looking at appellee at the time. Cases cited by appellant do not apply here.

3. Instruction 9, requested by appellant, was properly refused, because it in effect told the jury that appellee assumed the risk of Barker's negligence. 98 Ark. 227.

McCULLOCH, C. J. Appellant was engaged in operating a sawmill in Poinsett County, Arkansas, and appellee received personal injuries while working at the mill as an employee of appellant, and this is an action to recover compensation for such injuries. Appellee was engaged in the work of tailing the edger, as it is termed by the witnesses; that is to say, he was receiving the pieces of timber from the edger and forwarding the same on down the roller to be conveyed out to the proper places. He charges negligence on the part of a fellow-servant in reversing the live rollers so as to cause two pieces of timber to be jammed together and catch his fingers. One of his fingers was mashed entirely off, and the end of another finger was mashed or bruised. The jury awarded damages in the sum of $250.

Appellee testified that at the time he received his injuries, he was endeavoring to get a piece of lumber out from under a cross-tie which was to be passed on down the rollers; that the rollers were standing still at the time and were not working well that day from some cause; and that one of his fellow-servants, Barker, by name, who was working at a cut-off saw a few feet distant, negligently reversed the rollers so as to cause another piece of timber to run back up against the cross-tie he was handling, and in that way his fingers were caught between the two pieces of timber. His testimony tends to show that it was his duty to get the piece of lumber out from under the cross-tie so that the tie could be passed on down the rollers, and that Barker was standing in a few feet of him and was looking at him when the rollers were reversed.

The court, in addition to giving several instructions, requested by appellant, submitted the case upon the following instruction given on the court's own motion: "No. 4. If you find from the evidence that the plaintiff, while

in the performance of his duty, placed his hand upon a piece of timber, then upon the roller, for the purpose of removing the same therefrom, and exercising due care for his own safety, and that an employee of the defendant then in charge of the manipulation of the roller, without notice to the plaintiff, suddenly reversed said roller, causing another timber to be jammed against said timber upon which the plaintiff's hand was resting, thereby causing the injury herein complained of, the plaintiff will be entitled to recover for said injury." That instruction correctly defined the issues to the jury.

(1) It is contended that the court erred in refusing to give instruction No. 4, requested by appellant, which is as follows: "You would not be justified in finding that Barker was negligent unless the preponderance of the evidence shows that Barker actually saw the perilous situation of the plaintiff in time to have averted the injury. It is not enough to render Barker negligent to show that he might have seen plaintiff by the exercise of ordinary care." Barker did not testify in the case, and appellee's testimony was to the effect that Barker was looking at him at the time he pulled the lever. This was not directly contradicted by any other witness, yet the jury were not bound to accept appellee's statement of the facts. *Skillern* v. *Baker*, 82 Ark. 86. The instruction was not, however, a correct statement of the law as applied to the issues in this case, for the evidence tends to show that appellee was engaged in work which fell within the line of his duty, and that the act of Barker in reversing the levers, without looking to see whether or not any injuries would be inflicted upon others working about the live rollers, constituted negligence. There is some dispute about whether or not appellee was in the line of his regular duties in trying to dislodge the piece of lumber under the cross-tie, but there was substantial evidence to the effect that that was his duty, and that he was at a place where Barker not only could have discovered his perilous situation, but in fact did discover it.

Counsel for appellant rely upon the case of *Chicago Mill & Lumber Co.* v. *Johnson,* 104 Ark. 67, as sustaining the correctness of this instruction. The facts of that case were, however, different. There the evidence showed that the fellow-servant who committed the alleged act of negligence owed the injured employee no duty except not to injure him after discovering his peril. The difference in the two cases is that in the one cited, a servant, without being affirmatively charged with the duty of taking any steps to protect his fellow-servants while at work, was held not to be chargeable with negligence unless he failed to exercise care after discovering the peril; whereas, in the present case, the fact is that the fellow-servant was manipulating the rollers and was charged with the duty of exercising care to see that his act did not result in injury to another servant. The men were working together in a few feet of each other, and it was the duty of appellee's fellow-servant, before reversing the levers, to exercise care to see whether any other servant was in position where he was likely to be injured by this act of reversing the levers. It would have been improper, therefore, to tell the jury that appellant would not be responsible for Barker's act unless the latter had discovered the perilous position of appellee, for it was the duty of Barker, before setting the rollers in motion, to see that other employees working there were not thereby placed in peril.

(2-3) It is also insisted that the court erred in refusing to give the following instruction: "If the machinery that operated the live rollers at which the plaintiff was working was defective, and plaintiff had knowledge of same, and if Barker was, by means of the levers controlled by him, attempting to cause the live rollers to operate notwithstanding the defects, and if the plaintiff knew, or by the exercise of ordinary care should have known that Barker was doing so at the time he, plaintiff, was endeavoring to remove the timber from the rollers, he assumed any and all danger or risk of injury resulting from his so doing, and can not recover." That instruction was properly refused, for the servant did not assume

the risk of danger created by the negligent act of a fellow-servant. The question of Barker's negligence was correctly submitted to the jury, and the verdict depended upon the finding of the jury on that issue. Of course, appellee assumed the risk if he continued his efforts to dislodge the piece of lumber after having knowledge that Barker was going to reverse the rollers, but it would have been incorrect to declare the law to be that he assumed the risk simply because he could have ascertained that fact by the exercise of ordinary care. The jury might have understood from that that it was his duty to inquire of Barker whether or not he was going to reverse the rollers. The cause of the injury was not the mere moving of the rollers, but it was the reversal of the rollers which caused the other piece of timber to move back up and strike the one under which appellee had his hand. Therefore, it would have been incorrect, in any view of the case, to tell the jury that appellee assumed the risk simply because he knew, or might by the exercise of ordinary care have known, that Barker was undertaking to operate the live rollers.

We think the instructions were correct, and that no error was committed in refusing those asked by appellant.

(4) There is another assignment of error in the ruling of the court permitting the plaintiff to testify concerning Barker's statement to him immediately after the injury occurred. A sufficient answer to that exception is that the objection was not made in apt time, and appellant must be treated as having waived the erroneous admission of the statements. Instead of objecting at the time, appellant's counsel proceeded to cross-examine appellee on the subject; and after eliciting as much as he could, a motion was made to exclude all that appellee had said on the subject. Appellant speculated on the testimony in that way, and it was too late to raise an objection after the answers elicited were not satisfactory.

There is no error in the record which calls for a reversal of the case, so the judgment is affirmed.

HILL v. KAVANAUGH.

Opinion delivered April 5, 1915.

1. TRIAL—EFFECT OF BOTH SIDES ASKING PEREMPTORY VERDICT.—When both sides ask the court for a peremptory verdict in their favor and request no other instructions, the finding of the court is final and has the same effect as the verdict of a jury.
2. BANKS AND BANKING—PUBLIC FUNDS—DEPOSIT BY PUBLIC OFFICER IN OWN NAME—LIABILITY OF STOCKHOLDERS.—A., as county treasurer deposited county funds in the T. bank, in his name as treasurer. Shortly thereafter he had the account changed to his name individually so that he could himself claim the accrued interest on the deposit. The bank's affairs becoming involved, A. a short while before the bank was placed in a receiver's hands, had the account transferred back to himself as treasurer. In an action by A. against the stockholders of the bank to recover the amount of the deposit from them, on the statutory liability of stockholders for public funds; *held*, that A. having paid the money to the county could recover from the stockholders only on the theory of subrogation, and as the parties had always intended that the deposit be treated as A.'s individually, he could not undertake to recover on the ground that the deposit was public money.
3. ACTIONS—EQUITABLE ACTION TRIED AT LAW.—When a cause, properly cognizable in equity, is tried at law without objection, and judgment rendered upon proper equitable principles, the judgment will upon appeal, be affirmed.

Appeal from Miller Circuit Court; *G. R. Haynie*, Judge; affirmed.

J. M. Carter, for appellant.

1. It is proven and not denied that this money deposited by appellant in the Texarkana Trust Company bank was of the public funds of Miller County, and that this company failed and refused to pay it. It is admitted that defendants were stockholders in the trust company both at the time the deposit was made and when it failed. The bank knew that these were public funds because its cashier solicited the treasurer to make the deposit as treasurer. The shifting or changing of the bank's records in no way changed the nature or ownership of the funds. The stockholders are liable. 97 Ark. 385.

2. We do not think a preponderance of the evidence shows that the county has been reimbursed, but, if so, then

appellant is subrogated to all the rights the county had against the stockholders. 31 Ark. 421; 37 Cyc. 414 and note; 138 Ky. 201; 40 Ark. 138; 110 U. S. 729; 82 Ark. 407; 41 Ark. Law Rep. 351.

3. Appellees entered no equitable defense against the right of subrogation, neither did they move to transfer to equity. They can not now object to the circuit court's retaining jurisdiction. Kirby's Dig., § § 5991, 5993, 5994; 31 Ark. 422; 74 Ark. 85; 28 Ark. 458.

Frank S. Quinn, W. H. Arnold and *Webber & Webber,* for appellees.

1. The undisputed evidence shows that appellant in his settlement of July 6, 1914, with the county court, accounted for all funds, for all purposes, and the court on that day counted the moneys and found that he had in his hands all sums with which he was chargeable as treasurer. Therefore, at the date of the filing of the suit neither the county nor appellant as treasurer, had any cause of action against the stockholders of the bank.

If he had any right of action against them, it was as an individual and by way of subrogation to the orignal rights of the county, and the chancery court alone had jurisdiction. 82 Ark. 407-412. Therefore, the case is to be decided according to principles of equity.

2. The facts developed in evidence show that appellant does not come with the clean hands required of one who goes into equity seeking relief.

If the funds he deposited in the bank were county funds, he was speculating thereon in drawing interest on the deposit, and puts himself in the attitude of asking equity to relieve him from the unforeseen and disastrous result of an illegal contract. If the funds were an individual deposit while drawing interest, and, by manipulation of the account, the word "treasurer" was added on the day the bank was closed, changing the character of the transaction from an individual deposit to one of public funds, appellant and the cashier were parties to an unauthorized and wrongful combination to give him an unlawful advantage over other depositors, and to impose

upon the stockholders a statutory liability that they had neither contemplated nor assumed. 47 Ark. 301, 311; 53 Ark. 150; 67 Ark. 480.

3. Aside from the principles of equity applicable to the doctrine of subrogation, the only question involved in this appeal is as to the weight of the evidence, and as to that, both sides having requested a directed verdict, the court's finding is conclusive. 100 Ark. 7; 105 Ark. 25; 87 Ark. 109; 97 Ark. 438; *Id.* 486; 101 Ark. 120; 102 Ark. 200; 103 Ark. 260.

McCULLOCH, C. J. (1) Appellant was treasurer of Miller County and instituted this action against the appellees, who were stockholders of a defunct banking institution known as the Texarkana Trust Company, to recover the amount of certain funds alleged to have been deposited as the county funds in that institution. The facts are undisputed and the court gave a peremptory instruction in favor of appellees. Even if there had been any substantial conflict in the testimony, all doubt would have to be resolved in favor of the court's finding, in as much as both sides asked for a peremptory instruction without requesting the court to give any instructions submitting the issues to the jury. *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71.

The facts are that appellant deposited in the Texarkana Trust Company the sum of $2,500 on August 1, 1913, and the same was credited to him on the books of the bank as treasurer, and a pass book was delivered to him. A few days thereafter, he decided to change the deposit to a personal one in his own favor, and by agreement with the cashier the word treasurer was erased from the bank ledger, the pass book showing the deposit in his name as treasurer was surrendered and a new pass book was issued to him showing the deposit to be an individual one in his own name. Three months thereafter the bank allowed him a credit because of interest on the deposit, and the credit was placed on his individual pass book. The bank was found to be insolvent in November, 1913, and on the 12th day of that month the bank was placed in the

hands of a receiver by order of the chancery court of Miller County. On the day the doors of the bank were closed and the receiver appointed about thirty minutes before that occurrence, one of the witnesses testified that appellant and the cashier made an agreement that the deposit should be charged back to the account of appellant as treasurer so as to give him security by reason of the statutory liabilty of the stockholders for deposit of public funds (Kirby's Dig., § 1990), and pursuant to that agreement, the cashier added the word "treasurer" to the account on the ledger and also on the pass book.

It is therefore established by the uncontradicted evidence that the funds deposited were in fact public funds in the hands of appellant as treasurer, and were originally deposited in his name as treasurer; the deposit was changed to conform to the real intention of the parties so that it could be treated by the bank as an individual deposit, and interest thereon allowed to appellant individually in conformity with the custom of the bank to allow depositors interest. Appellant accounted for the funds to the county before the commencement of this suit. We are of the opinion that appellant was not entitled to recover from the stockholders of the defunct bank by imposing on them the statutory liability, and the court was correct in giving a peremptory instruction. The county had no cause of action at the time this action was commenced for the simple reason that the funds had been accounted for by appellant.

(2-3) In *Bank of Midland* v. *Harris,* 114 Ark. 344, 170 S. W. 67, the facts were that the treasurer brought suit against the stockholders of a defunct bank to recover public funds in his custody, deposited with the bank, and he was allowed to recover notwithstanding the fact that he had accounted to the county for the funds after the commencement of the action. It was held that the action did not abate by the payment of the county funds, and that the officer, who was the custodian of the funds, had a right of action to recover the amount after he had paid the same over on settlement. We said that

the right of recovery was based on the equitable principle of subrogation. That, however, was a case where the funds were in fact and in form deposited as public funds. It is unnecessary in this case to decide whether or not the mere fact that the payment was made before the institution of the suit would defeat the right of subrogation, for we can base our conclusion on the broader ground that the parties intended this in fact as an individual deposit for the purpose of enabling appellant to reap the fruits of such deposit by way of interest, and he can not now treat it as a deposit of public funds. The statute permits him to deposit funds in incorporated banks for safe-keeping, but it was manifestly in contemplation of the law-makers that the funds should be deposited as public funds. The deposit made by appellant in his own name, for the purpose of collecting interest, was not a lawful deposit in conformity with that statute. We do not mean to say that it is necessary that the deposit be in form so as to show that it is public funds in order to impose liability on the stockholders, for we held, in the recent case of *Black* v. *Special School District No.* 2, 116 Ark. 472, 173 S. W. 846, that school funds deposited by a board of school directors would be treated as public funds in the hands of the treasurer, the lawful custodian, and that the latter could recover the amount from the stockholders. There is no question involved in the present case of the right of the county to recover from the stockholders, for, as already shown, the county has sustained no loss. Appellant is trying to recover for his own benefit, and must do so, if at all, upon the equitable doctrine of subrogation. Now, equity aids only those who come into court with clean hands, and it can not be said that appellant was in that attitude after having entered into an agreement with the cashier of the bank to treat the deposit as an individual one so that he could reap the fruits of it. Though the deposit was made as treasurer, and the fund was not in fact checked out, the surrender of the pass book and the change of the form of the account by agreement with

the cashier, was equivalent to drawing the money out and redepositing it. *Cunningham* v. *State,* 115 Ark. 392, 171 S. W. 885. The deposit stood as an individual one until the bank became insolvent, and appellant then, for the sole purpose of imposing liability on the stockholders, entered into the agreement with the cashier for the change of the nature of the deposit. It was too late for him to do that after having accepted the benefits of the deposit as an individual one, and it would not be in accordance with the principles of natural justice to permit him to shift the deposit at that time so as to impose a liability on the stockholders. We have said in this class of cases that where the cause was tried without objection in the law court, it should be disposed of, nevertheless, according to principles of equity. *Wilson* v. *White,* 82 Ark. 407; *Bank of Midland* v. *Harris, supra.* This case was tried in a court of law without any question being raised, but the case was correctly decided upon the undisputed facts, and the judgment should therefore be affirmed. It is so ordered.

KIRBY, J., dissents.

HUDGINS v. SCHULTICE.

Opinion delivered April 5, 1915.

1. LOCAL IMPROVEMENT—LIEN FOR ASSESSMENTS.—Assessments for a local improvement are a charge and lien entitled to preference against the real property in the district, from the date of the ordinance levying the assessment, which shall continue until the assessment shall be paid. (Kirby's Digest, § 5684).

2. LOCAL IMPROVEMENT—NONPAYMENT OF ASSESSMENT—FORECLOSURE.—A complaint in equity is required to be filed by the board of improvement in the court having jurisdiction of suits for the enforcement of liens upon real property for the condemnation and sale of delinquent property for the non-payment of the assessment, and the owner of the property assessed shall be made a defendant if known, and if unknown that fact shall be stated in the complaint, and the suit shall proceed as a proceeding in rem against the party assessed.

3. LOCAL IMPROVEMENT—ASSESSMENTS—COLLECTION.—In a proceeding to collect an assessment for local improvement, a summons must

be issued to be served and returned as summons in other suits for the enforcement of liens if the defendant can be found, and if the decree is in favor of the board, judgment is rendered for the condemnation and sale of the land and the owner is given a year after the sale to redeem it from the purchaser thereat.

4. BONA FIDE PURCHASER OF LAND—LIS PENDENS.—The grantees and mortgagees of the owner of certain land, such conveyances being made after the commencement of a suit to foreclose a lien for assessments, no *lis pendens* notice having been filed with the recorder of deeds as required by law, and having no actual notice of the pendency of such suit, the said grantees and mortgagees were bona fide purchasers and not affected thereby.

5. LOCAL ASSESSMENTS—RIGHTS AND LIABILITIES OF VENDEES.—The vendee of real property embraced in a local improvement district, takes only subject to the lien for assessments levied in favor of the district, but is unaffected by a proceeding to foreclose said lien, of which he has no actual knowledge, there being no *lis pendens* notice filed with the recorder of deeds.

6. LOCAL IMPROVEMENT—ASSESSMENTS—FORECLOSURE OF LIEN—REDEMPTION.—The owner of property, upon which the lien for assessments has been foreclosed, can not, after the expiration of the statutory period, redeem, when he had full knowledge of the suit to foreclose, after being properly summoned.

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

STATEMENT BY THE COURT.

This suit was brought by appellees against appellant to redeem certain lots in the city of Hot Springs from the appellant, the purchaser, at the sale foreclosing a lien for improvement district taxes due thereon.

Lottie Schultice had formerly been collector of Improvement District No. 24, in which the lots are situated, and was on October 16, 1911, at the time of the bringing of the suit to foreclose the lien and collect the taxes the sole owner of the lots. On March 13, 1912, she executed a mortgage to Peter Valle, which still remains unsatisfied, and sold part of lot 14 to appellee, J. N. Searcy, on October 6, 1912, and on the same day executed a mortgage to Burgauer.

Suit to foreclose the lien was commenced October 16, 1911, and the summons issued and the return thereon

showed it was duly served by the sheriff on Lottie Schultice and the decree of foreclosure recites:

"That due service of process by summons against each of said defendants, and all of them, for the time and in the manner prescribed by law has been had in this cause, by service of said summons upon the defendants, * * * and that defendant Lottie Schultice, is the owner of lots 14 and 15."

The sale was made under the decree on January 25, 1913, at which J. W. Hudgins became the purchaser of said lots, and on February 2, 1914, a commissioners' deed conveying same to him was executed and approved.

No summons was served upon or notice given to Lottie Schultice's said grantees or mortgagees, nor was any *lis pendens* notice filed. The chancellor found that the sale was good as to Lottie Schultice, the owner of the property at the time the suit to foreclose the lien was commenced, and that she was not entitled to redeem after the year allowed had expired, but that her grantees and mortgagees were *bona fide* purchasers, had no notice of the proceedings, and were entitled to redeem from the purchaser at the foreclosure sale and decreed accordingly and from this decree this appeal is prosecuted.

Davies & Ledgerwood and *B. H. Randolph,* for appellant.

1. Lottie Schultice's grantees and mortgagees were not *bona fide* purchasers, without notice, and were not protected by the *lis pendens* law, and were not entitled to redeem. 69 Ark. 68; 15 *Id.* 331; 21 *Id.* 163; 23 *Id.* 432; 27 *Id.* 228; 42 *Id.* 343; 42 *Id.* 342; 98 Ark. 155; 38 *Id.* 78; 47 *Id.* 413; 77 *Id.* 216; 90 *Id.* 166.

2. The proceeding was *in rem,* and all parties must take notice and defend. The owner was duly summoned. 62 Ark. 407; 28 Cyc. 1116; Black on Tax Titles, § 237; Black on Judg., § 448; 77 Ark. 324; 98 *Id.* 151; 84 *Id.* 61; 21 Am. Rep. 112; 36 L. R. A. 121; 29 Cyc. 1116, 1113, etc.; 63 Ark. 517; 70 *Id.* 61.

3. After the year allowed it was too late to redeem. 77 Ark. 324; 79 *Id.* 364; 99 *Id.* 324; 98 *Id.* 589; *Ib.* 543; 49 U. S. (L. Ed.) 233; 72 N. E. 1069.

4. A sale for taxes is not subject to the rule of *lis pendens.* Black on Tax Titles, § 237; Wade on Notice, § 1048; 25 Cyc. 1483; 67 Ark. 371; 30 *Id.* 44; 97 *Id.* 480. See 109 Ark. 99; 106 *Id.* 154; 51 L. R. A. (N. S.) 137, 1143, etc.

Rector & Sawyer and *Martin, Wootton & Martin,* for appellees.

1. No *lis pendens* notice was filed, and appellees were not bound, and still have the right to redeem. Kirby's Digest, § § 5149-5694; 87 Ark. 608; 11 Vesey, 194-201; Pom. Eq. Jur. (3 ed.), § § 632-640; Kirby's Dig., § 5691; 131 S. W. 200; Wiltsie Mortg. Foreclo., § 61; 48 Neb. 646; 67 N. W. 741; 101 U. S. 837.

2. The *lis pendens* statute applies to suits to enforce a lien for local assessments. 79 Pac. 278; 68 *Id.* 176.

3. Having no notice of the suit, appellees are not bound. 50 Ark. 458; 101 *Id.* 142.

C. Floyd Huff, for Schultice.

Adopts the brief, insofar as applicable, of counsel for appellees, and contends that no summons was served on Schultice, and that the law was not complied with. Kirby's Dig., § § 5700-5737; 86 Ark. 255; 87 *Id.* 607.

KIRBY, J., (after stating the facts). The sole question for decision is whether the purchaser at the sale for the foreclosure of the lien for the improvement taxes after the year allowed for redemption had expired, can hold the property against grantees and mortgagees, *bona fide* purchasers to whom conveyances were made by defendant after the suit for foreclosure was commenced, and no *lis pendens* notice filed as required by section 5149, Kirby's Digest. Appellant insists that notwithstanding no *lis pendens* notice was filed, and said purchasers and mortgagees had no actual notice of the pendency of the suit to foreclose the lien and collect the taxes, that they are not *bona fide* purchasers, and are concluded by the judgment against their grantor, Lottie Schultice.

His contention is that the transaction is governed by the law relating to the sale of lands for the collection of taxes, and not under the law governing judicial sales.

If an individual had been proceeding against Lottie Schultice, the grantor, of the other appellees after suit commenced to enforce a lien against the lands and had filed no *lis pendens* notice, and she had conveyed the lands after suit begun to a *bona fide* purchaser without actual notice of such suit, there is no question but that the purchaser's rights would not have been concluded by the suit.

(1) The law provides that assessments for a local improvement shall be a charge and lien entitled to preference, against the real property in the district, from the date of the ordinance levying the assessment, which shall continue until the assessment shall be paid (section 5684), and prescribes the procedure for the foreclosure of the lien and collection of the assessments which have not been paid.

(2) A complaint in equity is required filed by the board of improvement in the court having jurisdiction of suits for the enforcement of liens upon real property for the condemnation and sale of delinquent property for the payment of the assessments and the owner of the property assessed shall be made a defendant if known, and if unknown, the fact shall be stated in the complaint and the suit shall proceed as a proceeding *in rem* against the party assessed.

(3) A summons is issued to be served and returned as summons in other suits for the enforcement of liens if the defendant can be found and judgment is rendered, if the decree is in favor of the board, for the condemnation and sale of the land, and the owner is given a year after the sale to redeem it from the purchaser thereat. Kirby's Digest, § § 5691-5709.

We also see no reason why the foreclosure of this lien under the prescribed procedure does not have the same effect and is not controlled by the same rules of law as govern decrees of foreclosure of liens upon real estate in chancery courts in other proceedings, Lottie Schultice

having been served with a summons, and it not being a proceeding *in rem*. Before the enactment of the statute requiring the filing of *lis pendens* notices in the recorder's office, all who purchased lands from a defendant against whom a suit for foreclosure of a lien thereon had been filed, were concluded, and bound by the decree rendered against the person from whom they acquired the title. The purchaser was held to have had constructive notice of the action by the commencement of the suit.

It was evidently the purpose of the statute to abrogate the *lis pendens* rule, since it requires the filing with the recorder of deeds in the county in which the property is situated, a notice of the pendency of any suit at law or in equity affecting the title or any lien on real estate, to render the filing of such suit constructive notice to a *bona fide* purchaser or mortgagee of any such real estate. Section 5149, Kirby's Digest.

Before its passage all such purchasers of real estate were affected by constructive notice of suits commenced affecting the title or a lien thereon and concluded by the decree against the vendor and necessarily bound to investigate the records of all courts in which suits could be brought that would affect such title, in order to ascertain the condition of the title to any real property purchased. Now, the would-be purchaser or mortgagee goes to the recorder's office where all the instruments of title thereto are necessarily found, and if no notice of a suit pending is on file with the recorder, he is not affected with constructive notice of any such suit, and is only bound by actual notice thereof.

The Supreme Court of Kentucky construing a like statute of that State held it applicable to all suits to enforce liens against real estate. *Perkins* v. *Ogilvie,* 131 S. W. (Ky.) 200.

In Washington and California, the courts have construed statutes requiring the filing of notice of pendency of suits affecting the title to or liens upon real estate, and held them applicable to suits to enforce a lien for local

assessments. *Page* v. *Chase Co.*, 79 Pac. (Cal.) 278; *Dow* v. *City of Ballard*, 28 Wash. 87, 68 Pac. 176.

(4-5) We hold therefore that the grantees and mortgagees of Lottie Schultice in her conveyances after the suit to foreclose the lien for assessments were begun, were not affected by constructive notice thereof, no *lis pendens* notice having been filed with the recorder of deeds as required by law, and that having no actual notice of the pendency of such suit, they were *bona fide* purchasers for value, and not affected thereby. It is true, that the lien for the assessments in local improvement districts is fixed from the date of the ordinance levying the assessment and superior and preferred and continues until the assessments are paid, but it is also true, that as between grantors and grantees of such property, all assessments unpaid at the date of the transfer are to be paid by the grantee, and while these purchasers had notice by reason of the organization of the improvement district that a lien for the assessments existed against the property, the title to it was only affected to the extent of such lien, and in the purchase without notice of the pending suit to foreclose it, they are not concluded by such foreclosure and their rights are affected only to the extent of the lien for unpaid assessments.

(6) The record in the foreclosure proceedings recites that Lottie Schultice, the owner of the lots, was duly served with summons and in addition the testimony clearly shows that she had knowledge of the pending suit and tried to make arrangements to borrow money and pay the assessments and put an end to it, but failed to do so. She can not be heard to question the judgment further, and is concluded by the decree of foreclosure and sale thereunder, and is without right of redemption, the time allowed by law for redemption having expired.

The case is poorly abstracted, but taking the chancellor's findings as recited by appellant to be supported by sufficient testimony, as we must, we do not find any prejudicial error in the record, and the decree is affirmed.

JONES v. JONES.

Opinion delivered April 5, 1915.

1. CONSTRUCTIVE TRUSTS—PAYMENT OF PURCHASE PRICE—GIFT.—When the purchase money of land is paid by one person and the conveyance thereof made to another, a stranger, a trust results by operation of law to him who advances the purchase money, and if the nominal purchaser be the wife or child of the person paying the consideration, it is presumed to have been a gift or advancement, but a determination of the question as to whether or not such trust resulted from the transaction, depends upon the intention of the parties themselves.
2. CONSTRUCTIVE TRUSTS—PAYMENT OF PURCHASE PRICE—BURDEN OF PROOF.—Notwithstanding there is a presumption of a trust resulting to the party paying the consideration for the lands, the burden of proof in the whole case is upon the one who seeks to establish a constructive trust, and it can not be discharged and the trust established by a mere preponderance of the testimony, nor anything short of evidence that is clear, convincing and satisfactory.

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

STATEMENT BY THE COURT.

This suit was brought by appellees, the widow and children of W. G. Jones, to have F. F. Jones, appellant, declared a trustee of certain lands, and to enforce a resulting trust for a one-half interest in their favor, after the administratrix attempted unsuccessfully to set the conveyance aside, under section 81, Kirby's Digest, as made in fraud of creditors. *Jones* v. *Jones,* 107 Ark. 402.

The complaint alleged that on August 27, 1899, Eliza Kerr and her husband sold to J. L. Jones and W. G. Jones, the tract of land for $350, each paying one-half the purchase price therefor and that the deed was made conveying the said lands to Fred F. Jones, the minor son of J. L. Jones. That it was the intention of the purchasers that they should hold the beneficial interest in the lands notwithstanding the deed was made to Fred F. Jones; that they went into possession of said lands and remained in possession thereof as tenants in common from the date

of the conveyance until the death of W. G. Jones, each collecting one-half the rents and profits from the land; that by reason of the payment of one-half the purchase money by W. G. Jones, a trust resulted in his favor for an undivided one-half interest in the lands; that said W. G. Jones died intestate in 1909, leaving appellees, his widow and children who succeeded to his interest in the lands; that Fred F. Jones was in possession of said lands and had been since the death of said W. G. Jones and collected and received all the rents and profits therefrom from that time.

They alleged further that he had on February 27, 1908, executed a mortgage to Myra Bergstrom to secure an indebtedness of $700; that they were entitled to have the assets marshalled to require the mortgagee to exhaust the other securities before resorting to their undivided one-half interest in the lands; prayed for an accounting, that the court decree them to be owners of a one-half undivided interest, etc.

The answer admits that the appellees are the widow and only heirs of W. G. Jones, deceased; that the conveyance was made of the lands to Fred F. Jones by Eliza Kerr and her husband as alleged; denies that the lands were purchased by W. G. and J. L. Jones; alleged that they were purchased by J. L. Jones, the father of defendant, for him and the title taken in his name, his father intending the same as an advancement; that J. L. Jones paid all the purchase money; denied that W. G. Jones ever had any interest or equity therein and all the other allegations of the complaint. Alleged that his father, J. L. Jones, went into the immediate possession of the lands after the deed from Kerr was made and retained possession until the defendant arrived at the age of majority, when he went into possession thereof and had ever since claimed to be the sole owner under the deed of conveyance; denied that W. G. Jones ever had at any time any kind of possession or interest in the land; admitted that part of the rent was paid to W. G. Jones, but stated that the payments were voluntary and without obligation on

his part to pay same; admitted the execution of the mortgage to Bergstrom and pleaded laches and limitations.

The mortgagee answered and by way of cross-complaint adopted the answer of Fred F. Jones and asked the foreclosure of the mortgage.

It appears from the testimony that the mortgage was executed to secure the payment of a note for money borrowed after an examination and approval of the abstract of title by the mortgagee's attorney, and that she had no knowledge whatever of appellee's claim to the land. The deed of conveyance made by Kerr to Fred F. Jones recited a consideration of $50 paid in cash by W. G. and J. L. Jones and two promissory notes of $150 each, executed by them to said grantor.

J. L. Jones testified that when the deed was made to Fred F. Jones, he and his brother, W. G. (Willis) were in business together, that Willis went to St. Louis and contracted for goods on a credit, agreeing to give a mortgage on all the lands owned by both of them, including witness' home; that when he learned of this, he proposed that they would take the title to this land in Fred's name, in order that he might have a home in case they lost their lands and as W. G. was unmarried, he would not have any use for the land in case of failure of the business; that the mortgage was executed accordingly. He stated that he had control of the land in controversy from the time of its purchase until his son, Fred Jones, married, when he turned it over to him; that W. G. Jones never had control nor possession of the land. He said also that after the purchase, he told his brother, W. G., that he was to have one-half of the rents as long as he lived, provided he and Fred could agree and get along all right after Fred came of age. He said the first $50 of the purchase money was paid out of the partnership funds; that he sold a mare for $125, which was paid on the land, and that W. G. Jones helped to pay the remainder of the purchase price. He stated also that afterward he and W. G. purchased a tract of land, known as the Ellis place, consisting of eighty acres for $1,000; that the first $300 was paid out of

partnership funds; the next payment, about $250, was paid from rents of his wife's land, and that he agreed to pay a $600 debt of the firm to the Wear-Boogher Dry Goods Company in consideration that W. G. Jones would pay the same amount on the Ellis land, to which W. G. replied that it made no difference, and that this was done and that W. G. Jones never paid back any of these amounts.

He stated that W. G. Jones, from 1877 until his marriage, resided with him, and was never charged any board, but lived as a member of his family. Fred was born in 1881, was about ten years old when the lands were conveyed to him, and he turned the lands over to him upon the date of his marriage. He and his brother were partners in farming and merchandising, and "lived it up as we made it: We did not keep any books on each other." He paid toward the purchase price of the Ellis lands which was conveyed to W. G. Jones, over $400; there was no agreement between him and his brother that he was to help buy the Ellis lands for W. G.'s interest in the land in controversy; that he never had any claim on the Ellis land, made no improvements on it, and received no rents from it, and answering the question why Willis Jones was allowed to have one-half of the rents of the land in controversy said, "He was living with me, and we used it the same as if it belonged to both of us."

He stated that all the lands mortgaged to secure the partnership indebtedness including his home were sold under foreclosure proceedings.

Fred Jones testified that he had been in possession of the land since 1900; he acquired possession from his father; had made no contract with Willis G. Jones to pay him any part of the rent, but that he did pay him one-half of the rent of the place during his lifetime upon the request of his father and upon his father's representation that he had agreed with Willis Jones that Willis should have one-half of the rent as long as he lived. He never talked with his uncle about the matter but once just before his death; that they were fussing about something, not the

land, and "uncle told me that he was to have one-half of the rents until my death or his." That his uncle made no claim to any part of rents except one-half during his lifetime; testified that he borrowed the money from Mrs. Bergstrom, and that the mortgage securing it was valid, and had not been paid except a year's interest.

Mollie Jones testified that she had heard Willis, her husband, and Jas. L. Jones both say that the land belonged to Willis and Fred Jones, and that when Fred came of age he would make a deed to Willis of his one-half interest or make it satisfactory to him; that J. L. Jones said Fred would do this.

She stated also that the partners paid all the debts of the partnership and had the forty acres of land in controversy left free of debt. She said that both of them stated often that the land was paid for out of partnership money, and had heard Fred say that he and his Uncle Willis owned the land; that during her husband's lifetime, she never heard Fred Jones claim that her husband did not own one-half interest in the land, and that Jim, Fred's father, and Willis, paid for the clearing of the land about half and half, and Willis paid for one-half of the fencing, and that Willis paid for the buildings on the place. Her understanding of the deed being made to Fred was that the partners failed in business and put this land in Fred's name to hold until they could pay their debts and that was the only land they got to keep.

Five or six others testified that they had rented the lands in controversy from Jim and Willis Jones, and from Fred and Willis, and it was their understanding after Fred came into possession that it belonged to him and Willis Jones.

A witness testified that he rented the lands in controversy in 1904 from Fred and Willis Jones, first talked with Fred, who said he could not give him an answer until he saw his uncle Willis, as they were partners in it, and that witness saw both of them in a few days, and made the trade.

The chancellor found that the lands were purchased by J. L. and W. G. Jones, each paying one-half of the purchase money; that it was their intention to retain a beneficial interest therein and that the conveyance was made for convenience to Fred F. Jones and that a resulting trust arose in favor of W. G. Jones for a one-half interest, and that he and J. L. retained the possession of the land until Fred F. became of age, and afterward Fred and W. G. Jones retained the possession as tenants in common until the death of W. G. Jones. That he was owner of an undivided one-half interest therein, and that the mortgage of Bergstrom was valid and the debt secured thereby unpaid and decreed accordingly; that the mortgage should be foreclosed and one-half the proceeds of the sale, after its satisfaction, turned over to appellees, and from the decree in appellee's favor, Fred F. Jones appealed.

S. A. D. Eaton and *Witt & Schoonover,* for appellant.

1. No trust was ever created in favor of W. G. Jones, but if any was ever intended, it was an express trust which can never rest in parol. 67 Ark. 526; 45 *Id.* 481; 55 *Id.* 414; 39 Cyc. 24, 25; 103 *Ark.* 279; 104 *Id.* 37; 110 *Id.* 393.

2. The facts and circumstances fail to create a resulting trust. 105 Ark. 318; 79 *Id.* 418; 82 *Id.* 569; 104 *Id.* 303.

3. The claim is stale and barred. Kirby's Digest, § 5056; 56 Ark. 601; 58 *Id.* 95; 40 *Id.* 301; 40 *Id.* 62.

T. W. Campbell, for appellees.

1. The facts and circumstances clearly establish a resulting trust. 42 Ark. 503; 55 *Id.* 414; 67 *Id.* 526; 64 *Id.* 160; 101 *Id.* 409; 79 *Id.* 418.

2. The action is not barred by limitation nor laches.

The proof of a resulting trust is clear, full and convincing. 42 Ark. 503; 64 *Id.* 155. The findings of the chancellor are supported by the evidence.

KIRBY, J., (after stating the facts). (1) Where the purchase money of land is paid by one person and the conveyance thereof made to another, a stranger, a trust re-

sults by operation of law to him who advances the purchase money, and if the nominal purchaser be the wife or child of the person paying the consideration, it is presumed to have been a gift or advancement, but a determination of the question as to whether or not such trust resulted from the transaction, depends upon the intention of the parties themselves. *Keith* v. *Wheeler,* 105 Ark. 323.

(2) Notwithstanding there is a presumption of a trust resulting to the party paying the consideration for the lands, the burden of proof in the whole case is upon the one who seeks to establish a resulting trust, and it can not be discharged and the trust established by a mere preponderance of the testimony, nor anything short of evidence that is clear, convincing and satisfactory, leaving no well founded doubt upon the subject. *Keith* v. *Wheeler, supra: Hall* v. *Cox,* 104 Ark. 303; *Tillar* v. *Henry,* 75 Ark. 446.

The deed of conveyance of the lands in controversy recites that the consideration was paid, and to be paid by J. L. and W. G. Jones and the testimony of J. L. Jones is to the effect that the remainder of the purchase money was paid by them both. He does say that he paid more of his individual money toward the purchase of some lands conveyed to W. G. Jones by one Ellis, than was paid by said W. G. Jones for the purchase money of these lands, but he also said it was not his intention to claim any interest in the Ellis lands, and that he had none.

The testimony all shows that possession of this tract of land was held by J. L. and Willis G. Jones until the coming of age of Fred, son of J. L., and that the possession thereafter was held by Fred and Willis G. Jones and the rents equally divided between them during the lifetime of said Willis Jones. It was evidently the intention of Willis G. Jones to retain a beneficial interest in the lands purchased, notwithstanding they were conveyed to Fred F. Jones, the minor son of his partner, J. L. Jones, and he did retain such interest and enjoyed it with J. L. Jones until Fred came of age and from then on, with the consent of Fred F. Jones, appellant, until his death.

One witness testified that Fred said he and his Uncle Willis were partners in the land. The widow testified that he always recognized that his uncle had a one-half interest in the land, and did not dispute the fact until after his uncle's death, and he himself admitted that they enjoyed the rents of the land together, but said he allowed his uncle to collect and enjoy one-half the rents until his death because his father told him he had agreed that it should be done.

Willis Jones was in possession of the land at his death and the claim of appellee's, successors to his interest, is not barred by the statute of limitations.

We think the testimony is sufficient to sustain the chancellor's decree, and it is affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. MIZELL.

Opinion delivered April 5, 1915.

DAMAGES—MENTAL ANGUISH—NEGLIGENCE—PHYSICAL PAIN—CAUSAL CONNECTION.—Appellees, wishing to attend the funeral of a near relative undertook to board a train at a certain place. The train did not stop and appellees suffered physical inconvenience and pain in walking to another station in the rain, and were unable to attend the funeral. *Held*, there can be no recovery against the railroad for mental anguish caused by appellee's inability to attend the funeral, there being no sufficient causal connection between the pain suffered from the walk in the rain and appellee's mental anguish on account of the delay.

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

STATEMENT BY THE COURT.

Appellees left home to attend the funeral of a Mr. Mizell, who was the father of two of the appellees and the uncle of the third. The funeral was to be near Malvern. Appellees attempted to take passage on one of appellant's trains at Essex Park, which was a flag station for the train they attempted to go on. The train was flagged, but failed to stop, whereupon appellees walked over to

Lawrence and took a train into Hot Springs; but in this walk they were caught in a rain and all became ill as the result of having gotten wet. If the train had stopped, they would have arrived at their destination that evening, whereas, appellee, Mrs. Sprouls, became ill and returned home without attending the funeral, and the other appellees did not reach their destination until the following morning. Mrs. Sprouls testified that she loved her uncle, and was grieved over her failure to attend his funeral; and the other appellees testified that they were grieved on account of the delay in reaching the place where their father's remains had been carried, and in not being present to know that proper funeral arrangements had been made.

Over appellant's objections, the court gave instructions numbered 3 and 4, which read as follows:

"3. The jury are instructed that if your verdict is for the plaintiffs, you should assess as damages such a sum of money as you think, from the facts and circumstances adduced in evidence, would fairly compensate plaintiffs for all inconvenience and physical pain suffered, if any, for all mental anguish, if any, and for any extra expense caused plaintiffs, if any."

"4. You are instructed that you can not assess any damages on account of mental anguish suffered, unless the proof shows that physical pain was suffered in connection with the mental anguish."

The giving of these instructions, and the refusal to give an instruction that no damages could be based upon any delay in arriving at the funeral, constitute the only error of which appellant complains. Substantial verdicts were returned in favor of all of the appellees, the cases having been consolidated by consent, and this appeal has been duly prosecuted from the judgment pronounced thereon.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

The third instruction given by the court erred in authorizing the jury to award damages for mental anguish, if any. A recovery of damages for mental anguish in this case is in the face of the doctrine laid down in the *Taylor*

case, 84 Ark. 42. The case does not fall within the exception to the *Taylor* case, and instruction 4 is not applicable. The mental anguish must be the result of a physical injury. 89 Ark. 187.

H. B. Means for appellee.

Instruction 4 follows the principle enunciated by the court in the *Moss* case, 89 Ark. 187. Appellees being caused to get wet, etc., and to take cold and to become ill, as complained of, was all the direct result of the negligence of appellant's employees. If mental anguish was suffered when accompanied with physical pain, if such pain and mental anguish was the result of negligence on the part of appellant, appellees are entitled to recover, and would not be required to designate the particular character of pain that caused the mental suffering. 97 Ark. 506.

SMITH, J., (after stating the facts). We think the instruction numbered 3 should not have been given. Mental anguish was not a recoverable element of damages under the facts of this case. The mental anguish suffered in this case did not result from the walk in the rain and cold, nor from the sickness which resulted therefrom; but from the delay in getting to Malvern in time to look after the funeral arrangements of the father on the part of two of the appellees and the failure to attend the funeral of an uncle on the part of the other. It is true appellees suffered physical pain as the result of their illness and mental anguish on account of the delay; but there is no such causal connection between the two as that the railway must respond in damages for both.

A somewhat similar contention was made in the case of *Chicago, R. I. & P. Ry. Co.* v. *Moss,* 89 Ark. 187. There a passenger debarked from a train and requested that his baggage be put off. His request was denied, and he was insulted and humiliated by the conductor. At the trial he recovered a verdict for $5 for actual damages and $700 for humiliation and injured feelings. The opinion in that case reviewed the opinion of this court in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 84 Ark. 42, which is

our leading case on the right to recover damages to compensate for mental anguish unaccompanied by physical injury. It was there insisted that Moss should recover for his humiliation because it was accompanied by another "element of recoverable damages." Discussing that question, it was there said:

"The 'other element of recoverable damages' referred to, in the excerpt of the opinion above quoted, was clearly indicated in the preceding part of the opinion, wherein it was stated that damages for mental suffering may be recovered where there is a physical injury, because the two are so intimately connected that both must be considered on account of the difficulty in separating them. This is the foundation for permitting a recovery for mental suffering; and without this necessary connection between the physical injury and the mental suffering, there can be no recovery for the mental suffering. There are many cases in the books where there is a constructive physical injury, such as duress, ejection from trains, etc., where there is no physical violence, but an actual restraint or coercion of the person. In such cases, and possibly others, it would not be sound to hold that, merely because the finger was not laid upon the lapel of the coat, there can be no recovery for the wrong done, including the mental suffering resulting from such duress or coerced ejection. In order not to exclude such cases, the clause which is made the basis for this suit was added; but it was not intended to permit any disconnected recoverable element to be used as a post to which to hitch mental suffering. In this case there is no connection whatever between the recoverable element and the mental suffering; and the latter can not be sustained independently."

Appellees assert their right to recover under the authority of the case of *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 97 Ark. 505. But the opinion in that case recites the fact to be that: "There is also evidence of physical suffering resulting directly from the wrongful expulsion of plaintiff with her baggage at a lonely place on the railroad where she could not procure shelter. She became

physically exhausted in attempting to carry her baggage back to the place where the auditor told her she would find the depot, and in seeking to find a house where she could procure shelter and protection for the night. The jury had a right to consider these circumstances, and the mental, as well as the physical suffering plaintiff endured in estimating the amount of her damages."

Here there is no connection between the mental anguish and the physical injury, and, consequently, there can be no recovery for the mental anguish.

For the error indicated, the judgment will be reversed and the cause remanded.

DENT v. PEOPLES BANK OF IMBODEN.

Opinion delivered April 12, 1915.

1. BANKS AND BANKING—EMPLOYMENT OF ATTORNEY—AUTHORITY OF PRESIDENT.—The president of a bank has authority to take charge of the litigation of the bank, to institute, carry on, and defend legal proceedings and for the accomplishment of these purposes may retain and employ counsel on behalf of the bank, but this authority does not extend to the right to employ counsel by the year.
2. BANKS AND BANKING—EMPLOYMENT OF ATTORNEY—AUTHORITY OF PRESIDENT.—In the matter of the employment of an attorney for a bank, by the year, the president or other officers of the bank can not act without authority from the board of directors.
3. BANKS AND BANKING—EMPLOYMENT OF ATTORNEY.—While a bank must pay an attorney a reasonable compensation for the conduct of any litigation of which it received the benefit, without regard to whether there was a contract of employment or not, and also must pay a reasonable fee for services rendered under a contract of employment made with the president, the bank is nevertheless not bound by a contract made with said attorney by the president for services by the year, unless such contract is ratified by the directors.

Appeal from Lawrence Circuit Court; *H. L. Ponder*, Special Judge; affirmed.

STATEMENT BY THE COURT.

G. G. Dent, an attorney at law, brought suit against the Peoples Bank of Imboden for the recovery of $1,440, claimed as compensation upon a contract for a yearly retainer for twelve years' service as attorney for the bank, and $1,550 as damages for breach of the contract alleged to have been made with him by the bank, to pay him for attending to all lawsuits brought by or against the bank or for collections coming through it.

He alleged an oral contract of employment by W. C. Sloan, president of the bank, from its organization in 1905 until the filing of the suit on January 2, 1910, and that from time to time prior to 1908 he was consulted by the bank, its officers and employees and rendered valuable service in giving advice, etc., other than in the institution and conduct of litigation, for which he was to be paid fees to be fixed by agreement.

The second count of the complaint alleged that by the contract of employment, he was to attend to all litigation of and for the bank, and that he had held himself in readiness at all times to perform the service and carry out the contract, but that the bank had instituted various suits and employed other attorneys in the conduct of the litigation to his damage in the sum of $1,500. This count was stricken out upon motion of appellant.

The answer denied any agreement to retain the plaintiff at a salary of $120 a year, or any other amount, and alleged that the bank made an arrangement with him providing when it needed the services of an attorney in litigation from time to time it would give him such business and pay him for whatever services he rendered; that it used him as attorney from time to time and paid him for each service when completed; plead the three-year statute of limitations, and denied that it employed the plaintiff to represent it in all litigation, and plead the statute of frauds, the alleged contract not being one to be performed within a year.

The plaintiff testified that after the bank was organized, he talked with two or three of the stockholders about

the attorneyship, with several of the directors, "and finally had a conversation with W. C. Sloan, the president of the bank and principal owner of its stock. He told him he would like to become the bank's attorney and Captain Sloan replied that he could consider himself the attorney of the bank. Nothing was said about any pay, but from the conversation he, witness, was to attend to any suits the bank had, that is, suits for or against the bank, for which he was to be paid. There was nothing said about how long the employment was to continue. He knew that Captain Sloan was president of the bank, and virtually the owner, having a majority of the stock—he and his children—that he generally attended to the business of the bank—"whatever he said went in a business way." That the then cashier, as well as the one who succeeded him relied on the judgment of Captain Sloan in all business matters, and that nobody ever objected to what he did and all acquiesced in his actions; that from time to time independent of specific lawsuits, he was called upon for advice by the cashier of the bank in consultation about its affairs and rendered services proper and necessary under the law, for which he had never been paid; that he rendered such services beginning with the organization of the bank and continuing until it closed in 1908. He held himself out as the attorney of the bank during this time. * * * Said he was not claiming under an express, but an implied, contract, his contention being that no specific amount was agreed upon, that he was the regular retained attorney for the bank, was consulted about its business from time to time, held himself in readiness at all times to answer all questions and inquiries made, and he could not say how many times he was consulted but very often. That $120 a year was a reasonable compensation for the services for which he had never received any compensation; that he always intended to charge for such services, and felt himself disqualified from taking any business against the bank. He did not claim to have had any contract of employment with the board of directors, or any one else except with Captain

Sloan, the president of the bank, as already stated, nor did he tell any member of the board of directors that he was the regular retained attorney of the bank by the year, for he knew he was the bank's attorney, and did not think of how much he was to be paid.

He said on cross-examination that he never intimated to anybody that he was retained by the bank as attorney by the year, nor that he expected a compensation of $120 yearly, but that he never dreamed of it being questioned that he was the bank's attorney. He made no claim of the bank being due him any amount for services as attorney until after it went into the hands of a receiver, and he was notified to pay up his indebtedness to the bank; he then claimed he notified the officers of the bank that he had an account against the bank far in excess of his overdraft, and said, "I was sued by the bank after I had gone and told them, I did not owe anything, and when they commenced suit against me, I remembered these services."

Another attorney testified that he knew the value of the services claimed to have been rendered by plaintiff, and that $10 or $15 a month would be a reasonable retainer, "and when an individual has considerable business and employs me in whatever business he has, I ordinarily consider advice and consultations as gratuities." "The general custom is, so far as I know it among lawyers, that a retainer is not considered to be due unless there is a special contract for it," and to the question, "If the Peoples Bank were to say to you that you might consider yourself their attorney, would you take that to mean that they would pay you a salary by the year?" Answer: "Ordinarily, without more was said than that, I would consider that they expected to employ me in whatever business they had and pay me the customary fees for attending to it. I think that is the custom among attorneys, so far as I know it in this locality."

Homer Sloan, cashier, testified that whatever his father, the president, did, usually met with the approval of the directors. Whatever legal business we had we gave it

to Mr. Dent, and I suppose you would consider that we made him the attorney for the bank. We had so little legal business that we had little use for an attorney; whatever we had, however, was turned over to Mr. Dent. I attended most of the directors' meetings, never heard of Mr. Dent being the attorney for the bank at a yearly salary or being retained by the year, and meant when I said he was its attorney that whenever we needed an attorney in litigation, we gave the business to Mr. Dent and paid him for such lawsuits as he attended to. He made the bank his headquarters when he was in town, and I asked him questions when he was there and wanted advice, thinking I had the right to do so, because the bank gave him whatever legal business it had.

C. C. Bacon testified that Homer Sloan, the cashier, told him if he had occasion to use an attorney to use Mr. G. G. Dent. "I did not make any contract with Mr. Dent at all while I was cashier or assistant, but used him in that capacity for certain cases."

Two others testified they had been vice presidents of the bank for some years, attended most of the meetings of the directors, and had never heard of Dent's being employed or retained as attorney for the bank.

Doctor Warren stated that he had talked with Dent in 1901 and asked him how much salary the bank paid him as attorney, and he replied that he was the regular attorney of the bank, but that he did not get a salary, but was to attend to the cases of the bank and was to get paid for his services in that way.

The court instructed the jury, amending and giving, over plaintiff's objections, requests numbered 1 and 3, by adding a proviso, the instructions given being as follows:

"No. 1. If you find from the evidence in this case that W. C. Sloan, while acting as president of the Peoples Bank, employed the plaintiff, Geo. G. Dent, as its attorney, and that under such employment, the said Dent performed services for the said bank or held himself in readiness at all times to advise, consult or otherwise serve

the bank being its regular attorney, for which service he has not been paid, you will be warranted in finding for the plaintiff, in such an amount as the proof in the case shows his services to be reasonably worth. Provided, that you further find that the employment of the plaintiff and services rendered were known to the directors of the defendant bank, and were accepted by them, and they acquiesced in said employment by Sloan and ratified the same.

"No. 3. You are further instructed that if you find from the evidence in this case that the plaintiff Dent, as an attorney at law, performed services, such as giving advice about the business of the bank during the period of years as alleged in the complaint in this case; that he refrained from taking cases against the bank, and always held himself in readiness to serve the bank when called upon by its cashier or other officers, and that the services rendered were at the solicitation of the cashier and other officers of the bank; that such services have never been paid for, then in that event you will be warranted in finding for the plaintiff in such an amount as the proof shows such services to be reasonably worth. Provided, that you further find that the employment of the plaintiff and services rendered were known to the directors of the defendant bank, and were accepted by them, and they acquiesced in said employment by Sloan and ratified the same."

The jury returned a verdict for the bank, and from the judgment plaintiff brings this appeal.

R. E. L. Johnson, for appellant.

1. The president of a banking corporation has power to employ an attorney for the bank without specific delegation of such authority from the board of directors. 10 Cyc. 904; 53 Kan. 696, 37 Pac. 131; 9 Paige 406, 38 Am. Dec. 561; 5 Denio 355; 33 Cal. 183; 45 Mo. 419; 51 Mo. 501; 61 Mo. 89; 23 Pa. Super. Ct. 138; 64 N. J. L. 497, 46 Atl. 168; 18 Tex. Civ. App. 176, 44 S. W. 875; 2 Ga. App. 746, 59 S. E. 10; 4 Thompson on Corp., 536.

The court, therefore, erred in adding the proviso to instructions 1 and 3, requested by appellant.

2. The board of directors, by its silence, impliedly ratified the appointment of appellant as attorney for the bank by the president, even if he exceeded his authority in so doing. There is no evidence that the board repudiated the act or chose other counsel for the bank, but there is evidence that the directors had knowledge that appellant was attorney under authority from the president. Clark on Corporations, 500; *Id.* 498; 103 Ark. 283; 146 S. W. 508; 48 N. J. L. 513, 7 Atl. 318; 28 N. E. 245; 104 U. S. 192; 78 Ark. 483, 95 S. W. 802; 86 Ark. 287, 110 S. W. 1039; 89 Ark. 435, 117 S. W. 232; 61 N. Y. St. 817; 151 Ill. 444, 38 N. E. 140; 121 Ala. 505, 25 So. 612; 10 Cyc. 1073; 131 U. S. 371, 33 Law Ed. 157.

3. Appellant was entitled to recover such an amount as would reasonably compensate him for the services rendered. It is a settled principle that where an attorney renders valuable services to one who has received the benefit thereof, a promise to pay their reasonable value is presumed, unless the circumstances show that such services were intended to be gratuitous. 2 R. C. L., § 130, p. 1048; 166 Mo. 28. See, also 66 Ark. 190; 3 R. C. L., § 128, p. 1046; 98 Pac. 911, 19 L. R. A. (N. S.) 961, note; 27 Wis. 238: *Id.* 281; 17 Pac. 464; 77 N. E. 762; 97 Ill. App. 374; 54 N. Y. 76; 35 Minn. 124.

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

1. Plaintiff is barred by the statute of limitations, he having brought suit on January 18, 1913 for services which terminated in 1908.

2. The president had no power to make the alleged contract. 89 Ark. 173; 1 Morowitz on Corporations, § 537; 2 Cook on Corporations, 716; 10 Cyc. 903; 53 Pac. 634, 121 Cal. 202.

3. The evidence does not show that Sloan, the president, reported his action to the board of directors. All the members who testified say they had never heard of plaintiff's employment, and that it was never reported to the directors. There can be no ratification without knowl-

edge. 11 Ark. 189; 88 Ark. 64; 64 Ark. 217; 76 Ark. 472; 103 Ark. 283; 105 Ark. 506.

KIRBY, J., (after stating the facts). (1) It is strongly urged that the court erred in refusing the instructions as requested, and in giving said instructions as amended. The president of a bank has authority to take charge of the litigation of the bank, to institute, carry on, and defend legal proceedings, and for the accomplishment of these purposes, may retain and employ counsel on behalf of the bank. 1 Mitchie Banks & Banking, 704; Boone on Banking, § 144; Bolles National Bank Act, 89; 3 R. C. L. 442; 10 Cyc. 904; *Citizens Natl. Bank* v. *Berry,* 53 Kan. 696, 37 Pac. 131.

In the Kansas case, the court said: "The president of a banking corporation has power to employ counsel and manage the litigation of the bank in the absence of any order of the board of directors depriving him of such powers." The authorities do not reach to the extent, however, of holding that the president of a bank is authorized to make a contract of employment retaining the services of an attorney by the year, for consultations and advice. The business of a bank and other corporations is under the care of and managed by its board of directors, and the president, as a rule, has no greater powers by virtue of his office merely, except he is presiding officer at the meetings of the board, than any other director of the company. Kirby's Dig., § § 841-843; 1 Morowitz on Corporations, § 537; 10 Cyc. 903; 3 Cook on Corporations, § 716.

(2) The employment of an attorney upon a yearly retainer is a matter of moment to the corporation, and there is usually no such haste required about it as would prevent the matter being considered and passed upon by the board of directors, and although the authority of the president of the bank in this instance to make the contract might have been implied from the usual course of business of the bank, the president having been allowed to manage and control its affairs largely, the instruction offered did not submit the question of his implied au-

thority to the jury and permit them to draw the inference that he had such authority, and was erroneous as requested in telling the jury that if the contract was made by the president of the bank, and the services performed, they would be warranted in finding for the plaintiff. The requested instruction numbered 1 being erroneous, in assuming that the president had authority to make the contract and bind the bank, the court tacked on the amendment to correct the error and directed the jury that such a contract made with the president would be valid in effect if ratified by the board of directors.

(3) Neither did the court err in giving instruction numbered 3, which, as requested, assumed that the cashier or other officers of the bank had authority to bind it to the payment under an alleged contract of yearly retainer for an attorney's services, other than attending to its litigation, in giving advice about the business of the bank in refraining from taking cases against it, and holding himself in readiness to serve the bank. These officers, as such, had less authority than the president of the bank in that regard, and the amendment to the instruction added by the court did but tell the jury that the bank would be bound to pay a reasonable compensation for such service only if the employment was ratified by the board of directors. Of course, the bank would have been bound to the payment of a reasonable fee to the attorney, for the conduct of any litigation of which it received the benefit without regard to whether there was a contract of employment or not, and also to the payment of a reasonable compensation for his service in attending to any litigation of the bank upon a contract of employment made with its president, but each of the instructions, as requested, assumed that the president of the bank or the officers consulting the attorney, had the authority to retain the attorney by the year and bind the bank to the payment of a reasonable compensation for consultations with and advice from him in the conduct of the bank's affairs and the court's amendment directing that they could not find in his favor unless the contract of employ-

ment was ratified by the directors of the bank, was but a correction of the instructions in accordance with the law, and no error was committed in giving them as amended.

As already said, the court could have submitted the question of the president's or the cashier's implied authority, to make the contract with the attorney upon the testimony relating to the course of conduct of this bank's affairs, but appellant did not request an instruction of this kind, and the court did not err in its attempt to correct the requested instructions by the amendment without including the submission of this question in the same instruction.

The views already expressed render it unnecessary to pass upon the question of waiver of the plea of the statute of limitations.

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

CITY OF MENA v. TOMLINSON BROTHERS.

Opinion delivered April 19, 1915.

1. MUNICIPAL CORPORATIONS—PUBLIC LIGHTING—AUTHORITY TO MAKE CONTRACT.—A city council has authority to pass an ordinance providing for lighting the streets, parks, and other public places in the city, and when the ordinance is properly passed and accepted by the contractor, it becomes a contract, and governed by the same rules and principles that control other contracts.
2. MUNICIPAL CORPORATIONS—PUBLIC LIGHTING—AUTHORITY OF CITY COUNCIL.—The power to contract for public lighting in a city, rests with the city council, and not with the board of public affairs.
3. MUNICIPAL CORPORATIONS—CITY COUNCIL—ADJOURNED MEETING—VALIDITY.—In all bodies exercising legislative functions, the minority, that is less than a quorum, has the right to adjourn the meeting to another day, for lack of a quorum.
4. MUNICIPAL CORPORATIONS—ADJOURNED COUNCIL MEETING—VALIDITY.—The proceedings of a special meeting of a city council are legal, if all the members had notice, whether all attended or not, and when all the members of the council are voluntarily present in a council meeting and participate therein, it is a legal meeting for all purposes, unless the law provides otherwise. An ordinance passed at such a meeting is valid.

5. MUNICIPAL CORPORATIONS—LIGHTING CONTRACT—VALIDITY.—Where a contractor accepted the terms of an ordinance providing for the lighting of a city, passed at a legal meeting of the city council, the city will be bound thereby, and the contract will not be affected by the contractor's delay in installing the work, occasioned by an attempt to refer the city ordinance to a vote of the people.

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

STATEMENT BY THE COURT.

Tomlinson Brothers, a partnership, brought suit against the City of Mena for $1,200, alleged to be due from the city for furnishing 150 lights at $1.60 each, for the months of April, May, June, July and August, 1913, under its contract with the city, made on February 28, 1913.

It was alleged that the contract stipulated that if the city did not within thirty days from the passage and publication of the ordinance, designate the location of the lights, the same could be located by Tomlinson Brothers. That under the terms of the contract, they were required to install and furnish 138 lights of 32 candle-power each, and twelve lights of 100 candle-power each, receiving for the service, $1.60 for each light per month. That they had furnished said lights as stipulated in the contract, that the said amount of $1,200 was due for the service for said months, and that the city had failed and refused to pay the same or any part of it; and prayed judgment therefor, with interest.

A copy of the ordinance granting the franchise was exhibited with the complaint and their written acceptance of same.

The city answered, denying that it had entered into a contract with the plaintiffs to furnish lights as alleged; that the alleged contract contained the stipulation relative to locating the lights; that under the terms of the alleged contract the lights were installed and furnished to the city at the price and for the months claimed and that it was due the plaintiffs any sum whatever.

It was further alleged that the contract was never legally entered into because the ordinance was passed at an adjourned meeting of the council, of which no notice was given, because the contract was not made with the plaintiff by the board of public affairs of the city, after an advertisement for bids, and upon the report and recommendation of the board of public affairs to the city council.

It alleged further, that plaintiffs had never accepted the ordinance, had failed to comply with the terms of the alleged contract in not reducing the charge for commercial lighting, as stipulated by its terms, and because of their failure to install the lights for more than a year after entering into the contract.

Plaintiffs replied, denying the allegations of this answer and demurring to several paragraphs of it; alleged also that the city was estopped by its conduct to deny the validity of the contract and its liability for the lights furnished thereunder.

It appears from the testimony that the city of Mena entered into a contract with Tomlinson Brothers to furnish lights for the streets, parks and public places in said city, for a term expiring January 2, 1920. The contract was in the form of an ordinance, accepted in writing by Tomlinson Brothers. Prior to the meeting of the council, the terms of the ordinance had been virtually agreed on by the members of the council, some of whom had requested Tomlinson Brothers to proceed with the purchase of materials for installment of the lighting system, that it might be done as soon after the passage of the ordinance as practicable and some of the materials had been purchased in compliance with the suggestion. After the passage and acceptance of the ordinance and a large part of the materials for construction had arrived and was being installed, a referendum petition was filed with the Secretary of State, containing the required number of petitioners, asking that the ordinance be referred to the voters of said city, and upon notice received from the Secretary of State that it had been filed, Tomlinson Brothers

stopped the work of further construction. On June 7, 1913, they filed a suit, against the Secretary of State, in Pulaski County, praying that he be enjoined from certifying the ordinance to the election commissioners of the county to be voted upon. The case was finally disposed of on appeal to the Supreme Court, by a decision rendered in their favor on December 22, 1913.

Immediately thereafter, plaintiffs resumed the work of constructing the lighting system, and installed the lights on the last day of February, 1914, and presented monthly bills for the amount claimed to be due for furnishing lights each month thereafter for allowance, and all were disallowed or not acted upon.

Plaintiffs reduced the price on commercial lighting to the amount fixed by the terms of the ordinance on December 1, 1913.

The ordinance granting the franchise and making the contract for lighting the city with Tomlinson Brothers' written acceptance thereof, is recorded as ordinance No. 285 in the ordinance book of the city. It shows it was passed and approved February 27, 1913.

The time for the regular meetings of the city council of Mena was the first Tuesday of each month. The city council met in regular session on the first Tuesday of February, 1913, and adjourned to February 12. At the meeting on the 12th, the minutes showed that the council met in adjourned session, the mayor and clerk and three aldermen, naming them, were present, and that on account of no quorum they adjourned to meet on February 20. The minutes of the meeting of the 20th likewise showed that the council met in adjourned session, that the mayor and three aldermen, naming them, were present, and that because of no quorum, they adjourned to meet again on February 27. On February 27, the minutes show that the council met pursuant to adjournment, and also that all the aldermen of the city were present, that the ordinance was introduced, read the first time, and under suspension of the rules read the second and third times, and that five of the aldermen voted for it on

its passage, and the sixth one voted against it. The acceptance by Tomlinson Brothers reads:

"To the Mayor and City Council of the City of Mena, Arkansas.

"We, Tomlinson Brothers, hereby accept the contract made by the city council, by Ordinance No. 285, passed, approved and published, February 28, 1913, authorized the lighting of streets and furnishing current to commercial consumers.

"This February 28, 1913.

"Tomlinson Brothers,
"By F. W. Tomlinson."

One of the plaintiffs testified that the number of lights were furnished as stipulated in the ordinance at the price allowed, for all the months charged for, and that no part of the account had been paid. He testified further that they were delayed in the construction of the lighting plant and the installation of the lights by the referendum proceeding to submit the ordinance to the voters for their approval. That immediately after it was disposed of the system was completed and the lights installed and the reduction made in the charge for commercial lighting in accordance with the price fixed in the ordinance, beginning December 1.

He stated also that three members of the council, naming them, designated the location for the lights, and that one or two aldermen had called their attention to certain lights being in bad order, which had been repaired. That all the lights were equal to or in excess of the candle-power required by the contract.

The city requested the court to instruct a verdict in its favor, but the court directed a verdict for plaintiffs for the amount of their claim, and from the judgment thereon the city brings this appeal.

Chas. A. Zweng and *Minor Pipkin,* for appellant.

1. The contract should have been made by the board of public affairs. Kirby's Digest, § 5643. It is clothed with the *exclusive* power to purchase all "supplies,"

which comprises anything yielded or afforded to meet a want (8 Words & Phrases, 6801), or anything furnished a city, etc. *Ib.* Light is a supply within the statute. Suth. on St. Const., 392. If not, it is included in "other things." *Ib.*, 437.

2. The improvement involved more than $300 and no advertisement was made for bids. 13 Pac. 249. A city when sued may plead as a defense that the requisite steps to authorize the contract were not taken. 108 Ark. 24; 63 N. E. 711; 98 Ind. 168; 98 N. W. 287. The statute must be followed. 49 Ark. 480; 123 Mo. 546; 14 S. E. 843; 57 Atl. 837. If not such contracts are void (49 Ark. 480; 3 Ky. Law Rep. 85), and no recovery can be had. 26 N. W. 527. Nor is the city estopped, even where benefits have been received. 82 Pac. 601; 23 Oh. C. C. Rep. 96. A void contract can not be ratified. 82 Ark. 531; 51 Atl. 32; 105 N. W. 293.

3. The city council was not legally convened. Kirby's Digest, § § 5601-5607; 132 Fed. 668; 44 S. E. 271; 56 Mo. App. 615; 27 Ark. 414; 28 Cyc. 327.

4. The contract was never accepted.

5. Appellees violated the contract and were guilty of gross laches.

6. There is a fatal variance between the pleadings and proof.

W. Prickett, for appellees.

1. The council properly made the contract. The board of public affairs under § 5643, may have had the authority to make the contract, but the power is *not* exclusive of the council. The principal can certainly do what an agent or arm can do. An agent can have no power his principal does not possess. It was never intended by the word "exclusive" to deprive the council of its constitutional powers, rights or duties. 55 Cal. 606; Kirby's Dig., § 5473; 80 Ark. 108-138; 61 *Id.* 397; Kirby's Dig., § § 5445-5446.

2. A failure to publish or advertise or give notice is a mere irregularity. The contract having been performed

in good faith and the city having received the benefits, is estopped from denying the regularity of the proceedings. 29 Am. Rep. 134. A municipal corporation is subject to estoppel *in pais* by the acts or contract of its officers. 28 Cyc. 465.

3. The council was legally convened. Kirby's Dig., § 5607; 174 Fed. 182; 84 Neb. 434; 83 Ark. 491. All the members were present.

4. The contract was duly accepted as shown by the records.

5. There were no laches by appellees, and there was no violation of their contract. The delay was unavoidable. 110 Ark. 531.

6. No variance is material unless it has actually misled the adverse party to his prejudice. Kirby's Dig., § § 6140-6145; 104 Ark. 276.

7. The finding of the court is conclusive. 111 Ark. 190; 170 S. W. 72.

KIRBY, J., (after stating the facts). Appellant contends that the contract of Tomlinson Brothers, with the city, is void, for the reason that it was not made by the board of public affairs of the city, and that the ordinance prescribing its terms was not passed by the city council at a legal meeting, and in the manner required by law.

The board of public affairs of a city of the first-class is given exclusive power to make certain purchases for the city and required, where the amount of the expenditure involved exceeds $300, to transmit an estimate thereof to the council, with a recommendation in relation thereto, etc. Kirby's Digest, § 5643.

Section 5607, Kirby's Digest, provides: "The city council shall possess all the legislative powers granted by this act and other corporate powers of the city not herein prohibited, or by some ordinance of the city council made in pursuance of the provisions of this act, and conferred on some officer of the city; they shall have the management and control of finances, and of all the property, real and personal, belonging to the corporation; they shall

provide the times and places of holding their meetings, which shall at all times be open to the public; and the mayor, or any three aldermen, may call special meetings in such manner as may be provided by ordinance. * * *"

A majority of the whole number of aldermen shall be necessary to constitute a quorum of the city council for the transaction of business. Section 5601, Kirby's Digest.

Section 5473 provides: "On the passage of every by-law or ordinance, resolution or order, to enter into a contract, by any council of any municipal corporation, the yeas and nays shall be called and recorded; and to pass any by-law or ordinance, resolution or order, a concurrence of a majority of a whole number of members elected to the council shall be required."

(1) The city council had the power to pass the ordinance providing for lighting the streets, parks and other public places in the city and when it was properly passed and accepted by Tomlinson Brothers, it became a contract, binding on the parties thereto and such contracts are governed by the same rules and principles that control other contracts. Kirby's Digest, § § 5443-5448; *Lackey* v. *Fayetteville Water Co.,* 80 Ark. 108.

(2) The board of public affairs had no authority to provide for, construct or acquire, works for lighting the streets, parks and other public places of the city by electricity, nor to authorize the construction thereof, the power being expressly given to the municipal corporation to be exercised necessarily by the city council. *Lackey* v. *Fayetteville Water Co., supra.*

There is nothing in the statute providing for the appointment of the board of public affairs and prescribing its duties, authorizing it to make a contract, where the amount of the expenditure involved may exceed $300, without an ordinance of the city authorizing it, when it becomes the duty of the board to advertise and let the work on contract to the lowest responsible bidder, under the terms of the ordinance.

It is true the ordinance was passed on a day other than the regular meeting day of the council. On the reg-

ular meeting day there was less than a quorum present, and they adjourned to another day on which there was not a quorum present, and they adjourned until the 27th of February, 1913, when the mayor and all the aldermen of the city were present, held a meeting of the council and the ordinance was duly passed, the yeas and nays being called and recorded, and five of the six aldermen voted in favor of the ordinance, and one against it.

The council had the power to provide the time for holding their regular meetings, and the mayor or any three aldermen are given the power by law to call special meetings in such manner as may be provided by ordinance. The meeting at which the ordinance was passed was not a regular meeting, nor was it one attempted to be called by the mayor or three aldermen in accordance with the provisions of any ordinance. It was held on the second adjournment by less than a quorum from the regular meeting day, and although the law requires a majority of the whole number of aldermen to constitute a quorum for the transaction of business, the adjournment of the council to another day because of the lack of such quorum is not the transaction of business within the meaning of the statute, requiring the presence of a quorum.

(3) In this country the rule is generally recognized in all bodies exercising legislative functions that the minority, less than a quorum, has the right to adjourn the meeting to another day for lack of a quorum. 2 McQuillan Municipal Corporations, § 595; *Kimball* v. *Marshall,* 44 N. H. 465; *State ex rel. Parker* v. *Smith,* 22 Minn. 218.

And even if it could be held that the adjournment of the regular meeting for lack of a quorum to another day would not constitute the meeting of the council upon the adjourned day, a legal meeting, as a continuation of the regular meeting, that alone would not invalidate the ordinance which would be valid, if passed at a special meeting, held as provided by law. It appears that the city council of Mena had not provided by an ordinance for the calling of special meetings, but the mayor and three aldermen had adjourned the regular meeting to the day on

which the ordinance was passed, and on that day all the aldermen of the city were present and participated in the council meeting and passed the ordinance prescribing the terms of the contract.

(4) The proceedings of a special meeting duly called would be legal, if all the members had notice, whether all attended or not, and when all the members of the council are voluntarily present in a council meeting and participate therein, it is a legal meeting for all purposes, unless the law provides otherwise. *State ex rel. Parker* v. *Smith, supra; Lord* v. *City of Anoka,* 36 Minn. 176; *Magneau* v. *City of Freemont,* 27 American State Reports, 436, 9 L. R. A. 786; 28 Cyc. 329.

(5) There is nothing in the statutes prohibiting the passage of an ordinance at such a meeting, and having been properly passed, it is valid. The appellees accepted its terms in writing, in accordance with the provisions thereof, and it became a binding contract.

No time is fixed by the ordinance when the installation of the lighting plant should be completed and the failure of the appellees to reduce the cost for lighting under commercial contracts to private consumers on the date fixed in the ordinance, under the circumstances, the delay of the construction of the plant being occasioned by the attempt to refer the ordinance to the electors for their approval and no action being taken by the city to forfeit the contract because thereof, would not relieve the city from its obligation to pay for the lights furnished it, in accordance with the terms of the contract.

It is undisputed that the lights were furnished in accordance with the terms of the ordinance for the time charged for and at the price agreed upon, and the court did not err in instructing the verdict.

The judgment is affirmed.

SKARDA v. STATE.

Opinion delivered April 19, 1915.

1. CRIMINAL LAW—INSOLVENT BANK—ACCEPTING DEPOSIT.—An indictment charged that defendant as cashier of a certain bank, did "unlawfully, feloniously * * * accept and receive on deposit in said bank * * * fifty-five dollars, gold, silver and paper money * * *," knowing the bank to be insolvent at the time; *held*, the indictment was good and stated the commission of a public offense.*

2. CRIMINAL LAW—INSOLVENT BANK—RECEIVING DEPOSITS—RESPONSIBILITY OF OFFICERS.—An indictment charging that defendant was cashier of a bank, and that he accepted deposits therein, knowing the bank to be insolvent, held sufficient to properly state a charge against defendant under Kirby's Digest, § 1814.

3. CRIMINAL LAW—INSOLVENT BANK—RECEIVING DEPOSITS—OFFICER.—Where S. had been cashier of a bank and continued to discharge the duties of that office, although superseded by another officer in the bank, he can not escape criminal liability under an indictment charging him with having received deposits, knowing the bank to be insolvent, and charging him with being the cashier thereof, on the ground that he was not cashier of the bank.

4. INSOLVENT BANKS—RECEIVING DEPOSITS—CRIMINAL RESPONSIBILITY OF OFFICER—EVIDENCE.—To sustain the conviction of an officer of the crime of receiving deposits knowing the bank to be at the time insolvent, the State must show both that the bank was insolvent, and that the officer indicted had knowledge of that fact; and in order to do so, the State may show the nature and value of the bank's assets, the character and extent of its liabilities, and the State must show the receipt of a deposit after knowledge of insolvency. This latter fact may be proved by circumstances which impute to the officer a knowledge of the bank's insolvency.

5. EVIDENCE—INSOLVENT BANK—RECEIVING DEPOSITS—KNOWLEDGE OF OFFICER.—In the prosecution of an officer of a bank for the crime of receiving deposits, knowing the bank to be insolvent, a complaint at the instance of appellant's successor as cashier of the defunct bank, in which a receivership was asked, and from which the insolvency of the bank was inferrable, is incompetent as evidence, since the appellant was not responsible for the recitals of fact therein, and the same was incompetent as hearsaw.

6. CRIMINAL LAW—INSOLVENT BANK—DEPOSIT.—Evidence held to show that the defendant received a deposit in the bank, and that the transaction had, constituted the making and receiving of a deposit.

---

*See Kirby's Digest, § 1814.

7. CRIMINAL LAW—INSOLVENT BANK—RECEIVING DEPOSITS—INDICTMENT AND PROOF—VARIANCE.—J. presented a check for $70 at a bank and received $15 in cash. The balance being credited to his account. The bank was insolvent and the officer receiving the deposit was indicted for receiving "fifty-five dollars in gold, silver and paper money etc.," knowing the bank to be insolvent. *Held*, there was no variance between the indictment and the proof.

8. INSOLVENT BANKS—RECEIVING DEPOSITS—INSOLVENCY.—In a prosecution for the crime of receiving deposits knowing the bank to be insolvent, the evidence held sufficient to show the bank to be insolvent, and that defendant was aware of that fact, when he accepted the deposit.

9. BANKS—INSOLVENCY.—A bank is insolvent, when, under ordinary and usual circumstances, it is unable, by putting up its collateral and credit, to get the money to pay its debts or depositors, as the same become due or payment is demanded in the ordinary course of business.

10. BANKS—INSOLVENCY—CAPITAL STOCK.—Capital stock and surplus are not to be considered as a liability in determining a bank's solvency. If a bank by using its capital and surplus, or both can promptly pay its depositors and other debts, it is not insolvent.

11. CRIMINAL LAW—INSOLVENT BANK—RECEIVING DEPOSITS—SOLVENCY—EVIDENCE.—S. was indicted as an officer of a bank, for the crime of receiving a deposit, knowing the bank to be insolvent. *Held*, it was improper to refuse to permit the receiver, who was thoroughly conversant with the affairs of the bank, to answer questions as to her belief as to the probability of collecting certain obligations due the bank.

Appeal from Prairie Circuit Court, Southern District; *Eugene Lankford*, Judge; reversed.

J. G. & C. B. Thweatt and *Manning, Emerson & Morris*, for appellant.

1. The indictment does not charge any offense under Kirby's Dig., § 1814. It is fatally defective. Penal statutes are strictly construed and the language of the indictments must state facts within the terms of the statute. 90 Ark. 1; 49 So. 615; 107 N. W. 927; 32 Atl. 617; 57 N. E. 109; 58 Ark. 35-38; 50 N. E. 106, etc.

2. There is variance between the indictment and proof. 91 Ark. 1; 50 N. E. 106; 13 Ark. 62; 29 *Id.* 299; 34 *Id.* 160; 96 *Id.* 63; 70 *Id.* 144; 73 *Id.* 169; 55 *Id.* 242-389; 62 *Id.* 516; 102 *Id.* 513; 60 *Id.* 141-161; 71 *Id.* 415; 107 N. E. 927.

3. The court admitted incompetent testimony and refused competent testimony offered. 42 Mo. 242; 74 S. W. 846; 48 *Id.* 72-77; 98 N. W. 190; 91 Ark. 555-9; 39 *Id.* 278; 52 *Id.* 303-9.

4. The court erred in giving and modifying instructions and in refusing instructions requested. 38 Pac. 296-9.

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

1. The indictment was sufficient to bring appellant within the terms of the statute. 102 Ark. 513-517; 99 *Id.* 547; 90 *Id.* 596; 102 *Id.* 651; 64 So. 740; 20 L. R. A. (N. S.) 444-449; 35 L. R. A. 176-182.

2. There is no variance between the indictment and proof. 37 L. R. A. 132; 57 A. S. R. 339-492; 20 L. R. A. (N. S.) 444-448; 115 S. W. 1106-1122.

3. No incompetent testimony was admitted, but, if so, the error was cured by instruction No. 11, as modified. 118 Pac. 9; *Davis* v. *State,* 115 Ark. 566.

4. There is no error in the instructions. 57 A. S. R. 339-402; 92 N. W. 420; 38 Pac. 298; 54 S. W. 226; 119 Pac. 30; 20 L. R. A. (N. S.) 444. The cases above state the two rules or methods used by the courts to determine "insolvency" of a bank. Instruction 5 correctly states the law, cases *supra,* and even if No. 4 improperly defined "debts of the bank," in view of No. 5 stating the test properly no prejudice resulted.

SMITH, J. Appellant was convicted for accepting money for deposit in a bank of which he was the cashier when he knew the bank was insolvent.

The prosecution was had under section 1814 of Kirby's Digest, which reads as follows:

"No bank shall accept or receive on deposit, with or without interest, any money, bank bills or notes, or United States treasury notes, gold or silver certificates, or currency, or other notes, bills or drafts, circulating as money or currency, when such bank is insolvent; and any officer, director, cashier, manager, member, party or managing

party of any bank who shall knowingly violate the provisions of this section, * * * shall be guilty of a felony. * * *".

The indictment alleged that on the 17th day of March, 1913, (appellant), then and there being the cashier of the Bluff City Bank, of DeValls Bluff, Ark., said bank being a corporation organized and doing a banking business under the laws of the State of Arkansas, did unlawfully, wilfully, knowingly and feloniously accept and receive on deposit in said bank, the Bluff City Bank, of and from Joe Janet, fifty-five dollars, gold, silver and paper money, said money being then and there accepted and received on deposit in said bank by said defendant, Joe Skarda, the said Bluff City Bank, being then and there insolvent, and the said Joe Skarda being then and there the cashier of said bank, well knowing at the time he so accepted and received on deposit said money as aforesaid that said Bluff City Bank was then and there insolvent. * * *"

The record is a voluminous one, and many questions are discussed in the appellant's brief, but all of the questions which it will be necessary to consider may be arranged under the following topics:

1. Does the indictment charge an offense?

2. Is there a variance between the indictment and the proof?

3. Was error committed in the admission or rejection of testimony?

4. Did the court err in giving or refusing instructions?

(1) It is first insisted that the indictment does not charge the commission of a public offense, in that it does not allege that the money deposited circulated in this jurisdiction as money, and fails to allege that the money so deposited was of any value.

In reply to this it may be said that the indictment does allege the deposit of $55 gold, silver and paper money; and such deposit is within the protection of the statute if it is of any value. Fifty-five dollars of gold, silver and paper money, whether current in this jurisdic-

tion or not, necessarily have some value. *Morris* v. *State,* 102 Ark. 513. And if an officer of an insolvent bank knowingly receives such money on deposit he can not defend by showing that the money so received was not current in this country. Nearly all of the States now have laws more or less similar to our statute on this subject, and the courts of all the States, in construing their respective statutes, say they are designed for the protection of depositors, and our own court has said that a special deposit, as well as a general one, is within the protection of this statute. *State* v. *Smith,* 91 Ark. 1.

(2) It is also urged that the indictment is defective in that it fails to allege that appellant received the money as cashier. Support for this position is found in the case of *State* v. *Winstandley,* 57 N. E. 109. In that case an indictment very similar to the one in the present case was held insufficient for the reason stated. But a contrary view has already been taken by this court in the cases of *Morris* v. *State, supra,* and *Davey* v. *State,* 99 Ark. 547. In the *Morris* case, *supra,* it was said:

"A corporation can only act through its agents. The allegations of the indictment were sufficient to charge that the bank had received and accepted the deposit while insolvent, and that the appellant, who was president of the bank, and who acted for it in receiving and accepting the money on deposit, knew at the time the bank was insolvent, and therefore violated the provisions of the statute in thus accepting the money on deposit.

"It was unnecessary for the indictment to charge in specific terms that appellant was an officer of the bank. He was designated in the indictment as president of the bank, which was sufficient to show that he was an officer of the bank. The allegations of the indictment were amply sufficient to show that the bank, through its duly constituted agent, accepted and received the deposit, being at the time insolvent, and that the appellant, being at the time president, and therefore an officer of the bank, and knowing of its insolvency, accepted and received the de-

posit. Everything necessary to constitute the offense charged was stated."

The indictment here was substantially in the form of the indictment which was approved in the two cases last cited.

This question was recently before the Supreme Court of the State of Mississippi, and that court refused to follow the Indiana case. *State* v. *Taylor,* 64 So. 740.

(3) Appellant also insists that the proof fails to show that he was the cashier of the bank at the time the alleged deposit was made, and he says that, upon the contrary, the proof shows that he was not the cashier at that time, and that there was therefore a failure of proof to sustain a material allegation of the indictment. The proof on the part of the defense was that appellant had been cashier of the bank for a number of years, but had been superseded by his assistant. Yet there was proof from which the jury no doubt found, and which was sufficient to sustain the finding, that appellant continued to remain in the bank and to discharge, ostensibly, his customary duties there. This change in the cashier appears to have been made at the direction of the managing officer of one of the defunct bank's correspondents, and while after the change was made, there was a limitation upon the authority which appellant had previously exercised, at least, so far as the defunct bank's dealings with this correspondent bank were concerned, yet, as has been said, appellant continued in the performance of his former duties.

Upon this question the court gave the following instruction:

"You are instructed that one who has been elected and made cashier of a bank and remains in the bank and holds himself out to the public as cashier of the bank and is held out by the bank as its cashier for the purpose of receiving deposits is under the law under which this defendant is being tried the cashier of the bank."

We think no error was committed in giving this instruction.

It is insisted that the proof failed to show the bank was insolvent at the time it closed its doors; and the contention is also made that incompetent evidence was admitted upon the question of the bank's insolvency and of appellant's knowledge of that fact.

(4) The evidence is very voluminous and conflicting, and we shall not undertake to state the evidence in regard to the various transactions relating to these questions. We shall merely state the general principles which should govern trial courts upon such issues. To sustain the conviction the State must not only show that the bank is insolvent, but must further show that the officer receiving the deposit has knowledge of that fact. It would be very unusual if these facts could be established by proof of a single transaction. It is almost certain that these facts can be established only by an examination into the affairs generally of the bank. It is, therefore, competent and proper for the State to show the nature and value of the bank's assets, and likewise the character and extent of the bank's liabilities; and it is further competent and necessary for the State's proof to show the receipt of a deposit after knowledge of insolvency. The proof of this knowledge is frequently an inference to be drawn from circumstances, and the official charged with this crime can not complain of the proof of circumstances which impute to him knowledge of the bank's insolvency, even though such proof tends to show the commission of this offense by the receipt of deposits other than those alleged in the indictment. *State* v. *Welty,* 118 Pac. 9, and cases there cited. But the proof should be limited to the purposes stated, and the State should not be permitted to prove any facts or circumstances from which the guilt of the accused might be inferred, unless such facts and circumstances also tend to show the bank's insolvency and the officer's knowledge of that fact.

(5) The State was permitted to offer in evidence, over appellant's objection, the complaint filed at the instance of appellant's successor as the cashier of the defunct bank, in which the appointment of a receiver was

asked. From this complaint it was fairly inferable that the bank was not only insolvent at the time it closed its doors, but had been for some time prior thereto.

We think the court erred in the admission of this complaint in evidence. Appellant was not responsible for the recitals of fact contained in this complaint, and it was incompetent as hearsay evidence.

(6) It is also urged that the evidence does not show that Janet became a depositor of the defunct bank. But this question was submitted to the jury under proper instructions, and we think the proof is sufficient to support a finding that he was in fact a depositor. Appellant testified that Janet presented at the bank one morning, before it had opened for business, a check for the sum of $70, and that Janet was told at the time that the vault was not open and there was not enough money out of the vault to cash the check, but that there happened to be $15 in a drawer, which was given him, and he was given a deposit slip to show that $55 was still due him, and was told to return for the remainder when the bank opened. Such a transaction does not constitute a deposit within the meaning of the law; but this was not the transaction had according to the proof upon the part of the State. That proof was to the effect that Janet took a check drawn on the defunct bank by one of its depositors for the sum of $70, and demanded, and was paid, $15, and received from the bank the usual deposit slip showing the deposit to his credit of the sum of $55, this fact being shown by the receipt of the check, less the credit.

It is next earnestly insisted that if the State's proof is sufficient to establish the fact that a deposit was made by Janet, it further shows a variance between the indictment and the proof, in that the indictment alleges the deposit of $55 in money, whereas the proof shows the deposit of a check. Counsel rely upon the opinion in the case of *Morris v. State, supra,* to sustain their position that there is a variance between the indictment and the proof. The facts in that case were that the indictment

alleged the deposit of $100, while the proof showed the deposit of $11 in money and the balance in checks. Objection was made to the introduction of testimony tending to show that the deposit consisted of checks, instead of currency; but the court said the contention was not sound as the proof was sufficient to show that $11 in currency were received and checks representing the balance of the amount alleged were received, as the offense under the statute was complete by knowingly receiving any amount of money and that it was not, therefore, necessary to prove the receipt of the full amount alleged. The court was not there called upon to decide, and did not decide, whether the proof would have been sufficient if the deposit had consisted entirely of checks.

Appellant further insists that the case of *State* v. *Smith,* 91 Ark. 1, is authority for his position that the indictment in the present case is defective. The indictment in that case alleged that the deposit consisted of a check, but it was not there alleged that the check was endorsed by the payee, nor that it was an obligation circulating as money. Discussing this question, it was there said:

"It is not altogether clear what the legislature meant by the words 'other notes, bills or drafts, circulating as money, or currency.' Literally construed, there are no 'notes, bills or drafts' which circulate as money or currency except United States treasury notes and national bank notes, and it is obvious that the legislature did not refer to these in using this language, for they are especially mentioned in the statute. If any meaning at all be given to this language, it must be held to refer to notes, bills or drafts (other than United States treasury notes and national bank notes) which pass from hand to hand; that is to say, such as are payable to bearer or are properly endorsed by the payee, so that the legal title may pass by delivery.

"Now, applying this test, the allegations of the indictment do not sufficiently describe the check so as to bring it within the terms of the statute. It is not alleged,

either in general terms that it was a 'note or draft circulating as money or currency,' or that the check which was drawn payable to Miss Bobbie Yocum was ever endorsed by her so that the legal title might pass by delivery.

"It is contended on behalf of the State that the allegation of the indictment to the effect that the check was accepted by the defendant in lieu of money was equivalent to an allegation that it was a draft circulating as money. We do not think so. The meaning of the two statements is altogether different. One is descriptive of the written instrument, and the other refers entirely to the manner of acceptance of the paper. It may as well be said that an allegation of acceptance on deposit of a horse or bale of cotton in lieu of money would bring it within the statute."

(7) But no such defect is found in the indictment in the present case. The indictment is good, for it alleges the deposit of money, while the indictment in the Smith case, *supra,* alleged the deposit was a check without alleging that it circulated as money. The indictment there was disposed of on demurrer, and it was held void for the reasons stated.

A somewhat similar question was raised in the recent case of *Cunningham* v. *State,* 115 Ark. 392, 171 S. W. 885. The facts in that case were that a check was drawn by the collector of Sebastian County in favor of the treasurer of that county. The treasurer sent the check to the bank and received from it a receipt signed by Cunningham as cashier. The bank was insolvent at the time and closed its doors soon afterward. It was contended that this transaction was not within the terms of the statute under which the prosecution in the present case is had. But it was there said:

"The word 'draft,' as used in the section of the statute above quoted, is a general term and includes checks as well as other orders drawn for the payment of money. *State* v. *Warner,* 60 Kan. 94, 55 Pac. 342.

"When the cashier in the instant case received the check he charged the account of Norris with the amount

of the check and credited Harris with the amount thereof. It is claimed by counsel for the defendant that because no new money came into the bank that there was no violation of the statute. The money was in the bank, or was supposed to be there, and the transaction was considered and treated as though the cashier had actually paid over the money to Harris, and that Harris had immediately redeposited it in the same bank. The transaction was not essentially different from what it would have been had the whole amount of the check been received from other sources and then deposited in the bank. *State* v. *Shove,* 96 Wis. 1, 70 N. W. 312, 37 L. R. A. 142, 65 Am. St. Rep. 17.

"In Third Ruling Case Law, section 123, page 496, the author says: 'The deposit need not be a deposit of money, and although a portion of the money for which the certificate of deposit is issued by a bank consists of that represented by a prior certificate of deposit against the same bank and surrendered at the time that the last deposit is made, the last deposit and the certificate thereof must be treated as if the whole amount had been deposited in cash.' "

"Therefore, we are of the opinion that the contention of counsel for defendant is not well taken."

Attention is called to the fact that the indictment in the case of *State* v. *Smith, supra,* did not allege the deposit of a check drawn on the bank in which the deposit was made, and in this respect the case is distinguishable from the case of *Cunningham* v. *State, supra.*

The case of *Ellis* v. *State,* 119 N. W. 1110, 20 L. R. A. (N. S.) 444, was a prosecution under an indictment, the second count of which alleged the deposit of a check. The statute under which the indictment was drawn made it unlawful for an officer of an insolvent bank to receive money or paper circulating as money after knowledge of the bank's insolvency.. It was there contended that the receipt of a check did not come within the inhibition of the statute; but, in disposing of this question, the Supreme Court of Wisconsin said:

"The fact that the deposit relied upon in the second count in the indictment was a check does not militate against its satisfying the call of section 4541, Stat. 1898, for a deposit of money. True, the check, as it went over the counter, was not money, but it was treated as such between the bank and its customer. It was taken as the equivalent of money at the face value. The money equivalent was placed to the credit of the depositor the same in all respects, as if legal tender money had been passed over the counter. The relation of debtor and creditor, as between the bank and the depositor, with the characterization of liability on the one side and expectancy on the other as to payment on demand at any time within the banking hours, was created. In short, the transaction, in practical effect, was the same as if the bank had passed to its customer $1,000 for the check, and he had immediately passed the same back for deposit and received credit therefor."

A case very similar to the present case, and one in which the question now under consideration was raised and thoroughly considered, was that of *State* v. *Salmon,* 115 S. W. 1106. There the indictment alleged that one Paul had deposited with George Y. Salmon and Harvey W. Salmon, the owners of a private banking institution known as the "Salmon & Salmon Bank," "a certain deposit of money, towit, two hundred dollars, of the value of two hundred dollars, the money and property of one James Paul." The proof disclosed the fact to be that Paul presented to the bank a check for about $315 or $320 and was paid about $115 or $120 in money from the bank and was given a deposit slip for $200, which was the difference between the amount of the check and the amount he had received. Various objections to the introduction of this evidence were offered, and, among others, of course, that the proof was not responsive to the allegation of the indictment and that the proof of the deposit of a check could not support the charge of the deposit of money. The opinion in that case is very lengthy and

thoroughly well considered, and among other things it was there said:

"It is insisted by learned counsel for appellant that there was a total failure of proof on the part of the State of the offense charged, for the reason that the allegation in the indictment that the defendant assented to and received a deposit of $200 in money was not shown to have been true by evidence which showed a deposit of a check. In other words, such allegation of the deposit of money was not supported by the evidence. It is sufficient to say upon this proposition that if, by competent evidence, it should be shown that a check was drawn upon the bank of Salmon & Salmon in favor of James Paul, and this check was presented to the cashier for payment, and that said James Paul was paid partly in cash and the balance credited to his account in the bank, then in our opinion, in contemplation of law, such balance credited to his account was a deposit in such bank of so much money. This check was drawn upon the bank of Salmon & Salmon, and presented to that bank for payment, and when James Paul received such part in cash as he desired, and had the balance placed to his credit, this, in contemplation of law, was the payment to him of the amount of money called for in the check.

"We are unable to reach the conclusion that before this money could be treated as a deposit it was essential, first, that the cashier should count him out the entire amount of money called for in the check for the purpose of allowing him to retain what ready money he desired, and then return the balance for deposit in the bank. This, in our judgment, would be a useless formality, in fact would have been simply playing and trifling with a purely business transaction. This transaction can not be treated otherwise than a payment of the check in favor of James Paul.

"We shall not undertake to review all the authorities to which our attention has been directed. We have carefully reviewed them and find that they by no means settle

the proposition now under discussion. The law upon this proposition is well stated by Morse on Banks and Banking, section 569, where it is said: 'When a check is presented for deposit drawn on the depositary bank, the bank may refuse to pay it, or take it conditionally by express agreement, or by usage, if such a one exists, as in California; but otherwise, if it pays the money, or gives credit to the depositor, the transaction is closed between the bank and the depositor, unless the paper proves not to be genuine, or there is fraud on the part of the depositor. The giving of credit is practically and legally the same as paying the money to the depositor, and receiving the cash again on deposit. The intent of the parties must govern, and presenting a check on the bank, with a passbook in which the receiving teller notes the amount of the check, is sufficient indication of intent to deposit, and to receive as cash.' "

(8) It is also insisted that the proof fails to show that the bank was insolvent, and that the court erred in its declarations of law as to when a bank is insolvent. While the proof is conflicting as to the value of the bank's securities upon which money had been loaned, and as to the causes for its suspension from business, we think the proof legally sufficient to support the finding that the bank was in fact insolvent at the time Janet's deposit was made, and that appellant was aware of that fact when he received it. Nevertheless, it is true that, according to appellant's evidence, the bank was not insolvent, and would not have suspended business, nor would it have failed to respond to the demands of its depositors and other creditors, but for the fact that its correspondent bank failed to extend the usual and expected credit, and because of the failure to collect certain moneys as soon as had been anticipated.

(9) The court gave an instruction numbered 5, in which insolvency was defined. That instruction is as follows:

"5. Now, upon the question of insolvency, you are instructed that the bank was insolvent in the sense used

in the indictment, first, if the bank at the time of the deposit referred to in the indictment by Joe Janet did not have assets sufficient to pay its debts; second, if the bank was financially unable to pay its debts or obligations when they became due. Now, this inability to pay its debts does not mean a temporary inability to pay its debts such as might occur when there is a 'run on the bank' or failure of the officers of the bank to have enough available cash on any particular day to run the bank that day, or because of any other emergency, but it means an inability to meet the bank's obligations or debts and pay depositors in the ordinary course of business when given such a reasonable time to get the money as might be expected or required by a bank in carrying on its banking business.

"In other words, if the bank, under ordinary and usual circumstances, was unable to get the money by putting up its collateral and credit to pay its debts or depositors as same became due and presented for payment in the ordinary course of its business, it was insolvent in the sense used in the indictment."

We think this a very fair and accurate statement of the law and as favorable to appellant as he could ask. *Ellis* v. *State,* 20 L. R. A. (N. S.) 444, and cases there cited. Over appellant's objection, however, the court gave on this question of insolvency the following instruction:

"4. The terms debts, liabilities or obligations as used in the instructions means all debts or obligations of every kind owing by the bank to other persons, including deposits, certificates of deposits, checks unpaid, bills payable, certificates of capital stock, surplus and undivided profits."

(10) We think the giving of this instruction was error which calls for the reversal of the case. If this instruction was correct, any bank would be insolvent which had sustained a loss of sufficient size as to make the book value of its stock worth less than par. A bank might be entirely solvent so far as all of its creditors were con-

cerned, and yet its stock not be actually worth par. This question was discussed in the case of *State* v. *Myers,* 38 Pac. 296, and the Supreme Court of Kansas there said:

"In a criminal prosecution against an officer of the bank for knowingly receiving deposits when the bank was insolvent, the capital stock and surplus fund can not be considered as liabilities or debts in determining the insolvency; otherwise, the greater the capital of the bank, and the larger its surplus fund, the more insolvent it will be. The contrary is the actual fact. The capital and surplus of a bank are its resources, which may be used to pay its depositors and other creditors when there have been losses, by loans or otherwise. If a bank, by using its capital or surplus, or both, can pay promptly its deposits and other debts, * * * it is not insolvent. Upon the book and in the official statements of a bank, capital stock and the surplus fund are denominated as 'liabilities,' but they are resources of the bank with which to transact its business. The more capital a bank has, the better able it is to meet its deposits and other debts. The more surplus on hand, the greater its ability to pay promptly its deposits and other debts. If a bank is able to pay promptly every depositor and every other creditor in the ordinary course of business, the bank, under section 16 of said chapter 43, is solvent, whether there is any surplus or capital to be distributed afterward to stockholders or not. Section 16 was adopted by the Legislature for the protection of the depositors, not for the benefit of the officers or stockholders of the bank."

(11) After the failure of the bank a Mrs. Zearing was appointed receiver, and she had served in that capacity for about a year and a half prior to the time of the trial below. She had been employed in the bank as a bookkeeper prior to its failure. She was shown to have had entire familiarity with all the affairs of the bank, and after testifying at length about the value of the bank's assets and the extent of its liabilities, and after having stated that she was acquainted with the parties who owed

the bank and that she had made an investigation of their financial standing, she was asked the following questions:

"From your investigation and from your acquaintance with these parties, state whether or not you may reasonably expect to collect all these notes and overdrafts, or about all of them? And, further, are the overdrafts which you have in your possession valueless or are they good?"

We think the witness should have been permitted to answer these questions. The answer would have been competent and relevant, and the court erred in its exclusion.

For the errors indicated the judgment of the court must be reversed and the cause will be remanded.

KIRBY, J., dissents.

GRAYSONIA-NASHVILLE LUMBER COMPANY v. SALINE DEVELOPMENT COMPANY.

Opinion delivered April 12, 1915.

1. TIMBER—CONVEYANCE—INTEREST IN LAND.—The conveyance to A. of the timber on a certain tract of land is a conveyance of an interest in the land itself.
2. TIMBER DEEDS—PURCHASE PRICE—LIEN—PURCHASER WITH NOTICE.—Plaintiff company sold the timber on certain lands to the N. company at a certain sum per thousand feet. Defendant company then purchased the timber from the N. company. *Held*, the recitals in the deed from plaintiff company to the N. company were such as to put defendant company upon notice of its liability to pay for the timber according to the terms of the contract, and that it was bound thereby.
3. VENDOR AND PURCHASER—INTEREST IN LAND—SUBSEQUENT PURCHASER—NOTICE.—A vendor of land who has parted with the legal title, has, in equity, a lien on the land for the unpaid purchase money, as against the vendee and his privies, including subsequent purchasers with notice; and a subsequent purchaser is affected with notice of all recitals in the title deeds of his vendor, whether recorded or not.

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

STATEMENT BY THE COURT.

The Saline Development Company instituted this action against the Graysonia-Nashville Lumber Company to recover the value of certain timber which it alleged the defendant company cut from its land without paying therefor. The defendant filed an answer in which it claimed title to the timber cut from the land, and also the title to that yet standing on the land, and alleged that the plaintiff's claim was a cloud on its title to the timber. The defendant asked that the case be transferred to chancery, and on its motion, the cause was transferred to equity and heard and determined there. The facts briefly stated, are as follows:

On the 11th day of January, 1911, the Saline Development Company, a corporation, entered into a written contract with the Nashville Lumber Company, also a corporation, whereby the former corporation sold the latter all the merchantable timber standing upon certain lands known as the Barefield tract, in Howard County, Arkansas, the lands comprising 1,562½ acres.

The contract recited that the timber had been estimated by Lemieux Brothers and comprised, in the aggregate, 2,623,000 feet, or thereabouts, for which the purchaser had made settlement with the seller at the rate of $2 per thousand feet. The contract further recited that it is conceded by both parties that the said estimate is below the actual amount of merchantable timber upon said lands and that it is understood that the purchaser will pay at the rate of $2 per thousand feet for all the timber exceeding the amount estimated.

The contract also recites that the vendor has on the same day executed to the purchaser a deed conveying the timber purchased, and this deed is referred to and made a part of the contract. The contract in question was signed by the Saline Development Company by W. H. Toland, general manager; and by the Nashville Lumber Company by H. C. Anderson, assistant manager. The contract then contains the following clause: "I agree to the above terms and conditions and guarantee the payment of over-

charge by Graysonia-Nashville Lumber Company. A. C. Ramsey, G. M., G.-N. L. Co."

On the 11th day of January, 1911, the Saline Development Company executed a deed to the Nashville Lumber Company to the merchantable timber upon certain lands described in the deed, containing in the aggregate 1,562½ acres. The deed recites that it is executed for the purpose of carrying into effect the former contract of the Saline Development Company with the Nashville Lumber Company. The consideration recited in the deed is the sum of $5,298 cash at the time of the execution and delivery of the deed and remainder due, if any, payable as the cutting of the timber proceeds at the rate of $2 per thousand feet.

The Graysonia-Nashville Lumber Company was organized in June, 1910. At the time of its organization, it took over a large portion of the assets of the Nashville Lumber Company and of the Graysonia-McLeod Lumber Company. The Nashville Lumber Company executed to it a timber deed for most of the timber which it had purchased from the plaintiff company, and the defendant company agreed to pay therefor the sum of $3 per thousand feet.

W. H. Toland was general manager of the Saline Development Company, and acted for it in making the sale of the timber to the Nashville Lumber Company.

A. C. Ramsey was a stockholder in the plaintiff company, and was the general manager of both the Nashville Lumber Company and of the defendant company at the time the contract was entered into.

He acted for the Nashville Lumber Company in making the contract, but the contract was signed by H. C. Anderson, assistant general manager of the Nashville Lumber Company.

Anderson testified that as assistant manager, he was authorized to buy timber lands for the Nashville Lumber Company, and that he had authority from that company to make the contract with the plaintiff company; that he was employed by the defendant company to take charge of

its timber lands, and was also treasurer of that company. He stated that he did not know how far his authority to purchase timber lands for the defendant company extended, but that he had bought timber lands for it; that the defendant company never turned down any purchase of land or timber while he was in its employ; that he had made settlements for the amount of timber that had been purchased by him for the defendant company; that it was not exclusively his duty to ascertain what was due to different parties who delivered timber to the defendant company, but that he did that character of work and that defendant company had not at any previous time refused to abide by any settlement he had made; that the market value of timber of the character of that on the Barefield lands was $2 per thousand in 1911; that Doctor Toland came to him for a settlement under the contract in question in this case, and that he admitted that the defendant company owed the plaintiff company something over $700 on settlement for timber.

W. W. Brown was president of the defendant company, and also was connected with the Nashville Lumber Company at the time the contract in question was entered into. He stated that he was vice president of the Nashville Lumber Company at the time A. C. Ramsey was its general manager, and that Ramsey had authority to buy timber and land for that company; that he knew that Ramsey had purchased the timber on the Barefield tract and approved the purchase. Brown continued as president of the defendant company until some time in November, 1912, at which time W. E. Grayson became president. The timber in controversy was cut from the land while Brown was president, and Ramsey general manager of the defendant company.

W. E. Grayson testified that only the executive committee had authority to purchase timber and lands for it, and that he did not know anything of the purchase of the timber on the Barefield lands until after he became president of the defendant company in November, 1912.

According to the by-laws of the defendant company, the executive committee had power to make all contracts concerning the purchase of land for the company. The by-laws provided that the general manager should exercise full control over the operation of the mills, tramways and other property of the company, and that he should have the care and management of all the company's property, real and personal; that his acts should be subject to the approval of the executive committee.

The chancellor found that on the 11th day of January, 1911, the plaintiff company entered into a written contract with the Nashville Lumber Company for the sale of the merchantable timber on the Barefield tract of land, and that contemporaneously it executed its deed to the Nashville Lumber Company conveying the timber on said lands to it; that said contract provided for the payment of $2 per thousand feet based upon the estimate contained in the contract, which was paid in cash, and for the further payment of $2 per thousand feet by the Nashville Lumber Company for all the timber cut in excess of the estimate; that the recitals in the deed from the plaintiff company to the Nashville Lumber Company were of such kind and character as to put the defendant company upon inquiry such as would have disclosed the rights and equities of the plaintiff company; that A. C. Ramsey, general manager of the defendant company, had actual notice of the terms and conditions of the contract under consideration; that the defendant company is not an innocent purchaser of the timber taken from the Barefield land, and is liable to the plaintiff company for all timber cut by it on said lands in excess of the estimate mentioned in the contract between the plaintiff company and the Nashville Lumber Company at the rate of $2 per thousand feet.

The chancellor then appointed a master to take testimony and ascertain the amount of timber that had been cut by the defendant company from the Barefield lands. Upon the coming in of the report of the master, the court found that the plaintiff company had been paid the sum of $5,246 on the contract between it and the Nashville

Lumber Company; that the timber paid for amounted to 2,623,000 feet at $2 per thousand; that 543,243 additional feet had been cut from the lands, and that the defendant company owed the plaintiff company for this 543,243 feet of timber at $2 per thousand feet, which amounts to $1,086.

A decree was entered in favor of the plaintiff company in accordance with the finding of the chancellor and the defendant company has appealed.

W. C. Rodgers, for appellant.

1. It is fundamental that the minds of the parties to a contract must meet and agree upon all the essential features of the contract. 78 Ark. 586; 90 Ark. 437; *Id.* 131; 95 Ark. 421; 97 Ark. 613. There is no meeting of the minds of the parties upon all the essential features of the contract in this case, unless the endorsement by Ramsey, "I agree to the above terms and conditions and guarantee payment of average by Graysonia-Nashville Lumber Company," can be said to have effected that result. Yet this endorsement did not bind appellant. It was merely his personal undertaking, if anything. Moreover, he had no authority to act for both the appellant and Saline Development Company. The authority of the general manager of appellant is limited by the by-laws of the company as follows: "His acts shall be subject to the approval of the executive committee," and there is no testimony that his act in this respect was ever approved by the executive committee. 3 Clark & Marshall, Corporations, § 760; 103 U. S. 651; 88 Ala. 630; 48 Kan. 672.

If Ramsey's acts were a fraud upon the appellant, the latter is not chargeable with any notice he may have had with reference to the title. 40 N. E. 362.

2. The master in this case having been appointed over the protest of appellant, and not by consent, his findings are merely persuasive, and this court will exercise its own judgment with reference to the same, rejecting all irrelevant and incompetent evidence considered in the trial below. 91 Ark. 549; 23 Ark. Law Rep. 517; 92

Ark. 359; 4 Ark. 251; 76 Ark. 153; 78 Ark. 209; 96 Ark. 589; 97 Ark. 135; 99 Ark. 218.

J. G. Sain, for appellee.

1. The purchaser of real estate is bound to take notice of all recitals in the chain of title through which his own title is derived. Not only is he bound by everything stated in the several conveyances constituting that chain, but he is bound fully to investigate everything that may affect his title, to which his attention is thereby directed. 53 Miss. 701; 20 Ind. 40; 26 *Id.* 333; 4 Little (Ky.) 317; Wade on Law of Notice, § 330; 59 Ark. 291; 50 Ark. 328.

The endorsement made by Ramsey corroborates the fact that appellant recognized the contract of appellee and its rights.

The mere fact that Ramsey owned stock in both companies would not deprive him of authority to make the endorsement, nor is it any evidence of fraud upon the appellant. 69 Ark. 85.

But the evidence shows that the president of the company knew of the purchase of this timber and approved it; and the by-laws of the company provide that the instructions of the president shall be taken by subordinates as having received the sanction of the directors.

2. The findings of the master are justified under the evidence.

HART, J., (after stating the facts). (1) The conveyance by the plaintiff company to the Nashville Lumber Company of the timber on the Barefield land was a conveyance of an interest in the lands themselves. *Liston* v. *Chapman & Dewey Land Co.,* 77 Ark. 116; *Collins* v. *Bluff City Lbr. Co.,* 86 Ark. 202; *Indiana & Arkansas Lbr. & Manufacturing Co.* v. *Eldridge,* 89 Ark. 361.

(2-3) In the case of *Stephans* v. *Shannon,* 43 Ark. 464, the court held: "A vendor of land who has parted with the legal title, has, in equity, a lien on the land for the unpaid purchase money, as against the vendee and his privies, including subsequent purchasers with notice; and a subsequent purchaser is affected with notice of all

recitals in the title deeds of his vendor, whether recorded or not."

To the same effect, see *Wilson* v. *Shocklee,* 94 Ark. 301; *Green* v. *Maddox,* 97 Ark. 398; *Miller* v. *Mattison,* 105 Ark. 201.

See, also, *Gaines* v. *Summers,* 50 Ark. 322, where it is held:

"A person purchasing an interest in lands, 'takes with constructive notice of whatever appears in the conveyances constituting his chain of title.' If anything appears in such conveyances 'sufficient to put a prudent man on inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry, and if he does not make it, he is guilty of bad faith or negligence,' and the law will charge him with the actual notice he would have received if he had made it."

So, too, in the case of *Swan* v. *Benson, Admr.,* 31 Ark. 728, it was held that a vendor's lien for purchase money is solely a creature of equity, and does not depend upon stipulation or contract, and a purchaser with notice is bound by it. It was also further held that knowledge that part of the purchase money remains unpaid is sufficient notice.

In the application of these well settled principles of law, it may be said that the plaintiff company in equity had a lien on the timber for the unpaid purchase money against the Nashville Lumber Company and subsequent purchasers with notice. The defendant company having purchased the timber on the Barefield tract from the Nashville Lumber Company, was required to take notice of everything recited in the deed from the plaintiff company to the Nashville Lumber Company. The deed from the plaintiff company to the Nashville Lumber Company recited that $5,298 in cash was paid at the time of the execution and delivery of the deed. It also provided that the remainder due, if any, was to be payable as the cutting of the timber proceeded at the rate of $2 per thou-

sand feet. The deed was referred to in the contract which had been executed between the plaintiff company and the Nashville Lumber Company, and the contract was referred to in the deed. By an examination of this contract the defendant company could readily have ascertained that an estimate had been made of the amount of the timber upon the land, and that the cash payment was based upon that estimate, and that both parties to the contract recognized that this estimate was too low, and that an additional amount was to be paid as the timber was cut.

If the defendant company had pursued with ordinary diligence the inquiry suggested by the deed from the plaintiff company to the Nashville Lumber Company, it would have led to actual knowledge of the equities of the plaintiff company. Moreover, the evidence shows that the general manager and the treasurer and land man of the defendant company had actual knowledge of the facts in the case, and their knowledge, under the circumstances, was imputable to the defendant company. See *Carter* v. *Gray,* 79 Ark. 273.

Another reason for upholding the finding of the chancellor is that the undisputed evidence shows that the transaction was fair and reasonable and absolutely free from fraud. It is true that A. C. Ramsey was a large stockholder in the plaintiff company, but Doctor Toland was the largest stockholder in that company, and acted for it. W. W. Brown was the president of the defendant company and vice president of the Nashville Lumber Company during the time Ramsey was general manager. He stated that he knew Ramsey had purchased the timber on the Barefield land and approved of the purchase. The deed from the Nashville Lumber Company to the defendant company recites a consideration of $3 per thousand feet, and it is admitted by the defendant company that this was a reasonable price. The deed from the plaintiff company to the Nashville Lumber Company recites a consideration of $2 per thousand feet. The president of the defendant company knew that Ramsey had purchased the

timber in question for the benefit of the defendant company and approved of the purchase. The company proceeded to cut the timber off of the land and accepted all the benefits of the contract. Under these circumstances it ought not to hold to the fruits of the purchase, and not be bound by the terms thereof. See, Thompson on Corporations (2 ed.), vol. 2, sections 1241, 1242; Cook on Corporations (7 ed.), vol. 3, § 662.

The only remaining question to be disposed of is whether or not the chancellor erred in his finding as to the amount of timber cut from the land. A good deal of testimony was taken on this point, but we do not think any useful purpose could be served by setting it out in detail and commenting upon it at length. We deem it sufficient to say that we have carefully and patiently read the testimony bearing on this phase of the case, and are of the opinion that the finding of the chancellor is not against the preponderance of the evidence. Therefore, under the well settled rules of this court, his finding must be upheld.

We are of the opinion that the finding of the chancellor upon the whole case was correct, and the decree will be affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* MULKEY.

Opinion delivered April 26, 1915.

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—MENTAL ANGUISH.—P. sent a message to M., advising M. of his father's death. M. replied, asking P. to send him funds to come to Arkansas to attend the funeral. This message was not delivered. Shortly thereafter M. raised sufficient funds, and wired that he was coming. The message was delivered to M.'s brother and not to P., the addressee, but the funeral was not delayed awaiting M.'s arrival. *Held*, under the facts, no case of negligence was made out against defendant telegraph company, and that neither P. nor M. could maintain an action for damages for mental anguish.

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

Martin, Wootton & Martin, Geo. H. Fearons and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for appellant.

1. The Arkansas mental anguish statute is void as to interstate messages, and the court should have directed a verdict for defendant in both cases. *Western Union Tel. Co.* v. *Brown,* 234 U. S. 542; *Western Union Tel. Co.* v. *Compton,* 114 Ark. 193; *Western Union Tel. Co.* v. *Johnson,* 115 Ark. 564.

2. The alleged mental anguish of Pevia is not such as may be the basis for recovery under the terms of the Arkansas statute. "The court must take the construction which common sense and experience adjudges should be given to the terms describing such elements of damage." 83 Ark. 39.

No brief filed for appellees.

McCULLOCH, C. J. These are two consolidated actions instituted by Leonard Mulkey and Fred Pevia, respectively, against the Western Union Telegraph Company to recover damages alleged to have been sustained by reason of negligent failure to deliver a telegram sent from one of the plaintiffs to the other. The facts are undisputed. Plaintiff Mulkey resided at Chattanooga, Tenn., and his father died at Malvern, Arkansas, on March 25, 1914. Plaintiff Pevia was a son-in-law of the elder Mulkey and also resided at Malvern. Two brothers of deceased also resided at Malvern, and two sons—brothers of plaintiff Leonard Mulkey. On the afternoon of March 25, Pevia sent a telegram to Leonard Mulkey, informing the latter of his father's death, and later in the afternoon sent another telegram informing him that the body, which had been embalmed, would be interred at Mineral Springs, Howard County, Arkansas, on March 27. The last of those messages was delivered to the addressee at night on the 25th, and at 8:35 o'clock the next morning Leonard Mulkey filed with defendant company the following message, addressed to Pevia at Malvern:

"Can't come unless you send me money."

The nondelivery of this message is the basis of each of the actions. The message was received by the operator at Malvern at 9:10 o'clock A. M. Pevia lived about a half-mile from the telegraph office, and had no telephone in his residence. The body of deceased was removed from Malvern on that morning and taken to Nashville, Arkansas, the funeral party reaching Nashville during the afternoon and remaining there that night. The next morning, March 27, the remains were taken out to Mineral Springs and interred about 3 o'clock in the afternoon. Pevia was sick on the morning of the 26th, and did not accompany the funeral party nor go to the station to see them off. He remained at home. The other relatives, including the two brothers of deceased and his two sons, were at the station and accompanied the remains. The train was scheduled to leave at 9:05, but was an hour or more late. Pevia sent a messenger to the telegraph office at 7 o'clock in the morning to inquire for a message, but made no further inquiry after that time. All of the members of the funeral party knew of the telegram sent by Pevia to Leonard Mulkey, and were expecting to hear from the latter, and one of the brothers, O. B. Mulkey, made inquiry of the telegraph operator concerning the expected message from Leonard Mulkey. When the message came, the operator delivered it to O. B. Mulkey, who promised to send it out to Pevia, or try to do so. He opened the message and read it and informed the other members of the party of its contents, but the message was not sent out to Pevia.

Plaintiff Mulkey, after filing the message, decided to raise the necessary funds by his own efforts, and did so by selling some of his furniture and borrowing the balance of the amount from his employer. After securing the funds, he filed another message with the company at 9:40 A. M. on March 26, addressed to Pevia, containing the following words: "Will be there tomorrow." That message was received in due time, but after the funeral party had left Malvern, and it was delivered to Pevia, who read it, but did not communicate its contents by telegraph or

otherwise to the funeral party after they reached Nashville. Plaintiff Mulkey left Chattanooga at 10 o'clock on the night of March 26, but did not reach Arkansas in time to attend the funeral of his father.

Both of the plaintiffs claim that they suffered mental anguish by reason of the nondelivery of the telegram, but we are of the opinion that in neither of the cases is the evidence sufficient to sustain the verdict. So far as the case of plaintiff Mulkey is concerned, it is manifest that the failure to deliver the message to Pevia was not the proximate cause of the mental anguish which resulted from his inability to attend his father's funeral. This is true for more than one reason. In the first place, if the message had been delivered to Pevia as promptly as it could have been done, he could not have replied to it in time to forward the money, even in the most expeditious way, so that Mulkey could have gotten it before he did in fact get it from other sources. There is no claim that the message was delayed in transmission, and the undisputed evidence is that it reached Malvern at 9:10 o'clock. Now, Pevia had no telephone at his residence, and if the message had been sent out according to the customary method by the messenger boy in the office, he would have had to go a distance of nearly a half-mile, and then return with the reply. There was only a space of thirty minutes between the receipt of the message at Malvern and the time that Mulkey sent the second message, after having raised the necessary funds, so it is obvious that during that short space of time the money could not have been sent to Mulkey before he actually raised it from other sources.

Whatever delay there was in preparation for his journey to Arkansas to attend the funeral, was brought about by the procrastination of Mulkey himself, and, according to the evidence, he made no move toward getting the money until after he had filed the message with the company at 8:35 o'clock, asking Pevia to send him the money. As soon as he raised the money, he sent the message to Pevia informing the latter that he would start for

Arkansas on the first train, and expected to reach Malvern the next day. Pevia made no effort to communicate with the funeral party so as to postpone the funeral, and there is no reason to suppose that the situation would have been changed if the first message had been delivered to Pevia. Another reason is that the message was in fact delivered to O. B. Mulkey, a brother of plaintiff Mulkey, and its contents were communicated to the others composing the funeral party. They received all the information from it that Pevia would have received, and if they had desired to postpone the funeral in order to hear from the absent one they could have done so. It is extremely doubtful whether a charge of negligence can rightfully be made against the operator for delivering the message to O. B. Mulkey, in view of the fact that he was more closely related to the sender than the addressee was, and was there at the station and was one of the funeral party about to leave on the expected train. The failure of the company to deliver the message to Pevia was therefore not the cause of Mulkey's distress or mental anguish, but that condition resulted from his own delay in making necessary preparation to come to Arkansas, or from the failure of his relatives in charge of the remains of the deceased to postpone the funeral so that he could reach there.

It is very plain that Pevia can not recover, for he has not proved any mental anguish as an element of damages within the meaning of our statute on the subject. The most that can be said of his case is that he was deprived of the privilege of sending his co-plaintiff and brother-in-law the money to use in coming to Arkansas. He did not attend the funeral himself, and the failure to deliver the message did not deprive him of any privilege in that respect. His brother-in-law was not to come to offer any solace to him, but to attend the funeral, and there is no conceivable phase of the case that would admit of the view that he was deprived of anything that caused him to suffer mental anguish within the meaning of the statute.

Both cases are entirely without merit, according to the undisputed evidence, and the judgments are reversed and the causes dismissed.

BIDDLE ET AL., RECEIVERS v. RILEY.

Opinion delivered April 26, 1915.

1. RECEIVERSHIP—RAILROADS—LIABILITY OF NEGLIGENCE.—Where a railroad company is in the hands of receivers, and another railroad is permitted to use its tracks for certain purposes, the receivers are responsible for negligence resulting in injuries to third persons, whether caused by acts of their own servants or of those of the other company using the line.
2. RAILROADS—NEGLIGENCE—LIABILITY OF RECEIVERS.—The receivers of a railroad company owe a duty to passengers on their line to see that they are not injured through the negligence of other persons using the track.
3. PARTIES—SERVICE—NONSUIT—TRIAL.—Kirby's Digest, § 6191, which provides that "the plaintiff can only demand a trial at any term as to part of the defendants, upon his discontinuing his action upon the first day of such term as to the others," applies only to cases when there is a failure to serve part of the defendants, and the plaintiff elects to proceed to a trial, and provides that this can be done only when there is a nonsuit taken on the first day of the term as to the defendants' not served.
4. PARTIES—MISJOINDER—NONSUIT.—Where several defendants have been improperly joined in an action, and the plaintiff takes a nonsuit as to those not proper parties, it is not error for the court to permit the trial to proceed as to the proper parties, and Kirby's Digest, § 6191, does not apply.
5. EVIDENCE—DAMAGES—NON-EXPERT OPINION.—In an action for damages for personal injuries, in estimating the amount of plaintiff's damages, it is proper to permit him to testify as to the cost of procuring the services of a nurse, and that the same would cost a certain amount, such testimony not being a matter of special or expert knowledge.
6. TRIAL—AMENDMENTS TO PLEADINGS.—A trial court may permit an amendment at any stage of a trial, which will not operate to the prejudice of the defendant in their preparation for the trial.
7. EVIDENCE—PERSONAL INJURY ACTION—PHYSICAL CONDITION OF PLAINTIFF—OPINION OF PHYSICIAN.—A medical expert may base his opinion upon a clinical history of the case under consideration, and in

order to make his testimony intelligible, he may testify to the observations that he made, and also as to what his patient said to him in describing his bodily condition and the character and manifestations of his sickness, pains, etc.

8. EVIDENCE—EXPERT TESTIMONY—HYPOTHETICAL QUESTION.—Where, in stating a hypothetical question to expert witnesses, none of the undisputed material facts were omitted from the question, and all the matters submitted therein were such as there was testimony tending to prove, it will not render the answers of the witnesses incompetent that the questions were to some extent based upon matters which had come to the personal knowledge of the witnesses.

9. RAILROADS—PERSONAL INJURIES—COLLISION.—When defendant railway permitted another railroad company to use its tracks, and plaintiff, a passenger on the former, was injured by a collision between trains of the two roads, *held*, the accident constituted *prima facie* proof of negligence on the part of the defendant, justifying a recovery by plaintiff, unless it was shown by a preponderance of the testimony that the injury occurred without negligence on its part.

10. NEGLIGENCE—PRESUMPTIONS—ALLEGATIONS.—In an action for damages due to personal injuries, the plaintiff may take advantage of the general presumption which arises, even though he has made one or more specific allegations of negligence in his complaint.

11. EVIDENCE—PERSONAL INJURY ACTION—CHARACTER OF PLAINTIFF.—When plaintiff received personal injuries due to defendant's negligence, in estimating the amount of damages, it is proper to present to the jury proof of plaintiff's moral character, as well as his habits of sobriety and industry.

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

W. F. Evans, B. R. Davidson, George S. Ramsey, Edgar A. de Mueles and *Farrar L. McCain,* for appellants.

1. Appellants and the St. Louis & San Francisco Railroad Company were sued jointly, and both were served with process. When, on the tenth day of the term, the plaintiff elected to take a nonsuit, or to discontinue the case as to the railroad company, this worked a continuance for the term, and the court erred in forcing appellants into trial at that term. Kirby's Dig., § 6191; 4 Ark. 509; *Id.* 546; 18 Ark. 361; 9 Ark. 455-462; 33 Ia. 356; 8 Nev. 239; 21 Enc. Pl. & Pr. 957; 36 Tex. 315-317; 73

Ark. 183-187; 83 Ark. 6-8; 58 Ark. 136; 66 S. W. 375; 88 S. W. 37.

2. It was erroneous to permit the plaintiff, who was not shown to possess any knowledge of the value of nurse hire, to testify what it would cost to secure the services of a nurse by the day. 55 Ark. 65; 108 Mich. 350, 66 N. W. 218; 130 U. S. 611-620; 30 S. W. 254; 27 S. W. 920.

3. It was erroneous to permit the plaintiff in making out his case in chief to introduce testimony, over the objection of defendants, that he was a moral, honest, hardworking, model, exemplary young man. Every person is presumed to have a good moral character until the contrary is shown, and this presumption obtains as well with reference to earning capacity as to character as a witness. Such testimony is not admissible in a civil case until the reputation of the witness has been attacked. 91 S. W. 691; 113 Ala. 360, 21 So. 366; 113 N. W. 1118; 57 Ind. 378; 33 S. W. 249; 129 S. W. 863; 15 Am. Neg. Rep. 372; 7 Conn. 116; 110 Cal. 414; 20 S. E. 763; 23 Pa. St. 424; 84 *Id.* 446; 68 Ia. 737; 7 Ind. 17; 62 Ark. 267; 1 Atl. 605; 36 Fed. 657; 101 Ind. 582; 128 S. W. 677; 1 L. R. A. (N. S.) 198-201; 64 S. W. 923; 129 S. W. 863; 60 S. W. 669; 76 S. E. 711.

4. The conclusions of physicians who have been called not for the purpose of treatment, but for the purpose of becoming witnesses, based upon a history of the case, consisting largely of self-serving statements, related by the plaintiff a month or more after the injury, were not admissible. 70 Fed. 21; 206 Fed. 765; 16 L. R. A. 437; 20 Am. St. Rep. 17; 38 Atl. 683; 41 S. W. 517; 28 Atl. 102; 80 Mich. 237; 63 N. W. 172; 100 N. W. 788; 132 Mass. 439.

Opinions based upon hypothetical questions which do not embrace essential facts nor a substantial part of them, as shown by the evidence, are not admissible. 100 Ark. 518-524; 103 Ark. 196-199.

It was clearly erroneous for the court to allow the plaintiff to make an exhibition of himself before the jury

by having one of his physicians to stick pins in his leg. Such a test was admittedly not conclusive, but was of such a character as to unduly arouse the sympathies of the jury, and that it succeeded is reflected in the excessive verdict. 90 S. W. 511-514; 101 N. W. 1011; 177 N. Y. 359.

5. Instruction 1, given by the court on its own motion, was erroneous. There were specific allegations of negligence contained in the complaint, yet, notwithstanding these, the court by that instruction applied to the case the doctrine of *res ipsa loquitur.*

The specific omissions charged do not constitute negligence under the facts in the case; and there is no lookout statute in the State of Oklahoma, where the accident occurred. 217 Fed. 956; 26 Okla. 788, 110 Pac. 776; Pomeroy's Code Remedies (4 ed.), 682; *Id.* 614; *Id.*, § 448; 31 Cyc. 85; 29 Okla. 797, 119 Pac. 1008; 66 S. W. 906; 132 S. W. 975; 202 Mo. 576, 101 S. W. 32; 155 S. W. 1092; 99 S. W. 1062, 8 L. R. A. (N. S.) 929; 126 S. W. 126; 52 Tex. C. App. 550, 114 S. W. 186; 119 Ga. 837; 23 Okla. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892; 22 Mont. 445, 56 Pac. 867; 62 N. W. 301; 49 S. W. 868; 10 Pac. 821; 40 N. E. 65; 53 N. E. 464.

That the doctrine of *res ipsa loquitur* does not apply to this case, and that the complaint must stand or fall upon the specific issues of negligence tendered, is sustained by this court. 63 Ark. 563; 88 Ark. 12, 114 S. W. 230; 84 Ark. 311, 105 S. W. 573. See, also, 83 Ark. 395; 87 Ark. 471; 82 Ark. 547; 65 Ark. 222; 89 Ark. 24; 88 Ark. 594; 85 Ark. 390, which sustain the principle that instructions should be confined to the issues made by the pleadings, and that instruction based on issues not raised by the pleadings are erroneous.

To charge the jury upon the facts developed and notwithstanding the complaint specified the act of negligence, that if the plaintiff was injured without fault on his part by reason of the train colliding with another train, this was *prima facie* proof of negligence, was contrary to the Constitution of this State. 43 Ark. 289; 45 Ark. 492; *Id.* 165; 57 Ark. 461; 51 Ark. 147; 85 Ark. 138;

83 Ark. 195. It was clearly erroneous to instruct them that upon proof of the collision, the plaintiff was entitled to recover "unless the defendants showed by a preponderance of the evidence that said injury occurred without negligence on their part." 228 U. S. 233, 33 Sup. Ct. Rep. 416.

6. There was no evidence that the Midland Valley Railway Company was and had been operating trains over the track of the railroad company in charge of the appellants, or that they were so operated with the knowledge and permission of appellants or their employees, and instructions based upon or assuming such a state of facts were erroneous.

Pace, Seawel & Davis, for appellee.

1. There was no error in requiring appellants to go into trial after the dismissal of the cause as to the railroad company. The statute, Kirby's Dig., § 6191, has no application to cases of this character. The statute is not mandatory, and does not do away with the discretion of the trial court in the matter of refusing or granting continuances. 57 Ark. 287; 37 Ark. 491.

2. The testimony as to the cost of securing the services of a nurse was competent. Appellee had the means and opportunity of acquiring knowledge of such cost. The jurors were competent to determine from their common knowledge and experience what such services would cost him. 87 Ark. 308.

3. Evidence as to the age, health, habits, etc., of appellee was admissible. This court has frequently declared that evidence of habits, etc., was competent, and that character should be considered in estimating the damages. 60 Ark. 559; 105 Ark. 533; 88 Ark. 225; 82 Fed. 158.

4. The medical testimony introduced by appellee was clearly within the rule declared by this and other courts. The hypothetical questions embraced all essential undisputed facts and also those established by appellee in the case. It was not necessary to preclude *all*

facts proved in the case. Appellee was entitled to include such facts as he conceived to have been proved and predicate his hypothetical question thereon. 83 Ark. 589; 98 Ark. 399; 106 Ark. 353; 98 Ark. 352.

5. There is no error in instruction 1 complained of by appellants. This court has already held the contention of appellant as untenable, and has refused to follow the doctrine in Missouri and other States, relied on by appellants. 40 Ark. Law Rep. 1; 95 Ark. 315; 34 Ark. 613; 51 Ark. 459; 90 Ark. 485; 57 Ark. 418; 104 Ark. 528.

For a discussion of the conflict of authorities upon this question, see 48 Wash. 233, and notes thereon in 24 L. R. A. (N. S.) 788.

6. There is sufficient evidence in the record to justify the second and third instructions complained of by appellants. There is no denial in the answer that *at the time of the injury,* the Midland Valley Railroad Company was being permitted to use the tracks of the St. Louis & San Francisco Railroad Company at the point where the injury occurred. Therefore, it stands admitted. 51 Ark. 459. Moreover, the law would charge the latter railroad company and its receivers with knowledge of the occupancy of this track by another railroad company, and if such use was long continued, acquiescence and consent would be inferred, especially so where, as in this case, the matter was peculiarly within the knowledge of the appellants, and no effort was made to contradict the evidence upon that question. 83 Ark. 94; 102 Ark. 499; 49 Fed. 209.

McCULLOCH, C. J. This is an action to recover damages on account of personal injuries received by the plaintiff Riley while he was a passenger enroute from Fort Smith to Mansfield over the railroad owned by the St. Louis & San Francisco Railroad Company, which was being operated by the defendants as receivers appointed by one of the courts of the United States. There was a collision of the train on which plaintiff was a passenger with a freight train operated over the same line by another company, towit: The Midland Valley Railroad

Company, at a point between Bonanza, Arkansas, and Jenson, Arkansas; the particular point where the collision occurred being, however, in the State of Oklahoma. The injuries received by the plaintiff were according to the evidence adduced by him, very severe, and caused him to suffer great pain and permanently destroyed his earning capacity. The evidence tended to show that he sustained a severe injury to the spine, spoken of by one or more of the physicians who testified in the case as a lesion of the spinal cord, and that he was completely paralyzed from his hips downward. It is alleged in the complaint that the Midland Valley Railroad Company had been using the track by permission of the St. Louis & San Francisco Railroad Company for a number of years, and that it was being so used at the time of the collision with the consent of the receivers. It is also alleged that the collision was caused by negligence of the employees in charge of defendant's train in failing to keep a lookout, and negligence on the part of the Midland Valley Railroad Company in having its train to occupy the track at that time when the passenger train operated by the defendants was expected to pass along, and negligence of the said Midland Valley Railroad Company, in failing to direct those in charge of the freight train to wait at Jenson until the passenger train of the defendants had passed that point. There was a verdict in favor of the plaintiff assessing damages in a very substantial amount, and the defendants have appealed from the judgment rendered thereon.

(1-2) It is unnecessary to discuss the facts at any considerable length, for we are of the opinion that, according to the undisputed evidence, the defendant is responsible for the injuries which resulted to the plaintiff from the collision. The collision occurred between two trains operated along the line owned by the St. Louis & San Francisco Railroad Company in control of the receivers. The other company was permitted to use the track, and under well settled principles, the receivers are

responsible for negligence resulting in injury to third persons whether caused by their own servants or those of the other company using the line. They certainly owed the duty to their own passengers to see that they were not injured through the negligence of other persons using the track. The occurrence speaks for itself, and it would be a waste of words to discuss the question whether or not the operators of the line of railroad and the passenger train on which plaintiff was a passenger are responsible for the injury which resulted. The proof shows that the Midland Valley Railroad Company was allowed the use of the track, but that there was negligence in allowing the freight train to use the track at that point until the passenger train had passed. It is argued here that the proof fails to establish the fact that this track was owned by the St. Louis & San Francisco Railroad Company, and also that the track was being used by the other company with the consent of the receivers. We are of the opinion that there is no basis for that contention, as the proof shows quite satisfactorily that the track so used was a part of the line of railroad of the St. Louis & San Francisco Railroad Company, and had been used for several years by the Midland Valley Railroad Company. It would be a very technical estimate of the testimony to say that it is not established beyond dispute that the receivers were permitting the Midland Valley Railroad Company to use the track. A finding by the jury that the Midland Valley Railroad Company was a trespasser in undertaking to make use of the tracks would be entirely without any testimony whatever to justify it.

(3-4) The suit was first instituted against the St. Louis & San Francisco Railroad Company, as well as against the receivers, and all of the defendants were served with process; but the receivers demurred on the ground that they were improperly joined with the railroad company as defendants, and on the 10th day of the term, after the court had sustained the demurrer, the plaintiff elected to take a nonsuit as to the railroad company. The

remaining defendants, the receivers, then asked a postponement of the trial on the ground that under the statutes of this State, a nonsuit as to some of the defendants operated as a continuance of the case for the term. Counsel rely upon the statute which provides that in actions at law, other than those upon contract, wherein summons has been served upon part only of the defendants, "the plaintiff can only demand a trial at any term as to part of the defendants, upon his discontinuing his action upon the first day of such term as to the others." Kirby's Digest, § 6191. That statute applies only to cases where there is failure to serve part of the defendants, and the plaintiff elects to proceed to trial, and provides that this can be done only where there is a nonsuit taken on the first day of the term as to the defendants not served. This statute has no application to cases where there has been a misjoinder, and that error is corrected by entering a nonsuit as to those improperly joined. It is unnecessary to decide whether the statute is mandatory or merely directory, for it has no application to the present case.

(5-6) Objection was made to the testimony of the plaintiff himself concerning the cost of nurse hire. His testimony tended to show that he was totally and permanently incapacitated from any kind of work, and would have to be constantly attended by a nurse, and he stated that the cost of procuring a nurse would be $3 a day. Objection was made on the two grounds that the plaintiff had not qualified himself to testify concerning the customary charges of nurses, and that there was no allegations in the complaint of injury in that respect. The plaintiff stated positively that he knew what the charges of nurses were, and that was not a matter of special or expert knowledge. The statement was sufficient to go to the jury for what it was worth. The complaint contained no allegation as to pecuniary loss to accrue in the future by reason of the expense for nurses, but we think that was unnecessary for the reason that his allegations concerning the extent of his injuries were sufficient to admit

proof of any loss which resulted from that injury. Moreover, the plaintiff, when the objection was made, offered to amend the complaint by putting in a specific allegation on that point, and no further objection was made by defendants. The court had the right to permit an amendment at any stage of the proceedings which would not operate to the prejudice of the defendants in their preparation for the trial, and it was not suggested to the court that this introduced new matter which would render it necessary for defendants to have additional time in which to meet the issue.

Numerous objections were made to the testimony of physicians who testified concerning the extent of plaintiff's injuries. There were no broken bones nor scars, no abrasions of the skin indicating objective symptoms, and the examination was to some extent subjective. The physicians were allowed to testify concerning exclamations and other verbal indications of pain, and inability on the part of the plaintiff to handle himself normally, and they were permitted to give their opinions based upon those matters as well as the appearance of plaintiff as indicated in their examination. One of the physicians was allowed to state that at the time he examined the plaintiff, shortly after the injury, the latter was unable to draw up his leg except very slowly, and complained of pain whenever he moved. Other physicians, who examined plaintiff at the time of the trial and immediately before that time, testified about tests that were made to determine whether or not his lower limbs were paralyzed. As before stated, they all gave their opinions based upon what may be termed the clinical history of the case thus obtained, and their own observations and the result of the tests which they made. It is insisted that the court erred in allowing the witnesses to express their opinions from that predicate.

(7) The rules of evidence bearing upon this subject are, we think, correctly stated, as follows: "A medical expert may base his opinion upon a clinical history

of the case under consideration, and in order to make his testimony intelligible, he may testify to the observations that he made, and also as to what his patient said to him in describing his bodily condition and the character and manifestations of his sickness, pains, etc. The reason for this rule is that the physician must oftentimes of necessity take into consideration such statements in reaching a conclusion as to the physical condition of the patient, and the nature and extent of his malady or injury; and hence the rule being founded on such necessity, it has been declared that it must be applied with caution, and not extended beyond the reason of necessity upon which it rests. It has been declared, however, that the mere statements made by a person as to his sufferings, pain, etc., which statement was made for the sole purpose of furnishing the expert with information on which to base an opinion, is not admissible, and that the witness, in testifying to what he has heard and observed, is confined to exclamations, shrinkings and other expressions which appear instinctive, intuitive and spontaneous." 5 Encyclopedia of Evidence, p. 608.

The rule on the subject is also stated by Mr. Jones, in his work on Evidence (2 ed.), section 349, as follows: "Whenever it becomes material to show a person's condition of health, or motives, or state of mind, such person's declarations may often be received in evidence for such purpose, provided the requisites already pointed out are complied with; and it appears that such statements are spontaneous and undesigned, and that they illustrate the facts which are the subject of inquiry. In some of the decisions, the utterances are limited to groans and exclamations, and other involuntary exclamations of pain. But in others assertions and complaints as to present feeling are received more liberally. But on the grounds already stated, such declarations are confined to the present condition of the declarant. * * * Anything in the nature of narrative or statement is to be carefully excluded; and testimony is to be confined strictly to such complaints, ex-

clamations and expressions as usually and naturally furnish evidence of a present existing pain or malady."

These are the rules recognized by this court in the recent case of *Prescott & Northwestern Ry. Co.* v. *Thomas,* 114 Ark. 56, 167 S. W. 486; and also in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Williams,* 108 Ark. 387. Those rules were, we think, adhered to in the trial of this case, and that all the statements of the witnesses and the methods of their examination were competent.

(8) It is claimed also that there was error in submitting the hypothetical questions to the witnesses, but we think there was no error in that regard. The questions were based to some extent upon matters which came to the knowledge of the witnesses through their personal examination of the plaintiff as well as matters entirely hypothetical which the testimony of the plaintiff himself tended to establish concerning his injury. But it was competent to embrace all those matters in the questions. *St. Louis & San Francisco Rd. Co.* v. *Fithian,* 106 Ark. 491. None of the undisputed material facts were omitted from the hypothetical questions, and all the matters submitted therein were such as there was testimony tending to prove. *Ford* v. *Ford,* 100 Ark. 518.

(9) It is next contended that the court erred in instructing the jury, at the instance of the plaintiff, that proof of the fact that the injury occurred by the collision of the train on which plaintiff was riding with another train upon the track of the defendants, constituted "*prima facie* proof of negligence on the part of defendants, and would justify a recovery on the part of the plaintiff unless it is shown by a preponderance of the evidence that said injury occurred without negligence on their part." The contention is that the plaintiff, by specifically alleging one or more acts of negligence, abandoned the right to the presumption arising from the rule of *res ipsa loquitur.* Attention is also called to the fact that this injury occurred in the State of Oklahoma, where there is no lookout statute in force.

The general rule on the subject, stated by Mr. Elliott, is as follows: "The true rule would seem to be that when the injury and circumstances attending it are so unusual, and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road over which the company has entire control, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury." 4 Elliott, Railroads, section 1644.

(10) Now, the proof shows beyond dispute, as we have already mentioned, the fact that plaintiff's injury resulted from a collision between defendant's train, on which the plaintiff was riding, and another train which the defendants were permitting to be operated along the track. Therefore, it is undisputed that the injury was caused either by the negligence of defendants' own servants operating the passenger train, or the servants of the other company for whom the defendants had made themselves responsible by permitting them to operate trains on that track. The proof shows just how the negligence occurred, namely, in the failure to hold the freight train at Jenson until the passenger train had passed. It would be putting form above substance to hold that under that state of the case, the plaintiff must start the trial over again under proper allegations specifically alleging these facts, when, under the facts proved in the case, he is entitled to recover. It is true, there are cases cited on the brief of counsel for defendant, holding that a specific allegation of negligence waives the general presumption arising from the maxim stated above, but that rule has never been adhered to in this State. On the contrary, this court, in the recent case of *St. Louis & San Francisco Rd. Co.* v. *Coy,* 113 Ark. 265, reiterated the rule long observed in this State that pleadings are treated as amended to conform to the proof in the case, and it necessarily results from the operation of that rule of practice here that the

plaintiff can take advantage of the general presumption which arises in the jurisdiction where the injury occurred, even though there are one or more specific allegations of negligence in the complaint. The just rule on the subject, and the one which we prefer to follow, is that "a plaintiff who proves the happening of an accident, and is otherwise entitled to certain presumptions arising therefrom, does not lose the benefit of such presumptions because he has alleged what he conceives to be the specific cause of the accident." *Kluska* v. *Yeomans* (Wash.), 103 Pac. 819.

(11) The only other assignment which we deem to be of sufficient importance to call for discussion is that which relates to the testimony of two or three witnesses who were permitted to testify concerning the moral character of the plaintiff. The witnesses were asked to state if they knew, what kind of a man the plaintiff was with reference to being "industrious, moral, upright and a hard-working man," and they stated that they knew his character and habits in these respects, and that he was an exemplary young man of good habits, and industrious and of good moral character. Objection was made to this, and the court decided that in addition to his habits of sobriety and industry, the plaintiff's moral character might be proved. It is insisted that that constituted error and was prejudicial for the reason that it bolstered up plaintiff's standing as a witness, and also introduced an improper element for consideration in estimating damages. The court expressly limited the consideration of this testimony to the question of the amount of his damages, and it can not be urged that there was any prejudicial effect for the reason that it was considered as sustaining the plaintiff's testimony before the jury. We think that under the facts of this case it was not improper to present to the jury proof of the plaintiff's moral character, as well as his habits of sobriety and industry, for the purpose of drawing a picture before the jury of the earning capacity of which he had been permanently deprived by the negligent acts which caused his injury. In *Ry. Co.* v. *Sweet*, 60 Ark. 550, we held that in a suit of this kind, brought

for the benefit of the next of kin, it was competent to introduce proof concerning the deceased as to his "character, business qualifications and capacity for earning money." In disposing of the matter, the court said: "It would be a travesty upon justice and a reproach to the law if the sobriety, industry, honesty and ability of deceased—the constituents of character, and the very things which determine a man's business qualifications—were not permitted to be considered by the jury." While it is true that that was said in a case in which the next of kin were seeking to recover compensation for an injury which totally deprived them of the earning capacity of one upon whom they were dependent, the same rule ought to and does apply in a case where the injured person himself sues for the recovery. If he is entirely deprived of the earning capacity which he would have enjoyed in the future, but for the injury received, he is entitled to show to the jury the manner of man he was so that they can estimate what his earning capacity would have been in the future. As was aptly said by this court in the *Sweet* case, *supra,* one of the chief things which determines business qualifications and earning capacity is moral character, and even though a man's activities are confined to manual labor, his moral character necessarily affects to a large degree his earning capacity, for even the humblest laborer is trusted on account of the good moral character which he has established among those who know him. There are cases, it is true, in which it is held that proof of moral character in cases of this sort is incompetent. Defendants rely especially upon the case of *L. & N. Ry. Co.* v. *Daniel,* 122 Ky. Rep. 256, 91 S. W. 691, decided by the Kentucky Court of Appeals. That was a well considered case and embraced not only this question, but the right of the plaintiff in a case of this sort to prove his habits of industry and sobriety. The reasoning of the court upon the first proposition is quite convincing, and establishes beyond controversy the justice of the rule by which habits of industry and sobriety may be proved. The discussion on the other subject is very short, and, to our minds, far

from satisfactory. The court intimates that such proof would necessarily be taken by the jury, according to the insistence of the defendants in this case, as bolstering up the character of the deceased, and for that reason should not be accepted. The proof was referred to in the opinion as establishing moral reputation of the plaintiff. It is not reputation that was sought to be established in this case, but character. Character is what a person is, and includes natural and acquired traits; while reputation is that which a person is thought to be by others, or, in other words, the popular estimate of him. "Character lives in a man; reputation outside of him."—J. G. Holland, in "Gold Foil." We think it entirely proper in a case of this kind for the plaintiff to prove his moral character; but it might not do to lay the rule down generally to be applied in all cases. This is true for the reason that in a case of partial decrease of earning capacity, the moral character which is still an asset of the injured man to help him in his future undertakings, and proof of it would have no bearing at all upon the extent of the partial loss of his earning capacity. In a case like this, however, where the proof shows that there is a total loss of earning capacity, the plaintiff is certainly entitled to introduce proof to the utmost to establish all the elements which enter into an estimate of his earning capacity so as to enable the jury to determine what the man has been deprived of.

The assessment of damages in this case is for a large amount, and there was a sharp conflict as to the extent of the plaintiff's injury, but the proof is sufficient to sustain the amount which the jury awarded, and the verdict is not alleged to be excessive; that is to say, there is no assignment in the motion for new trial that the verdict is excessive.

We find no prejudicial error in the record, and it follows that the judgment must be affirmed. It is so ordered.

CONQUEROR TRUST COMPANY v. REVES DRUG COMPANY.

Opinion delivered April 26, 1915.

1. BILLS AND NOTES—INNOCENT PURCHASER—BURDEN OF PROOF.—When appellant showed itself to be an innocent purchaser for value before maturity of certain notes, the burden then shifts to the defendant maker to show that appellant was not an innocent purchaser.
2. BILLS AND NOTES—INNOCENT PURCHASER—FRAUD IN EXECUTION—EVIDENCE.—In the absence of any testimony first tending to show that the holder of certain notes was not an innocent purchaser thereof, it is error for the court to permit the introduction of any testimony as to fraud in the execution of the notes.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; reversed.

STATEMENT BY THE COURT.

The appellant instituted this suit against the appellee to recover upon three promissory notes executed by appellee to the order of the Vernon Advertising & Manufacturing Company (hereinafter designated as the Vernon Company). Appellant alleged that the notes were endorsed by the payee to the appellant, being purchased by appellant in the usual course of business, before maturity and for value and without notice.

The appellee admitted the execution of the notes, but denied that appellant was the innocent holder thereof, and alleged that the notes were procured by fraud.

The only issue presented on this appeal is whether or not the appellant was an innocent holder for value.

Julius A. Becker, on behalf of the appellant, testified that he was the treasurer of the appellant, and that appellant bought the notes in the usual course of its business, on the 17th day of March, 1913, a short time after the notes were executed and several months before their maturity, and without any notice at the time of any defense, or that there was any alleged fraud in their execution; that the notes were purchased at a discount of 10 per cent, and the proceeds placed to the credit of the payee, the Vernon Company, which it checked out in the usual course of its business within two weeks thereafter. He

further testified that he had made an investigation before the purchase of the notes as to the financial standing of the appellee by writing to the Bank of Alma, and to the Commercial Bank of Alma. The Bank of Alma replied, stating that the appellee was doing a good business, and that it was considered good for the amount of $400. The Commercial Bank replied as follows: "From what information we have, the Reves Drug Company owe about all that their business justifies, although with Mr. W. R. Reves behind the obligation, it would be gilt-edge, and worth many times more."

The witness further stated that he investigated the rating given the appellee by Dun's Mercantile Reports. Witness stated that appellant had bought other similar notes from the Vernon Company, given by other residents of Arkansas, whom witness had not seen nor heard of when the notes were offered to appellant for purchase, and witness stated that he bought these notes as the agent of appellant after careful investigation through local banks and commercial agencies as to the standing of the makers of the notes; that the appellant had bought four or five sets of notes similar to the ones in controversy. Witness stated that at the time he purchased the notes as the agent of appellant, he did not know the appellee Reves, nor did he know his signature. Appellant had bought other notes from the Vernon Company and the signatures of the makers of these notes had been genuine and regular in every instance, and witness had no reason to suspect that the signatures to the notes in controversy were not genuine and valuable, and he had never heard it contended that the signatures to the notes were not genuine.

The Vernon Company had an account with the appellant. None of the officers, agents or directors of the appellant had any connection whatever with the Vernon Company or with the individuals composing that company.

Testimony was introduced on the part of the appellee, over the objection of the appellant, which tended to prove that the appellee entered into a contract with the Vernon Company by which the Vernon Company was to furnish the appellee a piano which appellee was to give away in a contest by way of an advertising scheme for the sale of fountain pens bought by the appellee of the Vernon Company; that under the arrangement between the appellee and the Vernon Company, at the expiration of the time fixed for the contest to run the Vernon Company was to take back such of the fountain pens at $1.50 each as had not been disposed of and credit the amount of these on the notes. It was orally agreed between the Vernon Company and the appellee that the notes were not to be negotiated, and that the scheme would not be placed with any other person in Crawford County. The Vernon Company did not comply with its contract and agreements with the appellee in this respect, having sold the notes to the appellant, and also having placed their goods, under the same scheme, with one J. O. Porter, at Mulberry, Crawford County.

At the conclusion of the testimony, the appellant moved the court to instruct a verdict in its favor. The court overruled its motion and submitted the issue to the jury upon instructions to which no objections are urged here. From a verdict and judgment in favor of the appellee, this appeal has been duly prosecuted.

Southmayd & Southmayd, for appellant.

1. Appellant having established the fact that it paid a valuable and adequate consideration for the notes before their maturity, the burden was upon appellee to show that appellant was not an innocent purchaser. There is nothing in the evidence tending to show that appellant had any notice of the defenses set up. 113 Ark. 1; 113 Ark. 72.

A promissory note in the hands of an innocent purchaser is not affected by any fraud in its execution nor by any contemporaneous oral agreement that it should

not be negotiated. 94 Ark. 100; 104 Ark. 388; 111 Ark. 258.

2. The issue in the case was whether or not the appellant was a bona fide holder of the notes, an innocent purchaser. The court erred in admitting evidence not directed to that issue. 94 Ark. 100; 167 S. W. 75; 118 Mo. 296; 40 Am. St. Rep. 373, 377-8; 111 Ark. 258; 90 Ark. 93.

C. A. Starbird, for appellee.

WOOD, J., (after stating the facts). 1. The court erred in not directing a verdict in favor of the appellant. The uncontroverted evidence showed that the appellant was an innocent purchaser of the notes sued on. The appellant established the fact by its evidence that it paid a valuable consideration for the notes before their maturity and without any notice of any fraud in their execution or of any defenses that the makers thereof might have against the payee. This shifted the burden to the appellee to show that the appellant was not an innocent purchaser. *Pinson* v. *Cobb,* 113 Ark. 28; *Bank of Monette* v. *Hale,* 104 Ark. 388-395. The appellee did not meet this burden, and there were no circumstances developed in the testimony on behalf of the appellant that would warrant a conclusion that appellant was not an innocent holder of the notes. The circumstances did not even create a suspicion of that kind.

2. In the absence of any testimony first tending to show that appellant was not an innocent purchaser, the court should not have permitted any testimony as to fraud in the execution of the notes. *Bothell* v. *Fletcher,* 94 Ark. 100-103.

For the errors indicated the judgment is reversed and a judgment is entered here in favor of the appellant for the amount of the notes sued on.

HOWLE v. EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN.

Opinion delivered April 26, 1915.

BENEFIT INSURANCE—DEATH—VIOLATION OF LAW.—When a policy of insurance in a fraternal order provides for a forfeiture in case the insured met his death while committing an act in violation of law, *held*, in order to avoid the policy the insured must have met his death while voluntarily engaged in a violation of the law, and when the insured was insane and not responsible for his acts when the act was committed, then he did not voluntarily commit an unlawful act in violation of law.

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

Rachels & Miller, for appellant.

1. We should have been allowed to prove the insanity of the deceased at the time he entered into the combat that caused his death. 76 N. Y. 426; 55 *Id.* 169; 95 U. S. 232; 109 *Id.* 101; 99 Mass. 317; 3 L. R. A. 486.

2. The "incontestable clause" bars all defenses after the lapse of time. 111 Ind. 462; 60 Am. Rep. 702; 11 N. E. 230; 173 Ind. 613; 89 N. E. 398; 91 *Id.* 230; 43 Ind. App. 321; 6 L. R. A. 731; 101 Tenn. 22; 42 L. R. A. 247; 189 Mass. 555; 2 L. R. A. (N. S.) 821; 97 Iowa, 226; 32 L. R. A. 473; 136 U. S. 297; 63 L. R. A. 453; Richards on Ins. Law (3 ed.) 536, § 383; 170 Ill. A. 79.

3. In the absence of any stipulation in the policy the fact the insured met his death in the commission of a felony does not constitute a defense. 57 Mo. App. 87.

4. All defenses are cut off by the time limit which has elapsed. 104 Ga. 256; 42 L. R. A. 261; 53 *Id.* 743. It was error to take the case from the jury and direct a verdict.

S. Brundidge, for appellee.

1. The abstract of appellant wholly fails to comply with rule 9 of this court and the judgment should be affirmed. 83 Ark. 359; 108 *Id.* 14; 87 *Id.* 205; 78 *Id.* 374; 75 *Id.* 517; 74 *Id.* 323; 81 *Id.* 327; and many others.

KIRBY, J. This is the second appeal of this case, a sufficient statement of which appears in the opinion on the first appeal, *Eminent Household of Columbian Woodmen* v. *Howle,* 109 Ark. 400.

The court held there that the section of the constitution and by-laws of the society providing that the policy of insurance or benefit certificate should be void, if the death of the member or guest occurred while he was violating the law, became a part of the contract, proof of which would prevent a recovery by the beneficiary, and the case was reversed and remanded for a new trial because the court erred in refusing to permit the insurer to show that the insured met his death while violating the law.

On the trial anew, judgment was rendered against the appellant, from which she prosecutes this appeal and contends that the court erred in the exclusion of certain testimony. She offered to show by the testimony of four witnesses that they were acquainted with her husband, the deceased, that they knew his mental condition at the time he engaged in the altercation with the town marshal of the town of Searcy, which resulted in his death and "that he was of unsound mind, temporarily insane and crazy on the subject of the controversy between him and the town marshal, at the time, and not capable of understanding the consequences of his acts, nor responsible for them."

The benefit association had the right to show that the insured met his death while engaged in a combat or in consequence of a violation of the law to avoid liability for the payment of the benefit in accordance with the terms of the contract, as already held.

A proper relation however must be shown to exist between the violation of the law and the death of the insured to make good the defense—that is that death followed as a natural and legitimate effect of such violation. Bacon Benefit Societies, section 339; *Insurance Co.* v. *Seaver,* 19 Wallace 531; *Murray* v. *New York Life*

Ins. Co., 96 N. Y. 614; *Bloom* v. *Franklin Life Ins. Co.*, 97 Ind. 478.

Under our law if the deceased was of unsound mind and not responsible for his acts in assaulting the marshal of the town by whom he was killed, he could not have been convicted of an offense if the combat had resulted differently, and the marshal been killed by him instead, and the authorities also hold in accordance with this view that the deceased must have met his death while voluntarily engaged in a violation of the law, in order to avoid the policy or benefit certificate on that ground.

An act can not be regarded as voluntary, where the person doing it does it under the control of an insane impulse which deprives him of the capacity to govern his own conduct in accordance with reason. *Newton* v. *Mutual Benefit Life Ins. Co.*, 76 N. Y. 426.

And if the insured was of unsound mind, insane, and not responsible for his acts at the time he was killed as the evidence offered tended to show, then he did not voluntarily violate the law, not being responsible for the consequences of his acts, because of his insanity, and the fact that he was killed in the difficulty which he provoked, was not such a violation of the law within the meaning of the contract, as would avoid it.

We have not found any case directly in point, but see no reason why it is not controlled by the same principle that prevents the death of the insured by his own hand when he is insane, from forfeiting his policy, providing it shall be void if the insured committed suicide.

In *Blackstone* v. *Standard Accident Insurance Co.*, 3 L. R. A. 486, it was held that where there was testimony sufficient to go to the jury on the question of the sanity of the insured at the time he came to his death by his own hands, that the policy was not forfeited under its terms, providing that it should be void if the insured committed suicide. See, also, *Charter Oak. L. Ins. Co.* v. *Rodel*, 95 U. S. 232.

The court erred in excluding the testimony and the judgment must be reversed therefor.

It is too late to raise the question now that under a clause in the policy, appearing to limit the grounds for contest thereof to two, not including the death of the insured while engaged in the violation of the law, that such provision can not be considered a defense, it having been held in the former opinion, which is the law of the case, that such provision of the by-laws became a part of the contract of insurance and constituted a defense to the suit.

The abstract herein is sufficient to raise the questions presented and it is stated in the brief that they were saved at the trial by proper objections, and exceptions, and also in a motion for a new trial filed, which was referred to in the brief.

For the error pointed out, the judgment is reversed and the cause remanded for a new trial.

FLUKE v. SHARUM.

Opinion delivered April 26, 1915.

1. FRAUDULENT CONVEYANCES—JUDGMENT CREDITOR—EXECUTION.—When the defendant, in a suit to set aside a conveyance, as made in fraud of a judgment creditor, is admittedly insolvent, plaintiff need not show an execution issued upon the judgment with a *nulla bona* return thereon.

2. FRAUDULENT CONVEYANCES—JUDGMENT CREDITOR—INSOLVENCY OF DEBTOR.—In a suit to set aside a fraudulent conveyance, it is not necessary to first obtain a judgment at law in order to prove insolvency, for insolvency may be established by any competent testimony, and only one suit is necessary to obtain relief.

3. FRAUDULENT CONVEYANCES—VOLUNTARY TRANSFER—PRESUMPTION.—A voluntary transfer of property by one in debt is presumptively fraudulent as to existing creditors, and if the debtor is insolvent or the gift will necessarily hinder, delay or defraud the donor's existing creditors, then it is conclusively fraudulent.

4. FRAUDULENT CONVEYANCES—INADEQUATE CONSIDERATION—VENDEE'S PARTICIPATION.—Mere inadequacy of price or consideration paid for lands alleged to be fraudulently conveyed is not sufficient to show

that the grantee participated in the grantor's fraudulent intent and is affected by it; it is only when the inadequacy of price is so gross that it shocks the conscience and furnishes satisfactory and decisive evidence of fraud that it will be sufficient proof that the purchaser is not *bona fide*.

5. FRAUDULENT CONVEYANCES—INADEQUATE CONSIDERATION—INTENT OF VENDEE.—Testimony showing the payment of a grossly inadequate consideration for the land of an embarrassed debtor is evidence affecting the good faith of the purchaser, from which it may be inferred, as a fact, that the purchaser knew of the fraudulent intent of his grantor, and thus assisted in the commission of the fraud.

6. FRAUDULENT CONVEYANCES—VOLUNTARY CONVEYANCE—HUSBAND AND WIFE.—A voluntary conveyance from a husband to his wife, held under the evidence to have been fraudulent.

7. FRAUDULENT CONVEYANCES—FORFEITURE OF LAND—RIGHT OF CREDITOR.—The rights of a creditor to follow the debtor's land will not be defeated by the act of the debtor in permitting the same to forfeit for taxes and procuring a relative to purchase the same, in order to defeat the creditor.

8. FRAUDULENT CONVEYANCES—HOMESTEAD.—A creditor can not complain of a voluntary conveyance by the debtor of his homestead, for the conveyance of his homestead, by one entitled thereto, can not be fraudulent as to creditors.

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

STATEMENT BY THE COURT.

Appellant brought this suit to set aside certain alleged fraudulent conveyances made by Sam Fluke to Abby Rebecca Anderson, whom he later married and to her, his wife.

Sam Fluke was indebted to Sharum upon a promissory note dated April 1, 1902, for $1,400 and interest, who brought suit in the circuit court thereon in December, 1906, and recovered a judgment in July, 1907, for $2,199.18, a copy of which was exhibited with the complaint herein.

It is alleged that on the 29th day of May, 1906, Sam Fluke conveyed to Abby Rebecca Fluke the south half of the northeast quarter of section 27, eighty acres, township 18 in range 1, east, for a consideration recited in the deed of $300, with the fraudulent intent to defeat plain-

tiff in the collection of his debt, that he had conspired with said grantee, who knew he was largely indebted at the time and in fact paid no consideration for the conveyance and permitted it to be made in a conspiracy with said Fluke, to cheat, hinder and delay plaintiff in the collection of his debt.

As to the northeast quarter of the northeast quarter of said section, it was alleged that Sam Fluke permitted same to forfeit for taxes for the year 1907, that he personally attended the sale of delinquent lands on the 8th day of June, 1908, and at the sale became the purchaser of said tract for $5.43, and caused the certificate of purchase to be issued to Jule Anderson, the brother of his then wife, Abby Rebecca Fluke. That he later caused said Anderson to transfer the certificate to his wife and on the 22d day of December, 1910, caused a tax deed to be issued by the clerk to his said wife for said tract, all of which, it is alleged was a fraudulent transaction made with the knowledge of his said wife in furtherance of the conspiracy to defeat plaintiff in the collection of his debt.

It is alleged further that Sam Fluke on May 1, 1909, while plaintiff's judgment was in force, fraudulently executed a deed to his wife, Abby Rebecca Fluke, for the southwest quarter of section 23, for a recited consideration of $700, which his wife knowingly accepted with the fraudulent intent to defeat the plaintiff in the collection of his debt.

It is further alleged that Sam Fluke and his wife had executed a mortgage to the New England Securities Company of Kansas City upon the southwest quarter of section 23 and the south half of the northeast quarter of section 27, to secure a pretended indebtedness of $1,200 and that said deed of trust was executed in furtherance of a conspiracy to defeat the plaintiff in the collection of his debt; that said company knew of the fraudulent conveyances from said Sam Fluke to his wife of said lands.

Defendants answered separately, admitted that the plaintiff had secured the judgment against Sam Fluke;

denied that the conveyance to Rebecca Anderson of the eighty acres on the 29th day of May, 1906, was fraudulent or in furtherance of a conspiracy to defeat the plaintiff in the collection of his debt; alleged the consideration paid therefor was adequate and plead the statute of limitations. Denied that the lands were allowed to forfeit and were purchased and conveyed to Abby Rebecca Fluke as alleged and that the last conveyance of the southwest quarter of section 23 was fraudulent and alleged that it was a *bona fide* sale for a consideration of $700, which was an adequate price for the lands at the time thereof and further that said lands were the homestead of defendants and had been since the 26th day of December, 1906, and pleaded laches.

It was also alleged that the mortgage executed upon the lands was a valid conveyance.

The mortgagee denied all the allegations of the complaint relative to the execution of the mortgage and that the same was in any respect fraudulent, and alleged that it was a *bona fide* purchaser without notice.

The testimony shows that the note was executed, the suit brought and judgment obtained at the time alleged; that Sam Fluke had no other property than the lands in controversy; that he conveyed the lands to Rebecca Anderson on the 29th day of May, 1906, the fractional southwest quarter of section 23 and the south half of the northeast quarter of section 28, for a consideration of $300, recited in the deed and which he testified was paid in cash. That this was some time before he married the said Rebecca; that she had very little property at the time of the marriage and got $600 later on the land out of which she paid him $100, the balance due. That the timber had been cut from the eighty acres of land and that all the land with the timber on it had only cost $5 an acre. Denied having permitted the land to forfeit for taxes and stated that he was out of money and could not help it; that the land was low and wet and he did not have the money with which to redeem it, and his wife had proposed the transfer of the certificate from her brother. Said the land was not worth more than $200 now and that

when it was forfeited it was not worth one-half that amount.

Stated, relative to the conveyance of the southwest quarter in May, 1909, there were two pieces of the land, one owned by his wife which he had conveyed to her before and one by him, all held by tax title, that the description was so indefinite you could not locate either tract and his wife wanted to borrow some money to pay off the other $600, so he made the deed for the other tract to perfect the description and so the money could be borrowed. That he got part of the $700 that was borrowed. He admitted he had no personal property at the time of the trial and was considerably in debt. Said he got the deed from the chancery court since the last conveyance to his wife of 100 acres, but it was contained in the southwest quarter conveyed. Stated also that he had lived on the southwest quarter of section 23 as his homestead for thirteen or fourteen years, and about seventy acres of it was in cultivation.

Several witnesses testified that the 160 acres, the southwest quarter of the section was worth—the woods land about $15 an acre and the cleared land, from $35 to $40 an acre.

Mrs. Fluke testified that she bought the lands conveyed to her before her marriage and paid $300 therefor, cash. She paid $200 that she had on hand, received from her father's estate and she was not at that time contemplating marrying Mr. Fluke.

Her testimony was unsatisfactory in explaining how she had gotten the money with which to pay the consideration. She refused to answer several questions. She did not answer any questions relative to the transfer of the certificate of purchase for the lands bought at the tax sale and said she did not remember how much she paid her brother for it, that she paid something, but did not remember how much; that she got some money after mortgaging the other lands.

The lands in controversy were shown to be worth from $20 to $30 an acre at the time of the trial. Some witnesses put the cleared land at as high a value as $30.

One witness testified that the value of the land in 1905 and 1906, was $10 and $15 an acre and that Sam Fluke desired to sell the lands in 1909 and priced them at $25 an acre.

A witness testified that he had asked Fluke about whether he had settled up with Sharum and Fluke replied he had fixed it so the old man could not get it. He had made the stuff over to his wife. That this conversation occurred after Fluke had married his present wife.

There is no testimony relative to the possession of the lands except one witness said he lived about three miles from the Flukes and did not know that Mrs. Fluke owned the land. This witness also said that he had heard Mr. Fluke talking about selling the lands and that he did not know of any lands in that vicinity that could be bought in 1905 and 1906 at $2.50 to $5 an acre, after the timber was cut therefrom.

The court found in favor of the plaintiff and rendered judgment for the recovery of the amount due on the judgment sued on and declared same a lien on all the lands in controversy, subject to the lien of the New England Securities Co., whose trust deed was held valid. That the conveyances from Sam Fluke to Rebecca Anderson and to Rebecca Anderson Fluke, his wife, were fraudulent and set them all aside; that by reason of such conveyances he rendered himself insolvent and that the southwest quarter of section 23, claimed as the homestead was worth more than $2,500 at the time it was transferred by Sam Fluke to his wife Rebecca Fluke, and that she had never at any time held adverse possession of any of the lands conveyed to her, but merely held them in trust for her husband. They were all made in furtherance of the conspiracy to defeat the plaintiff in the collection of his debt, as well as the other creditors of Sam Fluke and that the procedure permitting the forfeiture of the forty acres of land for taxes was but a subterfuge made with the fraudulent purpose of placing it beyond the reach of creditors

and decreed accordingly, from which decree appellants appealed.

J. J. Lewis, W. S. Pope and *S. A. D. Eaton,* for appellants.

1. While courts look with suspicion upon *voluntary* conveyances from husband to wife, yet where a valuable consideration passes from wife to husband such transfer is valid. 46 Ark. 542.

The first transfer antedated the marriage, and the burden is on appellee to show not only that the grantor was endeavoring to defraud creditors but that the grantee was cognizant of the fraud and participated therein. 49 Ark. 20; 64 *Id.* 184, 69 *Id.* 541; 17 *Id.* 146; 31 *Id.* 554; 41 *Id.* 316; 23 *Id.* 508; 33 *Id.* 762. The transfer must render the vendor insolvent. 12 Ark. 381. Mere inadequacy of consideration is not sufficient. 92 Ark. 248.

2. No fraud was shown in allowing the tract to be sold for taxes, nor in the transfer of the certificate of purchase. Kirby's Dig., § § 7105, 7114; 20 Cyc. 406.

3. A *bona fide* purchaser is entitled to protection. Eaton on Eq. 162, 7 L. R. A. 118. The second deed was made to cure error in description. 20 Cyc. 570.

4. The 100 acres was a homestead and the value did not exceed $2,500; therefore the sale was not fraudulent. 57 Ark. 242; 52 *Id.* 101, 493. Even if one transfer was in fraud of creditors, yet if others were free of taint they are valid. 20 Cyc. 411. The conveyance must be fraudulent when made. 18 Ark. 172, 123; 20 Cyc. 413.

5. As to the tax sale there was a plain remedy at law. 74 Ark. 161; 63 *Id.* 417; 66 *Id.* 488; 80 *Id.* 451.

6. Appellee is barred by limitations and laches. 36 Ark. 25; 54 *Id.* 641; Kirby's Dig., § 5056; 56 Ark. 601; 58 *Id.* 95; 84 *Id.* 1; Pom. Eq. Jur. 418; Eaton on Equity 305.

A. S. Irby, for appellee.

1. The husband's testimony amply shows his insolvency. 66 Ark. 489; 80 Ark. 447. It was unnecessary to issue execution on the judgment. 80 Ark. 447.

2. No laches are shown. 96 Ark. 441; 100 *Id.* 403; 70 *Id.* 371. There was no adverse holding of the property. The statute of limitations does not apply. 86 Ark. 281; 74 *Id.* 317; 76 *Id.* 509.

3. Adequate consideration must be affirmatively shown. 46 Ark. 542; 49 *Id.* 20; 64 *Id.* 184.

4. The tax forfeiture was simply the second step in appellant's fraudulent scheme. No consideration was paid.

5. The homestead was shown to be worth more than $2,500, and cases (57 Ark. 242; 52 *Id.* 101 and 493), cited do not apply.

6. Even though it was not shown that the first transaction was fraudulent at the time the conveyance was executed, yet prior and subsequent conduct and transactions are sufficient to show that it was in fact fraudulent and part of one scheme to defraud. 20 Cyc. 414; 20 Cyc. 412; 101 Ark. 573.

KIRBY, J., (after stating the facts). It is contended first that the testimony is not sufficient to show any knowledge upon the part of the grantee Abby Rebecca Anderson of Sam Fluke's fraudulent intention to defeat the payment of his debts by the conveyance of the land. It is true the conveyance was made eight months before the marriage of Sam Fluke to Rebecca Anderson and that the deed recites a consideration of $300 paid.

The great preponderance of the testimony shows however that that was an entirely inadequate consideration for the lands and from the statements of both Sam Fluke and Rebecca Anderson, who was Rebecca Fluke at the time of the trial, it is extremely doubtful if any consideration was paid at all. The parties to the conveyance later married and the other conveyances were made from Sam Fluke to his wife of all his other property, leaving nothing from which the creditors could make their debts. He was indebted to the appellee at the time of these first conveyances and evidently intended to defeat the collection of the debt by the different conveyances of his property and expressed a conclusion that he had done so to one of the

witnesses, saying he had "put his stuff in his wife's name so Sharum could not reach it."

(1) He was admittedly insolvent at the time this suit was brought to set aside the conveyances, and being so, it was not necessary to show an execution issued upon the judgment with a *nulla bona* return thereon.

(2) It is no longer necessary in suits to set aside fraudulent conveyances to first obtain a judgment at law in order to prove insolvency which can now be established by any competent testimony and only one suit is necessary, to obtain the proper relief. Section 6297, Kirby's Digest and *Euclid Ave. National Bank* v. *Judkins,* 66 Ark. 489.

(3) The rule is also that a voluntary transfer of property by one in debt is presumptively fraudulent as to existing creditors and if the debtor is insolvent or the gift will necessarily hinder, delay or defraud the donor's existing creditors, then it is conclusively fraudulent. *Miles* v. *Monroe,* 96 Ark. 531; *Brady* v. *Irby,* 101 Ark. 573.

(4) Mere inadequacy of price or consideration paid for lands alleged to be fraudulently conveyed, is not sufficient to show that the grantee participated in the grantor's fraudulent intent and is affected by it.

It is only "when the inadequacy of price is so gross that it shocks the conscience and furnishes satisfactory and decisive evidence of fraud, it will be sufficient proof that the purchase is not *bona fide*" as said by Pomeroy. *Hershy* v. *Latham,* 46 Ark. 550; *Beebe Stave Co.* v. *Austin,* 92 Ark. 248.

(5) The testimony of the grossly inadequate price paid for the property is evidence affecting the good faith of the purchaser from which it may be inferred as a fact that the purchaser knew of the fraudulent intent of his grantor and thus assisted in the commission of the fraud. *Hogg* v. *Thurman,* 90 Ark. 93; *Beebe Stave Co.* v. *Austin, supra.*

(6) Here is shown such a grossly inadequate consideration paid for the lands first conveyed, according to the great preponderance of the testimony, and the evidence tending to show any consideration paid at all is of

such an unsatisfactory and doubtful character, with the marriage of the grantee to the grantor following so shortly after the conveyance, and we are not able to say that the chancellor's finding that the conveyance was voluntary and fraudulent is clearly against the preponderance of the testimony.

(7) There is also sufficient testimony to sustain the chancellor's finding that the grantor allowed the tract of land conveyed to his wife by the clerk's tax deed, to be sold for taxes and purchased and the certificate issued to his wife's brother, who afterwards transferred it to her without any consideration paid or for a consideration paid by him with a fraudulent intent to evade the payment of appellee's judgment. It was but a subterfuge as shown by the testimony and no more valid as a conveyance to deprive the creditor of his right to resort to the land, than if it had been made directly by the debtor husband to his wife.

(8) There is a different question raised by the last conveyance of the southwest quarter of section 23, containing 160 acres, which was occupied by the debtor as his homestead at the time of the conveyance. A creditor can not complain of a voluntary conveyance by the debtor of his homestead, for the conveyance of his homestead by one entitled thereto can not be fraudulent as to his creditors. *South Omaha Nat'l. Bank* v. *Boyd,* 79 Ark. 215; *United States Fidelity & Guaranty Co.* v. *Smith,* 103 Ark. 145.

It is not questioned that the said southwest quarter of the section last conveyed, was the homestead of the debtor, Sam Fluke, at the time of the voluntary conveyance thereof to his wife in 1909, but only insisted that it was of the value of more than $2,500 at the time of such conveyance as the chancellor found. Seventy acres of the land were cleared and in cultivation and the testimony tends to show that the whole tract was worth from $20 to $30 an acre, the cleared land being worth $30. Some witnesses placed the valuation at $15 to $20 for the uncleared and $35 to $40 an acre for the cleared lands. One

witness testified that Sam Fluke himself priced the whole tract at $25 an acre in 1909.

The debtor was entitled to a homestead not exceeding 160 acres of land with the improvements thereon to be selected by him, if the same did not exceed in value the sum of $2,500 and in any event to eighty acres, without regard to value. Section 3899, Kirby's Digest. Section 4, article 9, Constitution of 1874.

The last conveyance being of the homestead was valid without regard to the intent of the debtor or the fact that it was voluntarily made unless the lands exceeded in value the sum of $2,500 and valid as to eighty acres thereof in any event, and to so much more as would not make the acreage claimed of value greater than $2,500.

The chancellor evidently found that the whole quarter section last conveyed was worth more than the debtor was entitled to claim as a homestead and therefore set the conveyance aside as fraudulent, allowing him thirty days in which to make his selection of a homestead. The better practice doubtless would have been to have refused to set aside the conveyance as to eighty acres of the land or of so much more of the tract as the evidence showed to have been worth only $2,500 and decreed the sale of the other. The result will necessarily be the same upon the selection of the homestead and no prejudicial error could have resulted from the decree. Neither can we say that the chancellor's finding that the grantee had not held the lands conveyed adversely is not supported by the testimony. There was no evidence tending to show adverse possession of the lands by her in fact. *Martin* v. *Gregory*, 86 Ark. 281; *Baldwin* v. *Williams*, 74 Ark. 317.

Affirmed.

KAHN v. WILHELM.

Opinion delivered April 26, 1915.

1. WORDS AND PHRASES—"SALOON" DEFINED—LEASE.—In a lease which provided that the lessee "will use said premises as a hotel and saloon, and for no other purpose whatever," the word "saloon" held to mean a place where intoxicating liquors were to be sold.

2. LEASES—LIMITATION UPON USE OF PREMISES.—A lease provided that the lessee "will use said premises as a hotel and saloon, and for no other purpose whatever." *Held*, the phrase should be construed as a lease for a single purpose, and that when it became unlawful to operate a saloon for the sale of intoxicating liquors, on the premises, by reason of a city ordinance prohibiting the same, that the entire contract of lease was rendered void, and it is immaterial that the lessor was willing that the premises should be used for other purposes than those mentioned in the written lease.*

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

STATEMENT BY THE COURT.

The appellant leased to appellee Wilhelm a building situated in the city of Argenta, for the term of five years, beginning January 1, 1913, at the rate of $165 per month, payable in advance; and appellee Schneider guaranteed the performance of the contract on the part of Wilhelm. For reasons hereinafter stated Wilhelm declined to pay rent, and Schneider was sued in his capacity of guarantor.

The suit was based upon a written lease, which, contained the following provisions:

"And the said party of the second part covenants that he will use said premises as a hotel and saloon, and for no other purpose whatever, and that he specially will not let said premises or permit same to be used for any unlawful business or purpose whatever, * * * under penalty of a forfeiture of all his rights under this lease, at the election of the party of the first part."

The lease further provided: "In the event the lessee shall do anything herein prohibited to be done, justifying the cancellation of this lease by the lessor, he (the lessee) shall be liable for all rents and profits lost or caused to be lost to the lessor by reason of his acts whether the said right of cancellation be exercised or not by the lessor."

"It is further agreed that in the event Pulaski County should vote dry at the election in September, 1916, this lease shall terminate December 31, 1916."

*See Section one, Act 418, page 1106, Session Laws 1907.

The City Council of Argenta passed an ordinance December 8, 1913, the validity of which is not questioned, defining the territory in which license for the sale of intoxicating liquors would be granted, and under this ordinance it became unlawful to operate a saloon in the leased premises.

On the 1st of January, 1914, Wilhelm offered to surrender possession of the premises, but the offer was not accepted, and this suit was brought for the rent of January, 1914, upon Wilhelm's refusal to pay the rent for that month.

The cause was heard by the court by consent, sitting as a jury, and this appeal has been duly prosecuted from the finding and judgment of the court below that appellee was not liable for any rent accruing after the 1st of January, 1914.

Morris M. and *Louis M. Cohn,* for appellant.

1. The lease was not avoided by the Argenta ordinance, nor by the "Going Act." There is only one provision for the termination of the lease, *i. e.,* that Pulaski County should vote dry, etc. The doctrine of "*expressio unius est exclusio alterius*" clearly applies. 2 Wharton on Cont., § 674; 2 Parsons on Cont., p. 515. An express provision for forfeiture precludes all other causes. 196 U. S. 1; 48 S. W. 1043; 33 N. Y. Supp. 19; 102 Ark. 1, 8; 88 *Id.* 561; 99 *Id.* 291; 93 *Id.* 519; 91 *Id.* 92; 80 *Id.* 374; 79 *Id.* 235; 62 *Id.* 597, and many others.

2. A lease of premises for saloon purposes is not avoided by a subsequent failure to obtain license, or where the sale of liquor subsequently becomes unlawful. 99 Tex. 79; 88 S. W. 197; 113 Pac. 788; 133 Ga. 776; 26 L. R. A. (N. S.) 498; 66 S. E. 1081; 131 Ga. 840; 63 S. E. 631; 1 A. & E. Ann. Cases, 1397; 74 S. E. 279; 161 Ala. 620; 23 L. R. A. (N. S.) 496; 50 So. 83.

The lessor alone can avail himself of such a covenant. 52 L. R. A. (N. S.) 718, and note; 16 Tex. 1; 55 N. Y. 511; etc.

3. A saloon does not always mean a place where intoxicating liquor is sold. It is only where the lessee is

deprived without his fault of the use of the premises for *any purpose* that rent ceases.

It is the duty of the lessee to provide for the contingency of a license being refused. 10 Misc. 718; 31 N. Y. Supp. 818; 132 Pa. 56; 18 Atl. 1069; 41 La. Ann. 281; 6 So. 529; 18 R. I. 770; 30 Atl. 966; 208 Mass. 265; 94 N. E. 307; 131 Pac. 83; 74 S. E. 279; 161 Ala. 620.

4. There is nothing to show that a hotel can not be operated and a saloon for soft drinks, cigars, etc., kept for sale, or a restaurant run, etc. Cases *supra*. See, also, 23 L. R. A. (N. S.) 496; 50 So. 83; 1 A. & E. Ann. Cases 1397, and many others.

Carmichael, Brooks, Powers & Rector, for appellee.

1. The language of the lease itself defines the term saloon according to the meaning and intention of the parties. Both contemplated a place where intoxicants were to be sold. A contract is made invalid by the subsequent enactment of police regulations which render its performance illegal. Performance of the contract having become unlawful, it follows the promise is avoided. 123 U. S. 623; 158 Mich. 595; 133 Am. St. 339. Where an act contracted for is rendered unlawful by statute before the expiration of the time for performance, the obligation is thereby discharged. 158 Mich. 595; 123 N. W. 24; 39 Mich. 581; 33 Am. Rep. 430; 1 Phila. 106; 62 Conn. 378; 21 L. R. A. 58; 36 Am. St. 350; 26 Atl. 479; 5 Cow. 538; 85 Ga. 1; 21 Am. St. 135; 11 S. E. 442; 128 Ind. 555; 12 L. R. A. 652; 28 N. E. 76; 4 N. Y. 411; 98 N. W. 666; 43 Am. Dec. 499; 13 La. Ann. 599; 1 Salk. 198; 3 Wash. C. C. 276; 19 L. R. A. (N. S.) 964; 60 So. 876.

2. If the landlord is an affirmative party to some unlawful act he can not enforce the contract. 103 Ark. 114; 85 *Id.* 111.

3. But we do not rely upon the acts of individuals, we rely upon the law. 60 So. 876. This is the latest case we have found. The Argenta ordinance was not in existence when the lease was made. For full discussion of all the authorities see, 60 So. 876.

SMITH, J., (after stating the facts). The controlling question in the case is whether or not the ordinance of the City of Argenta, making it unlawful to sell intoxicating liquors in the leased premises, operated to cancel the lease. It will be observed that the language of the lease is that Wilhelm covenants that he will use said premises as a hotel and saloon, and for no other purpose whatever, and that he specially will not let said premises, or permit same to be used for any unlawful business or purpose whatever.

(1) It is first argued that the word "saloon" does not necessarily mean a place where intoxicating liquors are sold, and that the city ordinance prevents the operation only of a saloon for the sale of intoxicating liquors. It is true that the word "saloon" does not always mean a place where intoxicating liquors are sold, but there can be no doubt that such was the meaning contemplated by the parties to this contract. This is shown by the provision of the lease cancelling it in the event Pulaski County should vote dry at the election in 1916. This election, of course, refers only to saloons in which intoxicating liquors are sold, as no other kind of saloons could be affected by that election.

But it is insisted that, even though it be conceded that the word "saloon," as here used, means a place where intoxicating liquors are sold, this would not avoid the lease, because the keeping of a saloon was not the only business authorized by the contract; and for the further reason that the parties expressly named a condition upon which the lease should be terminated, towit: That Pulaski County should vote dry at the general election in 1916, and that having named one condition which should operate to cancel the lease, the parties thereby agreed that the lease should not otherwise be cancelled. This last contention was based upon the doctrine of *expressio unius est exclusio alterius.*

(2) We think the important question in the case is whether or not the building was leased for a single purpose, that purpose being the operation of a hotel and saloon; and we think the lease should be so construed. The

lease does not provide for keeping a hotel *or* saloon, but for a "hotel *and* saloon."

It is not necessary that a lease specify the use to be made of the property let. In 24 Cyc. 1061, under the title of "Landlord and Tenant," it is said: "Where the contract of lease is silent on the subject, the lessees have by implication the right to put the premises to such use and employment as they please, not materially different from that in which they are usually employed, to which they are adapted, and for which they were constructed. The law, however, implies an obligation on the part of the lessee to use the property in a proper and tenant-like manner, without exposing the buildings to ruin or waste by acts of omission or commission, and not to put them to a use or employment materially different from that in which they are usually employed, or apparently violative of the spirit and purpose of the lease as such spirit and purpose is evidenced by the recitals therein."

Discussing restrictions in leases as to mode of use, the same authority, page 1062, says: "Express condition or covenants are frequently embodied in leases to the effect that the premises shall only be used for purposes specified therein, and such covenants run with the land. A recital in a lease of the purposes for which the demised premises are let is often held to constitute an express covenant on the part of the tenant to use them for no other purpose. Where, however, such restrictive conditions or covenants are incorporated into a lease, the general rule of interpretation is that they should be so construed as to carry into effect the intention of the parties, and when considered in connection with other parts of the instrument, will tend to support, rather than defeat it. * * * "

The parties to this lease agreed and covenanted that the property should be used as a hotel and saloon, and for no other purpose whatever, and, in construing the lease, we have no right to strike out one of the terms there employed. It is argued that the building could be used for a hotel, even though no saloon was kept there, and that a temperance saloon could be kept, where cigars and non-

intoxicating drinks could be bought; and further that the property has other usable value. But we think the answer to this contention is that this is not a general lease, but a special one, for the purpose of operating a hotel and saloon. It is alleged, and there was proof to support the allegation, that the landlord does not object to the tenant making other uses of the property. But we can not consider the landlord's present inclination in determining the meaning of his written contract. His permission for a different use is essential and it would be a modification of the contract to read into it the landlord's changed purpose. And in construing this lease, we can not say that the stipulation of the use to be made of the building was solely for the benefit of the landlord.

Through the industry and research of opposing counsel, we have had the benefit of citation to many cases on this subject; but we shall not undertake to review these cases in this opinion. The cases are numerous and are conflicting, and it must be conceded that there are courts of the highest authority which sustain appellant's view of the law. But we think the better rule is announced by those courts which hold such contracts to be void, when their performance becomes unlawful.

In the case of *Hooper* v. *Mueller,* 158 Mich. 595, 123 N. W. 24, a certain building in Alma, Michigan, with the hotel furniture and fixtures, was let for a term of eight years, to be occupied for hotel and saloon purposes. The lease contained the following clause: "The said first parties further agree that in case they are unable to furnish, that is secure, for the said second parties, or the tenant of said parties, two sufficient bondsmen required by law in case of retail dealers in malt and spirituous liquors, at second parties' own proper expense, however, then this lease shall be and become void." Thereafter, under the operation of the local option law, the sale of intoxicating liquors was prohibited, and upon suit for the rent of the building after the prohibitory order became effective, the trial court held that the lease became void and nonenforceable on the date the prohibitory order became effective. It was there contended that the contract did not

provide for its abrogation in the event of the adoption of local option, and, consequently, the law would not operate to avoid it on the happening of that event. But the court there said:

"It is not argued by either party that the contract was not such a one as the parties at the time could not undertake to perform, and which could not be enforced. The local option law which went into effect in that county during the term of this lease, rendered the performance of the contract on the part of plaintiffs impossible. They had agreed that in case of failure to furnish and secure bondsmen for defendants as retail liquor dealers, the lease should be and become void. It may well be said that they contracted with reference to this contingency which has arisen, as well as to any other circumstance which would intervene, either from their own acts or otherwise. This was a part of the consideration which induced defendants to enter into the lease.

"In a recent well-considered case decided by the Supreme Court of Maine, the question involved in the case at bar was before the court. It was held that the enactment of a law after a lawful contract is made which renders its performance unlawful, discharges the contract. *American Mercantile Exchange* v. *Blunt,* 102 Me. 128, 120 Am. St. Rep. 463, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 10 Em. & Eng. Ann. Cas. 1022, notes and cases cited. In the case note, it is said: 'The authorities are almost unanimous in holding that, where the act contracted for is rendered unlawful by the enactment of a statute before the expiration of the time for performance, the obligation is thereby discharged,' citing, among other cases, *Cordes* v. *Miller,* 39 Mich. 581, 33 Am. Rep. 430."

In the case of *Jamieson* v. *Indiana Natural Gas & Oil Co.,* 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652, a bill of complaint was filed by a stockholder seeking an injunction, in which it was alleged that a contract had been entered into by his corporation with a construction company for building and operating a pipe line for transportation of natural gas, which had become incapable of per-

formance by reason of a statute passed, after part performance, which prohibited the transportation of gas at as high pressure as that provided for in the contract; and the syllabus in that case is as follows:

"A contract is invalidated by the subsequent enactment of police regulations which render its performance illegal as to one of the parties."

An extensive case note reviews a large number of cases.

Another case which discusses the principle which we think should control here is that of *Heart* v. *East Tennessee Brewing Co.*, 19 L. R. A. (N. S.) 964, 113 S. W. 664. In that case a certain house situated in Knoxville, Tenn., had been leased for a term of eight years, to be used as a saloon or place for the sale of intoxicating liquors, and by an act of the General Assembly of that State, it thereafter became unlawful to sell intoxicating liquors in said city. The chancellor sustained a demurrer to a suit for the rent which accrued thereafter, and, in sustaining that action, the Supreme Court of Tennessee, speaking through Shields, J., said:

"There is no error in the action of the chancellor. When the contract was made, the purpose for which the property was leased, the sale of intoxicating liquors in Knoxville—was lawful, and the lease valid and enforceable. Afterward, that purpose was made unlawful by the acts of the General Assembly above referred to, and thus, by operation of law, the lease became and is void and unenforceable at the instance of either party."

Many cases were cited in that opinion, and among other things, it was there said:

"It is a principle of general application that all contracts are void which provide for doing a thing which is contrary to law, morality, and public policy. * * * It has been applied to contracts of this character, and held for that reason, that the rent contracted to be paid could not be collected."

"It is not necessary in this case to determine whether or not the contract contained in the lease restricts the use of the property for the sale of intoxicating liquors.

It was the purpose of both lessor and lessee, as clearly expresesd in the instrument, that it should be used as a saloon, and this being made unlawful by law, the contract is no longer enforceable."

One of the cases strongly relied on by appellant is that of *O'Byrne* v. *Henley,* 23 L. R. A. (N. S.) 496, 50 So. 83. The lease in that case provided for the occupation of the premises as a saloon, and not otherwise. The court there discussed the meaning of the word "saloon," and held that this word will not be understood, as a matter of law, to mean a place where intoxicating liquors only were sold, and not a place for the sale of soda water, etc., and it was there said that there had been only a partial, and not a total, destruction of the business for which the premises were leased after the prohibitory law became effective which prevented the operation of a saloon for the sale of intoxicating liquors. That the lessee could have continued to use the premises as a saloon, though he could not have sold intoxicating drinks or beverages, and after reviewing a number of cases, the court reached the conclusion expressed in the syllabus as follows:

"A lease of property solely for saloon purposes is not terminated by the taking effect during the term of a prohibitory liquor law, where, by construction of the parties, the right was conferred upon the lessee of selling upon the property nonintoxicating beverages and tobacco, so that the right of the lessee was not totally destroyed."

A later case by the same court is that of *Greil Bros.* v. *Mabson,* 60 So. 876, 179 Ala. 444. The lease in that case provided "that the parties of the first part have leased * * * the bar room and fixtures known as the Windsor Hotel Bar, and located in the Windsor Hotel building on Commerce Street, for occupation as a bar, and not otherwise." The complaint in that case set out the facts stated above, and alleged the passage of a prohibitory law, which made the sale of intoxicating liquors unlawful in the State of Alabama. A demurrer was interposed to the complaint, which raised the question of the sufficiency of the allegations of the complaint of incapacity to use the building for other purposes than the sale of intoxicating

liquors, in that it was not shown that the passage of the prohibitory act destroyed or deprived the lessee of the beneficial use of the premises, and that it was not alleged in the complaint that the lessor had declined or refused to permit the lessee to use the premises for other legitimate purposes, or that the lessor had consented to an abandonment of the premises. The opinion in that case called attention to the fact that the lease included the bar room and fixtures inseparably and provided that the room was to be occupied as a bar, and not otherwise, and that the lessor was bound under the contract to have permitted the use of the property as a bar, and the lessee was prohibited from using it for any other purpose. After defining the terms "bar" and "barroom," the court said:

"It is therefore evident that the main, and, indeed, the sole, purpose for which the property was leased was that it should be used as a place for selling intoxicating liquors. Therefore, did the said business become totally prohibited by the subsequently enacted State prohibition law? We think that such was the result, and that the said prohibition law forbade the very business and purpose for which the property was leased. The general rule is that, where the performance of a contract becomes impossible subsequent to the making of same, the promissor is not thereby discharged. 9 Cyc. 627. But this rule has its exceptions, and these exceptions are where the performance becomes impossible by law, either by reason of a change in the law, or by some action or authority of the Government. It is generally held that, where the act or thing contracted to be done is subsequently made unlawful by an act of the Legislature, the promise is avoided. Likewise, where the performance depends upon the continued existence of a thing which is assumed as a basis of the agreement, the destruction of the thing by the enactment of a law terminates the obligation."

Without reviewing in detail the decisions of the various courts upon this subject, it may be said that we have a statute on the subject of leases of buildings for use in connection with the unlawful sale of intoxicating liquors of a kind which we have not found referred to in any of the

opinions which have been called to our attention on this subject. This is Act No. 418 of the Acts of 1907, found on page 1106 of the Acts of the General Assembly for that year.

The purpose of this act was to aid in the suppression of the unlawful sale of intoxicating liquors, and, as a means to that end, it is made unlawful for one to lease a building for that purpose, and under the conditions stated, the landlord is made guilty of a misdemeanor who permits the illegal sale of intoxicating liquors in his building, and the act cancels the lease where the liquor law is violated.

Performance of the contract having, therefore, become unlawful, it must necessarily follow that no action will lie to compel its performance, and the judgment of the court below is therefore affirmed.

McCULLOCH, C. J., dissenting. I find no fault with the court's statement of the principle, as an abstract proposition of law, that "a contract is invalidated by the subsequent enactment of a police regulation which renders its performance illegal as to one of the parties," but that principle is not, in my judgment, applicable to the contract now under consideration. Such a construction of the contract should be adopted as will obviate a forfeiture or abrogation, if that construction be fairly within the meaning of the language used. The clause concerning the use of the leased premises was intended merely to permit the use for the purposes named and to restrict the use to that extent. It was manifestly not intended as a covenant to use the premises for those purposes—certainly not for both purposes—the operation of a saloon and a hotel. There is nothing in the contract itself nor in the evidence in the case to show that the lessor was interested in that particular use of the premises. Therefore, it would be a very strained construction of the contract to hold that it was a covenant on the part of the lessee to so use the premises. If any doubt is felt on that point, it ought to be dispelled on consideration of the express stipulation of the contract that "in the event Pulaski County should vote

dry in September, 1916, this lease shall terminate December 31, 1916." If the parties meant to create an absolute obligation on the part of the lessee to operate a saloon on the premises, and to absolve him from that obligation whenever its performance should become unlawful, they would not have confined themselves to that stipulation on the subject, for they are presumed to have known at the time the contract was entered into that the performance of such an undertaking might be rendered illegal by the failure of the electors to vote for license at the election in September, 1914, or by a majority of the adult inhabitants in that locality petitioning out the sale of liquor at any time under the "three-mile" law.

Treating the contract, therefore, as one merely permitting the use of the premises for the operation of a hotel and as a saloon, and restricting the occupancy to those uses, I do not think the principle referred to should be applied. Under that state of the case, it can not be said that the contract has been subsequently invalidated by operation of law. The contract is still valid notwithstanding the subsequent enactment of the regulation restricting the use of the premises so as to prohibit the operation of a saloon at that place. That part of the contract specifying the use to which the premises might be put is separable unless the contract be treated as a covenant on the part of the lessee to use the premises for the purposes named. The contract permits the use of the premises as a hotel and as a saloon, and, of course, extends to either one or both of the specified uses. The use of the premises for either one of the specified purposes would be within the letter of the contract. The test is this: Would the lessee be within his contractual rights in using the premises for the operation of a hotel without also operating a saloon? If so, he is not absolved from the obligation of the contract by reason of the fact that the new regulation enacted by the city council renders it unlawful for him to operate a saloon at that place. In order to hold otherwise, it would be necessary to construe the contract as an affirmative undertaking on the part of the lessee to use the premises as a saloon as well as a hotel, but

I do not understand the court to go that far—at any rate, it is not tenable to assume that position. There is some conflict in the authorities on this subject, but none of them (except the case of *Heart* v. *East Tennessee Brewing Co.,* which is referred to later), go to the extent of holding, as this court does in the present case, that where the contract does not restrict the use of the leased premises to one purpose, is it invalidated by a subsequent enactment prohibiting the use for one of several purposes specified. The great weight of authority is, I think, to the effect that unless there is an affirmative undertaking on the part of the lessee to make a specified use of the premises—that is to say, unless the operation of the specified business is a part of the contract—the subsequent enactment of a police regulation prohibiting the use does not of itself abrogate the contract. The cases are cited on the briefs, and it is only necessary to quote from a few of them to show the state of the law on that subject.

The case of *Houston Ice & Brewing Co.* v. *Keenan,* 99 Tex. 79, 88 S. W. 197, involved a rental contract which provided that the leased premises should be used only for "saloon purposes," and subsequently the sale of intoxicants was, by vote of the people under the local option law, prohibited at that place. The lessee sought to escape the payment of rent, but the court, in holding him liable notwithstanding the fact that it had become unlawful to use the premises for the purposes named in the contract, said: "Appellee had no interest in the business to be conducted in the leased building, and appellant knew that, by a vote of the people under the existing statute referred to, the 'saloon business,' which included the sale of intoxicating liquors, might be prohibited before the beginning of the lease term. This was a probable contingency which an ordinarily prudent man should have foreseen and provided for in his contract, and, having failed to so do, he took the risk upon himself, and must abide the consequences."

In *Goodrum Tobacco Co.* v. *Potts-Thompson Liquor Co.,* 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. (N. S.) 498, there was a lease contract which stated that "the purpose

of this lease is for the operation by second party of a general retail liquor business," and the lessee abandoned the premises and refused to pay rent after the sale of liquor was prohibited by statute. The court, in disposing of the controversy, said: "We do not deem it necessary for the decision of this case to decide whether the clause that 'the purpose of this lease is for the operation by second party of a general retail liquor business,' denotes only permission to conduct that particular business, or restricts the tenants from devoting the premises to other lawful beneficial use. In either event, the tenant would not be relieved from the payment of rent."

In *Teller* v. *Boyle,* 132 Pa. 56, the facts were that the lease contract contained a covenant that the lessee would not permit the premises to be occupied otherwise than as a saloon and dwelling, and it became impossible to operate a saloon by reason of the fact that the court of quarter sessions refused to relicense the lessee to sell intoxicating liquors. It was held that the lessee was responsible for rent, notwithstanding the facts stated, and the court said: "If the lessor were insisting that his lessee should sell intoxicating liquors, and claiming the right to forfeit the lease because he refused to comply, it would doubtless be a good defense to say that he was forbidden by law to sell; but that is not this case. The license was a matter with which the lessor had nothing to do. The risk of obtaining it was assumed by the lessee; and that risk, as he must have known, depended on many contingencies, such as public necessity, character and conduct of the applicant."

In *Gaston* v. *Gordon,* 208 Mass. 265, the facts were quite similar to those in the *Pennsylvania* case, *supra,* and the Massachusetts court reached the same conclusion as to the law. The court, in stating its conclusions, said: "There is nothing about the lease to raise the inference that the parties intended it to be subject to an implied condition that the defendant should procure a license. On the contrary, there is much to lead to the opposite conclusion. It is elaborate in all its details. * * * The lease seems to be a studied effort to put into written phrase

every consideration which was a part of their agreement. It was apparently an intelligent attempt to express their contract in such a way and with such fullness that nothing could be left uncertain. * * * The lessee has bound himself in unmistakable language to pay the rent without any qualification dependent upon his failure to obtain the necessary authority from public officers. Although this mischance renders it impossible for him to make the valuable use of the property which was contemplated, that was a contingency which ought to have been foreseen, and some anticipatory provision of partial or entire exoneration from liability inserted in the lease if such was the intention of the parties."

The theory upon which the rule rests is that the lessee, who voluntarily takes upon himself an unconditional obligation to pay rent, is not excused from such payment merely because he is prohibited by law, or by any agency other than the lessor himself, from using the premises. The principle was stated by Chancellor Kent as follows: "If a party will voluntarily create a duty or charge upon himself, he ought to abide by it when the other party is not in fault, and when he might have provided, if he had chosen, against his responsibility in case of such accidents." 3 Kent. Comm. 467. That principle finds peculiar force in the present case where the parties themselves have expressly stipulated that the lessee shall be exonerated from liability for rent in one contingency (*i. e.*, that of a majority vote against license in September, 1916), and under the maxim *expressio unius est exclusio alterius,* the presumption arises that they did not intend that the lessee should, under any other circumstances, be excused. *Hope Spoke Co.* v. *Maryland Casualty Co.,* 102 Ark. 1; 2 Wharton on Contracts, section 674.

There are only two cases which seem to support the conclusion reached by the majority, and they are cited in the opinion. *Heart* v. *East Tennessee Brewing Co.,* 121 Tenn. 69, 19 L. R. A. (N. S.) 964; *Greil Brothers* v. *Mabson,* 179 Ala. 444, 60 So. 876. The Alabama case, however, distinguishes a former decision of that court (*O'Byrne* v. *Henley,* 161 Ala. 620) which is directly

against the decision in the present case. Both of those cases cited by the majority are distinguishable from the present one in that a single use of the premises was specified. In the present case, there are two uses specified, and, as it clearly appears to me, the contract does not treat them as inseparable uses. Those cases are also distinguishable from the present one in that the parties to the contracts did not undertake to specify any circumstances under which payment of rent would be excused, and no presumption arose from the expression of one excuse against an intention to exclude others. The maxim *expressio unius est exclusio alterius* did not, in other words, arise. The Tennessee case stands alone, and, in my judgment, is not supported by any other authority.

My conclusion, therefore, is that the court has misinterpreted the law and rendered a decision which is neither sound upon principle nor supported by the weight of authority.

HOLIMAN v. ROUSH.

Opinion delivered April 26, 1915.

SALES—RESERVATION OF TITLE—WAIVER.—A vendor of chattels waives a reservation of title when he consents to the execution of a mortgage thereon by the vendee, at least as to the mortgagee and those claiming under him, and when, in an action of replevin, the issue of waiver of title is raised, the issue should be submitted to the jury.

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

STATEMENT BY THE COURT.

The appellee sued the appellants in replevin for certain machinery used in conducting a cotton gin, sawmill and corn mill. He alleged that he contracted to sell the machinery to Protho and W. W. Holiman, who were to conduct the business under the firm name of Protho & Holiman; that the interest of Protho passed into the hands of Holiman, by successive sales thereof through

different parties; that the machinery was taken into the possession of one J. A. Greer under a mortgage which had been executed to him; that J. A. Greer sold to W. H. Greer, who was now in possession of the machinery; that the successive vendees knew that appellee had contracted to sell the machinery to Protho & Holiman for the sum of $2,600 and that he had retained title in the machinery until the purchase price had been paid. He alleged that there remained $696.65 due on the original purchase price and that the title to the machinery was still in the plaintiff, and that he was entitled to the possession of the same. He alleged that he had been damaged in the sum of $1,000 for the unlawful detention of the machinery.

The answer denied the allegations of the complaint, and set up that appellee and one H. B. Greer bought the machinery from one Dupriest on a credit, agreeing to pay therefor the sum of $2,100, for which sum they executed their notes; that Dupriest reserved the title until the purchase money was paid; that Greer sold his interest to appellee and appellee assumed the payment of the purchase money notes; that appellee turned the property over to Holiman & Protho, who were to pay themselves $1 per day and pay the indebtedness and afterward pay appellee $500; that Protho sold his interest to Goodman, and that Goodman and Holiman executed a mortgage to J. A. Greer, dated July 19, 1911, for $696.40, evidenced by a note which W. H. Greer signed as surety, which money was used in paying off the original purchase money owing from Holiman to Dupriest; that Holiman afterward sold the machinery to W. H. Greer for the sum of $500, which money was to be applied on the note of $696.40 held by J. A. Greer.

Appellee testified that he bought the machinery in controversy from Dupriest and was to pay him $2,100 for it; that he sold the same to Holiman and Protho, they assuming to pay him $500 and appellee's indebtedness to Dupriest, making the purchase price $2,600 agreed to be paid by appellee's vendees for the machinery. The notes appellee executed to Dupriest, on which Greer was surety,

were not paid at the time appellee sold the machinery to Holiman & Protho, there being over five hundred dollars due on the same. The total indebtedness due on the machinery at the time appellee sold the same to Holiman & Protho would not exceed $1,700. Appellee entered into a contract to sell to Holiman & Protho in the fall of 1912. He knew in September, 1912, that his vendees had mortgaged the property. He stated that he had no recollection of notifying Greer that he had sold the machinery with the understanding that his vendees were to pay him out of the net earnings of the machinery. The appellee's vendees never executed any notes. It was agreed, however, at the time he sold them the property that they would sign a copy of the note appellee had executed to Dupriest. The amount of the indebtedness that appellee's vendees agreed to assume was $1,558.12.

Witness Protho, on behalf of appellants, testified that he and Holiman bought the machinery from appellee with the understanding that the machinery was to pay for itself. They were to deduct from the net earnings $1 a day for their work and pay the balance on the purchase price until it was paid out. There was no agreement with the appellee that he should reserve the title. They agreed to assume the amount of appellee's indebtedness to Dupriest, towit, the sum of $2,600, provided that amount was earned by the machinery. Witness sold his interest to Goodman in 1910.

W. W. Holiman testified that he and Protho purchased the machinery from appellee and were to assume the payment of the purchase money to Dupriest and to pay appellee, in addition, the sum of $500; that the debts they assumed had been paid. He paid part of the Dupriest note. He borrowed $900 from Greer and paid $500 of that amount on the Dupriest note and $250 on a new press, after talking with appellee about it. On March 1, 1912, they had a settlement with appellee and there was shown to be due him a balance of $696.65. Witness offered to turn the machinery over to appellee and he would not

take it back because he did not want to pay the indebtedness that was against it.

Goodman testified that he and Holiman executed a mortgage on the machinery to J. A. Greer.

J. A. Greer testified that he talked with appellee and appellee told him he had a note against the machinery that would come in ahead of his mortgage; that on account of having such mortgage he had conversations with appellee concerning it and he never made any claim of having reserved title when he sold the machinery to Protho & Holiman. Witness never heard of appellee's claiming title until this suit was instituted. Appellee knew that witness had a mortgage and wanted witness to foreclose it. Witness advanced to Goodman and Holiman money which they stated they were going to pay on the purchase money note of appellee to Dupriest for the machinery. Witness met appellee, who informed witness that he was going to bring this suit and wanted witness to work up a compromise, and told witness that he would give him $400 if witness would release his mortgage.

The appellant, W. H. Greer, testified that the machinery was turned over to him by Holiman on a debt that Holiman was due him. He knew at the time that Holiman owed appellee on the machinery. Witness was surety on appellee's note to Dupriest.

In instructions given at the instance of appellee, over objections of appellants, the court told the jury, in effect, that if they found from the evidence that appellee contracted to sell the machinery to Protho & Holiman and at the time reserved title or ownership until he was paid, and if they found appellee had not been paid, then the jury should find for the appellee, even though they should find that the machinery, since said time, had been sold or mortgaged.

Among other instructions, the court gave, at the instance of appellants, the following:

"4. The jury are instructed that although you may find from the evidence that the plaintiff at the time he sold

the property to Holiman & Protho reserved the title in himself until the payment of the purchase money, yet, if you further believe from the evidence that the property was delivered to the purchasers, and they afterward mortgaged the same in good faith to secure money to pay the indebtedness existing against it or a part thereof, and the said plaintiff, after full knowledge of the execution of said mortgage, made no objection to the same, but afterward demanded of Mr. Greer, who was the holder thereof, that he proceed to foreclose same, then this would be a ratification upon his part of the execution of said mortgage, and your verdict will be for the defendants."

The court refused to grant appellants' prayer No. 6, as follows:

"The jury are instructed that even though you may find from the evidence that the plaintiff reserved title in himself to the property in controversy until the sale was paid for, yet if you find from the evidence that the defendants, Holiman and Goodman, mortgaged said property to J. A. Greer for money with which to pay off the Dupriest note, or if the said plaintiff received the benefits from the money so derived from said mortgage, and knew or consented to said mortgage, then your verdict will be for the defendants."

Appellants duly excepted to the ruling of the court in refusing to grant its prayer No. 6, and make this one of the grounds in its motion for a new trial. Appellants also make the giving of appellee's prayers for instructions above grounds in their motion for a new trial.

The jury returned a verdict in favor of the appellee "in the sum of $696.65 at 8 per cent interest from March 1, 1912, or the recovery of the machinery in controversy." Judgment was entered in favor of the appellee, and this appeal has been duly prosecuted.

S. Brundidge, Jr., for appellants.

1. Unless the plaintiff could show by a fair preponderance of the evidence that he reserved the title to the property at the time of the sale, he was not entitled to

recover in this action. Not only has he failed to meet this burden, but all the witnesses contradict him as to any conditional sale or reservation of title.

2. The plaintiff, as appears by the undisputed testimony, never had title to the property, and, therefore, could not reserve any title.

3. If appellant had been the owner and reserved title, he is estopped by his own conduct, his failure to inform Greer of any reservation of title, his knowledge of the execution of the mortgage, his frequent insistence that Roush foreclose it, etc. 88 Ark. 106.

4. The sale was ratified by the plaintiff. *Id;* 97 Ark. 435.

5. The instructions given at plaintiff's request were erroneous in taking away from the jury the right to consider whether or not the plaintiff had ratified the giving of the mortgage. They were misleading and prejudicial and the error therein was not cured by other and correct instructions.

6. The sixth instruction requested by appellant was warranted by the proof and correctly declared the law. 87 Ark. 360; 88 Ark. 99.

J. N. Rachels and *John E. Miller,* for appellee.

1. The question as to whether or not there was a reservation of title was one of fact for the jury to determine from the evidence, and their verdict will not be disturbed. 106 Ark. 438; 108 Ark. 578; 164 S. W. 1134, 112 Ark. 57; 112 Ark. 507; 166 S. W. 552; 113 Ark. 400; 168 S. W. 1073, and authorities cited.

2. The evidence shows that appellee purchased the machinery from Dupriest and that at the time he sold to appellants he owed Dupriest some money on the machinery. There is no merit in the claim that because he did not fully own the machinery clear of all debts he could not reserve title in it. He had such an interest in the machinery that he could sell or mortgage. 63 Ark. 268; 66 Ark. 240; 68 Ark. 230; 92 Ark. 530; 97 Ark. 432.

3. Appellee is not estopped. There is no evidence that appellee ever assented to any mortgage being executed covering this machinery. Moreover, the court, by instruction 4, given at appellant's request, submitted their contention to the jury, and the jury by its verdict failed to find the facts to be as contended by appellants.

4. The bringing of this suit without an order of delivery and bond did not amount to an abandonment of the suit in replevin and an affirmance or ratification of the sale. The right of possession of property may be tried without the possession having been in fact changed by an order of delivery. 65 Ark. 448; Kirby's Dig., § § 6853, 6854; 85 Ark. 73; 44 Ark. 308; 30 Ark. 681.

5. The instructions given at appellee's request were not objected to on the ground that they took away from the jury the right to consider whether or not plaintiff had ratified the giving of the mortgage, etc. Appellants made no request for amendment in this particular and can not complain. Moreover, instruction 4, given by the court, fully covers this objection.

6. It was not error to refuse instruction 6, requested by appellants. Instruction 4 fully covers the question whether plaintiff knew of the mortgage and assented to its execution.

If, as contended, there is a conflict in the instructions given, it was error invited by appellant and no ground for reversal. 88 Ark. 499; 89 Ark. 154; 102 Ark. 213; 106 Ark. 138; 107 Ark. 130.

WOOD, J., (after stating the facts). The court erred in its instructions. In instructions given at the request of the appellee the court, in effect, told the jury broadly that if the appellee contracted to sell the machinery in question to Protho & Holiman and at the time reserved title in himself until the purchase money was paid, and that if they found from the evidence that the purchase money had not been paid, their verdict should be for the appellee. These instructions entirely ignored the issue as to whether or not the appellee, after entering into the

contract with Protho & Holiman, thereafter ratified the acts of his vendees in executing the mortgage on the machinery under which appellant, W. H. Greer, holds.

True, the court granted prayer No. 4 of appellant, in which this issue was submitted, but this prayer is necessarily in conflict with the instructions granted at the instance of the appellee. While there were no specific objections to the instructions granted at the request of the appellee, instruction No. 4, given at appellants' instance, was tantamount to a specific objection to appellee's prayers so far as the issue of ratification was concerned, and also prayer No. 6 of appellants, which the court refused. Prayer No. 6 should have been given. The same idea was not covered fully in instruction No. 4, given at the request of appellants.

There was testimony to warrant the court in sending to the jury the issue as to whether or not appellee had ratified the conduct of his vendees in executing the mortgage under which appellant Greer claims the right to possession of the property, and the issue as to whether or not appellee had received the benefit of the money derived from the mortgage, knowing at the time that the property had been mortgaged, and thereby estopped himself from setting up title adverse to one who holds under such mortgage.

In *Bell* v. *Old,* 88 Ark. 105, we held that a vendor of chattels waives a reservation of title where he consents to the execution of a mortgage by the vendee, at least as to the mortgagee and those claiming under him.

The above principle is applicable here and the court should have submitted this issue, along with the other issues, in instructions that were not in conflict, and therefore calculated to mislead the jury.

For the errors indicated the judgment is reversed and the cause is remanded for a new trial.

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

Opinion delivered April 26, 1915.

1. PLEADING—SEPARATE CAUSES OF ACTION—ELECTION.—Plaintiff brought an action to recover damages for wrongful death, for the estate and for the next of kin; *held*, there is no error in refusing to require the plaintiff to elect between the two causes of action.
2. DAMAGES—PERSONAL INJURY ACTION—FORM OF VERDICT.—Where plaintiff brought an action for wrongful death, asking damages for the estate and for the next of kin, deceased being in the employ of defendant railroad company, and engaged in interstate commerce, it is not error for the trial court to refuse to require the jury to apportion the award of damages so as to show what sum they found on the cause of action for deceased's pain and suffering, and the cause of action in favor of deceased's widow and next of kin for their pecuniary loss.
3. NEGLIGENCE—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.—In an action for damages due to personal injuries, when the defendant has raised the issue of contributory negligence, the burden is upon the defendant to show the same by the greater weight of the evidence, and even though deceased was guilty of contributory negligence, that fact would not preclude a recovery, but the jury should reduce the amount of their verdict in proportion to the amount of the negligence attributable to the deceased.
4. DAMAGES—WRONGFUL DEATH—ELEMENTS—CHILD.—Where deceased was killed by the negligence of defendant railroad company, in assessing damages to his minor child, it is proper for the jury to consider as elements of damage the loss of instruction, training and care, which the child has sustained.

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

STATEMENT BY THE COURT.

Appellee, as administratrix of the estate of her husband, James Rodgers, deceased, instituted this suit against the appellant to recover damages to the estate and the next of kin, alleging that on the 29th of May, 1913, James Rodgers was in the employ of the appellant as a brakeman on a train engaged in interstate commerce, and at the time of his death was acting as a brakeman on said train; that the train arrived at Gurdon from the south in the night time, and at a point about a half mile south of

the depot, near what is known as the brick yard, the train men ran a caboose upon a sidetrack with such unusual force and at such a high and dangerous rate of speed that Rodgers, who was in the cupola of said caboose where his duties required him to be, was thrown forward against the window in the caboose; that his head was driven through the glass and his throat cut; that he lingered in great agony until about an hour after his injury when he died; that he left surviving him the appellee and two children; that appellee as administratrix, for herself and children and for the benefit of the estate, brings this suit under the act of Congress of April 22, 1908, as amended April 5, 1910; that at the time of his death Rodgers was earning wages at the rate of $75 per month; that he was sober and industrious, and contributed all that he made to the support and maintenance of his family. She prayed for damages to the estate in the sum of $5,000 and to the next of kin in the sum of $6,000.

Appellant moved to require the appellee to elect between the cause of action for the benefit of the estate and the cause of action on account of the loss of pecuniary support. The motion was overruled and appellant duly saved its exceptions.

The appellant answered, denying the material allegations of the complaint, and setting up the affirmative defenses of assumed risk and contributory negligence. The cause was submitted to the jury upon instructions, upon which we will comment in the opinion. There was a verdict in favor of the appellee in the sum of $2,000. After the verdict was read, and before the court had accepted it, both parties being present, the appellant asked the court to direct the jury to apportion the amount of the verdict between the two causes of action for deceased's pain and suffering and for pecuniary loss to the next of kin so as to show what sum they found on each. The court refused to direct the jury to apportion their verdict, and appellant duly excepted.

From a judgment entered in favor of the appellee in the sum of $2,000 this appeal has been duly prosecuted. Other facts stated in the opinion.

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

1. The court erred in refusing to require the plaintiff to elect which cause of action she would prosecute. This question having been determined adversely to our contention in other cases, it is raised now merely to save the question.

2. It was error, an abuse of discretion, for the court to refuse to require the jury to apportion the award of damages. "Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. *That apportionment is for the jury to return.*" 228 U. S. 173, 156 Ky. 550.

3. The third instruction given at plaintiff's request is erroneous. The correct rule is stated in instruction 11, given at appellant's request, and the request for the giving of the latter amounts to a specific objection to the former. 229 U. S. 114; *St. Louis S. W. Ry. Co.* v. *Anderson,* 117 Ark. 41; 104 Ark. 67.

4. In the fourth instruction given for plaintiff, the court erred in charging the jury that they might consider as one of the elements of damage "the care and attention, instruction and training, one of his disposition and capacity * * * might reasonably be expected to give his wife and children, which was lost to them by his death."

There is nothing in the statute to permit the plaintiffs to recover for the loss of care and attention, instruction and training which deceased might have given his wife and children. 227 U. S. 59. The effect of the instruction, so far as the wife was concerned, was to permit her to recover for the loss of the society of her husband; and a similar objection may be raised as to daughter who is of age and has been living away from home. 13 Cyc. 371; 98 Ark. 413.

5. The court in instruction 6 had told the jury that deceased assumed "the ordinary and usual risks of the occupation." In instruction 7, requested by appellant, they were told that he would be held to have assumed those risks which were known to him or were plainly observable. The court erred in refusing to give this instruction. 220 U. S. 590.

McRae & Tompkins, for appellee.

1. A refusal of the court to have the jury apportion the verdict is no cause for complaint on the part of a defendant in a personal injury action of this kind. 101 Ark. 436; *Id.* 424-426; 112 Ark. 305.

While there can be only one recovery, it is none the less true that the action which accrued to the injured party if he had survived can be added to that which accrued on his death to the widow and children, or next of kin. 106 Ark. 421; 227 U. S. 59; 232 U. S. 363. The request to require the jury to apportion the verdict was in the nature of asking a special finding, and such a request comes too late after the return of a verdict. Moreover, it is a matter within the discretion of the court. 38 Cyc. 1915.

2. There was no error in the third instruction. It follows the exact language of the statute, and is free of the objectionable words criticised in the *Earnest* case, 229 U. S. 114, relied on by appellant. Instruction 3 declares the statute, and instruction 11, given for appellant, explains it.

3. There is no error in the fourth instruction. If counsel had by specific objection called the court's attention to the wife being included in the care, attention, instruction, etc., the court might have stricken that word out, but it is too late to raise that question now. The cases cited do not hold that those are improper elements of damages for the wife. 35 U. S. Sup. Ct. Rep. 140, 144; 227 U. S. 59, 71, 73. See also 112 Ark. 305.

Certainly, the wife is entitled to recover for "care and attention" and the jury would know that "instruction and training" applied to the children only.

4. Requested instruction 7 was properly refused. An employee does not assume an extraordinary risk caused by the master's negligence, unless he knows it, *appreciates the danger, and voluntarily exposes himself to the danger.* 103 Ark. 61; 77 Ark. 367; 90 Ark. 555; 98 Ark. 145-150.

WOOD, J., (after stating the facts). We will consider the assignments of error in the order presented by appellant's counsel.

(1) There was no error in refusing to require the appellee to elect between the cause of action for the benefit of the estate and that for the pecuniary loss to the widow and next of kin. *K. C. S. Ry. Co.* v. *Leslie,* 112 Ark. 305-327; *St. Louis & S. F. Ry. Co.* v. *Conarty,* 106 Ark. 421.

(2) There was no error in refusing to require the jury to apportion the award of damages so as to show what sum they found on the cause of action for deceased's pain and suffering and the cause of action in favor of the deceased's widow and next of kin for their pecuniary loss. In *Gulf, Colorado & Santa Fe Ry. Co.* v. *McGinnis,* 228 U. S. 173-176, it is said: "Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss; that apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

In *St. Louis, I. M. & S. Ry. Co.* v. *Hesterly,* 228 U. S. 702, it is held that under the act only one recovery can be had. And in *Taylor* v. *Taylor,* 232 U. S. 363, it was held that the act under consideration supersedes all State statutes upon the subject covered by it, and that the distribution of the amount recovered in an action for the death of an employee is determined by the provisions of the Federal statute and not by the State laws. See also *Railway* v. *Hesterly, supra.*

There is nothing in any of these decisions that requires that the jury, in returning their verdict, should apportion the damages between the two causes of action, showing the amount allowed for the deceased's pain and suffering and the amount allowed for pecuniary loss to the widow and next of kin. The statute and the amendment, as we construe it, does not require that there should be any such apportionment. It does require that there "shall be only one recovery for the same injury," and the personal representative is entitled to recover only for the benefit of those surviving relatives of the deceased employee who derived pecuniary assistance from him during his life, and who, therefore, were entitled to compensation for the pecuniary loss resulting to them from his death. As was said in the case of *Railway Company* v. *McGinnis, supra,* "The recovery, therefore, must be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss."

The appellant did not ask the court to instruct the jury that it could find no damages in favor of the daughter of Rodgers, who was of age and who was not shown to have been receiving any pecuniary assistance from her father. The request to apportion the verdict between damages for pain and suffering and damages for the pecuniary loss to the next of kin did not include such request. Appellant did not ask the court to make a ruling to this effect, and it is therefore not in an attitude to complain. No possible prejudice could have resulted to appellant in the ruling of the court refusing to require the jury to apportion the verdict. The amount of the verdict was $2,000. This was not an excessive amount, even though it had been for only one of the causes of action. The evidence was amply sufficient to sustain it as a recovery for the pecuniary loss alone to the widow and infant son.

(3) Objection is urged to the following instruction which was given at appellee's request:

"3. The defendant pleads that the deceased was guilty of contributory negligence. You are told that the burden is upon the defendant to show such contributory negligence, if any, by the greater weight of the evidence. Even if you should believe that the deceased was guilty of contributory negligence, this would not preclude a recovery by the plaintiff; but you should reduce the amount of the verdict in proportion to the amount of the negligence attributable to the deceased."

This instruction follows the language of the statute on the subject of contributory negligence. The court granted the appellant's prayer No. 11, telling the jury, in effect, that where the deceased's negligence contributed to his injury that "the damages should be diminished in the proportion that deceased's negligence bears to the combined negligence of the deceased and the defendant."

In *Norfolk & Western Ry. Co.* v. *Earnest,* 229 U. S. 114-122, it is said: "The statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employee."

There is no conflict in the instructions, and when considered together the jury could not have possibly been misled to the prejudice of the appellant. Instruction No. 3, given at the instance of appellee, follows the exact language of the statute, and instruction No. 11, given at the instance of the appellant, explains what the statute means, in accord with *Norfolk & Western Ry. Co.* v. *Ear-*

nest, supra. See also *St. Louis S. W. Ry. Co.* v. *Anderson,* 117 Ark. 41.

(4) The appellant complains because the court permitted the jury to consider as one of the elements of damage "the care and attention, instruction and training, if any, one of Rodgers' disposition, and capacity, as shown by the evidence, might reasonably be expected to give his wife and children, which was lost to them by his death."

The instruction was correct so far as it applied to the infant child of the deceased. See *Norfolk & West. Ry. Co.* v. *Sarah E. Holbrook, Admx.,* 235 U. S. 625; *Mich. Cent. Rd. Co.* v. *Vreeland,* 227 U. S. 59; *Railway Co.* v. *Sweet,* 60 Ark. 550; *Railway Co.* v. *Leslie, supra.*

The jury, as sensible men, must have understood that the instruction and training mentioned referred to deceased's children. Moreover, there is nothing in the amount of the verdict to indicate that it was the result of any passion or prejudice. The instruction complained of only related to the measure of damages, and the amount is so much less than the jury might have found for the pecuniary loss to appellee and her minor child, it can not be said that the instruction, even if erroneous, in any way prejudiced appellant's rights.

(5) The court did not err in refusing appellant's prayer for instruction No. 7, in which the appellant sought to have the jury told that the deceased Rodgers assumed "those unusual and extraordinary risks that were plainly observable to the eyes of an ordinarily prudent man," etc.

In appellant's prayer for instruction No. 6, the court told the jury that Rodgers, when he entered the employ of the appellant, "assumed the risk of the ordinary and usual dangers of the occupation, and told them that if they 'believed from the testimony that Rodgers' injury and death resulted from one of the ordinary and usual dangers to which brakemen are exposed in the course of their work as usually and customarily conducted," the verdict should be for the defendant.

Under the evidence this instruction was all that was demanded and all that it was proper to give to correctly submit the issue of assumed risk. There was no testimony to warrant a submission to the jury of the issue as to whether there was an unusual risk which was so obvious that Rodgers must have known and appreciated the danger arising therefrom. See *St. Louis, I. M. & Sou. Ry. Co.* v. *Vann,* 98 Ark. 145-150. The instruction, as an abstract proposition of law, was not correct, because it failed to make a proper distinction between contributory negligence and assumed risk. See *Choctaw, Oklahoma & Gulf Rd. Co.* v. *Jones,* 77 Ark. 367; *St. Louis, I. M. & Sou. Ry. Co.* v. *Holman,* 90 Ark. 555; *St. Louis, I. M. & Sou. Ry. Co.* v. *Owens,* 103 Ark. 61.

(6) This is the second appeal in this case. The cause was reversed on the first appeal because the evidence was not sufficient to sustain the verdict. On the trial from which this appeal comes there were new developments and material changes in the evidence which it would unnecessarily lengthen this opinion to discuss. It was proper to submit to the jury the issues of negligence, contributory negligence and assumed risk, under the testimony disclosed by this record. The instructions are free from error and there was evidence to sustain the verdict.

The judgment is therefore correct, and it is affirmed.

LEWIS *v.* PEARSON COMPANY.

Opinion delivered April 26, 1915.

EXECUTIONS—FAILURE OF SHERIFF TO MAKE RETURN—PERSONAL LIABILITY.—Under Kirby's Digest, § 3286, providing that a sheriff who fails to make a return on an execution delivered to him on the return date, shall be liable for the whole amount specified in the execution, the sheriff will be liable, when he fails to make a return on the return date on an execution issued by the clerk of a common pleas court.

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

STATEMENT BY THE COURT.

Appellee brought this suit against appellant, alleging that appellant was the sheriff of Crittenden County, Arkansas; that on the 18th of October, 1909, in the common pleas court of Crittenden County appellee recovered judgment against the firm of A. D. Humphries & Son for the sum of $319.39, which with interest amounted to $340.95, and costs of the action which amounted to $10.75; that on December 7, 1909, execution was issued in the above cause by the clerk of the common pleas court, returnable in thirty days, and placed in the hands of the appellant as sheriff of Crittenden County; that appellant failed to make return of the execution within thirty days as required by law. The appellee therefore prayed judgment for the amount of the judgment and costs recovered in the common pleas court.

The appellant demurred to the complaint, which demurrer the court overruled, and, the appellant electing to stand upon this demurrer, judgment was rendered against him for the amount sued for, from which judgment this appeal has been duly prosecuted.

A. B. Shafer, for appellant.

The court has held that this statute is highly penal and that the party invoking it must bring himself within the letter and spirit of it. 74 Ark. 364, 85 S. W. 1124. Its terms should not be extended by construction to cases not within its plain meaning. 89 Ark. 488, 117 S. W. 558, and cases cited. See also 96 S. W. (Ark.) 119.

Section 9 of the act creating the court of common pleas of Crittenden County, Acts 1905, pages 364-367, providing that the rules of practice and procedure governing in the circuit court shall be the rules of practice and procedure in this court, except as otherwise provided in the act, has reference to the general rules, etc., and particularly the chapter on pleadings and practice in the Digest, and did not intend to include the penal provisions of section 3286. It ought not to be extended by construction to include the provisions of this highly penal statute.

W. W. Hughes, for appellee.

Section 3286 was in existence when the Constitution of 1874 was formed and was continued in force by section 1, schedule of that Constitution. The same instrument also provided for the establishment of courts of common pleas. Art. 7, § § 1 and 32. The force of the above statute became operative with relation to executions issued from the common pleas court of Crittenden County on and after the establishment thereof by the General Assembly.

WOOD, J., (after stating the facts). This suit was brought under section 3286 of Kirby's Digest, which, so far as is necessary for the purpose of this opinion to set out, is as follows: "If any officer to whom any execution shall be delivered * * * shall not return any such execution on or before the return day therein specified, * * * each officer shall be liable and bound to pay the whole amount of money in such execution specified, or thereon indorsed and directed to be levied."

This section was a part of the Revised Statutes, section 62, which has been continued in force under section 1 of the schedule of the Constitution, which provides that "all laws now in force which are not in conflict or inconsistent with this Constitution shall continue in force until amended or repealed by the General Assembly." Our Constitution provides for the establishment of courts of common pleas by the General Assembly. Art. 7, § 32. While the language of the statute is broad, it is sufficiently specific to cover executions issuing from any court created by the Constitution or by its authority. The language of the statute is "if any officer to whom any execution shall be delivered * * * shall not return any such execution," etc.

"The statute in question is highly penal, and the party invoking it must bring himself within both the letter and spirit of it." *Craig* v. *Smith,* 74 Ark. 364. See also *State* v. *International Harvester Co.,* 79 Ark. 517.

"Its terms should not be extended by construction to cases not within its plain meaning." *Mayfield Woolen Mills* v. *Lewis,* 89 Ark. 488.

The purpose of the statute, as was said in *Williams* v. *State,* 65 Ark. 159, was to reach palpable derelictions on the part of the officer, but when an officer fails to make the return within the time required by the statute, such is a palpable dereliction, and there is no escape from the plain mandate of the law, and it must be obeyed when the party invoking it brings himself within both its letter and spirit, as the appellee in this case has done.

The judgment of the circuit court is therefore correct, and is affirmed.

PLUMLEE *v.* BOUNDS.

Opinion delivered April 26, 1915.

1. REAL PROPERTY—CONTINGENT REMAINDER.—P. deeded lands to L. for and during her natural life, and the remainder to the heirs of her body; *held,* L. took a life estate in the lands, during her life, and that plaintiffs, who were her children, had only a contingent remainder therein.
2. REAL PROPERTY—CONTINGENT REMAINDER—SALE OF, UNDER EXECUTION.—When plaintiffs held a contingent remainder in certain lands during the life of the life tenant, such interest was not subject to sale under execution, and an attempt to make such a sale would not constitute a cloud upon plaintiff's title.

Appeal from Monroe Circuit Court; *Thomas C. Trimble,* Judge; affirmed.

STATEMENT BY THE COURT.

On the 6th day of November, 1914, R. A. Plumlee and J. H. Plumlee, Jr., instituted this action in the circuit court against T. D. Bounds, H. C. Harris, H. E. Hearon, J. B. May and John S. Black, doing business under the firm name of May & Black, to set aside a sale of certain lands under execution. The plaintiffs allege a state of facts substantially as follows:

J. B. May and John S. Black, partners as May & Black, recovered a judgment in the circuit court against R. A. Plumlee, J. H. Plumlee, Jr., T. D. Bounds and H. C. Hearon. An execution was issued and judgment levied on certain lands in Monroe County, Arkansas. The land was sold under the execution to T. D. Bounds, he being the highest bidder.

The lands were originally owned by Dedrick Pike, and on the 24th day of October, 1871, he executed a deed conveying the lands to his daughter, Lucinda Pike, for and during her natural life and the remainder to the heirs of the body of the said Lucinda Pike. Lucinda Pike married J. H. Plumlee, and by him she had five sons who are now living, two of whom are the plaintiffs in this case. Lucinda Plumlee, the life tenant, was also alive at the time of the institution of this action.

A copy of Dedrick Pike's deed is made an exhibit to the complaint. The court held that the plaintiff should take nothing and that the defendants should recover their costs. Judgment was rendered dismissing the complaint of the plaintiff. Plaintiffs have appealed.

S. S. Jefferies, for appellants.

The interest owned by the appellants, as appears by the record, is that of a contingent remainderman. 44 Ark. 458; 95 Ark. 18.

By the weight of authority a contingent remainder can not be sold under execution. *Supra;* 1 Black on Judgments, § 428; 17 Cyc. 952; 1 Ballard, Law of Real Property, § 224; 9 Lea 34.

Thomas & Lee, for appellees.

Under the deed from Pike to his daughter, who afterward married Plumlee, it is clear that these appellants are remaindermen. Kirby's Dig., § 736.

The general rule is that all property not expressly exempted by statute is subject to sale under execution for the payment of debts; and by the provisions of the sixth subdivision of section 3228, Kirby's Digest, the interest

of appellants, though that of contingent remaindermen, was subject to sale under execution. 6 Thompson on Corp., § 7847; 2 Freeman on Executions, § 172; 7 Am. & Eng. Enc. of L., 127; 22 Am. Dec. 248; 17 Cyc. 951; *Id.* 950; 79 Ark. 547; 105 Ark. 587; 22 S. W. 332; 125 Mass. 356; 189 Mass. 34; 200 Mass. 498; 1 Pearson (Pa.) 145; 102 Va. 631, 47 S. E. 871; 13 Ark. 74.

HART, J., (after stating the facts). (1) It is conceded by counsel for the plaintiffs that under the rule announced in the cases of *Horsley* v. *Hilburn,* 44 Ark. 458, and *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18, that Lucinda Plumlee had a life estate in the lands in question and that plaintiffs only had a contingent remainder therein.

It is contended by counsel for the defendant that under the sixth subdivision of section 3228 of Kirby's Digest a contingent remainder can be sold under execution.

In 17 Cyc. 951-2, is said that the doctrine is well established that a vested remainder is subject to sale under execution but that the authorities are divided on the question of whether a contingent interest, such as a contingent remainder, is liable to be sold under execution.

In some of the States, under statutes similar to our own, it is held that all interest in real estate, whether it be regarded as vested or contingent, is subject to sale under execution. In other States, under similar statutes, it has been held that a contingent interest in land can not be sold under execution. The reason given is that such a policy would encourage gambling and speculation and that the purchasers at such sales would not put a high estimate on the possibility of the defendant in execution afterward acquiring any interest in the land and that the danger of sacrifice is a strong reason for not subjecting contingent interests to sale under execution. This court has already taken a position on the question.

In the case of *Horsley* v. *Hilburn, supra,* F. M. Hilburn, guardian of certain minors, who owned a contingent interest in land, procured an order for their sale during

the lifetime of the wards' mother, who owned the life interest in the land. The court held that minors had no interest during the lifetime of the life tenant that could be sold with or without the consent of the donor. Mr. Justice EAKIN, who delivered the opinion of the court, in reference thereto, said:

"For like reason there was nothing in the ward of F. M. Hilburn which could be sold under order of the probate court during the lifetime of the mother. There was no error in permitting the proof to be made, by parol, of the loss of the records, and of the proceedings which had been taken. The sale passed all that the wards had in the land that was salable, and which the probate court could authorize to be sold, but that was nothing. Nor was the sale effective to carry subsequently acquired title. Section 642 of Mansfield's Digest upon this point, applied only to voluntary sales by the persons to be bound. It is to the effect that 'if any person shall convey,' etc., having no title at the time, and shall afterward acquire title, legal or equitable, it shall pass to the grantee."

(2) The principles there announced are conclusive of the present case. Lucinda Plumlee, the owner of the life estate, being still alive, the plaintiffs had nothing which could be sold under execution. The sale amounted to nothing and did not even constitute a cloud upon the plaintiffs' title.

It follows that the court was right in dismissing the complaint of the plaintiffs, and the judgment will be affirmed.

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

Opinion delivered April 26, 1915.

1. DAMAGES—LOSS OF ARTICLE WITHOUT MARKET VALUE.—In an action against a carrier to recover for the loss of an article which has no market value, the measure of damages is the value of the article to the plaintiff, and in ascertaining this value, inquiry may be made

into the constituent elements, and the cost to the plaintiff of producing the article.

2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.—Plaintiff shipped an article over defendant carrier in December. The same was lost in transit and in April plaintiff brought suit for damages, recovering judgment in June. The carrier found the article in August, and asked a new trial, tendering the article, and asking a submission of the issue of plaintiff's damage by reason of the delay. *Held*, it was not an abuse of its discretion for the court to refuse a new trial.

Appeal from Miller Circuit Court; *W. H. Arnold*, Special Judge; affirmed.

STATEMENT OF FACTS.

M. H. Dague sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages for the loss of certain property which he delivered to the railroad company at Newport, Arkansas, for shipment to Texarkana, Arkansas.

It appears from the record that on the 19th day of December, 1913, the plaintiff delivered to the defendant for transportation a certain model machine of a soil pulverizer for which he had letters patent; and that at the time he made the delivery he explained to the defendant the character and nature of the machine. It was packed in a box, was labelled "Model of Pulverizer Machine," and was addressed to M. H. Dague, Texarkana, Arkansas. The machine was lost in transportation, and, after waiting some months for the company to trace it, the plaintiff instituted this action.

The suit was commenced on the 29th day of April, 1914, and the trial had on the 15th day of June, 1914. At the trial the plaintiff testified as to what it would cost him to have the machine constructed and placed the total amount at $583.40, $200 of which he claimed for services performed by himself in working on the model. The remaining $383.40 was for material furnished and for work done by other parties. He gave a detailed statement of these items, and testified that he was a mechanic and that the prices were reasonable. The jury returned a verdict

in his favor for $383.40, and from the judgment rendered the defendant has appealed.

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

1. The court erred in permitting the plaintiff to testify in detail as to the cost of constructing the model plow. His testimony as to what he paid certain mechanics has no tendency to prove the value of the model. It does not appear that the raw material, chains, gear wheels, charged against appellant, were necessary, or were used in making the model. His personal time, expenses in the trip to Chicago, and his board, are not properly chargeable against appellant, nor shown to have had any relation to the making of the model, or to have been necessary. 80 Ark. 476; 47 N. Y. Sup. Ct. 370; 7 Ind. App. 451; 1 Tex. Civ. App. 424.

2. Appellant, by instruction No. 2, requested the court to instruct the jury that under the bill of lading plaintiff was not entitled to recover any special or extraordinary value of the model plow, but only its fair cost in the market. The court erred in refusing this, and in instructing the jury in lieu thereof that if it had no market value, *but was of value to the plaintiff,* they might consider *the reasonable value to him,* and, in doing so, might consider the fair cost of constructing the model. 88 Ark. 77.

3. The court erred in refusing a new trial for newly discovered evidence. The finding and production of the model after the trial amounted to newly discovered evi- Diligent search had previously been made. If it had been produced at the trial, not only would it have enabled the jury to form a better idea of its value, but it would have been the duty of the court under the circumstances to require the plaintiff to accept the model with reimbursement for damages incurred by reason of the delay. 1 Sutherland on Damages, § 156; 16 Vt. 243; 44 Ark. 439; 26 N. Y. S. 892.

Webber & Webber, for appellee.

1. There was no error in admitting the testimony as to the cost of the model. Appellee testified that he was familiar with the charges usually made by mechanics, with the cost of material and with the work done on this model, thereby qualifying himself as competent to testify as to what it would cost in the market to construct such a machine. The testimony was admissible, and it was for the court to say whether the witness was qualified to testify. 55 Ark. 70; 39 Ark. 167; 147 S. W. 440; 56 Ark. 465; 92 Ark. 569.

2. Instruction 2, requested by appellant, was properly refused.

The rule is that where an article has little or no market value, but is of special value to the owner, he may recover that. 38 Cyc. 2093, and cases cited; 81 Ill. App. 675. That the appellant had notice of the extraordinary nature of the shipment is shown by the testimony of appellant's agent. Under such circumstances the appellee was entitled to recover special damages. 104 Ark. 215, and cases cited.

3. There was no error in overruling the motion for new trial on the ground of newly discovered evidence. The doctrine that the owner can not on account of delay in transportation refuse to receive the goods and sue as for conversion, but must accept them and sue for damages caused by the delay, is one that has always been invoked where the tender was made at the time of trial. We find no authority for the proposition that such a tender after trial would be sufficient ground for a new trial.

HART, J., (after stating the facts). (1) In the case of *Southern Express Co.* v. *Owens,* 146 Ala. 412, 9 Am. & Eng. Ann. Cas. 1143, the court held that in an action to recover for the loss of an article which had no market value the measure of damages should be the value of the article to the plaintiff, and, in ascertaining this value, inquiry may be made into the constituent elements and the

cost to the plaintiff of producing the article. In that case the court said:

"Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruction or loss may be fixed. But it may be that property destroyed or lost has no market value. In such state of the case, while it may be true that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in its character that market value can not be predicated of it, its value, or plaintiff's damages, must be ascertained in some other rational way, and from such elements as are attainable."

Several cases are cited supporting that opinion, and other cases announcing the same principle are cited in the case note. In the instant case the plaintiff had procured letters patent upon his plow and had constructed a model to be used in selling the plow. He shipped the model from Newport to Texarkana over the defendant's line of railway and it was lost in transit. The court followed the principles of law above announced in the admission of testimony and in its instructions to the jury.

It is insisted by counsel for the defendant that the court erred in failing to grant it a new trial on account of newly discovered evidence. In support of its motion, it introduced the affidavits of its agents to the effect that the loss of the machine was reported in December, 1913, and that an investigation was at once started to find the plow; that the property was described in the bill of lading as a model plow; that they were looking for something like a plow and were not able to find it; that some time in August, 1914, the traveling freight claim adjuster for the defendant and one of its agents while looking over some unclaimed freight packages in the company's warehouse in Little Rock, a station between Newport and Texarkana, located a box about thirty inches square and

about twelve inches high, and upon looking into it found that it contained the model plow which plaintiff had lost; and that before this time an examination of the unclaimed freight packages in stations between Newport and Texarkana had been made and they had been unable to find the plow.

After the railroad company found the plow it asked the court to set aside the judgment and require the plaintiff to accept the model and resubmit to the jury for its decision the question of damages sustained by the plaintiff for the detention of the plow.

(2) The court did not abuse its discretion in refusing this request of the defendant. It is true, according to the testimony introduced by the defendant, that the box containing the plow did not look like a plow and was not marked "model plow" on the box. According to the testimony of the plaintiff, however, when the property was delivered for shipment the box was plainly marked "model plow or soil pulverizer." It was shipped from a point in the northern part of the State to a station in the southern part of the State and the whole route was over the defendant's main line of road. Though the defendant made some effort to trace the plow after its loss was reported to it, still, under the circumstances, it can not be said that it used due diligence in doing so. The property was lost in the latter part of December and was not found until some time in the following August.

Again, it is insisted by counsel for defendant that the verdict is excessive; but we do not agree with them in that contention. The plaintiff testified that he was a mechanic himself and gave a detailed estimate of the materials that went into the model and the reasonable cost of constructing same. These items amounted to $383.40. His testimony was in no manner contradicted and the jury properly found for him in that amount.

The judgment will be affirmed.

HENLEY v. ENGLER.

Opinion delivered May 3, 1915.

1. SPECIFIC PERFORMANCE—PURCHASE OF LANDS.—A party who seeks the specific execution of a contract is bound to show a substantial performance or readiness and offer to perform on his part all that is required of him by the contract. Failure in any material respect offers a full defense to the suit.
2. SPECIFIC PERFORMANCE—PURCHASE OF LANDS.—A. agreed to buy certain lands from B. on December 12, a deed was deposited by B. with a bank for delivery when A. should make a certain cash payment. A. had the abstract examined, and reported it correct, but when called on by B. for the cash payment, failed to make the same. B. thereupon rescinded the contract. *Held*, A. having failed to perform the condition imposed upon him by the contract, his failure to do so is a defense to his action against B. for specific performance.

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

STATEMENT BY THE COURT.

J. D. Henley instituted this action in the chancery court against Mary E. Engler, Sam Engler and the Bank of Brinkley to obtain specific performance of a contract for the sale of land. The facts are as follows:

The plaintiff Henley made a verbal contract with Sam and Mary Engler to purchase from them 160 acres of land in St. Francis County and agreed to pay therefor $2,100. He was to pay $150 in cash and to give four notes of $500 each for the balance. Pursuant to the agreement, Sam and Mary Engler executed to Henley a deed to the land in question and turned it over to the cashier of the Bank of Brinkley with instructions to deliver it to Henley upon the payment of $150 and the execution of a deed of trust on the land to secure the deferred payments. This was done on the 12th day of December, 1913, and on the same day Henley delivered to the cashier of the Bank of Brinkley a deed of trust to this land executed in favor of the Englers. Henley testified that the deed from the Englers to him was placed in an envelope, marked "To be delivered to J. D. Henley when check is paid;" that

he was to have the abstract of title to the land examined and when satisfied with the title was to pay $150 and deliver to the Englers the deed of trust; that the deed of trust was left at the bank in an envelope marked "To be delivered to Sam Engler when abstract is approved." He stated that Sam Engler and wife were present when these inscriptions on the envelopes were made; that his attorney was sick and did not get to examine the abstract for about a month; and that he did not put the money in the bank to pay his check for the $150 until February 23, 1914. He denied that he told Engler at the time the papers were deposited with the bank that the title to the land was good.

Sam Engler testified that he gave the abstract of title to Henley about the 6th day of December, 1913, and that the deed was deposited with the cashier of the bank on the 12th day of December, 1913; that Henley told him he had examined the abstract and it was all right; that the agreement was that Henley was to pay him $150 in cash and the balance in deferred payments secured by a deed of trust on the land; that the $150 was to be paid in a day or two and that the deed was not to be delivered until the cash payment was made; that the sale was made on condition that the cash payment should be made as soon as the abstract could be examined; that he and his wife left that part of the country as soon as the contract was made and went to the State of Montana; that on December 27, 1913, he wrote to Henley to warn him that if the cash payment was not made at once the trade would be rescinded; that during the first part of January he again wrote to Henley and also to the cashier of the bank, telling them that the money must be paid at once; that not getting any satisfactory replies to these letters, he returned to Brinkley on February 20, 1914; that as soon as he returned he went to Henley and demanded payment of the money, and, failing to receive it, declared the contract rescinded, and, on that account, refused to accept payment when it was offered to him on the 23d day of February, 1914.

The chancellor found the issues in favor of the defendants and decreed that the complaint of the plaintiff should be dismissed for want of equity. The plaintiff has appealed.

Mann, Bussey & Mann, for appellant.

1. The deeds and papers were placed in escrow, and the contract could only be rescinded upon failure to perform the condition. 16 Cyc. 561, 578. A reasonable time to comply with the contract was granted, and there was no unreasonable delay. 16 Cyc. 578. Time was not made the essential part of the contract; no specific time was fixed. 4 Pom. Eq. (3 ed.), § 1408; 72 Ark. 359; 1 *Id.* 421.

2. A bill for specific performance was the proper remedy. 97 Ark. 482; Pom. Eq., § § 221, 1402 (3 ed.). The delay was not unreasonable; but if so it was waived.

Roy D. Campbell, for appellees.

1. The delay was unreasonable. Equity has discretion to grant or refuse specific performance.

2. There never was a complete sale. 105 Ark. 513-517. Upon appellant's own testimony he was not entitled to relief. *Ib.*

3. Bills for specific performance are addressed to the sound discretion of the chancellor. 12 Ark. 421; 19 *Id.* 51; 21 *Id.* 110; 34 *Id.* 663. In this case, appellant's right is not clear and he failed to comply with his agreement. 134 U. S. 68; 23 Ark. 704; 44 *Id.* 197; 73 *Id.* 494.

4. Appellant had an adequate remedy at law. 95 Ark. 569.

HART, J., (after stating the facts). Professor Pomeroy, in discussing the question of specific performance, says that the doctrine is fundamental that either of the parties seeking specific performance against the other must show as a condition precedent to his obtaining the remedy that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commenc-

ing suit. Pomeroy's Equity Jurisprudence, vol. 6, par. 805.

In paragraph 809, following, he says that where the stipulations are mutual and dependent—that is, where the deed is to be delivered upon payment of the price—an actual tender and demand by one party is necessary to put the other in default and to cut off his right to treat the contract as still subsisting.

(1) In the case before us there was an executory contract for the sale of the land, and the chancellor has found that the failure of the defendants to deliver the deed was due solely to the failure of the plaintiff to pay the stipulated purchase price according to the terms of his agreement, and on that account refused specific performance of the contract. We are of the opinion that the decision of the chancellor was correct. The decision is based upon the maxim that he who seeks equity must do equity, and this applies with peculiar force in the case of specific performance of a contract to sell lands. The party who seeks the specific execution of the contract is bound to show a substantial performance or readiness and offer to perform on his part of all that is required of him by the contract. Failure in any material respect offers a full defense to the suit.

(2) According to the testimony of the defendants, the plaintiff on the 12th day of December, the date on which the deed was placed with the Bank of Brinkley for delivery, said that he had already examined the abstract of title and found it all right.

According to the testimony of the plaintiff himself, his attorney examined the abstract within a month after this time. So, according to his own statement, the abstract was examined by the middle of January. Still, he failed to make the cash payment of $150 as required by the terms of the contract. The agreement between the parties contemplated that this cash payment should be made in a reasonable time after the deed was placed in the bank for delivery. The plaintiff failed to make the

payment according to the terms of the contract and the defendant upon his return to Brinkley on the 20th of February, 1914, again demanded payment of the plaintiff and upon the plaintiff's failure to pay him declared the contract rescinded.

The plaintiff failed to perform the conditions imposed upon him by the contract, and his failure to do so was a defense to his action for specific performance. The decree will be affirmed.

FLEISCHER v. WAPPANOCCA OUTING CLUB.

Opinion delivered May 3, 1915.

1. TAXATION—ENFORCEMENT—COLLATERAL ATTACK.—Under Act 1909, p. 783, providing that the owner of land sold for nonpayment of taxes may, within three years after the rendition of the final decree, file his petition alleging payment of the taxes for the year, for the nonpayment of which the land was sold, and that on the establishment of the fact alleged, the court shall vacate the decree as to such lands. *Held*, when the petitioners filed their petition within two years after the rendition of the decree, such decree condemning the lands was not conclusive of the issue raised by the petition, whether the taxes had been paid for the year in which they were returned delinquent since the proceeding was under the statute, to be considered as directly attacking the decree, and being expressly authorized by the statute.
2. TAXATION—TENDER—REFUSAL—REMEDY.—When an owner of land tenders his taxes due on the same, and the collector by mistake refuses to accept the same, the owner may redeem the land if it is subsequently sold.

Appeal from Crittenden Chancery Court; *Charles D. Frierson*, Chancellor; affirmed.

STATEMENT BY THE COURT.

The appellees filed their petition, setting up that the west fractional half of section 34, township 9 north, range 8 east, containing 223.32 acres, was sold in 1910 under a decree of the chancery court for the alleged nonpayment of taxes due the St. Francis Levee District for the year 1909, and that appellants were the purchasers at that sale. The petitioners alleged that they had paid the taxes for

that year and that they filed their petition within two years after the sale.

Appellee Jewell alleged that he had been informed that the taxes on the tract of land owned by him had been paid for the year 1909, and that he was ignorant of the proceedings that had been taken against it, and that while the taxes, in fact, were not paid, he tendered with his petition, within two years after the final decree, the amount of the taxes, penalty and costs, if the same were legally charged against him.

Appellees asked that the decree under which their lands were sold be cancelled as a cloud on their title.

The appellants answered these petitions, denying their allegations, and setting up that the lands were condemned to be sold for the delinquent levee taxes for 1909; that they became the purchasers, and that deeds were executed to them in conformity with the sale. They denied that the sale was void for any reason. They set up that appellee Jewell had no right to pay the taxes within two years after the final decree in the cause, and asked that his petition be denied.

The stipulation of counsel shows that the lands were assessed for the year 1909, as follows:

"*Wappanocca Outing Club—All frl. section* 34, 543 *acres,* $59.73. Paid October 21, 1909. (Register receipt being No. 301.)

"G. A. Jewell—Frl. w. ½, sec. 34, 97 acres, $10.67. Not paid."

It was further stipulated that prior to the expiration of the time for the payment of levee taxes in the year 1909, G. A. Jewell went to the office of the tax collector for the St. Francis Levee District and asked to pay his taxes on the lands in controversy claimed by him and was told that the same had been paid by appellee, Outing Club.

The court found as to the appellee, Wappanocca Outing Club, that it paid the taxes for the year 1909 on the lands in controversy claimed by it, and that the sale that was made did not affect the title of the Wappanocca

Outing Club, and decreed that the sale of the lands "lying within the boundary line of Big Lake, or Wappanocca Lake," be set aside and cancelled.

As to appellee Jewell, the court found that Jewell tendered the levee taxes for the year 1909 during the time allowed by law for the payment of the taxes on the lands claimed by him and that the tender was refused by the collector.

The court further found that the lands claimed by Jewell as listed for taxation and as described in the complaint for their condemnation were not properly described, and that the chancery court had no jurisdiction to render the decree under which the lands were sold. The court therefore cancelled the decree as to the lands claimed by appellee Jewell. The appellants duly prosecute this appeal.

Mann, Bussey & Mann, for appellants.

The contention that petitioners had paid the taxes, and, therefore, no suit should have been instituted, nor decree rendered for the taxes, can not be sustained, for the reason that such question is concluded by the decree. 94 Ark. 588.

As to Jewell, the statute does not protect one who merely makes an effort to pay his taxes and fails. If he is entitled to any relief at all, he must come within the express language of the statute. This he has failed to do.

L. P. Berry, for appellees.

Appellees filed their petitions under section 1 of Act 262, Acts 1909, and this is not a collateral attack upon the decree. Therefore, the case of *Pattison* v. *Smith,* 94 Ark. 588, relied on by appellants, does not apply.

There is no dispute as to the facts. The outing club paid the taxes on the land owned by it, and Jewell offered to pay and tendered the taxes on his land, which the collector refused.

A tender would have the same effect as payment. 23 Ark. 375; 35 Ark. 505; 70 Ark. 500; 92 Ark. 630; 99 Ark.

137; 74 N. W. 1045; 75 N. W. 292; 100 N. W. 180; 38 So. 609; 34 S. E. 508.

WOOD, J., (after stating the facts). (1) The appellants contend that the decree condemning the lands in controversy to be sold for the nonpayment of taxes was conclusive of the issues raised by appellees in their petition, towit, that they had paid and tendered for payment the taxes on the lands in controversy for the year in which the same were returned as delinquent, and they rely upon the case of *Pattison* v. *Smith,* 94 Ark. 588. That was a suit in ejectment by the owner of the land sold for delinquent taxes against the purchaser at the sale, alleging that the taxes for which the lands had been sold had been paid and that the decree condemning the same for sale was therefore void. The court held in that case that the decree of the chancery court condemning the land to be sold under the act of 1895 was conclusive, on collateral attack, of the question as to whether or not the taxes had been paid, and that the land owner could not impeach the decree by showing actual payment of the taxes. That case has no application here for the reason that the appellees filed their petitions herein within two years from the rendition of the decree under which their lands were sold, as they were authorized to do by the act under which the lands were sold.

Act 262 of the Acts of 1909, under which the lands in controversy were sold for the alleged nonpayment of taxes, provides in part as follows: "And provided that the owner of said lands * * * may at any time within three years after the rendition of the final decree herein provided file his petition in said court, alleging the payment of taxes on said lands * * * for the year for which they were sold and upon the establishment of that fact the court shall vacate and set aside the said decree as to such lands."

Appellees' petitions therefore were not collateral attacks upon the decree of the chancery court, but were expressly authorized by the statute, and therefore must be

considered as direct proceedings in the original action, attacking the decree.

The appellants concede that the appellee, Wappanocca Outing Club, paid the taxes on the lands claimed by it. This, under the provisions of the act, shows that the decree of the court was correct as to appellee, Wappanocca Outing Club.

(2) But appellants contend that it does not protect appellee, Jewell. The court found that Jewell "tendered and offered to pay the levee taxes for the year 1908 during the time allowed by law for the payment of said taxes and that the said tender was refused by the collector of said taxes."

In *Scroggin* v. *Ridling,* 92 Ark. 630, we held. "Where the owner of land in good faith attempted to pay the taxes on all of his land, but by the collector's mistake the taxes on a part of it were not paid, the owner will be entitled to redeem the land." This principle applies here. The offer of appellee, Jewell, to pay and his tender of the taxes to the collector was tantamount, under the provisions of the statute, to a payment, and the collector, under those circumstances, was not authorized to return his land as delinquent. *Kinsworthy* v. *Austin,* 23 Ark. 375; *Gunn* v. *Thompson,* 70 Ark. 500; *Knauff* v. *National Coop. & Woodenware Co.,* 99 Ark. 137.

The decree is therefore affirmed.

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

Opinion delivered May 3, 1915.

CARRIERS—CHARGING EXCESSIVE FARE.—A carrier will not be liable for the statutory penalty for charging an excessive fare, when it does not appear that the carrier's agents intentionally made such a charge.

Appeal from Nevada Circuit Court; *G. R. Haynie,* Judge; affirmed.

STATEMENT BY THE COURT.

This is an action for statutory penalty under section 6620 of Kirby's Digest, which makes any corporation operating a railroad in this State liable to a penalty for taking or receiving any "greater compensation for the transportation of passengers than is allowed by law." The plaintiff alleged that he was a passenger on defendant's train from Prescott to Boughton; that he applied for a ticket to Boughton, for which the agent charged him ten cents, but when he produced the ticket on the train it was discovered that the ticket agent had, by mistake or otherwise, given him a ticket to Emmet, the first station south of Prescott, instead of to Boughton, the first station north; that defendant's conductor refused to accept the ticket to Emmet in payment of plaintiff's fare to Boughton and demanded ten cents for his fare. The court sustained a demurrer to the complaint and the appellant, resting on the sufficiency of his complaint, judgment was rendered in favor of the appellee dismissing the complaint and this appeal has been duly prosecuted.

J. O. A. Bush, for appellant.

The question presented is not, "Did the ticket agent make a mistake in selling the ticket and receiving the fare," but did the conductor on the train, having knowledge of the facts, have the right to receive the additional fare he required appellant to pay. His act was a clear overcharge within the meaning of the statute, and the complaint was and is sufficient. 65 Ark. 177; 88 Ark. 282; 93 Ark. 42.

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

The complaint states no cause of action within the statute. As between a conductor on a train and a passenger, a ticket is conclusive evidence as to the latter's right to transportation, and if by its terms the ticket does not entitle the passenger to transportation, although the fault may be that of the railway company, it is his duty

to pay the fare demanded and seek his remedy for breach of the contract. 23 Fed. 326; 50 Fed. 496; 52 Fed. 197; 37 Mich. 342; 97 Mich. 439, 37 Am. St. 354; 48 Mo. App. 125; 83 Md. 245.

WOOD, J., (after stating the facts). The complaint did not state facts sufficient to warrant a recovery of the statutory penalty and the court did not err in sustaining the demurrer. The case is ruled by the recent decision of this court in *Chicago, R. I. & P. Ry. Co.* v. *McDermott,* 106 Ark. 170. In that case we held that where a passenger asked for a round trip ticket from Little Rock to Hot Springs and paid the proper amount for the same, but by an unintentional mistake the railway company's agent gave him a round trip ticket to Benton, there being no intention to charge or receive more than the legal rate, the statutory penalty could not be recovered.

The complaint sets forth that the appellee's agent had by mistake given him a ticket "from Prescott to Emmet instead of from Prescott to Boughton," but it does not allege that the conductor intentionally demanded and received from the appellant more than the legal rate from Prescott to Boughton. There is nothing in the complaint to show that the carrier issued the ticket with an intention of charging an amount in excess of the legal rate. This was necessary in an action for the statutory penalty. In a suit for damages for a violation of the contract of carriage, the carrier under such circumstances would be liable, but not for the penalty prescribed by the above mentioned statute. See *Chicago, R. I. & P. Ry. Co.* v. *McDermott, supra,* and cases there cited. See also *St. Louis, I. M. & S. Ry. Co.* v. *Baker,* 118 Ark. 69.

The judgment is affirmed.

SWEPSTON v. AVERY.

Opinion delivered May 3, 1915.

1. ROAD IMPROVEMENT DISTRICT—FORMATION—WHOLE COUNTY.—A statute will be held ineffective which undertakes to form more than ninety-five per cent of a county into a single road improvement district.
2. ROAD IMPROVEMENT DISTRICT—INDEPENDENT ROADS—SINGLE DISTRICT.—When it is attempted to embrace such a considerable part of one county in a single road improvement district, so as to render the various roads affected by it, diverse, independent and remote, when the several improvements can not be grouped into one district and treated as single, the act making such attempt will be declared invalid.
3. LOCAL IMPROVEMENTS—BENEFITS—SPECIAL ASSESSMENTS.—Special assessments can be justified only on the ground that the contemplated improvement is local in its nature, and that the property taxed will be specially and peculiarly benefited.
4. LOCAL IMPROVEMENT—BENEFITS—LEGISLATION—DETERMINATION—DUTY OF COURTS.—When a statute, undertakes to form over ninety-five per cent of one county into a single road improvement district, and recites that the improvement of each road in the county will result in equal benefit, or benefit in the same ratio, to all the lands in the district, the courts are not bound by such recital, the same being arbitrary and unreasonable.
5. ROAD IMPROVEMENT DISTRICTS—FORMATION—VALIDITY.—Act 192, p. 797, Acts 1913, to create the Crittenden County Road Improvement District, *held*, invalid so far as it attempted to throw substantially all the road interests of Crittenden County into an improvement district, and authorize special assessments to pay for any roads that the commissioners may deem it advisable to improve.
6. LOCAL IMPROVEMENTS—INDEPENDENT IMPROVEMENTS—LEGISLATIVE AUTHORITY.—The Legislature is without authority to group together independent improvements, and arbitrarily declare them to be a single improvement.

Appeal from Crittenden Chancery Court; *Charles D. Frierson*, Chancellor; reversed.

Brown & Anderson, for appellants.

1. Our Constitution confers *exclusive* jurisdiction as to taxes, roads and bridges, etc., upon the county court. Art. 7, § 28, and Amend. No. 5, Kirby's Dig., § § 7227-8, 7273.

2. The act in question is unconstitutional and void, as an attempt to usurp the jurisdiction of the county court and vest it in a board created by the Legislature. It is also void because it lays off, practically, the *whole* county into one district and determines and declares in advance that all the real estate in the whole district (practically county) will be specially benefited. No *particular* improvement is provided for as in the *Bridge* cases. 89 Ark. 513; 50 *Id.* 117; 76 *Id.* 23; 103 *Id.* 529; 96 *Id.* 419; 84 *Id.* 555; 70 *Id.* 549.

3. The act cuts off all inquiry as to the matter of special benefits or betterments which are the only foundation for such local assessments. 50 Ark. 117.

4. The roads of an entire county are too numerous, diverse and remote to be included in one district. 89 Ark. 513.

Berry & Neely and *T. K. Riddick,* for appellees.

1. The act does not invade the jurisdiction of the county court. 104 Ark. 429. The Glover case (89 Ark. 513) does *not* determine this case. It has been modified by subsequent decisions. Here the entire county is not included and the board is not authorized to lay out or establish new roads. 96 Ark. 419, 104 *Id.* 429.

2. The Legislature is the final judge of whether property in the proposed district is benefited. 50 Ark. 117; 104 *Id.* 431; 96 *Id.* 419; 97 *Id.* 322; 108 *Id.* 419; 59 *Id.* 513. Absolute equality and uniformity in improvement districts is impossible.

3. Local assessments are not "*taxes.*" 80 Ark. 109; 81 *Id.* 562. The Legislature is the final judge of the limits of improvement districts and its conclusions can not be reviewed by the courts 89 Ark. 513; 87 *Id.* 8; 81 *Id.* 562; 108 *Id.* 419; 102 *Id.* 553.

4. The act does not violate any provision of our Constitution or that of the United States. 181 U. S. 324; 103 Ark. 526, and cases, *supra;* 172 U. S. 269.

McCULLOCH, C. J. This is an action instituted by appellant in the chancery court of Crittenden County, attacking the validity of a road improvement district formed in that county by a special act passed by the General Assembly of 1913, the title of said act being "to create the Crittenden County Road Improvement District."* The first section provides that all of Crittenden County west of the center of the main channel of the Mississippi River, except seven sections properly described, lying in the northwest corner of the county, is organized into an improvement district to be known as "Crittenden County Road Improvement District." The commissioners are named in the statute and it is declared that the board of commissioners and their successors shall constitute a body corporate under the style indicated above, with power to sue and be sued, etc., and that "the said commissioners shall be maintained in perpetual succession as a board of improvement for the preservation and maintenance of the highways herein contemplated." Section 2 of the act defines the purpose of the organization, as follows: "The said district is hereby organized for the purpose of improving the public highways within its territories, including the construction of such bridges as may be required in improving such highways, and the commissioners shall proceed to improve public roads within the district as now, or may hereafter be laid out, and such roads as the county court of Crittenden County may approve so as to connect all parts of the district with all other parts and with the county site. * * * The commissioners shall determine which roads shall be improved, and the order in which the improvement shall be made."

Section 3 provides that road work shall be performed by the residents under the general road laws of the State, or in lieu thereof to pay an annual commutation tax of $4. That section also provides that the road taxes levied and collected pursuant to Amendment No. 5 of the Constitution shall when collected be paid over to the sec-

*Act 192, page 797, Acts 1913.

retary of the Crittenden County Road Improvement District for use in construction of the contemplated improvements.

Section 5 reads as follows: "It is ascertained and hereby declared that all real estate within said district, including bridges, railroads and tramroads, will be benefited by the improvement within said district more than the cost thereof apportioned according to the ratio which it bears to the county assessment of each piece of real property, bridges, railroad and tramroad within the district for this and the succeeding years, and the cost thereof is made a charge upon such property superior to all other mortgages and liens except liens for the ordinary taxes, and for improvement districts heretofore organized, but the sale of any such property in foreclosure of the lien of any improvement district or for ordinary taxes shall not release the same from the lien hereby created. The total cost of the improvement undertaken by the district shall not exceed 10 per centum of the assessed value of the real property, bridges, railroads and tramroads of the district; but the interest upon the money borrowed shall not be computed as part of the costs, and as the assessed value of such property in the district is increased, the power of the district to borrow money shall be continually increased, so that it shall always have the power to incur an indebtedness equal to 10 per centum of the assessed value of such property within the district."

Section 6 provides that "the commissioners shall report to the county court from time to time all improvements and loans of money that they may contemplate making, and all bond issues that they desire to make, and no work shall be done or money shall be borrowed without the approval of the county court." It is further provided in the section that it shall be the duty of the county court, if it approves the plan, "to levy a tax upon the property of the district sufficient to pay for said work, or such indebtedness, or said bonds as they may mature, not, however, to exceed three mills per annum on the assessed

property value; but in computing the amount to be levied each year, the court may deduct the estimated amount to be derived from the proceeds of the road tax levied under Amendment No. 5 of the Constitution of the State of Arkansas hereinbefore referred to. Said tax is to be payable in annual installments, as provided in said order. The tax so levied shall be a lien on all the property in the district from the time the same is levied by the county court, and shall be entitled to preference over all demands, executions, encumbrances or liens whensoever created, and shall continue until such assessment with any penalty and costs that may accrue thereon shall have been paid."

A remedy is provided in subsequent sections for enforcement of the taxes by suit in the chancery court, similar to the statute with reference to the enforcement of improvement districts taxes in cities and towns.

Section 9 provides that "if the tax first levied shall prove insufficient to complete the improvement, the board shall report the amount of the deficiency to the county court, and the county court shall thereupon make another levy on the property previously assessed for a sum sufficient to complete the improvement, which shall be collected in the same manner as the first levy; *provided,* that the tax shall never exceed three mills per annum on the dollar of the assessed property value."

Section 12 authorizes the board of commissioners to borrow money and to issue negotiable bonds, if deemed best for the interest of the taxpayers.

Section 15 provides that "the district shall not cease to exist upon the completion of the improvement; but shall continue to exist for the purpose of preserving the same, and to this end the commissioners may from time to time apply to the county court for the levying of additional taxes" not to exceed three mills per annum on the dollar of assessed property.

Appellees are commissioners of the district, and an injunction against them is prayed, restraining them from proceeding, according to the terms of the statute, to award

contracts for the construction of a certain viaduct leading to the wagon bridge over the Mississippi River, and to issue bonds.

The complaint sets forth allegations, and the proof in the case shows that the commissioners formed plans for the construction of improvements, consisting of certain roads and a viaduct leading from the bridge across the Mississippi River, to cost in the aggregate the sum of $600,000; and that the issuance of bonds was authorized in the sum of $385,000. The county court approved the plans for the construction of said improvements and the issuance of bonds and assessed an annual tax of three mills on the lands in the district, according to the assessed value thereof, for a period of thirty years or until said bonds and interest thereon shall be fully paid.

It is thus seen from the foregoing statement that the Legislature has attempted to create a road improvement district consisting of nearly the whole of Crittenden County—at least 95 per cent of the lands, including islands in the Mississippi River, said to be a portion of the county—and create a perpetual commission to improve the public highways and bridges in the district "as now or may hereafter be laid out," with authority to "determine which road shall be improved and the order in which the improvement shall be made." A legislative determination is declared in the fifth section of the statute that all of the real estate in the district "will be benefited by the improvement within said district more than the cost thereof, apportioned according to the ratio which it bears to the county assessments of each piece of real property," and the cost of said improvement, not exceeding 10 per cent of the assessed value of real property, as augmented by future assessments, is made a charge on said property. The road tax collected pursuant to the constitutional provision is to be turned over to the board, and a tax of not exceeding three mills per annum on all the real property in the district is authorized for the purpose of paying for

such improvements as shall be constructed. Is this a valid exercise of legislative power?

In *Road Improvement District* v. *Glover*, 89 Ark. 513, we said "Such districts (formed for local improvements) are based and sustainable only upon the theory that the local assessments levied to sustain them are imposed upon the property of persons who are specially and peculiarly benefited in the enhancement of the value of their property by the expenditure of the money collected on the assessment; and that while they are made to bear the cost of the local improvement, they at the same time suffer no pecuniary loss thereby, 'their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.' * * * According to this theory, the district should not be so extended by many and independent improvements as to include territory in no wise affected by all the improvements. It is obvious the State can not be organized into a district to construct or maintain improvements to be paid for with money derived from local assessments. So counties can not be organized into districts for the building, repairing and maintaining roads without usurping the exclusive jurisdiction of roads vested in county court by the Constitution. Its roads and need for roads are too numerous, diverse and independent and some too remote from each other, to be embraced in one district and sustained by local assessments. In such a case the board of directors of the road district would become a partial substitute for the county court vested with its jurisdiction over roads."

(1-2) That was said in a case where there was an attempt to form the whole county into a road district, but it is no less applicable in a case like this where more than 95 per cent of the lands of the county are embraced in the district. The "roads and need of roads" are no less "numerous, diverse and independent and some too remote from each other" where 5 per cent or less of the county is omitted from the district than where the whole county is embraced. The doctrine of that decision is that on ac-

count of the diversity of the road interests of the whole county, or such a substantial portion of it as renders the conditions the same as if it were the whole county, the project to improve all of the roads does not constitute a single improvement and can not be made the subject-matter of an improvement district for the purpose of levying local assessments to pay for the improvement. It is clearly an evasion of the necessary effect of that decision to attempt to organize substantially the whole of a county, into a road improvement district and it can not be done. It does not follow from this that the improvement must be confined to a single road, or to a road of any particular length. We are holding to the contrary in the case of *Cox* v. *Road Improvement District,* 118 Ark. 119. But where such a considerable part of the county is embraced in it as to render the various roads affected by it diverse and independent and remote, then the several improvements can not be grouped into one district and treated as single. We held in the Glover case, *supra,* and also in the later case of *Parkview Land Company* v. *Road Improvement District No.* 1, 92 Ark. 93, that the statute then under consideration was valid to the extent that it authorized the formation of part of a county into a road improvement district. It is insisted that those cases authorize the organization of any portion of the county less than the whole into an improvement district to improve all the roads in that territory, but such is not their effect. The court was not dealing with the question of how much of the county, or what roads of the county, might be included in a district, but it was meant only to lay down the rule that the whole county, on account of the diversity of its road interests, could not be put into one district to improve all the roads; and, on the other hand, that a portion of a county could be organized into a district to improve such a road or roads as could be held to constitute a single improvement. It was held in those cases that the formation of an improvement district to improve a road or roads constituting a single improvement was not a usurpation of

the jurisdiction of the county court, but that the organization of the whole county would constitute such usurpation. It is contended that the doctrine of the Glover case is modified by subsequent decisions of this court, particularly *Shibley* v. *Fort Smith & Van Buren District*, 96 Ark. 410, and *Board of Directors of Jefferson County Bridge District* v. *Collier*, 104 Ark. 425. Those cases do not in any wise limit or modify the doctrine of the Glover case, but all of them are in perfect harmony with each other. In the two cases last cited, the court held that the whole county or any part of it could be organized into an improvement district for the construction of work which constituted a single improvement resulting in special benefit to the lands in the district. The force of the doctrine of the Glover case was fully recognized in those cases, but it was found not to apply for the simple reason that the construction of the bridge in those districts, respectively, involved in the cases, constituted a single improvement.

Now, in order to carry out the attempted scheme of treating all the roads in this district, or such portion thereof as the board of commissioners may decide to improve, as a single improvement, the framers of the statute in effect, if not in express language, declared that improvements of any of the roads would result in benefits in proportion to the assessed value. In other words, the commissioners are, as said in *Cox* v. *Improvement District, supra,* given a "roving commission" to improve any portion of any of the roads in the district, and it is declared that such improvement will result in a benefit to all of the lands in the district in proportion to the assessed value thereof, and an *ad valorem* tax of three mills is levied. Such a scheme can not be treated as a legislative determination of benefits for the simple reason that the improvement is not specified and it can not be known in advance what improvement is going to be made. It is incorrect on its face—a demonstrable mistake—to say that the improvement of every road or portion of road in so large a part of the county will result in special benefit, in

equal ratio, to all the lands in the county. The statute presents an impossible scheme when read in the light of the correct theory of justification for local improvements, which is in many of our decisions said to rest entirely upon the peculiar benefits to result to the property to be taxed for local improvement.

(3) The Constitution provides (Amendment No. 5) that a county court may levy a road tax of not exceeding three mills on the dollar "if a majority of the qualified electors of such county shall have voted public road tax at the general election * * * preceding such levy;" but special assessments can be justified only on the ground that the contemplated improvement is local in its nature and that the property taxed will be specially and peculiarly benefited. *Rector* v. *Board of Improvement,* 50 Ark. 116; *Kirst* v. *Street Improvement District,* 86 Ark. 1.

(4) It is insisted that this feature of the statute, constituting a legislative determination of the anticipated benefits, is sustained by the case of *Board of Directors Crawford County Levee Dist.* v. *Crawford County Bank,* 108 Ark. 419, but we do not find the case is decisive of the present one on that subject. In that and in many similar cases we held that the Legislature might determine in advance the benefits to accrue to property from a proposed improvement, but in the present case we have a determination which is on its face inconsistent and fallacious, and the courts are not bound to accept it, for it is entirely arbitrary and unreasonable to say that the improvement of each road in the county will result in equal benefit, or benefit in the same ratio, to all the lands in the district. The case of *Alexander* v. *Board of Directors Crawford County Levee Dist.,* 97 Ark. 322, supports us in this conclusion.

(5-6) We are therefore forced to the conclusion that this statute is invalid so far as it attempts to throw substantially all of the road interests of Crittenden County into an improvement district and authorize special assessments to pay for any roads that the commissioners may

deem it advisable to improve. That would not only be a clear usurpation of the jurisdiction and powers of the county court, but would violate every theory upon which the right to impose local assessments is based. We do not mean to say that the Legislature has not complete power to regulate the manner in which the jurisdiction of county courts may be exercised; and to authorize and compel county courts to act through certain agencies appointed by the Legislature, but the lawmakers can not strip the county court of that jurisdiction or delegate to other agencies the powers which rightfully and under the Constitution belong to the county court. Nor can the Legislature group together independent improvements and arbitrarily declare them to constitute a single one so that they must necessarily be treated as such in law.

There is no authority to issue bonds, except through an improvement district, inasmuch as the Constitution contains an express prohibition against the county issuing its bonds. The chancellor erred in refusing to enjoin the commissioners named in the statute from proceeding to let the contract and issue bonds, and the decree is therefore reversed and the cause remanded with directions to enter a decree granting the relief prayed for in appellants' complaint.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. LIVESAY.

Opinion delivered April 26, 1915.

1. MASTER AND SERVANT—ASSUMED RISK.—The defense of assumed risk is not abolished by the Federal Employer's Liability Act.
2. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.—Although the master owes to his servant the duty to furnish him a safe place in which to do his work, there are some risks of the employment which the servant necessarily assumes, and the master will be held to have performed its duty when it exercises reasonable and ordinary care to furnish a safe place in which the servant may perform his duties, and the master is not liable for an injury which occurs after the performance of this duty.

3. MASTER AND SERVANT—ASSUMED RISK.—A servant assumes all obvious risks of the work in which he is employed, including the risk of injury from the manner in which he knowingly sees and observes that the business is being operated and the work done.

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

Read & McDonough, for appellant.

1. The evidence is not sufficient to support a verdict under the "Federal Employer's Liability Act," and the decisions of this court and the United States Supreme Court construing same. 233 U. S. 573; 234 *Id.* 725; 231 *Id.* 222; 229 *Id.* 265. Negligence must be proved. 100 Ark. 467; 110 *Id.* 36. No negligence on the part of the company is proven. 105 Ark. 161; 102 *Id.* 581; 179 U. S. 658. The presence of the bolt, a bar, coal, etc., on top of the tank does not show negligence. 170 S. W. 948; 92 Atl. 178; 143 Pac. 1095.

2. The master is not an insurer of the servant's safety. His duty is to provide a reasonably safe place in which to perform his duties. 80 Ark. 260; 143 Pac. 1095; 169 S. W. 709; 87 Ark. 217; 90 *Id.* 145; 91 *Id.* 343; 92 *Id.* 350.

3. Where a servant is in control of the place of work and undertakes its performance, he assumes not only obvious dangers, but such as ordinary care in the inspection of the place would have enabled him to discover. 169 S. W. 709; 90 Ark. 387.

4. Plaintiff assumed the risk. 233 U. S. 492; 87 Ark. 471; 88 Ark. 292; 99 *Id.* 265; 87 *Id.* 511; 96 *Id.* 206; 93 *Id.* 140; 97 *Id.* 486; 82 *Id.* 11. The rule is well stated in 95 Ark. 560. See also 106 Ark. 436; 108 *Id.* 377; 104 *Id.* 67.

5. Review the instructions and contend that there is error in both giving and refusing prayers requested.

Elmer J. Lundy, for appellee.

1. There is no error in the instructions. The appellee did not assume the risk. The company was guilty of negligence in not providing a reasonably safe place to

work. Nor was plaintiff guilty of contributory negligence. 172 S. W. 840-2; 29 N. E. 464; 82 *Id.* 647; 200 Mass. 242; 81 N. E. 1; 121 S. W. 602.

2. This case does not fall within the rule of 90 Ark. 387; 106 *Id.* 436, nor 108 *Id.* 377. It was not the duty of the servant to search or look for danger. It was the master's duty to make reasonable inspection to see that the place was safe. 169 S. W. 940; 109 Ark. 288; 121 S. W. 602.

3. The evidence made a case for the jury under the Federal act. The verdict is sustained by the evidence and the judgment should be affirmed. The master had knowledge of a habit of its employees in throwing obstructions upon the tender in violation of rules and took no measures to guard against them and failed even to notify appellee of the habit, but instead supplied him with the rules by which it agreed that the engine would be safe. 81 N. E. 1; 86 *Id.* 282; 29 *Id.* 464.

SMITH, J. Appellee was a fireman, and was so employed on an interstate train running from Heavener, Oklahoma, to points north in other States. It is alleged, and admitted, that he was engaged in interstate commerce at the time of his injury.

He claims that his injury, which was a rupture, occurred at the town of Salisaw, Oklahoma, on November 16, 1913, at about 1:45 A. M. The train on which appellee was employed was an extra through freight. The train left Heavener at 6:40 P. M., and stopped at Spiro for orders and to take water, and its next stop was at Salisaw for water. After reaching Salisaw they took coal, and then backed the engine down to the tank to take water.

Appellee testified that it was his duty to move the water crane into place to convey the water into the tank of the engine, and that after taking water he was engaged in pushing the crane back into position, when he stepped upon a bolt lying upon the top of the water tank, and that the bolt turned under his foot and caused him to be

thrown against the edge of the tank. He was seriously injured, and recovered substantial damages.

The presence of this bolt constitutes the negligence complained of.

Appellant, in its answer, denied that it was guilty of any negligence, and pleaded, as separate defenses, negligence on the part of appellee and the assumption of risk.

The presence of the bolt upon the tank was one of the issues of fact raised by the evidence; but the verdict of the jury is conclusive of the fact that the bolt was upon the tank, and of the further fact that appellee was injured by stepping on it. Appellee described the bolt as being six or eight inches long and about the size of a chair post.

A number of witnesses testified concerning the duty of appellee to have inspected his engine before leaving the roundhouse. The evidence of the appellant is to the effect that this duty was imposed upon appellee; but he offered evidence that such was not his duty, and that he was under no duty to make any inspection for defects of any kind. It was shown, however, and the proof appears to be undisputed, that it was his duty to make a cursory examination of his engine; and it was also shown that he was at the roundhouse for an hour or longer before the departure of his train. Appellee testified that his engine was a coal burner, and had been cut loose from the train at the time of the accident, and that he had only the engine, tender and tank, the tank being a part of the tender. That there was a man-hole opening into the tank, and that it was necessary for him to stand on the platform around the man-hole to reach for the spout of the crane to let the water in. That there was a partition which cuts the coal off from the back end of this platform, but there were two lumps of coal, a piece of rubber hose, an iron bar, and about two inches of cinders on this platform, in addition to the bolt. Appellee carried an oil torch which threw a bright light, but which was placed by him on the coal and did not light up that part of the platform where the bolt was lying. Appellee testified that there was a rim

four or five inches high around the platform or flat part of the tender, which was seven or eight feet square, or possibly larger, and that the man-hole was in the center of this platform, and stood up some eight or ten inches above it, and there was a lid over this man-hole, and the floor was level between the lattice work which held in the coal and the man-hole, and that the bolt was on this level place. Appellee did not know for what purpose the bolt was used, and could not say whether it was a bolt that might be used around the engine or not.

The evidence was undisputed that it was necessary for engines to carry certain equipment, and that tool boxes were provided for engines of a certain class, while other engines, of the class similar to the one on which appellee was employed, did not have these tool boxes, and it was customary to carry the equipment on the back end of the tank or tender, and that there was no other provision for carrying the equipment on the engines which had no tool boxes. Appellee was shown to have been a skilled fireman, of long experience.

The evidence took a wide range, dealing with the question of the duty to inspect, and with that of the contributory negligence of appellee, and elaborate instructions were given covering all these questions; and many exceptions were saved at the trial and have been discussed in the briefs.

(1-2) The first question presented, and the one which we think is decisive of this case, is that of the assumption of risk. This case is governed by the Federal Employer's Liability Act, but the defense of assumed risk is still in existence under that act. *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492. Appellee was an experienced fireman, and there was no breach of any duty to warn him of the dangers incident to his service, unless that duty arose out of the presence of the bolt near the man-hole. But the proof is undisputed that appellee's engine carried no tool box, and that it was customary and usual to place on this platform about the man-hole such

articles as appellee says were there at the time of his injury. Appellee had no right to expect that this space about the man-hole would at all times be kept free of obstructions. He admits that there were two lumps of coal in this space, which fell over the lattice work supporting the coal after the engine had taken coal but before it took water. It was as probable that he would stumble over one of these lumps of coal as that his foot would be turned by stepping on the bolt. If the defense of assumption of risk means anything, this appears to be a proper case to apply it. The master is not required to make the servant's place absolutely safe. To impose this duty upon the master would make him an absolute insurer of the servant's safety. There are certain risks usual and ordinarily incident to the service in which appellee was engaged, and if the injury resulted from one of these risks appellant could not be held liable. The measure of appellant's duty was to exercise reasonable and ordinary care to furnish appellee a reasonably safe place in which to perform his duties while he, himself, exercised ordinary care in the discharge of those duties, and the master is not liable for any injury which results after he has performed this duty. But even when this duty has been performed, there remain certain risks of injury which may arise, notwithstanding the care which has been exercised to avoid them. These risks are the assumed risks, and if the servant is injured as the result of one of them he can not recover. This rule has been stated in many cases in our decisions, and is well stated in the case of *Graham* v. *Thrall,* 95 Ark. 562, as follows:

(3) "By his contract of service he (the servant) impliedly agrees to bear the risk of all dangers that are ordinarily incident to the employment, and consequently he can not recover for injuries which result to him therefrom. He thus assumes all obvious risks of the work in which he is employed, including the risk of injury from the manner in which he knowingly sees and observes that the business is being operated and the work done."

Under the proof in this case appellee's injury resulted from one of the risks incident to the employment in which he was engaged, and the judgment of the court must, therefore, be reversed and the cause will be dismissed.

KIRBY, J., dissents.

REECE v. STATE.

Opinion delivered May 3, 1915.

1. CRIMINAL LAW—SPECIAL TERM—ORDER OF CIRCUIT JUDGE.—The order of the circuit judge for a special term of the court to try criminal cases is jurisdictional, and must be strictly complied with in order to give authority to indict or try criminals at that term; every fact, according to the strict terms of the statute, must be made to appear of record, otherwise the jurisdiction of the court will fail.
2. COURTS—TERM OF COURT—SPECIAL TERM—ORDER OF CIRCUIT JUDGE—NUNC PRO TUNC ORDER.—The legality of a special term of the circuit court depends upon the sufficiency of the order of court, and if that order is, on jurisdictional grounds, insufficient, an amendment can not relate back so as to legalize a term of court which was not valid at the time it was held.
3. CRIMINAL LAW—SPECIAL TERM—ORDER OF CIRCUIT JUDGE—WHO MAY BE TRIED.—Only those persons may be tried at a special term of the circuit court, who are specially designated in the order of court calling the special term.

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

W. D. Gravette and *S. R. Simpson,* for appellant.

1. The special term of court was not legally organized. It is essential to the legal organization of a special term of the circuit court that the order therefor state (1) that there is some person or persons confined in jail, naming him or them, who may be tried upon some criminal charge; (2) that no other court must intervene; (3) that it must not be within twenty days of a regular term; (4) that the order be made out by the judge and transmitted to the clerk and be by him entered of record at least ten

days before the appointed day. To give jurisdiction to the court, all these requirements must appear from the order made by the circuit judge, and not otherwise and at such special term, no other person or persons than the one or more named in the order, and who was or were confined in jail at the time the order was made, can be tried. 2 Ark. 230; 9 Ark. 326; 29 Ark. 170; 45 Ark. 453; 79 Ark. 297; 100 Ark. 373; 103 Ark. 450, and cases cited.

2. The status of the case is not changed by the amendment of the record *nunc pro tunc,* which was unauthorized. The purpose of an amendment of a record by *nunc pro tunc* order is to make it speak the truth, and a court can not exercise this power to make the record speak what it should have spoken, but in fact did not speak. 87 Ark. 441; 35 Ark. 278; 31 Ark. 194; 40 Ark. 224; 78 Ark. 364; 92 Ark. 305; 72 Ark. 22; 55 Ark. 30; 93 Ark. 237; 99 Ark. 435; 93 Ark. 558.

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

The order for a special term contains the proper averments, and notice thereof was properly served. As to the objection that the appellant was not named in the order, it is sufficient to say that the order prepared by the judge followed the language of the statute.

McCULLOCH, C. J. A grand jury impaneled at a special term of the circuit court of Mississippi County, Chickasawba District, held on August 24, 1914, returned an indictment against appellant, E. Reece, for the crime of murder in the first degree, and at the next regular term of said court appellant was tried and convicted of murder in the second degree. The validity of the indictment was and is challenged on the ground that the special term of court, and the grand jury which was empaneled at that term, was illegal because not called by the circuit judge in the manner prescribed by the statute. The order of the circuit judge was directed to the clerk, and is in the following form:

"Whereas, the undersigned judge of the circuit court for the Second Judicial Circuit for the State of Arkansas,

being informed that a large number of persons are confined in the jail house, for said district, in said county, and State, charged with crime and are unable to give bail, and that a large number of persons aforesaid have not been indicted heretofore. Now, therefore, you are hereby directed to issue a *venire facias* to the sheriff of Mississippi County, requiring him to summon a grand jury to attend a special term of the circuit court in the second division, to be holden at the courthouse in the city of Blytheville, in said Chickasawba District of Mississippi County, Arkansas, on Monday, the 24th day of August, 1914, the same being a date at which no regular or adjourned session of the circuit court in the second division thereof is in session, and said date not being within twenty days of any regular term of said court in said division."

It will be observed in the first place that the instrument prepared and signed by the judge does not in express terms order that a special term be held on the date named. According to the express language used, it only recites the necessity for holding a special term of the court for the purpose of trying persons confined in jail, and directs the clerk to issue a *venire facias* to the sheriff requiring him to summon a grand jury to attend a special term to be holden at the courthouse on the day named.

The first point made against the legality of the proceedings is that there was no special term called. Our statute on this subject is a part of the Revised Statutes and was copied literally from a Missouri statute, and the Supreme Court of Missouri, in the case of *Mary* v. *State,* 5 Mo. 71, decided in 1837, which was before the statute was adopted in this State, held that an order substantially in the same language as the one now under consideration was sufficient to amount to a direction to hold the term of court. However, we need not discuss that point further or decide it in the present case, as we have reached a conclusion disposing of the case on another point.

(1) The principal contention is that the form of the order is insufficient to give vitality to the special term

of court for the reason that it fails to designate the accused persons who were to be indicted and tried. The order, as will be seen from its inspection, merely recites that the judge is "informed that a large number of persons are confined in the jail house * * * charged with crime and are unable to give bail, and that a large number of persons aforesaid have not been indicted heretofore." The order does not designate any individual nor does it expressly direct that all persons confined in jail are to be tried at a special term of court. We have decided that the order of the circuit judge for a special term of the court to try criminal cases is jurisdictional and must be strictly complied with in order to give authority to indict or try criminals at that term. In *Beard* v. *State,* 79 Ark. 293, we said: "It has been held by this court that every fact, according to the strict terms of the statute, must be made to appear of record, otherwise the jurisdiction of the court will fail. *Dunn* v. *State,* 2 Ark. 230; *Pulaski County* v. *Lincoln,* 9 Ark. 326. The order of the judge must therefore recite every jurisdictional fact, because in no other way can those facts appear upon the record." The same rule announced in the more recent case of *Hill* v. *State.* 100 Ark. 373.

(2) Since the case came here on appeal, the circuit court, has on motion of the prosecuting attorney, amended the order, *nunc pro tunc,* so as to specify that appellant was confined in jail and that the special term of court was called to impanel a grand jury and indict appellant on the charge for which he was confined. In *Beard* v. *State, supra,* we pretermitted any discussion of the question whether or not the court had the power, after indictment and trial of an accused under such circumstances, to make an order amending the original order of the judge calling the special term of the court. In that case it was unnecessary to decide the question for the reason that we held that the unamended order was sufficient under the law. Upon further consideration now, we are clearly of the opinion that since the order of the judge calling a special term of the court is jurisdic-

tional, it cannot, if found to be insufficient, be validated by a subsequent order of the court amending it so as to establish the jurisdiction of the court. The legality of the term of court depends upon the sufficiency of the order of the court, and if that order is, on jurisdictional grounds, insufficient, an amendment cannot relate back so as to legalize a term of court which was not valid at the time it was held. We must therefore test this case by a solution of the question whether or not the original order of the trial judge, calling a special term of the court at which appellant was indicted, was in conformity with the statute and sufficient to give the court jurisdiction.

Dunn v. *State,* 2 Ark. 230, was decided by this court in the year 1840, which was shortly after the adoption of the Revised Statutes containing the provision now under consideration. The statute was thoroughly considered and rules were laid down concerning the form of the order of the circuit judge necessary to give the court jurisdiction at a special session. After summarizing the essential features of the order, the court said: "We are therefore satisfied that the order for the special term must be made at least ten days before the commencement of the term, and designate the persons to be there tried, and state they are confined in jail, and whether they have been indicted, previously or otherwise, and if they, or either of them, have not been indicted for the offence for which he is to be there tried, the order must contain a direction to the clerk to issue a *venire facias* to the sheriff, requiring him to summon a grand jury to attend such special term of the court." The court further said in the opinion that no persons other than those in jail at the time the order was made, and designated in the order, could be tried. If that be the effect of the statute, it is clear that a mere recital that numerous persons are in jail is not sufficient designation of the persons to be indicted or tried.

(3) It is urged on behalf of counsel for the State that the ruling in *Dunn* v. *State,* with respect to the points

referred to, was *dictum.* The same point was made in *Hill* v. *State, supra,* but we said that the doctrine laid down in the Dunn case had been recognized ever since by this court as the correct interpretation of the statute, and that that interpretation should not now be departed from. Moreover, we are convinced, upon a reconsideration of the matter, that that interpretation was correct. A limited jurisdiction is conferred by the statute, and the purpose was clearly to provide for calling a special session in particular cases. The court has no right to try cases at a special term other than that designated in the order, nor has the grand jury impaneled at such term general powers of inquisition, but is limited to an inquiry into those matters specially embraced in the call. The general policy of our statutes is to provide for trial of cases at regular terms of court, of which the public is advised by the statute itself fixing the time for holding court. The statute now under consideration merely provides for an emergency, and the thought of the lawmakers was that in particular cases, where persons charged with crime are confined in jail, the court should have power to call a special term of the court to try those particular persons. Of course, the judge could specify more than one accused person in the order but, after all, the order is to be for the trial of the persons specially designated and no others.

We are of the opinion, therefore, that the indictment in this case cannot be sustained without departing from long established rules of practice laid down by this court in the interpretation of the statute under consideration. It follows that the judgment must be reversed and the cause is remanded with directions to quash the indictment, and for further proceedings in accordance with the statutes covering such cases.

KIRBY, J. dissents.

CALHOUN v. AINSWORTH.

Opinion delivered May 3, 1915.

1. BILLS AND NOTES—MATURITY—EXTENSION.—A note was given in payment for certain lots which the maker had purchased. The note was payable on a day certain but the contract of sale provided that payment could be delayed a certain time. *Held*, the stipulation in the contract did not operate as an extension of the note in the hands of a purchaser after the date upon which the note, upon its face, matured.
2. BILLS AND NOTES—ASSIGNMENT OF NOTE—PAYMENT TO PAYEE—MATURITY—AUTHORITY.—The maker of a negotiable note transferred after maturity will not be protected by payments to the original holder unless the latter was authorized by the true owner to collect them, or produced the note at the time of the payment, and when the original holder accepts payments, in order for the same to bind the true holder, actual authority to receive the same must be shown.

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

Gustavus G. Pope, for appellant.

1. Appellant not having given the Texarkana Trust Company any authority to collect any part of the principal of these notes, and having no knowledge of its custom of requiring deposits to meet payments, and he having purchased the note before any of these deposits were made, he is not bound thereby. 64 Ark. 119; 111 Ark. 263. After the purchase, the note was in the possession of appellant, and not in the possession of the Trust Company. The latter did not have even apparent authority to collect payments on the note. 141 S. W. 205; 102 Ark. 427.

The maker of a negotiable note who pays the same to the payee who is not the holder, is not discharged from his obligation to the holder, unless it be shown that the payee was authorized to receive payment, or that the holder led him to believe that the payee was so authorized. *Supra;* 109 Ark. 107; 55 Ark. 347; 89 Ark. 435.

The fact that the note was sent to the Texarkana Trust Company each year for payment of the annual

interest does not warrant an inference that it had authority to collect the principal. 105 Ark. 152; *Id.* 446; 75 Ark. 170; Kirby's Dig § § 509, 521.

The fact that the note was past due did not affect appellants rights as to anything that transpired after the purchase. 111 S. W. 1189; 168 S. W. 1086.

2. If it should be held that appellee Ainsworth is entitled to the credits claimed, then it is a trust fund in the hands of the receiver, and he should be directed to pay it over to appellant. 104 Ark. 550, 558, 560.

J. D. Cook, for appellee, Ainsworth.

On the question of payment, the evidence clearly justifies the findings of the chancellor, and they ought not to be disturbed. 99 Ark. 128; 86 Ark. 212; 78 Ark. 275; 90 Ark. 40; 97 Ark. 537; 104 Ark. 9.

The testimony shows that the Trust Company acted as agent both in the collection of interest and principal of all the notes sold to appellant, and that this was the custom on all paper and notes sold to him. The rule is that when the note and money meet in the hands of an accredited agent, the payment will be complete even though the payment may have come into the hands of the agent previous to the completion of his agency by delivery of the papers, provided the agent still has the money in his possession. 42 Ala. 117; 75 Cal. 66.

The Trust Company all the time held possession of the contract of sale in this case; it held possession of the security at the time all the payments were made, and the maker was protected in the payments to it. 168 S. W. 1068; 4 Hun. (N. Y.) 129.

Frank S. Quinn, for the receiver.

The evidence is not sufficient to establish a trust fund in the hands of the receiver. Appellant has failed in the first requirement of the law, that is, to identify the funds received in trust for the payment of the note. 73 Ark. 324; 99 Ark. 553; 104 Ark. 550; 83 Ark. 486.

McCULLOCH, C. J. The Texarkana Trust Company (now defunct), a corporation engaged in the banking

business in the city of Texarkana, agreed to sell certain lots of real estate in Texarkana to the defendants, J. S. Ainsworth and his wife, Jennie Ainsworth, executing a contract in writing covering the sale, and said defendants executed to the vendor a negotiable promissory note for the sum of $625.00 for the purchase price of said lots, with 8 per cent interest from date until paid. The note was due and payable on its face one year after date, but the contract of sale contained a stipulation that on payment of as much as $100.00 per annum the date of payment would be extended from year to year. The note was dated April 6, 1908, and was sold and transferred by the payee to the plaintiff, J. S. Calhoun, on Dec. 1, 1910. Plaintiff resided in Memphis, Tennessee, and the negotiations for the purchase of the note, together with other transactions, was conducted by correspondence. The Texarkana Trust Company failed and was placed in the hands of a receiver by the chancery court of Miller County on Nov. 12, 1913. Nothing had been paid to plaintiff on the note except the interest, but there was a credit of $330.16 standing on the books of the Texarkana Trust Company in favor of Mrs. Jennie Ainsworth, which was placed there to be paid on the note but had never been reported to nor paid over to the plaintiff, Calhoun. It was, according to the testimony, held in the bank to be finally applied on the note, but was never so applied. This is an action by the plaintiff to recover the amount due on the note and to enforce a lien on the land embraced in the contract of sale. The receiver of the bank was joined as defendant and the controversy in the case relates solely to the alleged credit of the amount of money in the bank, which defendants insist should be placed on the note in the hands of the plaintiff. The chancellor decided the disputed issue in favor of the defendants and rendered a decree in favor of the plaintiff for the balance due on the note after crediting said sum in bank, and enforced a lien on the lots therefor.

(1) The plaintiff was, as before stated, a resident of the city of Memphis and was never in Texarkana and had no acquaintance with any of the officers or employees of the bank except through correspondence concerning this and similar transactions which he had with the bank. The undisputed evidence shows that he purchased the note in good faith and paid face value therefor, and according to his own testimony he never authorized the bank to make any collections for him except when he sent the note to the bank for the interest to be collected and credited thereon. He purchased the note after maturity. The point is made that the stipulation in the contract for an extension of time operated as a postponement of the date of payment so that the note was immature at the time of the assignment. We are of the opinion, however, that the contention is not sound, and that this note must be treated as mature upon its face, which carried with it notice to the assignee of any defects or any defences to which the makers were entitled as against the original payee. But treating the note as one which had been assigned after maturity, we are of the opinion that the evidence fails to show that the payments made to the bank were authorized by the plaintiff or that he was bound by them; and such payments as were made to the bank after it ceased to be the holder of the note, and without having the note in its possession, were not valid as against the true owner.

(2) In the recent case of *Mammoth Vein Coal Co.* v. *Bishop,* 113 Ark. 585, 168 S. W. 1086, we held that the maker of a negotiable note transferred after maturity would not be protected by payments to the original holder unless the latter was authorized by the true owner to collect it or produce the note at the time of payment. In that case we said: "This was a negotiable note transferred and delivered to the appellant, it is true, after it became due; but this did not prevent it continuing negotiable, and gave the assignee the right to collect it subject only to defences existing at the time of the transfer." The authorities on this precise question are mea-

ger, but all that has been said and written on the subject is in support of the position which this court has taken. The rule was thus laid down by Mr. Daniels in his work on Negotiable Instruments (6th ed.) Vol. II, section 1233A. The Virginia Court of Appeals, in the case of *Davis* v. *Miller,* 14 Grat. 1, in discussing the subject, referred to paucity of authority on this particular question and explained it by saying that the proposition was so plain that it had rarely ever been controverted. The same rule was declared by Chief Justice SHAW in *Baxter* v. *Little,* 6 Metcalf 7, in language which appears to be dictum, but it is undoubtedly sound and is in accord with the few authorities on the subject. In a recent case decided by the Missouri Court of Appeals, it was said: "It being a negotiable note, payable to order, though past due, it was the defendant's duty to demand its production at the bank, as payee, before making payment. The payor of a negotiable note, though he does not know of its transfer, is not protected in paying to the payee who has sold and endorsed it to another." *Powers* v. *Woolfolk,* 111 S. W. 1187.

Now, the evidence in this case is sharply conflicting as to whether or not the defendants, Ainsworth and his wife, were apprised of the fact that the note had been transferred to plaintiff at the time the money was placed in bank. Mrs. Ainsworth testified positively that she had no knowledge or information on the subject and never received any communication from the plaintiff, Calhoun, until after the failure of the bank. The testimony of the officers and employees of the bank tends to establish a custom in cases of this sort, where they would transfer paper secured by real estate through transactions in that department of the bank, to open up a savings account with the vendees and allow payments to be made in installments, which were credited but not allowed to be drawn against, and at intervals the amounts would be credited on the notes. The bank officials claim that these payments received from Mrs. Ainsworth were treated in that way, but Mrs. Ainsworth denied that she had any in-

formation of that method of doing business, and says that they were straight payments on the note. On the other hand, the testimony of the plaintiff is that he had no information whatever of the bank's method of doing business and never authorized the bank to make any collections except when he sent the note to the bank for the collection of interest, supposing at the time that the bank was representing the makers of the note. At all other times he says that he kept the note in his possession at Memphis. He testified also that he generally wrote to Ainsworth and wife, giving notice of the approaching date for the payment of interest, and he exhibits a carbon copy of a letter dated March 30, 1911, notifying the Ainsworths that the interest would be due on April 6th of that year. Mrs. Ainsworth testified that she did not receive that letter or any other letter from plaintiff on the subject. Her husband's testimony on the subject is somewhat equivocal. He first said positively, in response to the question of his attorney, that he did receive the letter from plaintiff in 1911 informing him of the fact that plaintiff held the note, but after being pressed on the subject he retracted that statement and stated that he meant to say he received a letter from the plaintiff in 1914, and that was the first notice he had of the assignment of the note. It is unimportant to decide whether or not the defendants or either of them did in fact receive notice of the assignment before the disputed payments were made to the bank, for we are of the opinion that in either event the evidence fails to show any authority on the part of the bank to collect the money for plaintiff, and that the latter is not bound by those collections which were not in fact paid over to him.

It is thoroughly established by decisions of this court that the assumption of authority, under such circumstances as shown in this case, is not binding upon the holder of a note, and in order to bind him they must show actual authority or acceptance of the payments with knowledge of the assumption. In *Koen* v. *Miller*, 105 Ark. 152, we said: "Authority of an agent to collect interest on

a mortgage does not afford ground for inferring authority to collect the principal, where the agent is not intrusted with the possession of the securities." There is testimony in this case on the part of the bank employees tending to show that in transactions between plaintiff and the bank the plaintiff authorized the bank to collect notes which had been transferred, but this is positively denied by the plaintiff and we are of the opinion that the record fails to show enough to sustain the decree on that point. The testimony adduced on this subject by the bank officials is far from convincing on account of the fact that every transaction was carried on by correspondence and they fail to produce a single line from the plaintiff which would tend to show that he gave the bank any authority to collect. There is a letter, which relates to another transaction, which might have some tendency to show authority to collect in that particular matter, but it does not go to the extent of showing any authority to collect in other transactions. There is, too, testimony of a custom on the part of that particular bank to make collections for its customers, to whom notes had been assigned, but the usage of that bank is not sufficient to establish a general custom, and unless notice of it was brought home to the plaintiff he was not bound by any such usage. *Exchange National Bank* v. *Little,* 111 Ark. 263.

It is unfortunate that as between two innocent parties, the plaintiff on the one hand and the defendants, Ainsworth and wife, on the other, one or the other must be the loser on account of the wrong done by the officials of the bank either in accepting the money from Mrs. Ainsworth in the first instance or failing to transmit it to the plaintiff on the other hand; but plaintiff can not be made to bear the loss if he did nothing to cause it and was a bona fide holder of the note. We think that the plaintiff made out his case and is entitled to a decree for the amount of the note, less the payments which were made to him. He should also be decreed a lien on the land, for he is entitled to subrogation to the rights of the

original vendor. *St. Peter's Lit. Association* v. *Webb,* 31 Ark. 140; *Martin* v. *O'Bannon,* 35 Ark. 62.

The decree is therefore reversed and the cause remanded with directions to the chancellor to enter a decree in favor of the plaintiff in accordance with this opinion.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. BLISS-COOK OAK COMPANY.

Opinion delivered May 3, 1915.

1. CARRIERS—MISDELIVERY OF FREIGHT—LIABILITY—NOTICE.—A. shipped lumber via defendant carrier, to shipper's order, the bill of lading providing that claims for loss occasioned by failure to deliver must be made to the carrier within four months after a reasonable time for delivery has elapsed. The carrier made a misdelivery of a portion of the shipment. *Held,* notice of the loss, given to the carrier within four months after the discovery of the misdelivery, is a sufficient notice under the bill of lading. A shipper is not chargeable with notice of a misdelivery, and the specified period of time for presenting the claim does not begin to run until information of the misdelivery is received.
2. CARRIERS — FREIGHT — MISDELIVERY — DAMAGES.— Plaintiff shipped goods by defendant carrier consigned to shipper's order. The firm for whom the goods were intended failed to perform its contract, and plaintiff sold the goods to other parties. Meantime the carrier improperly delivered some of the goods to the firm for whom the goods were originally intended. *Held,* in an action for damages against the carrier, that under the evidence it could not be said the plaintiff had neglected to take steps which would have minimized the damages.

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

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

1. It was within the power of the appellee on the 29th day of February to recall the bill of lading by wire and to direct the railway company to deliver the lumber to the Continental Lumber Company, which undertook to pay the appellee's claim in full. Instead, appellee sold

to another company for a much smaller sum. It was the duty of appellee to minimize its loss. 67 Ark. 371; 78 Ark. 366; 80 Ark. 228; 96 Ark. 78; 102 Ark. 246.

2. The claim for damages was not made within the time limited by the bill of lading. 101 Ark. 436.

Coleman & Lewis, for appellee.

1. On the question of mitigation of loss, the cases cited by appellant do not apply to the case presented here, but even if they did apply in a case where the loss occurs through wrongful delivery, (and they do not,) even then, appellee has demonstrated that it exercised due diligence. 89 Ark. 346.

2. Appellee knew nothing of the delivery to the Continental Lumber Company until February 29, 1912. The limitation in the bill of lading contended for by appellant does not apply, and it would be unreasonable to hold it to bar recovery. The full measure of appellee's duty was to use such care and diligence as a man of ordinary prudence would have used under similar circumstances. 78 Ark. 373. And that was a question for the court to determine. *Id.*; 102 Ark. 251.

But appellee is not suing either for *loss* of shipment or for *damage* thereto, but for *wrongful* conversion of its property, and it owed no duty to appellant, whatever the requirements of the bill of lading, to file its claim within four months. 113 N. Y. S. 676; 228 Pa. 647, 31 L. R. A. (N. S.) 1178 and note; 143 Ala. 304, 5 Am. & Eng. Ann. Cases, 97 and note; 4 Am. & Eng. Ann. Cases, 19 and note; 89 Ark. 342.

3. Appellant is estopped from urging the foregoing defenses. Its claim agent, after taking about two years to "carefully investigate," placed his refusal to recognize the claim, not upon the ground that appellant could have avoided loss and failed to do so, nor that it failed to file claim within four months, but upon the ground that the Continental Lumber Company "was at all times ready and willing to pay the full amount of the invoice," and that appellee, knowing this fact, requested that the lumber be delivered to that company's com-

petitor. Appellant may discard the defense relied on for two years, but it will not be permitted to interpose new ones. 96 U. S. 258; 45 Ark. 37; 83 Ark. 554.

McCULLOCH, C. J. This is an action instituted by appellee to recover damages on account of misdelivery at point of destination of a carload of lumber shipped by appellee to Seattle, Washington, the shipment being initiated over the line of the appellant's railroad. The shipment was to appellee's own order, with a specification in the bill of lading to notify the Continental Lumber Company, a concern at Seattle, to whom the shipment had been sold. Appellant delivered the car of lumber to a connecting carrier at Kansas City, and in doing so its servants made a mistake in rebilling the car so that the shipment went through on straight billing to the Continental Lumber Company without showing that the consignment was to the shipper's order. Appellee drew a draft on the Continental Lumber Company and sent it for collection, with the bill of lading attached, to a bank in Seattle and gave instructions to deliver the bill of lading on payment of the draft. The delivering carrier at Seattle, on account of the error in the way bill, delivered the car of lumber to the Continental Lumber Company without requiring a surrender of the bill of lading. The car of lumber was placed in storage and held there several months, when it was finally retaken by appellee, but in the meantime the Continental Lumber Company had taken from the car 2,484 feet of the lumber, valued according to the price at which it was to be sold, at $219.45. This fact did not become known to appellee until several months thereafter, and after there had been considerable correspondence between it and the bank and the Continental Lumber Company concerning the failure of the latter to pay the draft. The car reached Seattle on November 28, 1911, and the wrongful delivery to the Continental Lumber Company occurred on November 30, 1911. Considerable correspondence took place between appellee and the collecting bank at Seattle, and between appellee and the Continental

Lumber Company, as before stated, concerning the payment of the draft, appellee's officers being under the impression all the while that there had been no error in the way-billing and that the car of lumber was still being held by the railroad company subject to the shipper's order. The Continental Lumber Company failed to pay the draft, and in the correspondence which followed it made repeated promises to appellee and the bank concerning the payment. The correspondence shows evasive conduct on the part of the Continental Lumber Company, and misrepresentations concerning the transactions. It went so far at one time as to represent in one of its letters that it had actually made remittance direct to the appellee for the price of the lumber. The bank at Seattle returned the draft to appellee and the Continental Lumber Company wired for its return, promising to pay it immediately, and in the meanwhile the car was in storage subject to the order of the Continental Lumber Company, and the latter took some of the lumber out of the car and sold it.

Appellee finally lost confidence in the promises of said purchaser, and on February 19, opened negotiations with another lumber concern in Seattle for the sale of the carload of lumber, and those negotiations were prosecuted to a final agreement whereby the concern agreed to purchase the carload of lumber and instructed appellee to wire the railroad company to deliver it. It was then discovered by the new purchaser, and by appellee for the first time, that there had been a misdelivery. The Continental Lumber Company then wired appellee, requesting permission to pay for the lumber and retain it, and for the first time called appellee's attention to the fact that the lumber was in its possession. Appellee having made a bargain with the other concern in Seattle, refused to deal further with the Continental Lumber Company, and caused the last purchaser to take possession of the lumber, but failed to recover the amount which the Continental Lumber Company had taken from the car. In addition to the price of that part of the shipment which was lost, appellee had to expend $54.30 for storage and

reloading the car, which was necessary in order to make delivery to the new purchaser, and a certain amount in telegrams which passed between appellee and the bank and between appellee and the Continental Lumber Company.

The case was tried upon an agreed statement of facts by the court sitting as a jury, and judgment resulted in favor of appellee for all of the items sued for. There is no contention that there were any items of damage improperly embraced in the judgment if there was any liability at all, but there are two contentions made by appellant—one that the claim for damages was not presented in time, and the other that appellee failed to discharge its duty to minimize the loss, after discovering that there had been a misdelivery.

The bill of lading was a standard form and contained the following stipulation:

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

(1) Claim was made to the delivering carrier on April 9, 1912, and upon the request of the latter, was also made to the appellant as the initial carrier on June 18, 1912. Learned counsel cite cases on the brief tending to support their contention that the stipulation does not cover loss on account of misdelivery. The authorities cited tend in some degree to sustain the contention, but the stipulation here is somewhat broader in its terms than the stipulations involved in the cited cases. The language used in the stipulation now before us shows that it was intended to cover loss on account of failure of delivery and it may well be argued that this embraces a loss on account of misdelivery, for that is included within the broader term of a failure to make delivery according to the terms of the contract. But it will be observed that the stipulation does not fix a definite time for the

period to begin, but uses somewhat elastic terms in stating that in case of a failure to deliver the claim must be made within four months "after a reasonable time for delivery has elapsed." Now, in the present case, we think that under the evidence the trial court was justified in finding that the claim was made within the time specified. In the method adopted in shipping the car, that is to say to the shipper's order, it was necessarily contemplated that there might be some delay in making delivery. In fact, there was considerable delay, and the draft was never paid and there was no rightful demand upon the railroad company for delivery until about the last of February, when it was ascertained that there had been a wrongful delivery to the original purchaser. The claim was presented to the delivering carrier on April 9, which was four months and eleven days after the car arrived at Seattle. Now, it will only be necessary to treat the first eleven days as a reasonable time for delivery in order to reach the conclusion that the claim was made within the time stipulated, and we think it was entirely within the range of the testimony for the court to treat even a longer period than eleven days as a reasonable time for making the delivery where a commodity of this kind is transported by the carrier under a bill of lading which calls for delivery to the shipper's order. The fact must not be overlooked that the consignment was, on its face, to cover a distance of several thousand miles, and the parties to the transaction must have known, by the consignment being to the shipper's order, that there would necessarily be some time required for negotiations at the place of delivery before there could be a delivery. This is what was manifestly intended by the language used in the stipulation. It must have been contemplated by the framers of the stipulation in the bill of lading that there would be delay in shipments of this kind, hence the flexible term that was used there with respect to the commencement of the period for making claim of loss where there had been a failure to deliver. Moreover, the claim was presented to the delivering carrier considerably less than four months after appellee and its agents received infor-

mation of the wrongful delivery, and that was sufficient. Appellee had the right to assume that the delivering carrier would not make an unauthorized delivery. It was not, therefore, chargeable with notice of such misdelivery and the specified period of time for presenting the claim did not begin to run until information of the misdelivery was received.

(2) We are of the opinion that there is no foundation for the other point made, that appellee failed to take any steps to minimize its loss. The basis of the argument is that appellee had not consummated its agreement for sale to the purchaser at the time the original purchaser offered to take the lumber and pay the full price, and it was appellee's duty to reinstate the broken contract with the original purchaser and accept the price. We think the argument is faulty for two reasons, first, that the original purchaser had broken the contract and appellee had consummated a sale to the other concern, and it was not bound to break its new contract in order to comply with the contract with the Continental Lumber Company, the terms of which the latter had already violated. In the next place, the Continental Lumber Company had not only broken its contract, but had been guilty of most evasive and reprehensible conduct in its dealing with appellee, and the latter was justified in disregarding any further negotiations in that direction. If it had accepted the new promise of the Continental Lumber Company, it had no assurance that the promise to pay would be kept; and if in reliance on that promise it had consented to the delivery to the Continental Lumber Company, and allowed the latter to make a sale to another purchaser, the carrier would then have been in position to claim that appellee failed to take charge of the lumber and had suffered a loss by reason of its restored confidence in the Continental Lumber Company. Appellee was called to act in the matter after the original purchaser had broken its contract, and it was justified in regaining possession of the remainder of the lumber and selling it to another available and re-

liable purchaser. Our conclusion is that the appellee's conduct is not open to the charge of omission to do all that was necessary, proper and reasonable to minimize the damage.

The judgment is correct and the same is affirmed.

DANIELS v. LITTLE ROCK PACKET COMPANY.

Opinion delivered May 3, 1915.

1. STEAMBOATS—LEASE—ABATEMENT OF RENT.—Where a contract for the lease of a steamboat provided that no rent should be paid in the event of the occurrence of an accident to the steamboat, that would destroy the boat entirely, or so injure her that she would have to be placed on the dock for repairs, *held*, the lessee would not be entitled to an abatement of rent, because of the presence of dangerous ice floes in the river or on account of other conditions dangerous to navigation, during a portion of the life of the lease.
2. STEAMBOATS—LEASE—RENT.—The lessee of a steamboat will not be entitled to an abatement of the rent provided therefor in the contract of lease, on account of conditions arising rendering the operation of the boat impractical, which are not provided for in the lease.

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

STATEMENT BY THE COURT.

The appellee (plaintiff below) sued appellant Daniels, alleging that it entered into a contract with him whereby it leased to him a certain steamboat for a period of ninety days; that Daniels agreed to pay for the use of the boat $300 for the first thirty days, $400 for the second thirty days, and $400 for the third thirty days, making a total of $1,100; that Daniels entered into a bond, with appellant E. O. Bagley as a surety, in the sum of $1,500 to secure these payments to the appellee; that the sum of $50 had been paid thereon; and appellee prayed judgment against appellants for the balance of $1,050.

Appellants answered and made their answer a cross-complaint. They set up that under the contract it was the duty of the appellee to bear the expense of the necessary repairs and equipment; that appellant Daniels had expended a large sum of money in making necessary repairs and furnishing necessary equipment for the steamer, at the request of appellee; that during fifteen days of the time covered by the contract there was a floe of ice in the river where the boat was plying that made it dangerous for navigation; that appellant Daniels notified appellee's manager of this dangerous condition, and, at the request of appellee, through its manager, he (Daniels) kept the boat tied up for fifteen days upon the promise of appellee's manager that there would be no charge for the boat during that time. They further alleged that when Daniels hired the steamer one of her rudders was unsound and that while being operated by him under the contract the same gave way; that appellee's manager was notified of that fact and directed appellant to have a new rudder supplied at the expense of appellee; that the rent due under the contract was to cease during the time that the rudder was being repaired; that it required ten days to do this work, and appellants were entitled to a deduction of ten days on that account; that Daniels had expended the sum of $620 in taking care of the boat while the ice floe was on and while same was undergoing repairs, which was justly due him by the appellee; that the sum of $233.35 was the amount that should be deducted on the contract price during the ice floe and the time that the rudder was being repaired. They set up these matters as a counterclaim against the appellee and prayed judgment over in the sum of $1,067.25.

The appellee introduced the lease signed by the appellant Daniels, the execution of which was not in issue. The lease contained, among other provisions, the following:

"The party of the first part (appellee) assumes all liability and risk that is covered by the ordinary marine hull and fire insurance policies, and storms and explo-

sions, and the extraordinary breakage of machinery, such as shaft, cylinders, collapsing of flues and such other accidents as may cause said steamer to go on the dock. The party of the second part (appellant) assumes and agrees to keep said steamer in as good order and condition as when delivered to him, except as aforesaid, and the dangers of river navigation, fire and unavoidable accidents * * *. And it is further mutually agreed that in case of the sinking, burning, or explosion or partial destruction from any cause whatsoever of the said boat, all charter money so promised to be paid is to cease at the time of said accident, and the party of the second part is to notify the party of the first part promptly of such accident and remain in charge of the steamer or wreck until party of the first part or their authorized agent can reach said boat or wreck."

The testimony on the part of the appellee tended to to show that it demanded of the appellant Daniels the sum of $1,013.34 as the balance due under the lease contract, after deducting the sum of $50 as a cash payment. Appellants introduced evidence tending to sustain the allegations of the counterclaim of appellant Daniels as to the items of expenditures for repairs and equipping the boat and for lost time.

The court, on its own motion, after defining the issues, instructed the jury "to find for the defendant for the amount of actual and necessary expenses incurred in equipping the boat and making the necessary and permanent repairs and for the ten days lost time on account of making and installing the new rudder, at $13.33 per day, or $133.33;" and further "if you find from the evidence that the plaintiff is indebted to the defendant for salary for November and December, 1910, and January, 1911, you should find for the defendant on his cross-complaint for any sum you may find due him for salary."

Among other prayers for instructions, the appellants asked the following:

"2. You are further instructed that if you find from the evidence that defendant, Daniels, in January, 1912,

encountered a dangerous floe of ice in the river, making it dangerous for the boat to be operated, and that he reported this condition to plaintiff's manager and was instructed by said manager to tie said boat up until such dangerous condition had abated, then defendant is entitled to have deducted from the charter fee the fifteen days time such boat was so tied up, if you find that it was tied up fifteen days, at the rate of $10 per day, or a total deduction of $150 on this account."

"4. If you find from the evidence that during twenty-five days of the time covered by the lease or charter party that the boat was tied up on account of ice in the river and for making repairs to the rudder, or otherwise, and that it was so tied up with the knowledge, and by the direction of plaintiff, or its manager, then you are instructed that defendant, under said contract or charter party would be entitled to recover from plaintiff, the actual and necessary expenses incurred by him in taking care of said boat during said time."

The court refused to grant these prayers, and appellants duly excepted to the court's ruling. The jury returned a verdict in favor of the appellee in the sum of $167.77, and from the judgment entered in its favor for that sum this appeal has been duly prosecuted.

Murphy & McHaney, for appellant.

Instruction 2 should have been given for the reason that, even if the tie up was not authorized by the terms of the charter party, it was authorized and required by the fact that it occurred under, and in accordance with, the direction or request of appellee's manager. For the meaning of the phrase "to go on the dock," see 9 Ohio, 165; 58 U. S. 426, 15 L. Ed. 118.

Appellee should be held to pay the expense of keeping and caring for the boat during the fifteen days time lost on account of the extraordinary ice floe in the river, and also during the time of repairing the rudder and shaft, hence instruction 4 requested by appellant should have been given.

Terry, Downie & Streepey, for appellee.

Appellant places a strained construction upon the phrase "to go on the dock." It is apparent from the writing and the language employed that the parties had in mind the going on a dry dock for repairs to the boat, which repairs were in the hull.

Appellant would not be entitled to damages on account of keeping the boat during the time it was tied up.

WOOD, J., (after stating the facts). (1) The court did not err in refusing appellant's prayers for instructions numbers 2 and 4. The giving of prayer No. 2 would have permitted the jury to find that appellant Daniels was not liable for the rents under the lease contract for a period of fifteen days during a dangerous floe of ice in the river, if the manager of the appellee instructed the appellant to tie up said boat during such time. This would have been varying the terms of the written contract by oral testimony. The written contract only relieved appellants of liability in case of "extraordinary breakage of machinery, such as shafts, cylinders, collapsing of flues, and such other accidents as may cause said steamer to go on the dock;" and in case of "storms, explosions," fire, etc., that resulted in the destruction of the boat or such injury to her as would put her out of use; or, in other words, those accidents that would destroy the boat entirely or so injure her that she would have to be placed on the dock for repairs. The contract did not contemplate a deduction for rents during such time as it might be dangerous to navigate the river on account of ice floes or some other dangerous conditions. Nothing short of some physical injury to the vessel, such as mentioned in the contract, would have relieved appellant Daniels from the payment of rents during such period as the boat was in that condition.

Prayer No. 4 for instruction would have permitted the jury to deduct from the amount due appellee any sums expended by appellant Daniels for taking care of the boat during the time that she was tied up on account of the ice, and during the time repairs were being made on her rudder. Such expenses were not in contempla-

tion of the written contract, and the court therefore did not err in rejecting this prayer.

(2) The court allowed the jury to find for the appellant Daniels the necessary expenses incurred by him in equipping the boat and in repairing same, and for the time lost while the rudder was being installed. In so instructing the jury, the court certainly construed the contract as favorably to the appellant Daniels as he was entitled. The court by its ruling upon the instructions sought to narrow the issue to the terms of the written contract which was correct.

The judgment is therefore affirmed.

BURRUS v. BUTT.

Opinion delivered May 3, 1915.

1. DOWER—DEATH OF WIDOW.—The right which a widow had to dower in the lands of her deceased husband abates at her death.
2. DOWER—LAND ASSIGNED—RENTS—JURISDICTION OF PROBATE COURT.—Lands were assigned to a widow as dower. *Held*, the probate court had not jurisdiction to entertain a suit in the name of the widow's administrator for the collection of rents due her on the lands up to the time of her death.

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

STATEMENT BY THE COURT.

S. E. Martin filed her petition in the probate court of Mississippi County, alleging that James W. Martin, prior to 1894, was seized of an estate of inheritance in certain tracts of land in Mississippi County; that in the year 1894 and previous thereto he had executed deeds conveying said lands to the defendants; that plaintiff was the wife of James W. Martin at that time, and that she did not sign or acknowledge any of these deeds; that Martin died in January, 1912, and that the plaintiff was therefore entitled to dower in the lands which she described in her petition, and asked that dower be allotted to her in those tracts of land conveyed that were in cultivation, designat-

ing the same. The defendants denied the right of the plaintiff to have dower assigned out of the lands in cultivation, but alleged that she was only entitled to have a one-third interest in value in each of the separate tracts of the lands at the time the same was sold by her husband.

The probate court found that she was entitled to dower in the lands to be selected from each separate tract only, and appointed the commissioners to so set her dower apart. Mrs. Martin, the plaintiff, appealed to the circuit court. The circuit court also found that the plaintiff was entitled to have her dower assigned "of said land in value from each separate tract of said lands, but she is not entitled to have dower assigned to her from the whole of said lands and select the same from such tracts as she chooses to the exclusion of other tracts."

The court directed its commissioners to so allot her dower, and also directed them to ascertain and report the value of the improvements upon the land, and also to ascertain and report the value of the land and improvements combined, and also to report the annual rental value of the land. Mrs. Martin appealed to the Supreme Court, but before the expiration of the time allowed her in which to file her bill of exceptions, she died. Her death was suggested in the circuit court and the cause was revived in the name of J. J. Burrus, her administrator. At a succeeding day of the term, the administrator moved for a judgment for rents of the lands, which motion the court overruled and entered an order abating and dismissing the cause at plaintiffs' costs, without prejudice, and the appellant was granted an appeal.

J. T. Coston, for appellant.

J. W. Rhodes, Jr., W. J. Lamb and *C. A. Cunningham,* for appellees.

WOOD, J., (after stating the facts). At the time of the death of Mrs. Martin, the circuit court had not entered any final order making the allotment of her dower. The court had appointed the commissioners to allot the dower and had designated the manner in which the same should be set apart to Mrs. Martin, and had directed them to as-

certain the value of the improvements upon the land, and the value of the land and improvements combined, and the annual rental value of the land, and to report to the next term of the court. Before the appeal was perfected from this order, Mrs. Martin died, the cause was revived in the name of her administrator, and he moved the circuit court for judgment for rents.

The circuit court had jurisdiction of the proceedings on appeal from the probate court. It had only such jurisdiction as the probate court had. See *Hilliard* Ex parte, and *Hilliard* v. *Hilliard,* 50 Ark. 34.

The right of Mrs. Martin to have dower assigned abated at her death. The suit for rents and profits of the lands, which had been designated and set apart by the order of the court as her dower, could not be instituted in the probate court, and the ruling of the court was correct in abating and dismissing the action after the death of Mrs. Martin. Whatever rights appellant, as the administrator of Mrs. Martin, may have had to the rents and profits, if any, would have to be asserted by original action in another forum.

The judgment is therefore affirmed.

DUNMAN v. RANEY.

Opinion delivered May 3, 1915.

1. EVIDENCE—PHYSICAL CONDITION OF PLAINTIFF—EXPERT OPINION.—In an action for damages against a physician for negligence in improperly setting and treating plaintiff's leg which had been broken, it is competent for the plaintiff to testify that on a certain date the leg became dislocated, the same being a matter of ordinary observation and not a matter exclusively of expert or scientific knowledge.

2. NEGLIGENCE—PHYSICIANS—NEGLIGENT TREATMENT.—In an action for damages against a physician for negligence in the setting and treatment of plaintiff's broken leg; *held,* under the pleading and proof an instruction was correct which charged the jury that if the physician failed to use reasonable care and diligence either in the diagnosis, treatment or the giving of instructions to the plaintiff or his attendants, and if such failure resulted in the

injury to plaintiff's leg, of which he complains, without the fault of the plaintiff, then the defendant is liable for damages.

3. PHYSICIANS—TREATMENT OF PATIENTS—DUTY OF CARE.—A physician or surgeon in the treatment of patients is not required to exercise the highest skill possible; he is only bound to possess and to exercise that degree of skill and learning ordinarily possessed and exercised, by members of his profession in good standing, practicing in the same line, and in the same general neighborhood or in similar localities; he must use reasonable care in the exercise of his skill and learning, and must act according to his best judgment in the treatment of his patients.

4. DAMAGES—PHYSICIANS—NEGLIGENT TREATMENT OF PATIENT.—The basis for awarding damages in an action by a patient against a physician for improper treatment, is such damage the jury finds from a consideration of all the evidence, would fairly and reasonably compensate plaintiff for his injuries, and the elements of damage to be considered by the jury, are plaintiff's loss of time, loss of earning power, bodily pain and suffering which he has been compelled to endure, mental anguish resulting from the negligence, and any future suffering or inconvenience which he must suffer by reason of such negligence.

5. NEGLIGENCE—PHYSICIANS—TREATMENT OF PATIENT—CONTRIBUTORY NEGLIGENCE.—In an action for damages caused by negligent treatment by the defendant physician, the burden is upon the defendant to prove plaintiff's contributory negligence, and the plaintiff will not be held to have been guilty of contributory negligence in disobeying instructions in the absence of a showing that he received any instructions from the physician, which it was the physician's duty to give him; and the plaintiff can not recover when his condition resulted from his failure to properly take care of himself.

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

STATEMENT BY THE COURT.

The appellee sued the appellant, alleging in substance that appellee employed appellant as a physician and surgeon to treat the appellee, whose leg was broken; that appellant, after setting the leg, so negligently and unskillfully treated and cared for same that the same could not heal, but that, on the contrary, the same became inflamed and diseased and the bones became dead so that the flesh did not adhere thereto, and the leg became so twisted, shortened, deformed and diseased as to necessitate its

amputation; that appellee, by reason of appellant's negligence, had been damaged in the sum of $5,000 for pain and suffering, loss of earning power, and loss of time and expense incident to the operation, for which he asked judgment.

The appellant denied that he was employed by the appellee, but alleged that he was employed by W. J. Lauck, and that under said employment he undertook to assist in setting appellee's leg and in attending and caring for him. He denied the allegations of negligence, and set up that if appellee's leg became diseased and refused to heal, that it was due to appellee himself and his condition.

Appellee testified that on the 18th of March, 1913, he was painting, the scaffold broke and a piece of timber hit him on the left leg and broke it. Doctor Parks set appellee's leg at the time, and was assisted by the appellant. Appellant continued to treat appellee's leg for about seventy-eight days after it was set. On the second visit of Doctor Parks, the appellant dressed appellee's leg, putting new bandages on it. There was nothing said at the time about appellee's leg being out of place. Appellant continued to treat appellee's leg until about the 5th of June. After being set on the 18th of March, appellee's leg got dislocated about the 1st of April. The end of his foot was a little to one side. Appellee called the appellant's attention to this condition, but appellant did not reset it. Appellant was the only one who treated the leg after that time. The people who waited on appellee followed the directions of the appellant. When appellant left appellee on the 5th of June, he told appellee that appellee's leg was a little crooked, but would be all right, and that appellee would not need any other physician. Appellee's leg was in a bad condition when he called in Doctor Parks. Appellee got on crutches while appellant was treating him. Appellee did not remove the bandage or splint from his leg. There was no effort made by the appellant to straighten appellee's leg after the same became dislocated.

On cross-examination, appellee stated that he did not know what caused his leg to get crooked. He was lying in bed on his back when it became crooked At the time appellee's leg was first set, appellant said something about amputating it. Appellee objected to it. While appellant was looking at appellee's leg, before appellant said anything to appellee about it, appellee stated that he said to appellant as follows: "Doctor, I want you to save that leg, if you can," and appellant says, "Save it?" "I told him, 'Yes,' and that is about all he said about it to me."

At the time the injury happened, appellee had on his working clothes. One of the bones protruded through his trousers. Appellee stated that after he got on his crutches, he had a fall and hurt his leg; that the leg had united there where the bone would touch the lower part of the break.

Appellee called Doctor Parks, who made about four or five visits after appellant left. Appellee's leg was amputated in March, 1913. Doctor Parks did not reset appellee's leg after he began treating it. Appellee got suspenders and bandaged his leg and made suspenders to hold the splints. He did this under appellant's instructions.

It was shown that the break was what is known as a "compound comminuted" fracture.

Surgeons testified that where the leg had been set after such fractures, if it became dislocated it would be difficult to ascertain that fact unless the bandages were removed; that if it were discovered that the bone, after being set, had become dislocated, it would be the physicians' duty to reset it; that after fifteen days, if the bones had not united, they would be in a condition that they could not unite. In cases of infection, there would be a failure of the flesh wound to heal. If there were no infection and the leg was properly set, the large majority of cases would heal. If the infection could not be cured, the bone would not be liable to heal, and an amputation would be necessary. Under normal conditions, that is, where the leg is properly set and the patient is in good health, and takes care of himself, that is all that is necessary. If

the leg is properly set and does not heal, the patient is bound to be either not in good condition or there is infection or some other condition. "There is not any reason except infection and the protruding or pressure of a broken bone against the flesh wound which would keep a wound from healing in an ordinarily healthy man."

Appellant testified that he had been practicing medicine for about eighteen years; that appellee's leg was set in his office on March 18, 1913. The fracture was a compound one, where the bones penetrated the soft part, went through the skin, underwear and trousers, which were overalls. Doctor Parks set the leg. Appellant advised appellee to have the leg amputated at the time. Appellant believed that the wound was infected because appellee's underwear and overalls were both dirty. Appellant found out about two weeks afterward that the leg was infected and treated the infected condition antiseptically. Appellant went out every day after the leg was set, and toward the latter part of March, he and Doctor Parks redressed and reset the leg. Appellant never heard any complaint until a long while afterward, when appellee seemed to have had a fall. So far as appellant could tell, the leg was just injured and not dislocated. Appellee made no complaint in regard to its being dislocated, and appellant did not believe that it was dislocated. Appellant treated appellee until about June 5, and left him, and as appellant was going away, he left appellee with Doctor Parks and spoke to Doctor Parks about him. The reason appellee's wound did not heal was because it was infected, and on account of the lack of nourishment to that part of the bone, and because it was a compound fracture. Appellant was appellee's family physician at the time. His general condition was anaemic.

Doctor Parks testified that he was present on the 18th of March, and set appellee's leg. Appellant administered the chloroform. The leg was perfectly adjusted at that time. He stated that he saw appellee again on the 24th of March, and the limb at that time was in perfect position. On the 30th of March, he again saw the appellee

and at that time the fracture had been dislocated, the bones not being perfectly adjusted. The witness did not see the case again until June 9, when he took charge of it at the request of appellant and appellee for the reason that appellant was going to take a vacation on account of his health. From witness's observation, appellant treated appellee's leg properly.

Witness further testified that appellant insisted on amputation when the leg was first set, but that appellee objected; that in his opinion, amputation was made necessary on account of the bones being misplaced, when the bones protruded through the skin, not having healing tissue sufficient to cover the bone. The healing was also prevented to begin with by infection. That appellant "used all the skill and care a physician is required to give in such cases."

The court gave certain instructions to which appellant objected, and which will be considered in the opinion. The jury returned a verdict in favor of appellee in the sum of $500. Judgment was entered for that sum, and this appeal has been duly prosecuted. Other facts stated in the opinion.

Elmer J. Lundy, for appellant.

1. It was error to permit appellee to testify as to the condition of his leg and as to the treatment given it, and that it was dislocated. These were matters for expert or opinion evidence only, by those qualified to give such evidence. 36 Ark. 117-124; 84 Md. 363; 35 Atl. 1094; 39 Miss. 732; 47 Pac. 360; Ellwell on Malpractice & Medical Evidence (4 ed.), 279.

2. Instruction 1, given by the court, is erroneous in that it attempts to cover matters not in issue, is not directed to any specific act of alleged negligence, and authorizes the jury to consider damages other than alleged in the complaint. It is abstract and misleading. 77 Ark. 567; 70 Ark. 441; 76 Ark. 599; 95 Ark. 597; 90 Ark. 378. It errs in its statement of the measure of damages. 14 Am. & Eng. Ann. Cases, 602.

Instruction 2 was erroneous in authorizing the jury to consider all bodily pain and suffering endured as well as future pain and suffering. This would authorize a finding for appellee for all damages which he had suffered from the result of the accident in the first instance. The third instruction clearly errs in assuming that appellant was not only under the duty to give instructions, but that he negligently failed to do so.

3. Instruction 3 requested by appellant correctly states the law and points out the specific acts as given in evidence, and it should have been given. 35 N. E. 521; 8 Ind. App. 264; 37 W. Va. 159; 38 Am. St. Rep. 17; 43 Ind. 343.

There was evidence that appellee undertook to treat his leg himself in violation of the physician's instructions, and if that is true, appellee is not entitled to recover. Instruction 5, requested by appellant, should, therefore, have been given. 56 Ind. 497; 95 Ind. 376; 115 Ind. 334; 109 Mass. 286; 9 Minn. 260; 91 Pa. 362; 36 Am. Rep. 668.

4. The evidence does not sustain the verdict. Where there is no allegation of incompetency of the physician, it will be presumed, in the absence of evidence to the contrary, that he used due care and skill. 70 Md. 162; 144 Mich. 632. See, also, Ellwell on Malpractice & Medical Evidence (4 ed.), 75-78.

Minor Pipkin, for appellee.

1. Appellant saved no exceptions to the ruling of the court in admitting appellee's testimony "as to the condition of his leg and as to the treatment given it, and that it was dislocated," except as to treatment, and upon this point appellee's testimony was harmless.

2. Instruction 1 is correct. It covers only the proof in the case, and no objection was made to the introduction of evidence tending to establish the negligent acts. 98 Ark. 529. If it was objectionable as to form, or verbiage, the defect should have been called to the court's attention by specific objection. 93 Ark. 589; 89 Ark. 522; *Id.* 404;

80 Ark. 574; 69 Ark. 632; 56 Ark. 563; 95 Ark. 220; 97 Ark. 643.

If it is not broad enough in its statement of the measure of damages, that defect is cured by the instruction which immediately follows it. 82 Ark. 64.

Instruction 2 is not open to the objection appellant urges that it authorized a finding for plaintiff for damages he suffered by reason of the accident in the first instance. It is so drawn as to emphasize the fact that damages may be assessed only if any loss or suffering has accrued to plaintiff *by reason of defendant's negligence.*

Intruction 3 does not assume that the defendant was under a duty to instruct and negligently failed to do so. Moreover, when considered in connection with other instructions, as it should be, appellant's objection is entirely overcome. 76 Ark. 377.

3. Instructions 3 and 5, requested by appellant, assume facts not in evidence and were properly refused.

4. The evidence is sufficient. The complaint will be treated as amended to conform to the proof as to negligence. It is the duty of a physician to act with the utmost good faith toward his patient; and if he knows that he can not accomplish a cure, or that the treatment adopted will be of no benefit, it is his duty to advise his patient of these facts. 75 Mo. App. 594.

WOOD, J., (after stating the facts). (1) The appellee testified in part as follows: "The second visit Doctor Parks made Doctor Dunman dressed the leg and put new bandages on it. There was nothing said at that time about my leg being out of place. My leg got dislocated about the 1st of April." The appellant moved to strike out the witness's evidence as to the dislocation for the reason that it was a matter for expert testimony.

The court did not err in refusing to strike the witness's evidence as to the dislocation. This was not exclusively a matter of expert or scientific knowledge. The appellee was competent to testify as to whether his limb was dislocated and out of shape after the same had been set.

Ordinary observation would discover whether a limb that had been properly set had been dislocated, especially where such dislocation was so marked as to cause the foot to be twisted, and the limb to be in an abnormal position. Moreover, the appellee, who was enduring the pain and experiencing the ill effects from the broken limb, was certainly competent to testify that the leg, after being set, had become dislocated.

(2) In its first instruction, given at appellee's instance, the court told the jury in part as follows: "That if the defendant failed to use reasonable care and diligence "either in the diagnosis, treatment or the giving of instructions to the plaintiff or his attendants, and that such failure resulted in the injuries to plaintiff's leg, or any of them, of which he complains, without the fault of the plaintiff, it will be your duty to find for the plaintiff, and to assess his damages at such sum as in your opinion, taking into consideration all the evidence in the case, will justly, fairly and reasonably compensate him for such injury or injuries."

Appellant made a general objection to the instruction, and he contends here that the same was erroneous because it authorized the jury to consider damages other than alleged in the complaint, and was therefore abstract, and for the reason also that it was erroneous in the statement of the measure of damages. The appellant's contention is not correct. The injuries of which "appellee complained" were that "the defendant, after setting said leg, so negligently, carelessly and unskillfully treated and cared for said leg that the same could not heal, but became inflamed and diseased to an unnecessary extent; the bones thereof to slip, override and overlap and the ends thereof to become dead so that the flesh can not adhere thereto, and said leg to become twisted, shortened and so deformed and diseased as to necessitate its amputation."

When the intruction is taken in connection with the allegations of the complaint, it could not have misled the jury, and it was not abstract so far as furnishing the jury a guide by which to determine whether or not the injuries

of which appellee complained, or any of them, were caused through appellant's negligence. The instruction was no broader than the allegations of the complaint, and the evidence on behalf of appellee which went to the jury without objection, warranted the instruction. It permitted the jury to find only for those injuries which appellee complained resulted from appellant's negligence. It was the duty of appellant, if he conceived that the instruction permitted recovery for injuries not set up in the complaint, to call the court's attention to same by a specific request. *St. Louis, I. M. & S. Ry. Co.* v. *Carter,* 93 Ark. 589; *Aluminum Co.* v. *Ramsey,* 89 Ark. 522.

The contention that the instruction is erroneous because it does not correctly define the elements constituting the measure of damages would be well taken if it were the only instruction on that subject. In *Dorris* v. *Warford,* 124 Ky. 768, the court held that "the correct measure of damages for injuries caused by careless and unskillful treatment by a physician is reasonable compensation for the bodily pain and mental suffering, if any, endured by the patient, and the impairment of the plaintiff's ability to earn money," and that an instruction which in effect told the jury to find such damages as they believed from the evidence the patient had suffered by reason of the negligent treatment was erroneous. But the instruction under review must be taken in connection with the other instruction which immediately followed it on that subject; and the two together declared the law as to the measure of damages in accord with the doctrine announced by the Supreme Court of Kentucky in the above case, and which is also the doctrine of our own court.

(3) Appellant does not contend that the instruction was erroneous in other respects, and it was not. A physician or surgeon is not required to exercise the highest skill possible. He is only bound to possess and to exercise that degree of skill and learning ordinarily possessed and exercised by members of his profession in good standing, practicing in the same line, and in the same general neighborhood or in similar localities. He must use rea-

sonable care in the exercise of his skill and learning, and act according to his best judgment in the treatment of his patients. 30 Cyc. 1570 "B," and cases in note; *Dorris* v. *Warford,* 124 Ky. 768, 14 Am. & Eng. Ann. Cas. 602, and note.

(4) In the second instruction the court told the jury as follows: "In assessing damages, you may take into consideration his loss of time, if any, resulting from defendant's negligence, his loss of earning power, if any, the bodily pain and suffering which he has been compelled to endure, and mental anguish, if any, which have resulted from such negligence, and any future suffering or inconvenience which he must suffer by reason of such negligence, if any."

In the first instruction the court did not undertake to define the elements constituting the measure of damages, but told the jury that the appellee would be entitled to such damages as they found from a consideration of all the evidence would fairly and reasonably compensate him for his injuries, and in the second instruction the court correctly defined the elements which constituted the measure of appellee's damages. They supplemented each other, and, taken together, are a complete and accurate statement of the law. *Satterwhite* v. *State,* 82 Ark. 64.

(5) In the third instruction the court, after telling the jury that the appellant had the burden of proving contributory negligence, further told the jury that "the plaintiff could not be held to have been guilty of contributory negligence in the absence of instructions which it was defendant's duty to give." Appellant urges that the instruction assumes that appellant "was not only under a duty to give instructions, but that he negligently failed to give instructions to the plaintiff." The instruction is not subject to the criticism which the learned counsel of appellant makes. The instruction, fairly construed, does not assume that it was the duty of the appellant to give instructions, or that he negligently failed to give instructions. This was still an issue for the determination of the jury.

The court, at the instance of the appellant, gave instructions which clearly told the jury that if appellee's condition was the result of his own negligence in failing to take proper care of himself by attempting to treat the injury himself, that their verdict should be for the appellant.

When the instructions on the subject of contributory negligence are considered together, they are not in conflict and the jury had the proper guide in the consideration of that issue.

The court did not err in refusing appellant's prayers for instructions numbered 3* and 5†. These instructions, as we view the evidence, were abstract. The idea contained in these instructions was sufficiently covered by the instruction which the court gave on contributory negligence at the instance of the appellant.

While we may differ with the jury as to the correctness of their finding on the issues of negligence and contributory negligence, we recognize that it was their province to determine these issues where there is a conflict of testimony. There is such conflict here, and therefore these issues were for the jury, and there was evidence to sustain their verdict. The judgment is therefore affirmed.

---

*3. If you find from the evidence that the plaintiff removed the splints and bandages placed thereon by the defendant, or removed the splints and bandages without the consent of the defendant, and that the action of the plaintiff in so removing the splints and bandages, or either of them, if he did remove them, contributed to his condition, you are instructed that plaintiff can not recover.

† 5. You are instructed that it is the duty of a patient to follow the instructions and advice of the physician employed by him, and if you believe from the evidence that the plaintiff did not follow the defendant's advice, and this failure contributed to his condition, plaintiff can not recover. (Reporter.)

OSBORNE v. HITTSON.

Opinion delivered May 3, 1915.

1. VERDICT—SUFFICIENCY OF EVIDENCE.—In order to uphold a verdict on appeal there must be some substantial evidence to support it.
2. EVIDENCE—DUTY OF JURY TO CONSIDER.—When the testimony of a disinterested witness is both reasonable and consistent, the jury has no right arbitrarily to disregard it.
3. SALES—HOGS—CHOLERA—EVIDENCE.—In an action to recover the purchase price of hogs sold; *held*, that defendant's testimony that the hogs were infested with cholera when received by him, was uncontradicted and a judgment rendered upon a verdict awarding plaintiff damages will be reversed.

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

Roleson & McCulloch, for appellants.

The testimony of the three veterinary surgeons shows that it was impossible for the hogs to have contracted the cholera after they left Green Forest, but that they must have been infected with it at the time they were shipped. This testimony is undisputed, and the jury had no right arbitrarily to disregard it. 57 Ark. 413; 96 Ark. 504.

This court will reverse where the verdict is so clearly against the weight of the evidence as to shock the sense of justice. 34 Ark. 632; 70 Ark. 384; 10 Ark. 492.

Troy Pace, for appellees.

The jury were not compelled to accept the testimony of the veterinary surgeons as true; but in weighing their testimony and its credibility, the jury were required under the law to take into consideration all the evidence in the case, whether their testimony conformed to the facts as established by the evidence, and how far such evidence seemed to be true, in the light of their own common sense, experience and knowledge of the subject about which such evidence was given. 87 Ark. 257; 100 Ark. 518; 50 Ark. 520; 108 Ark. 392.

As to whether or not the hogs had cholera when shipped, was a question of fact which the jury determined adversely to appellants upon conflicting testimony. It

ought to be sustained even though the court might have found otherwise, or be of opinion that it is against the preponderance of the evidence. 19 Fed. 405; 35 Fed. 711; 36 Fed. 657; 23 Ark. 50; 18 S. W. (Ark.) 172; 157 Fed. 656; 19 Ark. 117; 51 Ark. 495; 55 Ark. 31; 90 Ark. 23; 111 Ark. 309.

On appeal, the testimony will be considered in the light most favorable to the verdict. 89 Ark. 534.

HART, J. W. S. Hittson and F. M. Seitz, partners doing business under the firm name of Hittson & Seitz, instituted this action against L. M. Osborne, W. C. Osborne and Albert Starratt to recover the price of a carload of hogs which the plaintiffs alleged they had sold to the defendants.

The defendants in their answer averred that the contract of sale provided that the hogs should be free from cholera, and that the hogs were infected with cholera when they received them. The jury returned a verdict for the plaintiffs for the price of the hogs, and the defendants have appealed.

The facts are substantially as follows: The plaintiffs were dealers in stock and hogs at Green Forest, Carroll County, Arkansas, and the defendant L. M. Osborne owned a farm in Lee County, Arkansas. In December, 1912, he purchased a carload of hogs from the plaintiffs, and the contract of sale provided that the hogs should be free from cholera or other infectious diseases. The hogs were shipped by the plaintiffs at Green Forest on the 9th day of December, 1912, and arrived at Marianna, in Lee County, about 12 o'clock on the 11th of December. They were at once loaded in wagons and carried to the farm of the defendant Osborne, where they arrived about 7 o'clock P. M. on the evening of December 11.

Albert Starratt testified that he was manager of the Osborne farm in Lee County, but that he had no interest in the farm or hogs purchased by Osborne from the plaintiffs; that he went to Marianna with wagons to haul the hogs to the Osborne farm on the day of their arrival; that one of the hogs was practically dead on arrival, and died

on the way home; that four or five others were sick; that when he examined the hogs the next morning, he discovered that three more were dead; that at that time he had never had any experience with cholera, and did not know what was the matter with the hogs; that at the time there were a great many others hogs on the Osborne farm, and that all of them were healthy and free from disease; that the hogs shipped by the plaintiffs continued to get sick and to die to such an extent that a veterinary surgeon was called in and that he declared that the hogs had cholera; that the disease was communicated to the other hogs on the place, and that most of the hogs shipped by the plaintiffs, as well as the other hogs on the place, finally died of cholera.

The witness stated that he was satisfied now that the hogs had the cholera when they reached Marianna, and that he based this opinion on the knowledge of the disease he had acquired since their arrival; that he did not know at the time that they had cholera, but since that time has observed hogs pronounced to have cholera by veterinary surgeons, and that the hogs shipped by the plaintiffs, on their arrival at the farm, were affected in the same way as cholera hogs.

Three veterinary surgeons testified that they had had experience with hog cholera, and that it was impossible for the disease to develop under seven days; that it requires from seven to twenty days after the hog has the germ of cholera in its system before the disease becomes apparent; that if a car of hogs was shipped from Green Forest on December 9, and arrived at Marianna on December 11, and the hogs began to die on the next day, it would be impossible for them to have been healthy and free from cholera at the time they were shipped; that they could not have become infected in that length of time.

On the part of the plaintiffs, it was shown that hog cholera was prevalent in certain parts of Lee County at the time the hogs arrived there; but it was not shown that the hogs in question were exposed to that disease in Lee County. Both of the plaintiffs testified that the hogs in

question had been purchased in Carroll County and that some of them were purchased four days and other six days before the date of shipment; that they appeared to be healthy and free from cholera; that they both had been over Carroll County that fall purchasing hogs, and had not heard of any cholera in the county.

Other witnesses for them testified that they saw the hogs prior to their shipment, and that they appeared to be healthy and free from cholera.

(1) The only assignment of error is that the evidence is not sufficient to support the verdict. In this contention we think counsel are correct. We have never adopted the scintilla rule in this State; on the contrary, we have uniformly held that to uphold a verdict on appeal, there must be some substantial evidence to support it. The uncontradicted testimony of the veterinary surgeons shows that it takes from seven to twenty days after a hog has a germ of cholera in its system before the disease becomes apparent. The hogs were shipped from Green Forest on the 9th, and arrived at Marianna on the 11th of December.

Starratt was the manager of the defendant's farm and took charge of the hogs upon their arrival at Marianna and hauled them home on the same day. He was not interested either in the farm or in the hogs except as an employee of the defendant. He stated that one of the hogs died on the way home, and that three more of them were dead, and others sick on the next morning.

An attempt was made to contradict his testimony in this respect by a letter written to his employer the next morning in which he stated that only one of the hogs was dead, and that the others appeared to be healthy. On the trial he stated that three of the hogs were dead the next morning, and that some of the others appeared sick on the way home. This makes an apparent but not a real contradiction in his testimony, for he states that the letter was written before daylight, and before he had had an opportunity to inspect the hogs the next morning, and that after he had written the letter he went out into the

lot and found three more of the hogs dead. The letter itself shows that it was written before daylight, and Starratt states that the letter was sealed as soon as written. In explanation of the fact that he had stated in his letter that the hogs, except the one which died on the way home, appeared to be healthy, he said that he noticed that several of the others were "wobbly" but, having had no experience with cholera, never thought of them having that disease, but supposed that they had become tired out from the long journey on the car.

The undisputed evidence shows that later on, the disease was pronounced cholera by the veterinary surgeons, and that, in fact, nearly all of the hogs on the place died with it. Starratt testified that he had a large number of hogs on the place at the time, and that they were healthy and free from disease, but contracted cholera after the hogs shipped by the plaintiffs had been received. His testimony shows that the other hogs became infected at a point of time after the arrival of the hogs in question, which indicates that they contracted the disease from the hogs shipped by the plaintiffs.

Starratt also testified that after he observed hogs which were known to have cholera, he was satisfied that the hog which died on the way home, and those found dead the next morning had been infected with cholera.

(2) His testimony was reasonable and consistent, and the jury had no right to arbitrarily disregard it. His testimony taken in connection with that of the veterinary surgeons makes it appear as nearly as human testimony can establish a fact that some of the hogs had the cholera germ in them prior to the time they were shipped to Marianna. See *St. Louis, I. M. & S. Ry. Co.* v. *Ramsey,* 96 Ark. 37.

The question then presents itself as to whether or not the testimony of the defendants was contradicted by that of the plaintiffs. If so, the jury were the judges of the credibility of the witnesses, and had a right to believe the testimony of the plaintiffs and disbelieve that of the defendants. We do not think, however, that the testimony

of the plaintiffs tends in any way to contradict that of the defendants. It is true that the plaintiffs testified that the hogs appeared to be healthy at the time they were shipped; but, according to their own testimony, the hogs had been collected up in small bunches from various parts of Carroll County and some of them had been in their possession only four days. And, according to the testimony of the veterinary surgeons, which was uncontradicted, cholera would not become apparent in a hog until at least seven days after it had been infected with the cholera germ.

We are not unmindful that the plaintiffs testified that they had ridden over Carroll County, and that they had not seen any hogs in that county affected with cholera. But this testimony was negative in its character, and the bald statement does not, of itself, offer any contradiction to the testimony of the defendants. Besides this, the testimony of the plaintiffs shows that cholera had existed in Carroll County since they had been engaged in shipping hogs from there. They wrote the defendants that they ought to have shipped the hogs and sold them on the market as soon as they discovered that they had cholera, and thus have prevented the total loss of the hogs. They stated that they had done this in the past with hogs which they had collected in Carroll County, and had not sold such hogs to feeders, but had shipped them to the market to be sold there for immediate consumption.

(3) After a careful examination and consideration of all the testimony, we have reached the conclusion that the testimony of the defendants is uncontradicted, and that it shows that the hogs were infected with cholera when they reached Marianna. If this is true, it is incontrovertibly established that they must have been infected with cholera prior to their shipment.

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

KIRBY, J., dissents.

SOUTHERN LUMBER COMPANY *v.* LOWE.

Opinion delivered May 3, 1915.

1. BILLS OF EXCEPTION—JUDGE'S SIGNATURE—SIGNED WHEN.—A bill of exceptions may be signed by the judge in vacation, if done within the time specified in an order of the court entered at the trial term.

2. BILLS OF EXCEPTIONS—FILING.—The filing of a bill of exceptions is not a judicial act, but constitutes merely the making of a record of past transactions, and therefore may be done in vacation.

3. BILLS OF EXCEPTIONS—TIME FOR FILING—SUCCEEDING TERM.—Kirby's Digest, § 6222, provides that the time allowed by the trial court for filing a bill of exception must not be beyond the succeeding term. Appellant was given one hundred and twenty days in which to file a bill of exceptions; he filed the same within the time specified, but in the meantime, a succeeding term of court had come on, but when the bill of exceptions was filed the court was holding an adjourned session. *Held*, under the statute the bill of exceptions was filed on time.

4. BILLS OF EXCEPTIONS—TIME FOR FILING.—The only limitation, under Kirby's Digest, § 6222, upon the power of the court at the trial term to extend the time for filing a bill of exceptions, is that it must not run beyond the succeeding term, and the fact that the term is unduly extended by adjournments over from time to time does not prevent the extention of the time up to the limit of the number of days fixed by the court's original order.

Appeal from Bradley Circuit Court; *H. W. Wells*, Judge; motion to dismiss appeal overruled.

B. L. Herring and *Fred L. Purcell*, for appellant.
J. S. McKnight, for appellee.

PER CURIAM. This is a motion to strike out the bill of exceptions and affirm the case on the ground that the bill of exceptions was not filed within the time provided by law and the order of the trial court. On October 1, 1914, the trial court overruled the motion for a new trial and gave appellant one hundred and twenty days thereafter within which to file the bill of exceptions, and the same was signed by the judge and filed with the clerk on January 29, 1915, which was the last day of the allotted period.

The statute provides, however, that the time allowed by the court for filing exceptions must not be "beyond the succeeding term." Kirby's Digest, section 6222. The next regular term of the Bradley circuit court, after trial term, began on January 4, 1915, and the court was continuously in session until January 16, when there was an adjournment over to March 29, 1915. It is insisted by counsel for appellee that the words of the statute, "not beyond the succeeding term," mean before the commencement of the succeeding term, but we think the decisions of this court have settled that point to the contrary. *Stinson* v. *Shafer,* 58 Ark. 110, and cases referred to therein.

The further question arises whether the words refer to a continuous session of the court or to the whole term up to the final adjournment. Our statute was copied from one in force in the State of Kentucky, and the courts of that State decided, while the statute was in force, that a bill of exceptions could not be signed by the trial judge in vacation, but if the time was extended beyond the trial term it must be to a day in the next term and the bill of exceptions must be settled during that term. The practice has, however, been uniform in this State, and has been recognized by this court, to permit a bill of exceptions to be signed in vacation if done within the time specified in an order of the court entered at the trial term. It has been decided here that the filing of a bill of exceptions is not a judicial act, but constitutes merely the making of a record of past transactions and therefore may be done in vacation, and that is the basis of our construction of the statute on this subject. *Bullock* v. *Neal,* 42 Ark. 278. Since we hold that the bill of exceptions may be signed by the judge and filed with the clerk in vacation, there is little reason for construing the statute to mean that it must be done during the succeeding term while the court is in session. It may be that the lawmakers, in using the language, had in mind a continuous session of the succeeding term, but the language is broad enough to mean, and we think does mean when fairly interpreted, that the limit is fixed at the

final adjournment if that does not go beyond the period of time fixed in the order of the court. The only limitation upon the power of the court at the trial term to extend the time for filing a bill of exceptions is that it must not run beyond the next succeeding term, and the fact that the next term is unduly extended by adjournments over from time to time does not prevent the extension of the time up to the limit of the number of days fixed in the court's original order.

The conclusion of the court therefore is that notwithstanding the bill of exceptions was not filed during a continuous session of the term of the court next succeeding the trial term, it was within time when filed within one hundred and twenty days and not beyond the final adjournment of the court.

The motion will therefore be overruled.

STATE v. ALEXANDER AND MOORE.

Opinion delivered May 3, 1915.

1. LARCENY—REMOVING GOODS STOLEN FROM ONE COUNTY TO ANOTHER.—Where defendant stole goods in one county and removed the same to another county, he is guilty of larceny in every county into which he may carry the goods.
2. LARCENY—STATUTORY CRIME.—The rule announced above applies as well to goods which have been made the subject of larceny by statute as to property which is the subject of larceny at common law.

Appeal from Woodruff Circuit Court, Southern Division; *J. M. Jackson,* Judge; reversed.

Wm. L. Moose, Attorney General, *Jno. P. Streepey,* Assistant, and *J. N. Rachels,* Prosecuting Attorney, for appellant.

The court erred in sustaining the demurrer. In the eye of the law the parties were guilty of larceny in every county into which the stolen property was carried. Kirby's Dig., § § 2090, 2091, 2095; 54 Ark. 621; 58 Ark. 513; 97 Ark. 414; 11 Wharton's Crim. Law, Kerr's

Edition, § 1166; 74 Pac. 1086; 63 Pac. 596; 11 Cush. 483; 1 Car. & P. 127; 2 Russell, Crimes, 329; 15 L. R. A. 722; 14 *Id.* 559.

Thomas & Lee and *G. Otis Bogle,* for appellees.

The Constitution provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed." Const. 1874. Art. 2, Sec. 10, Declaration of Rights. Under the allegations of the indictment the crime was complete in Monroe county, and that county had jurisdiction. 30 Ark. 41, 42; 32 Ark. 568.

HART, J. The State has appealed from a judgment of the circuit court sustaining a demurrer to an indictment for larceny. The body of the indictment is as follows:

"Then and there unlawfully and feloniously did steal, take and carry away one cow, the personal property of Mary Patton, a resident of Monroe county, and did then and there unlawfully and feloniously, in the county of Monroe and State of Arkansas, unlawfully and feloniously take and receive with the unlawful and felonious intent then and there to take, steal and carry away said cow, did unlawfully and feloniously, with the unlawful and felonious intent then and there to deprive the true owner of said cow, unlawfully and feloniously did, with the felonious intent, transport and bring said cow, the property of Mary Patton, from the county of Monroe, Arkansas, into the southern district of Woodruff county, Arkansas, with the unlawful and felonious intent then and there to steal, take and carry away."

(1-2) The court erred in sustaining the demurrer to the indictment. While the indictment is not very artistically drawn, it contains all the essential elements necessary where a larceny is charged to have been committed in one county and the thief has removed the stolen property into another county. In such cases, in the eye of the law, he is guilty of larceny in every county into which he may carry the goods. The rule applies as well

to goods which have been made the subject of larceny by statute as to property which is the subject of larceny by the common law. Wharton's Criminal Law, Vol. II, § 1166, p. 1389.

By the common law, larceny, while the goods are in the possession of the thief with the felonious intent, is a crime committed by each movement of them and he may be indicted in any county into or through which they may be carried. In contemplation of law "the possession of them still remains in the true owner, and every moment's continuation of the trespass and felony amounts to a new caption and asportation." See *State* v. *Johnson,* 38 Ark. 568; *Baker* v. *State,* 58 Ark. 513.

Rapalje, in his work on Larceny and Kindred Offenses, section 63, says:

"The general rule is that, inasmuch as larceny does not change the ownership or lawful possession of the stolen property, if the thief carry it into another county, or have it so carried, and there exercise dominion over it, this constitutes larceny in such county, and the thief may be indicted and convicted therein; and the rule is the same notwithstanding the goods have been altered in their character before being carried from one county into another. Ordinarily the local jurisdiction of all offenses is in the county where the offense is committed. Larceny is made an exception, and the offender may be tried in any county to which he carries the stolen property, or where it may be found, as well as in the county in which the property was first stolen. This rule has no application, however to any crime other than larceny. The offense of receiving stolen property, or aiding in its concealment, knowing it to have been stolen, must be tried in the county where the offense was committed. Each asportation of stolen property from one county into another is a fresh theft; and where the original taking is felonious, every act of possession continued under it by the thief, is a felonious taking wherever the thief may be. In such cases a prosecution may be maintained in either county."

To the same effect see Bishop's New Criminal Procedure, Vol. I, Sec. 59.

The judgment will be reversed and the cause remanded for further proceedings according to law.

STATE v. WILSON.

Opinion delivered May 3, 1915.

PANDERING—FACTS SUFFICIENT TO SHOW CRIME—PLACE RESORTED TO.—Proof that prosecutrix voluntarily accompanied defendant to a thicket, where he left her and later returned, she waiting for him there, when they had sexual intercourse, does not show a violation of the pandering act, (Act 105, Acts 1913) in the absence of proof that the thicket was a place where prostitution was practiced, encouraged or allowed, or that men and women resorted thither for illicit intercourse.

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

STATEMENT BY THE COURT.

Appellant was indicted by the grand jury of White county for violating what is known as the "Pandering Act", Act. No. 105 of the Acts of the General Assembly of 1913.

The indictment, formal parts omitted, reads as follows:

"Did then and there unlawfully and feloniously, by promises, threats, violence, devices, and schemes, fraud and artifices, duress of person and goods and the use of his position of confidence, inveigle, entice, persuade, encourage and procure one Mabel Slaughter, a female, to be taken and detained for sexual intercourse and prostitution, and did unlawfully and feloniously, by his use of confidence, schemes, artifices and fraud, inveigle, entice, persuade, encourage and procure the said Mabel Slaughter to go and be by him detained at a place for sexual intercourse and for prostitution, he, the said W. F. Wilson, then and there not being the husband of the said Mabel Slaughter, against the peace, and so forth."

It appears from the testimony that the prosecuting witness Mabel Slaughter, 19 years of age, went with or was taken by, one Stanley, to the home of the defendant Dr. Wilson before daylight one morning; where Stanley rapped on the door and the doctor appeared and invited Mabel in. He closed the door after she entered; remained outside a few minutes with Stanley, and returned and told her that it would not do for her to stay there, and they would have to go to Stanleys and see what to do. He then took her and started away but before reaching Stanley's house left her in a thicket near a negro house; and continued on but returned after daylight and had sexual intercourse she said, with her there in the thicket over her strenuous objection and resistance.

The court directed the jury to find for the defendant and from the judgment the State prosecutes this appeal.

Wm. L. Moose, Attorney General, *Jno. P. Streepey,* Assistant and *J. N. Rachels,* Prosecuting Attorney, for appellant.

The law was intended to cover every act of unlawful intercourse, regardless of time or place, provided that the man planned or assisted in the planning of the act or acts necessary to enable the commission of the final act of sexual intercourse. It is broad enough to cover the offense proved here. Acts 1913, pp. 407, 408, 409.

No brief filed for appellee.

KIRBY, J., (after stating the facts). In *Boyle* v. *State,* 110 Ark. 318, this statute was construed, and this court held that when defendant took the woman to a place where prostitution was practiced for the purpose of prostitution, whether she went voluntarily or not, he was guilty, under the statute and said: "It was necessary for the State to show under the charge made in the indictment that the house to which Birdie Taylor was taken was a place in which prostitution was practiced, encouraged or allowed and that she was taken there for the purpose of prostitution." After saying

the proof of the bad reputation of the house as such a place was properly admitted, and a circumstance to be considered by the jury, but not alone sufficient to convict, continued "To warrant conviction the proof would also have to show that men and women actually resorted there for illicit intercourse."

In *Lee* v. *State,* 114 Ark. 310, 169 S. W. 963, the court held that the offense defined by this act is one of a local character or nature, consisting of enticing a female person to visit or become an inmate of a place where prostitution is practiced, or an assignation house, and place is properly descriptive of the offense, it being necessary to allege a place.

If the indictment was sufficient to charge an offense under the statute, the proof that the prosecutrix voluntarily accompanied the defendant to a thicket by the roadside in the night time and there awaited his return until daylight and had sexual intercourse with him, is not sufficient to show a violation of it. There is no proof whatever that the thicket was a place where prostitution was practiced, encouraged or allowed or that men and women resorted thither for illicit intercourse.

The testimony was insufficient to sustain a conviction and the court did not err in directing the verdict.

The judgment is affirmed.

MEANS v. STATE.

Opinion delivered May 3, 1915.

BOUNDARIES—STATE BOUNDARIES—CONCURRENT CRIMINAL JURISDICTION.—The terms of Act 290, Acts 1909, providing for concurrent criminal jurisdiction over the Mississippi river between Arkansas and Tennessee, not having been complied with by the State of Tennessee, by the passage of an act granting same, the Circuit Court of Mississippi County, Arkansas, has no criminal jurisdiction over offenses committed on an island in the Mississippi river, east of the middle of the main channel of the said river, opposite said county.

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

S. L. Gladish, for appellant.

Under the agreed statement of facts, the sale having been made on an island at a point east of the main channel of the Mississippi river, it occurred in the State of Tennessee, and not in Mississippi County. The court had no jurisdiction. 40 Ark. 503, 506, 507; 30 Ark. 43; 134 S. W. 624.

M. P. Huddleston and *J. T. Coston,* for appellant.

Arkansas and Tennessee have concurrent jurisdiction over crimes committed on the river. Shannon's Code of Tennessee, § 84; Castle's Supplement (Ark.) § 2083b. Independently of the foregoing statutes, the courts of either State would have jurisdiction by virtue of the Act of Congress admitting Arkansas into the Union. Revised Statutes of Missouri, 1909, p. 36; Kirby's Dig., p. 174; 159 S. W. 1133; 95 Pac. 720, *et seq.*

SMITH, J. Appellant was convicted on a charge of selling liquor illegally under the following agreed statement of facts:

"State of Arkansas,

vs. STIPULATION.

"Bob Means.

"It is agreed and stipulated in this case:

"First. That on March 10, 1915, defendant, Bob Means, did sell to Lightning Miller a pint of alcoholic, intoxicating liquor.

"Second. That at the time of said sale the defendant and Lightning Miller were at a point on Island 34 west of the Tennessee shore but east of the middle of the main channel of the Mississippi river, opposite Mississippi County, Arkansas.

"Third. That said sale of liquor occurred at a point on said island opposite Mississippi County east of the middle of the main channel of the Mississippi river and west of the Tennessee shore.

"This stipulation may be introduced in evidence by either party, and when introduced shall be binding and conclusive evidence of the facts stated therein.

"State of Arkansas,

"By M. P. Huddleston, Prosecuting Attorney.

"Bob Means, By S. L. Gladish, Attorney."

Upon the trial of any criminal charge the burden devolves upon the State to prove the commission of the crime within the jurisdiction of the court or, as is commonly said, to prove the venue. This may be done by a preponderance of the evidence, but no attempt is made here to show that the island upon which the liquor was sold is within the boundary of the State of Arkansas, and the stipulation does not prove the venue, unless jurisdiction is conferred upon the courts of this State by the section of Shannon's Tennessee Code, hereinafter set out and by the Act of the General Assembly of this State hereinafter referred to. *Cessill* v. *State,* 40 Ark. 503; *Kinnanne* v. *State,* 106 Ark. 286; *Wolfe* v. *State,* 107 Ark. 33.

It is conceded on behalf of the State that the proof does not show that the island is a part of the State of Arkansas, but it is said that inasmuch as the island lies in the Mississippi River, which river forms the boundary between the States of Arkansas and Tennessee at the point in question that such proof is unnecessary, for the reason that the courts of those States have concurrent jurisdiction of this and all other islands lying within the Mississippi River. The correctness of this contention presents the sole question in this case.

It is urged that concurrent jurisdiction exists on the waters of the Mississippi River and over the islands lying in said river as the result of the enactment of Act No. 290, of the Acts of the General Assembly of the State of Arkansas of 1909, page 888, and of section 84 of Shannon's Code of Tennessee. The said Act 290, is as follows:

"Section 1. That the criminal jurisdiction of the State of Arkansas be and is hereby extended as follows:

"Beginning at a point where the north boundary line of Arkansas intersects the west bank of the Mississippi River and extending east along a line in extension of and parallel to the said north boundary of Arkansas to the east bank of the said Mississippi River; thence south along said bank, and following the meandering thereof to a point where a line drawn east along and parallel to the south boundary of Arkansas would intersect the said east bank of the Mississippi River, thence west along said line to a point where the south boundary line of Arkansas intersects the west bank of the Mississippi River.

"Sec. 2. That the State of Arkansas and her sister States, Tennessee and Mississippi, have concurrent criminal jurisdiction over the parts of said territory lying opposite them and between the lines extending and parallel to their north and south boundaries.

"Sec. 3. That this act be in force when the said States of Tennessee and Mississippi, or either of them, pass a similar act governing the territory described in this act, opposite them and between their said north and south boundaries."

Section 84 of Shannon's Code reads as follows:

"The State has concurrent jurisdiction on the waters of any river which forms a common boundary between this and any other State."

We judicially know that our act is more recent than the section of Shannon's Code quoted, and we assume, of course, that the Legislature of this State was aware of this section of Shannon's Code at the time of the enactment of our statute quoted above. It will be observed that our act becomes effective in the event only that Tennessee and Mississippi, or either of them, enact similar legislation; and no such legislation had been enacted by Tennessee at the time of the sale of the liquor by appellant.

The difference between our statute and that of Tennessee is manifest. The Tennessee statute asserts jurisdiction "on the waters of any river which forms a com-

mon boundary between this and any other State." It will be observed that it does not say "within the banks of any river forming the boundary of this State." The sale here was on one of the permanent islands of the Mississippi River, and not upon the waters of the river. One reason for legislation of this character is that when crimes are committed upon boats or other floating objects it is frequently difficult to prove the venue, but this difficulty does not arise in the case of the permanent islands lying in the river. In the case of *Brown* v. *State,* 109 Ark. 373, which was a case involving the question of jurisdiction of an offense committed on the waters of a river forming the boundary between Arkansas and Missouri, this court quoted with approval from Rorer on Interstate Law, p. 438, the following statement:

"The existence of concurrent jurisdiction in two States over a river that is a common boundary between them, as more particularly referred to in section 1 of this chapter, vests in each of such States, and in the courts thereof, except as to things permanent, and except as to maritime and commercial matters cognizable by the National government and courts, jurisdiction both civil and criminal, from shore to shore, of all matters of rightful State cognizance occurring upon such river in all parts thereof where it forms such common boundary. Such concurrent jurisdiction obviates the difficulty in judicial proceedings of ascertaining on which side of the main channel of a boundary river occurrences have transpired or crimes have been committed."

The offense in the *Brown* case was committed on a boat tied to a bridge across the St. Francis River, but it appears from the opinion in that case that the State of Missouri had passed an act which gave Arkansas and Missouri concurrent criminal jurisdiction over the whole of the St. Francis River where it is the boundary line between the two States.

Discussing jurisdiction over permanent objects Mr. Rorer, at the same page says: "But in the very nature of things jurisdiction of permanent objects is exclusive

in the State on whose side of the main channel they are situated. Concurrent jurisdiction of the abutting States over permanent objects, as islands situated in the river, or permanent erections at either shore, would be utterly impracticable in the administrative affairs of State, as rendering owners and residents of such property liable to taxation, and other liabilities and duties of citizenship and ownership, to each of the States. Hence it can never be intended in law that jurisdiction which is concurrent over a river is concurrent also over islands and other permanently fixed objects therein. Nor does the reason of the law of concurrent jurisdiction apply to such objects whose true location in reference to the center of the main channel can always be known or ascertained; but it was to obviate the difficulty of showing on which side thereof occurrences of judicial cognizance had taken place that concurrent jurisdiction was resorted to in law."

We need not consider here what jurisdiction would be conferred upon the courts of this State over an island in the Mississippi River which is a part of the State of Tennessee if that State should enact a law similar to Act 290 of our Acts of 1909, nor need we consider what jurisdiction over the waters of the Mississippi River was acquired by the courts of this State upon the passage of this Act 290. Those questions are not presented here.

The condition required by our act to confer concurrent jurisdiction over the island is not met by section 84 of Shannon's Code, and has not been met by any subsequent legislation, and it follows, therefore, that the proof does not show that the circuit court of Mississippi County had jurisdiction of the offense charged, and the judgment of that court is, therefore, reversed and the cause remanded.

JONESBORO TRUST COMPANY *v.* NUTT.

Opinion delivered May 3, 1915.

1. SALE OF CHATTELS—PATENTED ARTICLE—CREDIT SALE—NEGOTIABLE NOTE.—All negotiable notes, given in payment for any patented machine, implement, substance or instrument of any kind or character whatever, when the vendor effects the sale of the same to any citizen of this State on a credit, or in payment of any patent right or patent right territory, are required to be executed upon a printed form showing upon its face that it was executed in consideration of a patented machine, etc., and no person shall be considered an innocent holder of such instrument, notwithstanding he may have paid value therefor, before maturity, and all such notes not showing on their face for what they are given are absolutely void. (Kirby's Digest, § § 512-516).
2. CITIZENS—RESIDENTS—PROTECTION OF THE LAW.—A resident in the State doing business here, is entitled to the same protection from the laws of the State as though he were in fact a citizen.
3. CITIZENS—RESIDENTS.—The word "resident" held to be synonomous with "citizen" within the meaning of Kirby's Digest, § § 512-516.

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

STATEMENT BY THE COURT.

Appellant brought this suit in the justice court against E. K. and S. M. Nutt, upon two promissory notes for $150 each, dated February 3, 1913, one due April 3 and the other June 3, after date.

Defendants failed to appear in the justice court and judgment by default was rendered against them from which they appealed.

In the circuit court they answered, alleged that the notes sued on were given as consideration for the sale and delivery of portable pantries, a patented article, and the exclusive right to sell same in Greene County and that they were void, not being executed upon a printed form as required by law. Sections 513, 516, Kirby's Digest.

Also that the consideration for the notes had failed and that the trust company was not a *bona fide* purchaser thereof.

The notes sued on were exhibited with the complaint and are alike, except as to date of payment, and read as follows:

"$150.00 Jonesboro, Ark., February 3, 1913.

June 3, 1913, after date, for value received, we promise to pay to the order of W. J. Gooch, One Hundred and Fifty Dollars. At the Bank of Jonesboro, with interest at 8 per cent per annum, from date until paid. If the interest be not paid when due, to become as principal and bear the same rate of interest. The makers and endorsers of this note hereby severally waive presentment for payment, notice of nonpayment, protest, and consent that time of payment may be extended without notice thereof.

Due.....

P. O.....

No. 3549.

.....Miles....."

E. K. Nutt.
S. M. Nutt.

The testimony shows that appellees made a written contract with the Portable Pantry Company, of which W. J. Gooch was manager, by which said company appointed E. K. Nutt exclusive agent or dealer to sell the Portable Pantry in Greene County, with the right to select another county of similar size if the number of pantries contracted to be sold could not be sold in that county. This contract gave to said Nutt the sole and exclusive privilege of selling the Portable Pantry until February 3, 1914, with power to transfer any or all parts of the same.

It was stipulated that he, as such dealer, should have the privilege of ordering from the factory, at the prices stipulated in the manufacturer's, The Cincinnati Stamping Co.'s, contract with the Portable Pantry Company, a copy of which was also given him.

He was to confine his operations to the field specified and not to sell the pantry for less than the designated prices, retail and wholesale. After canvassing the

territory thoroughly, he was to place the pantry on sale "with as many merchants as he may see practicable in said section," furnishing them at the wholesale price and have the profits derived from such sales, which were to be remitted to him by the Cincinnati Stamping Co. after being received by it. He was required to notify the Portable Pantry Company of all merchants contracted with and of any other parties to whom he gave authority to order pantries from the factory, stating the price at which they were to receive the goods, etc.

It was also stipulated: "As an evidence of good faith, and determination on the part of said dealer to carry out the intents and purposes of this appointment, he has this day made an advance payment of $2 each on Portable Pantries aggregating $300, the receipt of which is hereby acknowledged, for which we have issued to him 150 Portable Pantry Coupons No. 116-E and he is hereby authorized to use said coupons in ordering pantries from factory, and we guarantee that the Cincinnati Stamping Company will accept same at $2 each when accompanied by $6 in payment for one Portable Pantry," and the notes sued on were accordingly executed to make the advance payment of $300.

The contract of the Portable Pantry Company with the Cincinnati Stamping Company of Cincinnati, Ohio, relating to the manufacture of the portable pantries contains this stipulation:

"We agree and hereby obligate ourselves to the Portable Pantry Company, to furnish same in good order, f. o. b. Cincinnati, Ohio, at $10 each, or at $8 each when order is accompanied by a portable pantry coupon.

We will furnish the Portable Pantry Company certain coupons covering all advance payments made to us by said company from time to time on this contract, and we will accept said coupons at their face value as part payment on separate pantries shipped to said company or its legal representatives, but only at the rate of one coupon with each pantry."

E. K. Nutt testified that he went to appellant Trust Company on the date the contract was executed, Feb-

ruary 3, 1913, had a conversation with Mr. Hall, its cashier, and informed him of the execution of the notes and the consideration therefor. He did this because he knew Mr. Gooch with whom he had been working, had been selling other notes to the Trust Company, but had agreed with him that he would not sell these notes until a shipment of the pantries had been received. A copy of the letters patent issued to W. J. Gooch for the portable pantry was also introduced in evidence.

S. M. Nutt testified that he was the indorser of the notes and interested in the contract and also that the pantries were to be made in Cincinnati, Ohio, and the Portable Pantry Company was not an Arkansas corporation.

The cashier of the Trust Company stated that he knew W. J. Gooch, bought the notes from him on February 14, 1913, and had not had any conversation prior to that time with E. K. Nutt about them and did not know of any defense to the notes. He discounted the paper 10 per cent and first learned of the consideration for the notes some time after May 31.

It was admitted that both appellees are residents of the State and not merchants.

The court directed a verdict in favor of appellees and from the judgment thereon this appeal is prosecuted.

Baker & Sloan, for appellant.

The notes sued on do not come within the provisions of the statute, Kirby's Dig., § § 513, 516.

1. There was no sale of any article. The contract signed by appellee was a mere dealer's appointment. The notes were given not as consideration for such appointment, but for the purchase price of coupons. The transaction did not constitute a *sale* of any of the portable pantries. 1 Mechem on Sales, § 1; 27 Ia. 160, 173; 47 Ark. 460, 463. It was purely optional with appellee whether or not he would purchase any cabinet or cabinets. It was a mere option to buy. 28 Atl. 220, 159 Pa. 142; 120 Ia. 218, 94 N. W. 469, 470; 123 Fed. 9, 11; 28

Mont. 468, 72 Pac. 978, 981; 104 Ark. 459, 465; 82 Ark. 573; 78 Ark. 306; 171 S. W. 1183; 87 Ark. 400.

2. The statute by its own terms is applicable only to sales on credit. There was no sale on credit here, but, if it was a sale at all, it was partly for cash and partly on credit and the statute would not apply. The statute should be strictly construed and nothing should be taken by intendment.

3. The transaction was not shown to have been with a citizen of the State. A showing that one is a resident of the State is not proof that he is a citizen.

4. As to this transaction, the act would be unconstitutional as an attempted regulation of interstate commerce. 136 U. S. 326-328, 34 L. Ed. 455, and cases cited; 17 Am. & Eng. Enc. of L. (2 Ed.) 107, and cases cited; 227 U. S. 389, 33 Sup. Ct. 294; 135 U. S. 100; 34 L. Ed. 128.

T. A. Turner, for appellee.

1. The transaction constituted a sale within meaning of the statute, and since the notes conform to the requirements of the statute they are void. Kirby's Dig., § § 513, 514; 75 Ark. 328; 203 U. S. 347; 86 Ark. 159; 87 Ark. 555; 67 Ark. 575.

2. There is no merit in the contention that there was no sale on credit within the meaning of the statute. 86 Ark. 155.

3. No question was raised in the lower court as to appellee's citizenship. However, the record at least discloses that they were residents of this State, and the words "resident" and "citizen" will be treated as synonymous. 11 Ohio 28.

4. The act is constitutional. 60 Ark. 118; 75 Ark. 328; 203 U. S. 347; 86 Ark. 159; 207 U. S. 251; 102 Ark. 568.

KIRBY, J., (after stating the facts). (1) This case is controlled by the decisions in *Tilson* v. *Gatling,* 60 Ark. 118, *Columbia County Bank* v. *Emerson,* 86 Ark. 159, *Mullins* v. *Columbia County Bank,* 87 Ark. 555, and *Ensign* v. *Coffelt,* 102 Ark. 568. Said cases all arose out of

transactions governed by the law requiring "negotiable notes given in payment for any patented machine, implement, substance or instrument of any kind or character whatever, when the vendor effects the sale of the same to any citizen of this State, on a credit" or "in payment of any patent right or patent right territory" to be executed upon a printed form showing upon its face that it was executed in consideration of a patented machine, etc., and providing that no person shall be considered an innocent holder of such instrument, notwithstanding he may have paid the value therefor before maturity "and all such notes not showing on their face for what they are given, shall be absolutely void." Sections 512, 513-516, Kirby's Digest.

This act has been held constitutional by our court in said cause and by the United States Supreme Court in *Ozan Lumber Co.* v. *Union County National Bank of Liberty,* 207 U. S. 251.

Appellant contends that the contracts do not evidence the sale of a patented article "or patent right territory" but only give Nutt, the agent, an option to buy the portable pantries, for sale in the prescribed territory.

It insists also that the testimony does not show that appellees are citizens of the State within the meaning of the act having the right to the benefit of its provisions. The contract between the parties stipulated that Nutt, the dealer, as an evidence of his good faith, etc., had made an advance payment of $2 each on 150 portable pantries, aggregating $300, the receipt of which was acknowledged, for which he was issued 150 portable pantry coupons No. 116-E, and was authorized to use said coupons in ordering said pantries from the factory and the pantry company guaranteed that the manufacturer, the Cincinnati Stamping Company would accept said coupons at $2 each when accompanied by $6 in payment for one portable pantry, and the contract between the manufacturing company and the pantry company shows that the manufacturer was to furnish the pantry company certain coupons

covering all advance payments made the manufacturer by said company, under the contract, which coupons were to be accepted at their face value as part payment on separate pantries, shipped to the pantry company or its legal representatives at the rate of one coupon with each pantry. These notes were executed to cover the advance payment for said 150 pantries agreed to be delivered to Nutt which he was employed by the terms of the contract to sell in Greene County and were given in part payment for the patented machine or article sold on a credit within the meaning of said statute. *Columbia Bank* v. *Emerson, supra.*

The contract recites that the pantry company "does hereby appoint E. K. Nutt of Jonesboro, Arkansas, sole and exclusive dealer to sell the portable pantry, etc.," and it is admitted that both parties are residents of the State of Arkansas.

(2-3) The recital of the contract shows one of the appellees to be a citizen of the State, and a resident of the State doing business here, is entitled to the same protection from our laws as though he were in fact a citizen. The word "citizen" is often used in common parlance to denote an inhabitant or resident and the word "resident" may well be considered synonymous with citizen, within the meaning of said statute, the purpose of which is to protect all those residing in the State from imposition and fraud. *McKenzie* v. *Murphy,* 24 Ark. 159.

It follows that the court did not err in instructing the verdict, and the judgment is affirmed.

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

Opinion delivered May 3, 1915.

1. CARRIERS—REGULATION BY STATE.—The State has the right to enact appropriate legislation regulating the business of common carriers.
2. CARRIERS—FAILURE TO FURNISH CARS—TIME FOR BRINGING SUIT.—Act 193, p. 453, Acts 1907, held to limit the time within which suits may be instituted against a common carrier for failure to furnish freight cars, to the period of one year.

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

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

The suit was not instituted within one year after the alleged cause of action accrued, nor within one year after the date appellees became aware of their cause of action against appellant. The cause of action is barred, and the court ought to have directed a verdict for appellant. Act 193, Acts 1907, p. 453, 464, § 21.

Act 277, Acts 1909, p. 814, is not inconsistent with the foregoing act, does not cover the whole subject-matter of the former act, and, therefore, does not repeal any provision of the former act not specifically covered by its own terms and provisions. 41 Ark. 149; 92 Ark. 266; *Id.* 600; 101 Ark. 238. The statute of limitation provided in the first act is, therefore, still in force.

J. L. Shaw, for appellees.

The section relied on by appellant also provides that no action shall be brought after two years from the time the right of action accrued, and this suit was brought within that time. This act does not abrogate the common law rule by which it is the duty of appellant to deliver cars within a reasonable time after demand made therefor, and under which rule appellant had the right to bring suit within three years after the cause of action accrued.

SMITH, J. Appellees made a demand in writing on appellant on or about September 28, 1912, for a car and

stated in the demand that appellees desired to load stave bolts in said car for shipment. The car was not delivered until about October 28 thereafter and as a result of this delay the bolts were damaged. Appellees commenced suit on May 8, 1914, and recovered judgment for the amount of the damage done the bolts and this appeal has been duly prosecuted.

It will be observed the suit was not commenced until more than one year and seven months after the damage had occurred, and appellees' cause of action had accrued, and the question in the case is whether the cause of action was barred at the time of the institution of the suit. In the absence of legislation limiting the period within which such suits might be brought the period of limitation would be three years. But the Legislature, by Act No. 193, p. 453, of the Acts of 1907, passed a comprehensive act entitled "An Act to regulate freight transportation by railroad companies doing business in the State of Arkansas." The right of the State to enact appropriate legislation regulating the business of common carriers has been often recognized in the decisions of this court, and those of all other States and is a right which exists without question, and is one which has been freely exercised. Some of the legislation is declarative of the common law duties of common carriers, while much of it imposes additional duties, and, when the rights and duties of carriers are defined by statute such statutes must govern not only in ascertaining what the rights and duties of such carriers are, but also in their enforcement, when the legislation undertakes to provide remedies for their enforcement. The act in question defines the rights of shippers and the duties of carriers when cars are required and demanded for the shipment of freight. After enacting various provisions in this behalf section 21 of the act among other things, provides a time within which suit must be brought to recover damages for failure to furnish cars. It is there provided that no action shall be sustained unless brought within one year after the cause of action accrued, or within one year after the party complaining shall have come to the knowledge of

his or her right of action, with a *proviso* that no action shall be brought after two years from the time the right of action accrues. The two year *proviso* can have no application to the facts of this case, if the act applies at all.

We think the act should be held applicable to suits growing out of a railroad's failure to furnish cars. The Legislature has by this act imposed several additional burdens on railroads and having done so has seen fit to limit the time within which suits may be instituted to recover damages for failure to perform these duties. A study of the act gives no support to the position that the Legislature intended there should be a difference between the time within which suit should be instituted when the failure to furnish cars was such that a common law action would lie therefor, and the case where the cause of action was a failure to comply with the statute requiring cars to be furnished shippers. There are cogent reasons why the Legislature should limit to the period of a year the time within which suits may be instituted for failure to furnish cars, and we think the act in question accomplished that result.

The judgment of the court below is therefore reversed and the cause dismissed.

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

Opinion delivered May 10, 1915.

1. ACTIONS—RIGHT TO DISMISS—VACATION.—Kirby's Digest, § 6168, provides that a plaintiff may dismiss his action in vacation, in the office of the clerk, on payment of accrued costs; *held*, the plaintiff having an absolute right to dismiss his case at any time before final submission to the court or jury trying the same, that the word "vacation" as used in the statute, means any time when the court is not in session.

2. MASTER AND SERVANT—EMPLOYER'S LIABILITY ACT—CONSTITUTIONAL LAW.—The Employer's Liability Act, Act March 8, 1911, p. 55, fixing liability of railroads for injuries to their employees, and abolishing the defenses of assumed risk, fellow servant rule, and

contributory negligence, does not deprive the railroad of the equal protection of the law, as guaranteed by amendment 14 to the Federal Constitution.

3. MASTER AND SERVANT—EMPLOYER'S LIABILITY ACT—INJURY TO EMPLOYEE.—The first part of § 1, Act 1911, p. 55, known as the Employer's Liability Act, providing that railroads shall be liable for all damage to any person employed by such carrier for injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, does not apply to all employees of the company, but only to those engaged in the operation of the road.

4. MASTER AND SERVANT—INJURY TO SERVANT—OPERATION OF TRAIN.—A servant of a railroad company's bridge crew, unloading piling, *held*, under Acts 1911, p. 55 to be engaged in the operation of the train, the statute not being limited to those actually engaged in running the train; the statute includes every employee who, when injured, was performing some work in the line of his duty directly connected with and incident to the use and operation of a railroad.

5. EVIDENCE—NONRESIDENT WITNESS—TESTIMONY AT FORMER TRIAL.—The testimony of a witness taken at a former trial, which was dismissed before verdict by plaintiff, is not admissible at the second trial, when the witness resides in a neighboring State and his whereabouts are well known to the party desiring to introduce his testimony.

6. TRIAL—REQUEST FOR PEREMPTORY AND OTRER INSTRUCTIONS—TAKING CASE FROM THE JURY.—A party does not waive his right to go to the jury, when, after his request for a peremptory instruction is refused, he asks other instructions on the merits of the case.

7. TRIAL—PEREMPTORY INSTRUCTION—RULE.—The validity of a peremptory instruction depends upon whether or not reasonable minds might reach different conclusions from the evidence. It is error to take from the jury questions of fact where reasonable minds might come to different conclusions therefrom.

8. MASTER AND SERVANT—INJURY TO SERVANT—EMPLOYER'S LIABILITY ACT—PRESUMPTION OF NEGLIGENCE—QUESTION FOR JURY.—In an action for damages, under Act 1911, p. 55, for injuries to the servant of a railroad company; *held*, although a presumption of negligence is raised against the defendant, nevertheless the defendant is entitled to have that issue submitted to the jury.

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

STATEMENT BY THE COURT.

William Ingram sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages for personal injuries sustained by him while helping to load some bridge timbers on a flat car. The facts are as follows:

In February, 1914, E. T. Ross, a bridge foreman of the defendant company, with the plaintiff and others of his bridge crew, were engaged in removing some old guard rails from two bridges or trestles on defendant's line of road. The guard rails were made of 6x8 pine timbers, nine feet long, and were "dapped," that is, notched so that they fit down over the ties about two inches. When they were taken up the notched edges were trimmed down smooth so that the guard rails then were pieces of timber 4x8. There was a flat car standing on the side track near the trestle and the foreman directed his crew to take a push car and go down the side track about a quarter of a mile where some bridge piling lay and load the timber on the flat car. He directed them to use these guard rails as skids or running boards. The bridge crew loaded the push car with the piling and pushed the car down the track to where the flat car was placed. The members of the crew then took the guard rails and placed them between the push car and the flat car and rolled the piling over the skids from the push car into the flat car. The first load was unloaded safely. When the second load was brought up on the push car the plaintiff was standing at the north end of the car. Some of the other members of the crew picked up two guard rails to be used as skids. While the second piece of piling was being rolled along the skids the south skid broke. The north skid then slipped off the push car and the piling fell, striking the plaintiff on the leg and breaking it. The foreman of the bridge crew said that he looked at the guard rails before the bridge crew used them for skids and that he did not discover any defects in them.

A civil engineer, on behalf of the plaintiff, testified that pieces of piling of the dimensions stated by plain-

tiff's witnesses which caused the guard rail to break would weigh something over five hundred pounds and that sound pieces of pine of the dimensions of the guard rails would be able to sustain a weight several times that of the piling.

Other facts will be stated in the opinion.

The court directed a verdict for the plaintiff and the defendant has appealed.

E. B. Kinsworthy, McCaleb & Reeder and *Troy Pace,* for appellant.

1. No actionable negligence was established. The skids were simple appliances not embraced within the provisions of "Employer's Liability Act." The only duty resting on defendant was to exercise ordinary care in furnishing reasonably safe tools. 101 Ark. 119; 100 *Id.* 476; 17 S. W. 580; 72 *Id.* 712; 55 Ark. 483; 108 *Id.* 383-4; Elliott on Railroads (2 ed.) § 1374; Labatt on Master & Servant, § 1671, foot note 1; 128 Ala. 434; 101 U. S. 22, 30; 143 *Id.* 452.

2. There is no competent evidence that the skid was defective. No presumption arises from the fact that the skid did break. 51 Ark. 467; 89 *Id.* 50; 90 *Id.* 326. The so-called expert evidence was inadmissible. 87 Ark. 242; *Id.* 257; 50 *Id.* 520; 108 *Id.* 392.

3. Plaintiff assumed the risk. 82 Ark. 534; 73 *Id.* 55; 93 *Id.* 153; 107 *Id.* 341; 95 *Id.* 562; 56 *Id.* 206; 90 *Id.* 407; 82 *Id.* 11; 172 S. W. 493; 100 Ark. 462; 82 *Id.* 17.

4. The action should have been abated because of the suit pending. 27 Ark. 315; 88 *Id.* 160. There was no vacation of the court. 104 Ark. 629; 72 S. W. 494; 79 *Id.* 494.

5. It was error to refuse to admit the evidence of Dr. Campbell. 95 Ark. 176; 47 *Id.* 180; 60 *Id.* 400; 58 *Id.* 353; 42 *Id.* 288; 60 *Id.* 556; 98 *Id.* 357; 106 *Id.* 101; 90 *Id.* 278.

6. In order to justify the assessment of damages for future or permanent disability it must appear that a continued or permanent disability is reasonably certain to result. 13 Cyc. 144; 90 S. W. 115; 90 Ark. 278,

284. No recovery can be had for "probable" future suffering or permanent injury. 97 Ark. 358, 365; 106 *Id.* 186.

7. It was error to give the peremptory instruction for plaintiff. Questions of negligence and assumptions of risk are ordinarily for the jury. Defendant also asked a peremptory instruction accompanied with ten other requests. If the peremptory instruction was refused the other prayers should have been granted. 89 Ark. 534; 90 *Id.* 23; 16 L. R. A. 189; 107 Ark. 158; 114 Ark. 376; 111 Ark. 309; 78 *Id.* 234; 168 S. W. 135.

8. Defendant was not required to seach for latent or hidden defects. 79 Ark. 440; White Pers. Inj. on R. R., § 374; Elliott on R. R. (2 Ed.), § 1348.

Dene H. Coleman and *Jones & Campbell,* for appellee.

1. The question of assumed risk does not enter into this case. (1) There is no evidence that plaintiff knew of the danger. (2) Under the Act (No. 88, 1911), the defense of assumed risk has been abolished. 87 Ark. 396; 77 *Id.* 458; 97 *Id.* 364; 95 Id. 295; *K. C. Ry. Co.* v. *Huff,* ms. op. Jan. 25, 1915.

2. The skid was not a simple tool within the meaning of the act. 127 Wisc. 318; 82 Ark. 372; 92 N. W. 535; 54 Atl. 996; 57 *Id.* 85; 108 N. W. 1016; 58 *Id.* 878. If it was, it was the master's duty to furnish a reasonably safe kind. Labatt on M. & S. (2 Ed.), p. 2479; 47 Am. R. 286; 127 S. W. 1153; 169 S. W. 940; 70 Fed. 669; 54 So. 252. The rule is never required where there is not equal opportunity of inspection. (70 S. E. 742; 88 Ark. 36; 14 Oh. C. C. 377; 49 N. E. 854); nor where the servant does not have the manual control of the tool. Labatt on M. & S. (2 Ed.), p. 2483; 84 N. E. 730; 60 S. W. 319; 107 Ark. 524; 88 *Id.* 36.

3. The peremptory instruction for plaintiff was correct. 15 Ark. 624; 3 Labatt, M. & S. (2 Ed.), p. 2810. A request for a directed verdict by both sides, unaccompanied by other instructions, submits questions of fact to the court. 114 Ark. 376; 100 Ark. 71; 105 *Id.* 25. Proof

of a defect makes a *prima facie* case under the Act of 1911. The act is constitutional. 233 U. S. 324; 234 *Id.* 280.

4. There was no error in the admission or exclusion of expert testimony. 42 Ark. L. Rep. 101. Nor in excluding Dr. Campbell's testimony. 16 Cyc. 1088-1095, 1097-8; 90 Ark. 514. No prejudice resulted. 89 Ark. 483; 96 *Id.* 627; 85 *Id.* 376; 82 *Id.* 105; 80 *Id.* 376.

5. The former suit was properly dismissed. The court was in "vacation." Kirby's Dig., § 6168; 46 Ark. 229; 48 *Id.* 227; 63 *Id.* 1; 32 *Id.* 278; 82 *Id.* 193; Kirby's Dig., § § 1320, 1531.

HART, J., (after stating the facts). It is insisted by counsel for the defendant that the action should have been abated because there was another suit pending to recover damages for the same injury in the Jackson Circuit Court. The facts upon which this assignment of error is based are as follows:

The plaintiff first instituted an action in the Jackson Circuit Court to recover damages for the injury which is the foundation of the present action. The trial of the case was begun on September 23, 1914, and after a portion of plaintiff's testimony had been introduced, by agreement of the parties the case was withdrawn from the jury and continued for the term. On the 3d day of October, 1914, the court adjourned until the 14th day of November, 1914, and on the 7th day of October, 1912, the plaintiff paid to the clerk of the Jackson Circuit Court the cost which had accrued in the action and the clerk entered of record a dismissal of the cause on motion of the plaintiff.

Section 6168 of Kirby's Digest, provides that the plaintiff may dismiss any action in vacation in the office of the clerk on the payment of all costs that may have accrued therein. It is insisted by counsel for the defendant that the word "vacation" has a technical meaning and means that period of time from the final adjournment of the court until its convening at the next term. We do not agree with counsel in this contention.

Under section 6167 of the Digest the plaintiff may move the court to dismiss before final submission of the case to the jury.

Where the case is dismissed in vacation in the office of the clerk it is proper for the clerk to enter an order of dismissal at the request of the plaintiff. *Lyons* v. *Green,* 68 Ark. 205.

Under section 6167 of Kirby's Digest the action may be dismissed without prejudice by the plaintiff as a matter of right at any time before final submission of the cause; and after the cause has been submitted, in the interest of justice, the court may permit the plaintiff to withdraw the submission of his case and to take a nonsuit without prejudice. *St. Louis Southwestern Ry. Co.* v. *White Sewing Machine Co.,* 69 Ark. 431.

(1) The plaintiff having an absolute right to dismiss his case at any time before final submission to the court or jury trying the case, we think it is evident that the word "vacation" means any time when the court is not in session.

This suit was instituted under the Employers' Liability Act of March 8, 1911. See Acts of 1911, page 55. The first three sections of the act are as follows:

"Section 1. That every common carrier by railroad in this State, shall be liable for all damages to any person suffering injury while he is employed by such carrier, or, in case of the death of such employee, to his or her personal or legal representative, for the benefit of the surviving widow or husband and children of such employee; if none, then to such employee's parents; if none, then to the next of kin of such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any insufficiency of clearance of obstructions, of strength of roadbed and tracks or structures, or machinery and equipment, of lights and signals in switching and terminal yards, or rules and regulations and of number of employees to perform the particular duties with safety to themselves and their co-

employees, or of any other insufficiency; or by reason of any defect, which defect is due to its negligence in its cars, engines, motors, appliances, machinery, track, roadbed, boats, works, wharves or other equipment.

"Sec. 2. If the employee of any such common carrier shall receive any injury or shall be killed by reason of any defect in any car or cars, engines, motors, appliances, machinery, track, roadbed, works, wharves, or other equipment owned, operated or used by such common carrier, such common carrier shall be deemed to have had knowledge of such defect before and at the time such injury is sustained or death caused, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this State brought by such employee or his or her personal or legal representative against any such common carrier for damages on account of such injuries so received or death so caused, the same shall be *prima facie* evidence of negligence on the part of such common carrier.

"Sec. 3. In all rights of action hereafter arising within or by virtue of this act or any provision of the same for personal injury to an employee, or where such an injury has resulted in his death, the fact that an employee may have been guilty of contributory negligence shall not bar a recovery; provided, that the negligence of such employee was of a lesser degree than the negligence of such common carrier, its officers, agents or employees; provided, further, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier, its officials, agents or employees, of any law enacted for the safety of employees or persons contributed to the injury or death of such employee, and such employee shall not be held to have assumed the risk of his employment in any action arising out of any of the provisions of this act."

(2) It is first insisted by counsel for defendant that the statute is violative of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it denies to the defendant the equal protection of

the law, but we do not agree with them in that contention.

The Supreme Courts of Indiana and other States have sustained the constitutionality of somewhat similar acts by construing them as designed exclusively for the benefit of those who are, in the course of their employment, exposed to particular dangers incident to the use and operation of railroad engines and trains and whose injuries are caused thereby. See, *Indianapolis Traction & Terminal Co.* v. *Kinney,* 171 Ind. 612, 85 N. E. 954, and 23 L. R. A. (N. S.) 711.

In the case of *Louisville & Nashville Rd. Co.* v. *Melton,* 218 U. S. 36, also reported in 47 L. R. A. (N. S.) 84, the court held that the modification of the fellow servant rule as to railway employees, made by the Indiana Act of 1893, did not offend against the equal protection of the law clause of the Federal Constitution because construed as applying to all employees doing work essential to enable the carrying on of railway operations, and not as limited to those engaged in or about the movement of trains, and that such general classification of railway employees was a proper exercise of the police power.

Other decisions sustaining this view are cited in the case note.

The views expressed by the United States Supreme Court are in accord with the trend of our own decisions. See *Ozan Lumber Co.* v. *Biddie,* 87 Ark. 587; *Aluminum Co.* v. *Ramsey,* 89 Ark. 522; *Soard* v. *Western Anthracite Coal and Mining Co.,* 92 Ark. 502.

(3) It will be observed that section 1 of the act has two branches. The first part provides that every common carrier by railroad in this State shall be liable for all damages to any person employed by such carrier for injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier.

The courts of North Carolina and some other States, under statutes somewhat similar, have held that the language is broad enough to include injuries sustained by

any employee in the course of his employment. See *Mott* v. *Southern Ry. Co.*, 42 S. E. 601, and case note to 47 L. R. A. (N. S.) p. 84. To give the statute this broad and comprehensive construction would eliminate and render meaningless all the remaining portion of the section.

In the case of *Kansas City & Memphis Ry. Co.* v. *Huff*, 116 Ark. 461, 173 S. W. 419, we have already held that the first part of section 1, referred to above, does not refer to every servant of a railroad company injured in any department while in the course of his employment, but that the language was copied from statutes in other States where it was used to abolish the common law rule in regard to fellow servants. In that case we said:

"The legislation was first enacted in jurisdictions where the common law rule in reference to fellow servants was in force; and in the case of *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 58 L. Ed. 1062, the court construed the phrase 'resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.' This quotation appears in the Federal Employer's Liability Act and it will be observed that our act copies that phrase. Interpreting the section of the Federal Statute in which the above phrase appears, the Supreme Court of the United States in the above cited case said:

" 'This clause has two branches: The one covering the negligence of any of the officers, agents or employees of the carrier, which has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff * * *.'

"There was the same necessity in some other jurisdictions for language of this character to abolish the common law rule in regard to fellow servants. It is true there was no such necessity in this State as the common law rule on this subject had been changed by previous legislation. While there was no necessity, under the law of this State, for this phrase to change the common law rule in regard to fellow servants, yet the

language above quoted creates a right of action under this Act No. 88, where the servant's injury was caused by the negligence of a fellow servant."

It will be observed that the latter part of section 1 uses the language, "which defect is due to its negligence in its cars, engines, motors, appliances, machinery, track, roadbed, boats, works, wharves and other equipment." When this language is carefully read, we are of the opinion that the logical rule to be adopted is that the statute applies to those employees who are connected with the use and operation of the road. The word "appliances" as used in the statute extends to all those instrumentalities which are supplied and furnished to the servant by the master for the servant's use in the operation of the road.

(4) This brings us to the question whether loading the car under the circumstances in this case is connected with the operation of the railroad within the meaning of the statute. The authorities on this question are in direct conflict and a great many of them are collected in the case note to *Johnson* v. *Great Northern Railway Co.*, 18 L. R. A. (N. S.), at page 480-1.

After a careful consideration of the whole statute we do not think the Legislature intended to restrict its terms to those actually engaged in running trains. The statute refers to motors, boats, works, wharves and other equipment and contemplates that the railroad company might have wharves and boats and unload freight from them on the cars, or *vice versa*. We think the statute is broad enough to include something more than the mere running of locomotives and trains of the railroad company. It includes every employee who, when injured, was performing some work in the line of his duty directly connected with and incident to the use and operation of a railroad. The loading and unloading of cars is intimately associated with and directly connected with the operation of a railroad. Plaintiff at the time he was injured was doing a part of the work necessarily connected with the operation of defendant's trains. He was helping to load a car with piling to be transported to an-

other part of defendant's line of road and this work was inseparably connected with the operation of the defendant's line of road, and brings this case within the spirit of the statute. See, *Chicago, Kansas & Western Rd. Co.* v. *Pontius,* 157 U. S. 209; *Daley* v. *Boston & A. R. Co.* (Mass.) 16 N. E. 690; *St. L. S. W. Ry. Co. of Texas* v. *Thornton,* Tex. Civ. Ct. Appls., 103 S. W. 437; *Orendorff* v. *Terminal R. Association of St. Louis,* St. Louis Ct. of Appeals, 92 S. W. 148. Other cases supporting this conclusion will be found in the case note last above referred to.

(5) It is also insisted by counsel for the defendant that the court erred in refusing to admit the testimony of Dr. Campbell, taken while the trial was in progress in the Jackson Circuit Court. We do not think the court erred in this respect. It is true that he was a nonresident of the State but the defendants might have taken his deposition. Not having done so they are in no attitude to complain of the action of the court in refusing to permit them to introduce his testimony taken at the trial at Newport, for his place of residence at Memphis was well known to defendant's attorneys. Greenleaf on Evidence, vol. 1, sec. 163; see, also, *Wimberly* v. *State,* 90 Ark. 514.

(6-7) The record shows that at the conclusion of the testimony, the defendant asked the court for a peremptory instruction. This request was refused by the court. Thereupon the defendant asked the court to give other instructions, which were not peremptory in their nature, all of which were refused by the court. At the request of the plaintiff and over the objection of the defendant, the court directed the jury to find for the plaintiff and submitted to the jury only the question of the amount of damages to which plaintiff was entitled. It is urged by counsel for the plaintiff that this state of record brings the case within the doctrine of *St. Louis Southwestern Ry. Co.* v. *Mulkey,* 100 Ark. 71; but we can not agree with them in that contention. The effect of our decision in the *Mulkey* case is that where both parties request a

peremptory instruction and do nothing more, they thereby assume the facts to be undisputed, and submit to the trial judge the determination of the inferences proper to be drawn from them. The decision in that case does not go to the extent of holding that a party may not request a peremptory instruction, and upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or reasonable minds might draw different conclusions from it. To so hold would unduly extend the rule of the *Mulkey* case. The distinction between a case like the case before us and that which was before us in the *Mulkey* case was pointed out in *Gee* v. *Hatley,* 114 Ark. 376. After the defendant's request for a peremptory instruction was denied by the court, its counsel asked for other instructions not peremptory in their nature. We are of the opinion that the defendant did not waive its right to go to the jury in view of the fact that it asked other instructions when its request for a peremptory instruction was refused. It follows that the validity of the peremptory instruction depends upon whether or not reasonable minds might reach different conclusions from the evidence. See *Minnesota & Dakota Cattle Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 210 U. S. 1, 15 Am. & Eng. Ann. Cas. 70. Under the facts and circumstances introduced in evidence, we are of the opinion that the court erred in taking away from the jury the question of the primary negligence of the defendant. It is always error to take away from the consideration of the jury questions of fact where reasonable minds might come to different conclusions therefrom.

It is true that section 2 of the act under which this action was brought provides that the railroad company shall be deemed to have had knowledge of the defect in its appliances and that when the fact of such defect shall be made to appear in the trial of any action in the courts of this State brought by an employee, the same shall be

prima facie evidence of negligence on the part of such common carrier.

It was conceded by the defendant that the plaintiff was free of contributory negligence and the act by its terms took away from the defendant the plea of assumed risk. But, as already stated, we think the question of the primary negligence of the defendant was one of fact for the jury.

The plaintiff introduced a civil engineer who stated that he could tell the weight of the piling which was being rolled over the skids at the time plaintiff was injured if the dimensions thereof were given him, and stated that from the dimensions testified to by the plaintiff's witnesses the piling in question would weigh a little more than 500 pounds; and that a sound piece of pine timber, four by eight inches and nine feet long, would be capable of holding up several times that weight.

On the other hand the foreman testified that he observed the guard rails after they were taken from the bridges and that there were no defects in them.

The number of guard rails lying around there were variously estimated from three or four to about twelve. The particular guard rails which were used as skids were selected by some of the employees each time they began to unload the push car. At the time plaintiff was injured he saw some of the other servants pick up the guard rails and place them on the push car and flat car to be used as skids, but says that he did not pay any particular attention to them.

(8) The jury were the sole and exclusive judges of the weight of the testimony and the credibility of the witnesses. They had a right to believe all or part of the testimony of each witness. It was their duty to accept that which they believed to be true and to reject that which they believed to be false, and in the exercise of this right they might have found the question of negligence either for or against the defendant.

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

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

Opinion delivered May 10, 1915.

1. RAILROADS—TORT OF SERVANT—LIABILITY.—A railway company will be liable in punitive or exemplary damages for the wanton and malicious tort of its porter who without provocation severely hurt a passenger by beating him.
2. CARRIERS—ACTS OF PASSENGERS—LIABILITY—ACTS OF SERVANTS.—Carriers are not absolute insurers of the safety of their passengers against injury and ill-treatment from other passengers, but are insurers of the safety of a passenger against wilful assaults and intentional ill-treatment by its servants, for whose acts it is responsible.
3. CARRIER—INJURY TO PASSENGER—ACT OF EMPLOYEE—LIABILITY.—The porter on a railway train assaulted and severely beat a pessenger without provocation, and the passenger, to protect himself, fired a pistol shot at the porter, but striking and injuring plaintiff, another passenger. *Held*, the plaintiff could recover damages against the carrier.
4. DAMAGES—PERSONAL INJURIES—AMOUNT.—A verdict of $500 is not excessive in an action against a carrier, where plaintiff, a passenger, was shot by a fellow passenger, the officers of the carrier failing to perform their duty, and the shot being provoked by an unprovoked assault of the porter upon the passenger.

Appeal from Grant Circuit Court; *W. H. Evans*, Judge; affirmed.

STATEMENT BY THE COURT.

These suits are for damages for personal injuries alleged to have been caused by the assault of an employee of the railroad company, a porter on the train, on appellees passengers thereon.

Frank Patterson and Andrew Jackson boarded the train at Pine Bluff, after purchasing tickets, the one to Dermott and the other to Noble Lake. As Patterson started into the coach, he was struck by the negro porter because he did not move rapidly enough on the crowded platform. He went on in with his bundles and packages and sat down about the center of the coach for colored passengers. After the train started, the porter came in the front door of the coach in which he was sitting, ap-

peared to be looking for some one, walked on to where Patterson sat and began fighting him. They fought for some little time and were separated. Patterson getting back into his seat again. The porter renewed the fight, they were again separated and the porter ran back to the front of the coach and got an iron coal shovel and started down towards Patterson again, threatening to kill him and another man who got in the way, but before he could strike Patterson, was shot at by him. The bullet missed him however and struck another passenger, Andrew Jackson, in the shoulder. Several of the passengers ran into the other coach where the white passengers were, saying they were killing people in the other coach. The conductor asked the sheriff who was in that coach to go and arrest the fighters and stop the difficulty, but he had some prisoners in charge and could not go and the conductor borrowed his pistol intending to stop it himself. By this time the porter had reached the conductor, told him of the difficulty and started back into the car where it occurred with the conductor who had the pistol in his hand when Frank Patterson, upon seeing them approaching, ran out of the coach after a big negro who turned out to be the brakeman, had grabbed him, threatened to cut his throat and took his pistol from him, and jumped from the fast moving train, striking the ground and cutting a long gash in his head. By the time they stopped the train and backed up to the place where he fell, he was able to get up and was assisted into the train.

The bullet fired from Patterson's pistol struck Andrew Jackson in the shoulder inflicting a wound that bled considerably, was painful and required some time to heal.

Patterson was badly bruised and battered by the blows inflicted by the porter, "bloody as a hog" one witness said, in addition to the cut on his head, resulting from his jumping from the train.

The train auditor was in the coach for negro passengers, when the row first began and jerked the porter around by the arm and told him to "cut it out." He

then went on with the collection of fares and made no further effort to stop the difficulty.

The cases were consolidated for trial and the jury returned a verdict in Patterson's favor for $200 actual and compensatory damages and $1,400 exemplary damages, and for $500 in Andrew Jackson's case, and from the judgments thereon the railroad prosecutes this appeal.

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

1. There is error in the court's charge to the jury. Plaintiff was guilty of negligence. The company was not liable for a malicious or wanton assault committed by its servant. 65 Kan. 352; 166 N. Y. 289; 60 Oh. St. 448; 106 Wisc. 434; 4 L. R. A. (N. S.) 485; 73 N. Y. 543; 162 Mass. 319.

2. The damages were excessive. 172 S. W. 872; 78 *Id.* 553; 82 *Id.* 289; 103 *Id.* 361; 73 Tex. 47; 48 L. R. A. (N. S.) 38.

3. The assault was an independent act of the servant. 63 Wash. 593; 58 Minn. 218; 72 Miss. 32; 44 Neb. 732; 62 N. H. 436; 96 Mo. 299; 142 Cal. 681; 113 Ga. 1105; 50 Mo. 104; 1 East 106; 180 Am. St. 154; 38 Ark. 407.

4. In the *Jackson* case, the damages are excessive. If an agent go beyond the range of his employment, the master is not liable. 30 Am. St. 32; 3 Hurl & C. 256; 32 L. R. A. (N. S.) 1201; 154 Mass. 238; 13 L. R. A. 97; 32 L. R. A. (N. S.) 1209; 135 Ky. 438; 111 Ark. 337.

Nixon & Levine and *H. K. Toney,* for appellees.

1. There is no error in the charge to the jury. Taken as a whole, the instructions cover every phase of the case.

2. The damages are not excessive. 172 S. W. 872; 87 Ark. 127.

KIRBY, J., (after stating the facts). Appellant contends that the verdict of the jury awarding compensatory damages in the *Patterson* case is excessive, and that exemplary damages can not be recovered in any event for

the malicious tort of its servant, acting it is claimed without the scope of his employment.

Some instructions are also complained of that will be discussed later.

The passenger, Patterson, was thrice fiercely assaulted and without provocation, as the jury might have found, by appellant's train porter after he had taken his seat in the car and bruised and beaten until he was "as bloody as a stuck hog," as some of the witnesses expressed it. In addition he was so frightened by the conductor of the train coming into the coach with a pistol in his hand, accompanied by the porter, to quell the disturbance that he jumped from the moving train and struck on his head on the ground, cutting a gash therein three or four inches long to the skull. He was treated by two or three physicians for the severer injury, one of whom testified that the wound on the head suppurated and did not heal rapidly.

It is claimed that the jury might have made the excessive award of compensatory damages because instruction numbered 4, mentioned what might be taken into consideration by them where the injury appeared to be of a permanent or continuing character. We do not think this instruction open to the objection that it submitted to the jury the question of damages for a permanent injury, and if it did, no prejudice could have resulted therefrom, since the verdict was returned for only $200, an amount which the jury might well have allowed for the beatings alone, without taking into consideration the serious gashing of appellee's head.

The jury found that this passenger was not negligent in jumping from the train, under the existing condition and necessarily the railroad company was liable for damages for injury occasioned thereby, and an allowance of $200 is not only not excessive, but small compensation for the injuries suffered. The porter assaulted and struck this passenger before he got into the coach and without reasonable provocation disclosed by the testimony, and later after the passenger had seated himself in the coach

and the train had departed from the station and without any provocation whatever resumed the difficulty, and thrice assaulted and beat the passenger, finally procuring a heavy iron coal shovel and threatening to kill him therewith, after having advanced with this drawn weapon, to within striking distance of him. The train auditor only once spoke to the porter, upon the first separation of the combatants and told him to "cut it out," and then continued the collection of fares and made no further effort to prevent the difficulty or to protect the assaulted passenger, notwithstanding he was in the coach during the whole time.

A flagrant case of wanton abuse of a passenger and disregard of the carrier's duty to render him protection against the wilful misconduct and assault from its servant, whose duties related to the comfort and safety of the passenger, is disclosed by the testimony.

(1) In *Pine Bluff & Arkansas River Railway Company* v. *Washington,* 116 Ark. 179, a case where exemplary damages were awarded to a passenger, who was shot by the brakeman while seated in the car, because she declined to agree to stop over at another station than her destination and spend the night with him, the court announced its approval of the following general rule of liability for exemplary damages for torts committed by servants of corporations.

"A corporation may be held liable to exemplary or punitive damages for such acts done by its agents or servants acting within the scope of their employment as would if done by an individual acting for himself render him liable for such damages," and, after reviewing our own cases, said:

"It may therefore be taken as settled law in this State that punitive damages may be awarded against a railway corporation for the wanton and malicious torts of its servants, although the corporation, aside from the conduct of its servants may be entirely blameless."

The porter's duty required him to come in contact with the passengers, and related to their safety and com-

fort, and the railway company was liable for his wrongful and wanton conduct which can not be said to have been beyond the scope of his employment. *Moore* v. *La. & Ark. Ry. Co.,* 99 Ark. 235.

In the *Jackson* case, it is contended that the court erred in giving over appellant's objection, instruction numbered 5, which tells the jury "that if Jackson was a passenger upon the defendant's train, and the porter precipitated or brought on a row with another passenger, which caused a fight to take place between the porter and said other passenger, during which said other passenger fired a shot with a pistol at said porter, wounding the plaintiff in his shoulder, and that this plaintiff had nothing to do with said conflict between the porter and the other passenger, then your verdict will be for the plaintiff in this case, etc."

(2) Carriers of passengers, it is true, are not absolute insurers of the safety of their passengers against injury and ill treatment from other passengers. *Chicago, R. I. & P. Ry. Co.* v. *Brown,* 111 Ark. 288; *St. Louis, I. M. & S. Ry. Co.* v. *Dowgiallo,* 82 Ark. 289; *Goddard* v. *Grand Trunk Ry.,* 57 Me. 202; *Chicago & E. Rd. Co.* v. *Flexman,* 103 Ill. 546; *Penny* v. *Atlantic Coast Line Rd. Co.,* 32 L. R. A. (N. S.) 1209.

Such is not the rule, however, in case of injury resulting to the passenger from the misconduct of its servants, it being an insurer of the safety of the passenger against wilful assaults and intentional ill treatment of its servants, for whose acts it is responsible. *St. Louis & S. F. Rd. Co.* v. *Kilpatrick,* 67 Ark. 47; *Ry.* v. *Dowgiallo, supra.*

(3) The testimony herein shows that the porter assaulted and beat the other passenger without provocation, the fight lasting for some time with intermissions, that finally the porter renewed it the third time, advancing with an iron coal shovel to within striking distance of the passenger and threatening to kill him, when the passenger, to protect himself, fired the shot that inflicted the injury upon the plaintiff in this case.

The auditor of the train was in the coach during the whole time, and but for saying, upon the first separation of the combatants, to the porter, "cut it out," made no effort to stop the difficulty and protect the assaulted passenger nor the other passengers in the coach.

It is not to be expected that a passenger will submit to continued violent and unprovoked assaults from the servant of a railway corporation, and the servants in charge of the train knew of the difficulty, and should have anticipated that injury might result to other passengers because thereof, and the carrier's duty required it to protect such other passengers from resultant injury whether inflicted by its servant in the assault, or unintentionally by the assaulted passenger, in protecting himself against the wrongful assault of the servant.

In other words, the wilful assault and intentional ill treatment of the passenger, Patterson, by the porter may be said to have been the proximate cause of the injury resulting to the passenger Jackson, who was accidentally shot by Patterson while trying to protect himself against such wrongful assault, for which the railroad company was liable. *Ry.* v. *Dowgiallo, supra.*

It is apparent that other passengers might be injured by shooting in the coach in which all were riding, and the train operatives were bound to anticipate that shots might be fired and such would be the result and take the steps necessarily required to prevent it. Not having done so, the railroad company is liable for the injury inflicted upon Jackson by the misdirected shot that failed to reach the porter, who provoked the difficulty. The court did not err in giving said instruction.

(4) Neither do we think the amount of damage awarded is excessive. The bullet buried itself in Jackson's shoulder and, although it was picked out by him, inflicted a wound that was painful, which required treatment from two different doctors and prevented his following his accustomed occupation for more than a month.

We find no prejudicial error in the record, and the judgments are affirmed.

St. Louis, Iron Mountain & Southern Railway Company v. Hudgins Produce Company.

Opinion delivered May 10, 1915.

1. Carriers—connecting lines—damage to freight—liability.—In an action for damages to freight, when the same has been shipped over two or more lines, the law presumes, in the absence of other proof, that the delivering carrier was the negligent one.
2. Carriers—freight—insurers.—A common carrier is practically an insurer of all goods received by it for shipment, against all losses except those relating to, or which arise from the act of God, of the public enemy, of constituted authority, of the shipper, or from the inherent nature of the goods shipped, and in all cases in which loss occurs, not falling within the recognized exceptions, the carrier is responsible notwithstanding there may be no negligence or fault upon its part.
3. Carriers—damage to freight—vis major—concurring negligence.—Where the negligence of a common carrier concurs with an act of God in causing damage to freight, the carrier is still required to answer therefor.
4. Carriers—unexplained damage to freight—presumption.—In an action for damages done to freight, the presumption is, where the carrier offers no explanation of the damage, that the same resulted from its negligence.

Appeal from Miller Circuit Court; *George R. Haynie*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought this suit in the justice court for $50.75 damages to a carload of Irish potatoes, shipped from Chicago to it at Texarkana. Judgment was rendered by default in the justice court, and the case was appealed to the circuit court.

The president of appellee company testified that the Irish potatoes were bought through Earle Brothers of Chicago, and shipped with bill of lading attached to draft allowing inspection. That when the car reached his place at Texarkana, the entire first row of sacks of potatoes on the floor of the car was frozen, and "there was no straw in there to protect them. I have been in the produce business for about eight years, and had experience in receiving and shipping potatoes; the majority are shipped

without anything on the floor at all when the car is in good shape. I have received them with a stove in the car and with paper spread on the bottom of the car. I have received potatoes through the winter of each year, from one to five cars each week; have received them with stoves in the cars to protect them against freezing, and have had the cars held up and run in the roundhouse. This car had no protection—no straw or anything to protect the potatoes. I inspected the car and found it in bad shape."

The testimony showed that the potatoes damaged and destroyed were of the value of the amount claimed.

Witness further stated that he had no knowledge of how the cars were loaded, and did not know whether they were frozen when loaded in the car or not; that the bill of lading was an ordinary one, with no notation on it except at the bottom, "Allow Inspection." There was no notation of bad order or bad condition of any kind.

The court instructed the jury that the burden was on the plaintiff to show by a preponderance of the testimony that the potatoes were frozen or damaged by the negligence of the railroad company, that if it failed to make out a case of negligence, that it would find for the defendant; that the defendant would be liable for negligence causing damage to the potatoes whether the negligence occurred on its own or the connecting line from which it received the shipment.

The jury returned a verdict against the railway company and from the judgment it prosecutes this appeal.

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

1. There was no proof of negligence nor unnecessary delay. The company is not liable for unavoidable accident or *vis Major.* 1 Moore on Car. p. 314; 4 Elliott on Railroads, § 455; 30 Neb. 197; 102 Mass. 283; 32 N. Y. Supp. 1; 106 S. W. 1188; 111 Minn. 167; 92 Ark. 573; 63 Mo. 230; 103 Am. St. 507; 102 N. E. 34. Nor for improper loading. 37 Wisc. 190; 173 Pa. St. 398; 22 Ore. 14; 132 Fed. 125; 32 S. W. 14; 129 Fed. 253.

Webber & Webber, for appellee.

1. The evidence is sufficient and there is no error in the instructions. 100 Ark. 269; 82 *Id.* 143; 86 *Id.* 483; 61 *Id.* 64. In the absence of proof, the presumption is that the last carrier was the negligent one. The damage was proven and the burden was on the company to show it resulted from the act of God, or *vis Major. Supra.*

KIRBY, J., (after stating the facts). The appellant contends that there was no negligence shown for which it was responsible, causing damage to the shipment of potatoes, and that the court erred in not instructing a verdict in its favor.

(1) It is not disputed that the potatoes were in a damaged condition when they arrived at the point of destination on appellant's line. Appellant made no effort to show where or how the damage actually occurred, and the law presumes in the absence of other proof that the delivering carrier was the negligent one. *Midland Valley Rd. Co.* v. *Hale,* 86 Ark. 484; *St. Louis, I. M. & S. Ry. Co.* v. *Coolidge,* 73 Ark. 112.

(2) A common carrier is practically an insurer of all goods received by it for shipment against all losses except those relating to, or which arise from, the act of God, of the public enemy, of constituted authority, of the shipper, or from the inherent nature of the goods shipped, and in all cases in which loss occurs, not falling within said recognized exceptions, the carrier is responsible notwithstanding there may be no negligence or fault upon its part.

Its liability springs from the duty imposed upon it to carry safely and the law making it responsible as an insurer for the losses occurring from any and every cause, other than one falling within the specified exceptions. *St. Louis, I. M. & S. Ry. Co.* v. *Pape,* 100 Ark. 269; *Brennisen* v. *Pa. Rd. Co.,* 100 Minn. 102.

Appellant contends that the damage to the freight shipped, which was of a perishable nature and froze while in transit, was caused by act of God, for which the carrier is not liable, there being shown no unnecessary delay in

transportation or carelessness on its part in exposing the shipment to the cold.

Some of the authorities hold "where the immediate and sole cause of loss is the action of the elements, as by freezing, the carrier is relieved from liability. 4 Ell. Railroads, § 1455; 1 Moore on Carriers, p. 314; *Schwartz* v. *Erie Rd. Co.,* 106 S. W. (Ky.) 1188.

(3) Of course, if the negligence of the carrier concurs with the act of God in producing the injury, it is still required to answer therefor. *Vail* v. *Pacific R. R. Co.,* 63 Mo. 230; 6 Cyc. 381; *White* v. *Minneapolis & R. R. Ry. Co.,* 111 Minn. 167.

In the last cited case the court said: "A carrier is not an insurer against damages to freight from changes in temperature, unless the circumstances in which the transportation is undertaken impose upon the carrier that obligation; but if, after acceptance of the freight, its transportation is delayed, the carrier must use reasonable care to protect it during the delay."

There was no unnecessary delay in the delivery of this carload of potatoes shown from the testimony, nor any evidence tending to show negligence upon the part of appellant company, the delivering line, but the shipment arrived at destination in its possession in a damaged condition, and there is a presumption of law that the carrier is responsible therefor; that the delivering carrier is the negligent one. It made no effort to show when, where or how the injury occurred, nor whether before or after the shipment was received from the connecting carrier on its line, and although the testimony of the appellee tends strongly to show that damage was occasioned by the failure to load the potatoes properly by putting straw in the car to prevent those lying next to the floor from freezing, or by putting paper on the floor with a stove inside to keep the temperature above freezing, it was not shown whose duty it was to attend to the proper loading thereof, and generally the loading and unloading of goods are under the carrier's control, and it is responsible for any loss or injury incident thereto. 6 Cyc. 381.

(4) Of course, if the shipper assumed the responsibility of loading and unloading, it would relieve the carrier from liability for loss in that connection. We do not think the testimony in this case sufficient to overcome the presumption that the damage occurred on the appellant's line, and it is sufficient to support the verdict. Affirmed.

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

Opinion delivered May 10, 1915.

ACTIONS—PERSONAL INJURIES—SINGLE ACTION.—Where plaintiff was injured by the negligence of defendant railway company, he must, in an action for damages, demand all the damages which he has suffered or ever will suffer from the injury, grievance or cause of action upon which his cause of action is founded; he can not split a cause of action and bring successive suits for parts, because he may not be able at first to prove all the items of the demand, or because all the damages have not been suffered. If he attempts to do so, a recovery in the first suit, though for less than his whole demand, will be a bar to a second action.

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

M. B. Norfleet and *J. M. Prewett,* for appellant.

1. Appellant is not estopped by the former judgment. The question as to loss of time and diminished earning power was not adjudicated in the former suit, and hence is not *res judicata.* 66 Ark. 343; 96 *Id.* 89; 97 *Id.* 456; 62 *Id.* 76; 2 Black on Judg., § 609, p. 925; Wells Rep. Adj., § 14, p. 18; 66 Ala. 345; 86 N. W. 317; 35 So. 306; 29 *Id.* 847; 86 S. W. 47.

2. A point or question is not concluded by a judgment, although it was involved in the action, if it was withdrawn, abandoned or *stricken out on motion.* 11 Ark. 666; 4 So. 554. No question is settled until it is finally litigated. 48 N. W. 919; 48 S. W. 152; 48 S. E. 33; 48 Tex. 491; 34 Ark. 117; 55 Am. Dec. 301; 66 *Id.* 518; 96 *Id.* 733; 62 Am. Dec. 546; 96 *Id.* 772; 47 Ark. 351; 39 Mich. 254; 1 Cyc. L. & Pr. note, p. 702.

Troy Pace and *Gordon Frierson,* for appellee.

1. A cause of action for a completed tort as to one person is single and indivisible. A personal injury from a single wrongful act or negligence is an entirety and only one action can be brought. The question is *res judicata.* The cause of action and the damages sought and recovered are an entirety. Causes of action can not be split, and successive suits brought. One recovery bars any further suit. Suth. on Dam., § 1251; 23 Cyc. 1188; 2 Black on Judgments, § 738; 1 Freeman on Judgments, § 241; 1 Hale on Torts, § § 241, 114, p. 222; 101 Ark. 90, 94; 35 *Id.* 622; 93 *Id.* 46; 32 Am. Dec. 448; 40 N. W. 520; 24 Minn. 4; 125 Mass. 330; 23 Cal. 385; 43 Miss. 710; 69 Ill. 556; 18 Ark. 347; 96 *Id.* 89; 97 *Id.* 450; 67 *Id.* 76.

2. Appellant's cause of action was merged. 2 Black on Judgments, § 674; 66 Ark. 409; 64 *Id.* 94; 2 Smith Lead. Cas., p. 1312.

HART, J. On the 31st day of October, 1914, I. P. Hydrick instituted this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for personal injuries alleged to have been sustained by him while alighting from one of defendant's passenger trains in consequence of the alleged negligence of the defendant.

The defendant interposed the plea of *res judicata* upon the following facts: On the 17th day of May, 1912, Hydrick was a passenger on one of defendant's passenger trains from Newport to Swifton. After the train stopped at Swifton, it was suddenly jerked forward with great violence and thereby caused Hydrick to be injured while he was alighting from the train. He instituted an action against the railway company to recover damages for the injury sustained. In 1911 he was convicted of murder in the second degree and was sentenced to serve eleven years in the State penitentiary. The judgment and sentence of conviction were in effect at the time he instituted said action and at the time of the trial. Before the case was submitted to the jury, he dismissed his cause of action as to the loss of time and diminished earning

capacity, and the only elements of damages submitted to the jury were those of pain and suffering, medical attention, disfigurement and humiliation arising from said disfigurement.

The jury found for the plaintiff and assessed his damages at $7,749. The defendant railway company appealed to the Supreme Court, and the judgment was affirmed. See, *St. Louis, I. M. & S. Ry. Co.* v. *Hydrick,* 109 Ark. 231.

Subsequently, Hydrick was pardoned by the Governor, and thereafter instituted this action to recover damages for the same injury, his contention being that because he was pardoned by the Governor, he is now entitled to recover for his loss of time and diminished earning capacity.

The circuit court sustained the plea of *res adjudicata,* and the plaintiff has appealed.

The judgment of the circuit court was right. The cause of action and the damages recovered therefor are an entirety. The party injured must demand all the damages which he has suffered or ever will suffer from the injury, grievance or cause of action, upon which his action is founded. He can not split a cause of action and bring successive suits for parts, because he may not be able at first to prove all the items of the demand, or because all the damages have not been suffered. If he attempted to do so, a recovery in the first suit, though for less than his whole demand, will be a bar to the second action. See Sutherland on Damages (3 ed.), volume 1, section 106.

In volume 4, section 1251, the same author says: "A personal injury from a single wrongful act or negligence, is an entirety and affords grounds for only one action. In that action recovery may be had for all damages suffered up to the time of the trial, and for all that are shown to be reasonably certain or probable to be suffered in the future; or such as it is fair to believe will be so suf-

fered. Such prospective damages may include compensation for pain, disability and expenses. For this reason it is important in cases of serious injury to determine the permanence of any disability or reduction of workng capacity or impairing effect upon the health resulting therefrom." See also, Black on Judgments, volume 2, section 738; Freeman on Judgments, volume 1, section 241; Hale on Torts, section 114.

In *Foss* v. *Whitehouse* (Maine), 48 Atl. 109, the rule is stated as follows:

"It is common learning that a plaintiff can not thus split up a cause of action, and bring several actions for the different items of damage, resulting from the one cause of action. If he does bring an action for some only of which items of damage, he is barred from bringing another action for any other items of damage from the same cause."

In *Warner* v. *Bacon,* 8 Gray (Mass.) 397, the rule is thus tersely stated: "A fresh action can not be brought unless there be both a new unlawful act and fresh damage." See, also *City of North Vernon* v. *Voegler,* 103 Ind. 314; *Curtiss* v. *Rochester & Syracuse Railroad Co.,* 20 Barber (New York) 282.

In the application of these general principles, it is held that where a deceased in his lifetime brings an action and recovers damages for injuries sustained, his representative can not maintain an action for damages where death results from the same injury for which the recovery was had. This is so because there can be only one recovery and a recovery adjudicates the whole right. 3 Elliott on Railroads (2 ed.), section 1375.

The defendant was guilty of but one wrong, and can be subjected to but one action for it by the same party. The recovery in the first action is a bar to the present action.

The judgment will be affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* THOMAS.

Opinion delivered May 10, 1915.

CARRIERS—FREIGHT—SPECIAL DAMAGE—NOTICE.—Notice or information of circumstances whereby special damages might arise from a delay in the delivery of freight, given after the contract was made and during the period of transportation, is not sufficient to charge the carrier with liability for such special damages.

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

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

1. The case of *Crutcher* v. *C., O. & G. Rd. Co.,* 74 Ark. 358, settles this case. No notice was given at the time of shipment. 104 Ark. 215; 74 *Id.* 358.

Manning, Emerson & Morris, for appellee.

1. There is now no reason for the rule that notice of special damages must be given before shipment. Van Zile on Bailm. & Car. (2 ed.), § 494; C. Cyc. 450; 24 S. W. 353; 51 So. 863; 60 S. E. 477; 64 *Id.* 413; 30 L. R. A. (N. S.) 483-8; 71 S. E. 71; 4 Rul. Case Law, § 215, p. 747; 91 S. W. 1121-22; 142 *Id.* 629.

McCULLOCH, C. J. This is an action instituted by appellee against appellant railway company to recover damages alleged to have been sustained by reason of delay in the transportation of a carload of coal. The car of coal was shipped from a point on the Illinois Central Railway Company in the State of Kentucky to a dealer in Memphis, Tennessee, and when the car reached Memphis, it was sold to appellee and reconsigned to him over appellant's road to Thomas Switch, a station in Prairie County, Arkansas. There was a delay in transporting the car by reason of the fact that when it reached Brinkley there was no way bill, and the car was laid out there and remained there six or eight days before it was again moved under orders from the superintendent's office. That was after appellee had given notice of the delay, and at his request the car was finally located and forwarded.

Special damages are proved, arising from the fact that appellee is a rice grower and ordered the coal to use in running the engine which pumped water for the growing rice, and by reason of delay, the appellee's rice crop was ruined. There is no testimony tending to establish any other element of damages on account of the delay. There is no proof that notice of special damages was given at the time of the contract of reshipment from Memphis, or any time prior thereto, but there is proof that notice was given during the period of delay, and while the car was laid out at Brinkley. The testimony shows that appellee requested the Memphis dealer to hurry up the shipment, and that that request was communicated to appellant's Memphis agent, but it is not shown that any information was given concerning any element of special damages involved in any possible delay.

We decided in the case of *Crutcher* v. *C., O. & G. Rd. Co.*, 74 Ark. 358, following a line of authorities on the proposition, that notice or information of circumstances whereby special damages might arise, given after the contract was made and during the period of transportation, was not sufficient to charge the carrier with liability for such special damages. The authorities are not harmonious on this question, and some of the recent cases have relaxed the rule to some extent. As this court has, however, deliberately taken position on the question, we see no reason to change. In the latter case of *Chicago, R. I. & P. Ry. Co.* v. *King,* 104 Ark. 215, we decided that there may be a recovery for special damages arising on account of negligent delay in making a delivery after the transported article has reached its destination, if notice was given after the arrival of the article at its destination. It is insisted by counsel for appellee that the doctrine of that case relaxed the rule in the *Crutcher* case to the extent that it would permit a recovery in the present case. We do not, however, regard that as any relaxation of the rule laid down in the *Crutcher* case. It was a mere recognition of the well-established distinction to the doctrine stated in the *Crutcher* case.

In the opinion in the *King* case, we said: "The reason for the rule in the case of a common carrier rests upon the ground that it may have an opportunity by special precaution to protect itself from loss. The necessity for and justice of this rule is apparent when the delay occurs during the period of transportation. But, after the goods have arrived without delay at the place of destination, and are in the custody and control of the carrier at that place for delivery to the shipper or consignee, then the reason of the above rule would cease, if notice of the special circumstances is given to the carrier after the arrival of the goods at the place of destination, and thereafter it wrongfully delays making the delivery. The contract made by the carrier for the transportation and delivery of goods is two-fold: The obligation rests upon the carrier to transport the goods safely and promptly to the point of destination, and also thereafter to deliver the same to the consignee. If it fails to carry the goods safely or promptly, there is a breach of the contract; but there is also a breach of the contract from which damages may arise if it fails for an unreasonable time to deliver the goods after the actual transportation to the point of destination is completed. The special damages are not a part of the contract, but are simply an element of damages to which the injured party is entitled for its breach. After the arrival of the goods at the point of destination, and after notice is then given to the carrier of the peculiar conditions from which special damages may arise while the goods are in its possession and under its control, the carrier could then take all precautions necessary to avoid loss on account of delay in making the delivery thereafter. The obligation to make delivery after the arrival of the goods at the point of destination would then begin, and notice of the peculiar conditions then given to the carrier would charge it with the special damages arising on account of the delay to make the delivery after such notice had been given. In such case the delay does not arise during the actual transportation of the goods, but it arises in the delivery of the goods after the transportation has

been completed, and while the goods are still in the custody and under the control of the carrier."

Now, the above quotation amounts to a clear reaffirmation of the doctrine of the *Crutcher* case, but, as before stated, distinguishes it in a case where the facts are that the transportation is complete, and there is negligence in making a delivery. In the present case, the transportation was not complete, and the car was laid out at an intermediate point. Unless the decision in the *Crutcher* case is to be overruled, it necessarily follows that there can be no recovery in this case.

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

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. FOSTER.

Opinion delivered May 10, 1915.

CARRIERS—LOSS OF FREIGHT—CLAIM—TIME.—A. purchased coal from B. in Memphis. By contract with C. in Kentucky, B. purchased the coal there, and it was consigned under one bill of lading issued in Kentucky, and reconsigned under the same bill of lading at Memphis to A. at Mesa, Ark. A. brought an action against defendant carrier for failure to make prompt delivery. *Held*, A. was bound by a clause in the bill of lading, requiring him to make any claim in writing for damages due to delay, within four months, after the delivery of the shipment.

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

STATEMENT BY THE COURT.

The appellee alleged that on August 23, 1913, he purchased of the Hunt-Berlin Coal Company at Memphis, Tennessee, a carload of coal; that the coal company delivered the car to appellant for shipment to Mesa, Arkansas; that at the time the car of coal was delivered to appellant, appellee, through his agent, the Hunt-Berlin Coal Company, notified appellant that the purpose for which the coal was to be used was for fuel to run an engine to generate power with which to pump water for the purpose

of irrigating appellee's rice crop; that appellee could not obtain fuel anywhere else and was depending upon the delivery of this car of coal for that purpose; that his rice crop was in need of irrigation and that unless the coal was promptly delivered, appellee's crop would be damaged or lost for want of water; that after said notice appellant accepted the carload of coal for shipment, and promised appellee that the car would go forward to the point of destination that night; that appellee relied on these assurances and made no further effort to purchase coal; that on August 25, the car had not been shipped, and appellee went to Memphis to take the matter up in person with appellant's agent, and was assured that the car would go forward by the next train; that the car did not leave Memphis until August 28, and did not reach Mesa until August 30. Appellee alleged that he was damaged in the sum of $3,000.

The appellant denied the contract of shipment as set up in appellee's complaint, and denied the allegations as to notice and special damages, etc. It set up that the coal was shipped under a contract called a uniform bill of lading, which was approved by the Interstate Commerce Commission by order No. 787, on June 27, 1908; that this contract provided, "that no carrier is bound to transport the property described in the bill of lading by any particular train, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement endorsed thereon." That the contract further specified, "that the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the property, being the *bona fide* invoice at the place and time of shipment."

Appellant averred that by the terms of the contract under which the coal was shipped, it was not liable for the special damages claimed by the appellee; that the tariffs of appellant and of the initial carrier on file with the Interstate Commerce Commission and under which the shipment was made, did not authorize appellant nor the initial carrier to enter into a contract with the appellee to assume liability for special damages, nor for any damages

other than the damages covering the value of the coal; that any contract by which appellant undertook to assume liability to appellee for special damages would be a discrimination against other shippers of coal in favor of the appellee, and would violate the act to regulate commerce.

H. I. Pearce testified in substance: "I am traveling salesman for the Hunt-Berlin Coal Company, and was such in August, 1913. We sold J. B. Foster a carload of coal to be shipped to him at Mesa. We gave the Illinois Central Railroad an order to deliver the car of coal to the Rock Island to be shipped to Foster. I did not take up with the Rock Island the shipping of this car of coal to Foster that day, but did on the 23d day of August. On that day I called the Rock Island office and told the local agent that Foster would have to have the coal by Monday, or his rice crop would be ruined. The agent replied that upon receipt of the car, he would do his best to get it out Saturday night. I told the agent that Foster's rice had to have water on it, and if he didn't get the coal he could not put water on it and the crop would be ruined. The agent assured me that he would use his best efforts to get it out as soon as possible. That was on Saturday. Monday morning Foster and I went to the local office of the Rock Island Railway Company, and we had quite a lengthy conversation with the local agent in regard to the condition of Foster's crop. That agent at that time said that he had a car of coal, and would get it out without fail. I gave the Illinois Central billing instructions on this car of coal on August 20. That was three days before I spoke to defendant's agent about it. The car was then in the Illinois Central yards at Memphis. This coal is shipped from the mines and rebilled from Memphis, and then it takes a through rate as if it had been billed originally from the mines to destination. It takes the same rate as if it had been billed originally from the mines. Our billing instructions were given to the Illinois Central, and I took the matter up with the Rock Island agent afterward simply to expedite the movement."

The witness identified a bill of lading, which was in evidence, showing the shipment of I. C. Car No. 120115

from St. Charles, Ky., August 15, 1913, consigned to Hunt-Berlin Coal Company, Memphis, Tenn. The witness stated that this was the bill of lading upon which the car of coal sold to J. B. Foster was reconsigned to him from Memphis, Tenn. The car was ordered sent to J. B. Foster, Mesa, Arkansas. Witness did not procure another bill of lading from Memphis to Mesa, but merely directed that the carload of coal be sent on to destination at Mesa under the same bill of lading. The billing would merely be changed to show the destination Mesa, Ark., instead of Memphis, Tenn. The freight charges would be paid from the initial point to destination. At the time witness ordered the coal shipped from the mines to the Hunt-Berlin Coal Company witness did not know to whom it would be sold or delivered. The car was merely ordered along with other cars to keep a sufficient supply of coal on hand to meet the orders of the Hunt-Berlin Coal Company's customers. Witness stated, "In determining the rate which Foster had to pay on the carload of coal, the regular flat rate from the mines to Memphis and the regular rate from Memphis to Mesa were added together; he paid the full sum of the two."

There is no dispute as to the amount of the damages in the event appellee is entitled to recover. The record shows that the car was delivered to the appellant on August 23, 1913, at 11:59 P. M., with a grab-iron broken. It was returned to the appellant on August 27.

Appellee testified as to his damages and corroborated the testimony of the witness Pearce as to the notice that was given to the agent of appellant as to the special damages that would be incurred unless he received the coal promptly, and his testimony tends to prove that he went to Memphis to see about the coal on August 25; that if the car had arrived at Mesa August 26, the whole of his crop would have been saved. It damaged very fast after that date. His testimony tends to prove that it was eight or ten days after the appellee went to Memphis before the coal arrived at Mesa, and by the time it did arrive, the crop was burned to such an extent that appellee did not consider it wise or necessary to put the water on it. Ap-

pellee did not put in any claim against the appellant until his complaint was filed, which was March 2, 1914.

The testimony on behalf of the appellant tended to show that the rate on coal from Fox Run, Kentucky, to Memphis, Tennessee, on the Illinois Central was $1.10 per ton, and there was a proportional rate to destinations beyond Memphis of $1 per ton. There was no lower or higher rate for special contracts. The tariff provided that coal destined to Memphis could be reconsigned to points beyond in the same general direction at the balance of the through rate, that is, to points where there is a through rate. There was a through rate in effect at the time from Fox Run, Ky., to Mesa, Ark. The through rate was $2.25 per ton.

The tariffs of the Illinois Central and of the appellant, fixed by the Interstate Commerce Commission, were, by agreement, exhibited to the jury.

A witness who was a coal clerk of the Illinois Central in August, 1913, testified that he received orders from the Hunt-Berlin Coal Company on August 20 to reconsign a car of coal to J. B. Foster at Mesa, Ark., via the Rock Island on through rate. He reconsigned the car on August 20. The car was reconsigned by scratching out the name of the original shipper, towit, the St. Bernard Manufacturing Company, and inserting in red ink as the original shipper the Hunt-Berlin Coal Company, and by scratching out the Hunt-Berlin Coal Company, the original consignee, and inserting in lieu thereof J. B. Foster, Mesa, Ark., as the consignee.

Appellant's fourth prayer for instruction was as follows:

"You are instructed that if you find from the testimony in this case that the carload of coal in question was delivered to the Illinois Central Railroad Company at St. Charles, Kentucky, consigned to Hunt-Berlin Coal Company at Memphis, Tennessee, and that said shipment was under a written contract, attached to the deposition of H. I. Pearce herein, and that while said car of coal was in the custody of the said Illinois Central Railroad Company, said car was reconsigned by the said Hunt-Berlin

Coal Company to the plaintiff at Mesa, Arkansas, the plaintiff is bound by the terms of said contract, and if you further find that the plaintiff did not make a claim in writing, for the damages to his rice crop, to the railroad company, at the point of delivery or at the point of origin of said shipment, within four months after the delivery of said shipment, his action for damages is barred by the terms of said contract.

The jury returned a verdict in favor of appellee for $600. Judgment was entered in appellee's favor for that sum and this appeal followed.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

The suit is barred by failure to give notice in accordance with the terms of the bill of lading. It was error to refuse the fourth instruction prayed by appellant. 227 U. S. 648; 101 Ark. 436.

J. G. & C. B. Thweatt, for appellee.

This was not a *through* shipment and the suit is not barred by failure of plaintiff to give notice in accordance with the terms of the bill of lading. 5 Enc. Law, p. 214, 215; 29 Tex. Civ. App. 295; 101 Va. 778.

WOOD, J., (after stating the facts). The court erred in not granting appellant's prayer No. 4 for instruction. The undisputed testimony showed that the carload of coal in controversy was a through shipment from St. Charles, Ky., to Mesa, Ark. The Hunt-Berlin Coal Company, from whom the appellee bought the coal, directed the coal to be shipped from the mines in Kentucky over the Illinois Central Railroad. The bill of lading or contract under which the shipment was made provided that claim for loss, damage or delay should be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, and that unless claim was so made, the carrier should not be liable.

The testimony showed that under the contract between the initial carrier and the Hunt-Berlin Coal Company, the latter company could rebill the car when it arrived at Memphis to any of its customers, and that when

so rebilled or reconsigned it became a continuous or through shipment from the point of origin to the place of final destination.

The tariff rates on coal destined to Memphis over the Illinois Central provided that coal might be reconsigned to points beyond in the same general direction at the balance of the through rate. There was a through rate in effect at that time from Fox Run, Kentucky, to Mesa, Arkansas. When there is a reconsignment from Memphis the consignee at the place of final destination pays the through rate. The Hunt-Berlin Coal Company, in reconsigning the carload of coal, did not procure another bill of lading from Memphis to Mesa, but "merely directed that the carload of coal be sent from Memphis to destination under the same bill of lading."

In determining the rate which Foster had to pay on the carload of coal "the regular flat rate from the mines to Memphis and the regular rate from Memphis to Mesa were added together and he paid the full sum of the two. The freight was not made any cheaper by virtue of the reconsignment."

The above testimony was certainly sufficient to entitle appellant to have the jury instructed that the contract of affreightment between it and the appellee was that provided by the bill of lading issued by the Illinois Central Railway Company, the initial carrier. The appellant's prayer for instruction No. 4 was based upon the uncontroverted evidence. In refusing it the court ignored one of the material issues in the case which the testimony proved. The carload of coal having been shipped under the original bill of lading, issued by the Illinois Central Railway Company, the jury should have been told that as the appellee did not make a claim in writing for damages to his rice crop to the railway company at the point of delivery or at the point of origin of the shipment within four months after the delivery of said shipment, his action was barred. *Chicago, Rock Island & Pacific Ry. Co.* v. *Williams,* 101 Ark. 436.

For the error indicated the judgment is reversed and the cause dismissed.

EX PARTE BALDWIN.

Opinion delivered May 10, 1915.

CIRCUIT COURTS—ADJOURNMENT.—The circuit court record showed "ordered that court adjourn until.....", and immediately following was the entry "ordered that court adjourn until Thursday morning, March 4, 1915." *Held*, The record did not show that there was an adjournment without designation of another day for reconvening, and that the term did not, for that reason, lapse.

Petition for Certiorari; petition denied.

Otis T. Wingo, J. H. Warren and *Geo. W. Richardson,* for petitioners.

An order of adjournment made by the court in these words: "Ordered that court adjourn until . . . . " and signed by the judge, is a final adjournment of the term of court then in session. No order thereafter made by the judge adjourning the court to a day certain can give life to the term so previously adjourned, and any proceedings had in said court so adjourned the second time to a day certain is *coram non judice* and void. Kirby's Dig., § § 1527, 1531; 82 Ark. 192; 81 Ark. 311; 20 Ark. 77; 27 Ark. 353; 37 Ark. 379; 2 Ark. 229; 62 Tex. 185; 7 S. Car. 372; 22 S. Car. 412; 2 Okla. 191; 20 Mo. App. 322; 20 Ala. 453; 89 Pac. 1005; 1 Enc. Pl. & Pr. 238-242; 112 N. W. 192; Cooley's Blackstone, 185-186; 39 Ark. 448; 1 Comyn's Dig. 455-456; 45 N. W. 817-18; 77 Wis. 121; 22 Ala. 57-59; 22 Ark. 278; 57 Ark. 9.

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

Special adjourned sessions of the court may be held upon proper order duly entered of record. Kirby's Dig. § 1531 and note. Where the time of beginning but not the ending of the term is fixed, the term when begun, will continue until some affirmative judicial act, such as adjournment *sine die,* has ended it. 21 Enc. Pl. & Pr. 631.

The circuit court has authority to adjourn over until a day after court was held in another county. 104 Ark. 629; 81 Ark. 311.

The record can only be impeached by showing that it is a forgery, and in the absence of such showing, it is conclusive of every fact embodied in it. 3 Rice on Evidence, 62; Jones on Evidence, § 610; 79 Am. St. Rep. 352 and note.

Failure of the clerk to enter the order of adjournment from the 5th to the 6th of February would not affect the validity of the proceedings on the 6th. 34 Ga. 348; 8 Col. 210; 1 Enc. Pl. & Pr. 242.

A term of court is deemed to constitute but one day, and the orders of adjournment from day to day are mere announcements of the order of business to come before it during the term. 13 Ark. 653; 21 Enc. Pl. & Pr. 640 and note. See also 2 Ired. L. (N. Car.) 101.

McCULLOCH, C. J. The petitioners were convicted of a crime constituting a felony in the circuit court of Sevier county, and they bring the record here on *certiorari* to test the validity of the proceeding, it being contended that the adjourned term of court at which the judgment of the conviction was rendered was illegally held. The basis of this contention is that there was no proper adjournment of the court over to the day for the special adjourned term.

The Sevier circuit court convened in regular session on the day specified by statute in January, 1915, and remained continuously in session until February 6th, when there was an adjournment, and the special adjourned term began on March 4, 1915. The record of the court on February 5th shows the following entry: "Ordered that court adjourn until ....." This was signed by the judge, and immediately on the same page follows an order of dismissal in another criminal case, and then follows an entry in these words: "Ordered that court adjourn until Thursday morning, March 4th, 1915." This entry was signed by the judge, and the next entry on the record is the opening order on March 4th showing the opening of the court pursuant to the adjournment on February 6th. A term of court in another county intervened between

the two dates, so it follows that if on February 6th there was an adjournment of the court without specifying any other date for reconvening the court, the term lapsed. *Roberts & Schaeffer Co.* v. *Jones,* 82 Ark. 188. The order of adjournment, however, shows on its face that it was incomplete, and we are of the opinion that it is explained and controlled by the subsequent entry on the same day, signed by the judge, showing that the adjournment was to a definite date. The term did not lapse, for adjourned sessions are authorized by statute even over beyond a term of court in another county. *McVay* v. *State,* 104 Ark. 629.

The ancient rule was that a term of court was considered as of one day and the court deemed to be continuously in session from beginning of the term until the final adjournment. In conformity with that rule it has been held that the court may, at any intermission time before final adjournment, reconvene. *Barrett* v. *State,* 1 Wis. 156. It was decided by the Indiana Supreme Court that after an adjournment from one day to the next the court might reconvene and proceed with business, the basis of the decision being that the adjournment over from day to day was a mere intermission, and in contemplation of law the court was continuously in session. *Bowen* v. *Stewart, Admr.* 128 Ind. 507.

Our statute manifestly contemplates different days of the term of court, but it does not take account of parts of days, and even if the court announces an adjournment it has the power to reconvene on the same day for the purpose of transacting business; that is to say, it has the power to do so, but a question might arise as to the right of the court to proceed in the transaction of particular business in the absence of the interested parties and without notice. That question does not, however, arise in the present case and we have no doubt of the power of the court, even if in fact an order of adjournment has been announced, to reconvene the court and change that order and proceed with other business. In any view that might

be taken of this record, it does not show that there was an adjournment without designation of another day for reconvening, and the term did not, for that reason, lapse.

The prayer of the petition is therefore denied.

HANKINS v. STATE.

Opinion delivered May 10, 1915

1. JURIES—PEREMPTORY CHALLENGE—JUSTICE OF THE PEACE.—Under Kirby's Digest, § 4537, it is error for the court to overrule the challenge by defendant of a juror on the ground that he was a justice of the peace, when the challenge was made immediately after his cross-examination by defendant's counsel.
2. CRIMINAL LAW—EXPOSING POISON TO ANIMAL.—Under Kirby's Digest, § 1892, it is made a crime to administer poison to certain animals, and to maliciously expose poison with the intent that said animal shall swallow the same. *Held,* Exposing the poisonous substance with the intention that the animal shall get it, consitutes the offense of administering, if the animal does, in fact, get it.
3. ACTIONS—CIVIL AND CRIMINAL—MAY BE TRIED TOGETHER, WHEN.—There is no constitutional prohibition against the Legislature's authorizing the trial together of a civil action for damages and the criminal prosecution, when poison has been administered by the defendant to an animal belonging the the prosecuting witness, as provided in Kirby's Digest, § 1892.

Appeal from Ashley Circuit Court; *Turner Butler,* Judge; reversed.

R. W. Baxter, C. S. Pool and *E. E. Williams,* for appellant.

1. A justice of the peace is not a competent juror. 69 Ark. 449. Defendants peremptory challenges were exhausted. Kirby's Dig. § 2367; 69 Ark. 322.

2. Kirby's Dig. § 1892 embraces two crimes, one "knowingly administering" and the other "maliciously exposing" poison, etc. The court erred in its charge to the jury. 129 N. W. 234.

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

Confesses error in the selection of a justice of the peace as a juror. 98 Ark. 327; 69 *Id.* 449. Defendant's

peremptory challenges were exhausted. 69 Ark. 449-451.

McCULLOCH, C. J. Appellant is charged with the crime of administering poison to a certain horse named "Wattan", the property of one W. H. Shanks. The indictment charges that appellant knowingly administered strychnine to said horse, and was framed under the following statute:

"Every person who shall knowingly administer any poison to any horse, ass, mule or to any cattle, hog, sheep, goat or dog, or maliciously expose any poisonous substance with intent that the same shall be taken or swallowed by any of the aforesaid animals, shall on conviction be punished in the manner prescribed by law for feloniously stealing property of the value of the animal so poisoned; and the jury who shall try such case shall assess the amount of damages, if any actual damage has occurred, occasioned by such poisoning or intent to poison, and the court shall render judgment in favor of the party injured for threefold the amount so assessed by the jury." Kirby's Digest, § 1892.

The evidence adduced on the trial was mainly to establish circumstances which tended to show that appellant administered the poison to the horse and that the horse died from the effects of it. The owner found the horse dead in the stall when he went out to feed early in the morning, and there is sufficient testimony to connect the defendant circumstantially with the commission of the crime.

(1) In making up the trial jury, appellant exhausted all his peremptory challenges, and there are several assignments of error with respect to rulings of the court in passing on the competency of jurors. One of the veniremen disclosed the fact on his *voir dire* that he was a justice of the peace in the county at that time, and appellant challenged him peremptorily on that ground, but the court overruled the challenge for the alleged reason that appellant had failed to exercise his right of challenge before the attorney for the State passed on the juror.

It appears that the juror disclosed the fact that he was a justice of the peace when being cross-examined by appellant's counsel, and the question of his competency was duly challenged. We think that the challenge was exercised in apt time and that the court erred in disregarding it. *Langford* v. *State,* 98 Ark. 327. The Attorney General has confessed error on this point, and we are of the opinion that the confession is well founded. The statute provides that the fact that a "juryman is a postmaster, justice of the peace or county official" affords grounds for peremptory challenge. Kirby's Digest, § 4537. This error of the court calls for a reversal of the judgment.

There are many other assignments of error which need not be discussed for the reason that the same matters may not arise in the next trial.

(2) There is one, however, which relates to the question of the correctness of an instruction of the court, and as that question may arise in the next trial we deem it proper to consider it. In instruction No. 8 the court told the jury that if appellant "placed strychnine poison in the place for the purpose of having "Wattan" to take it, and that "Wattan" did take it into his stomach, then you will find that defendant administered said strychnine to "Wattan." Objection was made to this instruction and the ruling of the court in giving it is now assigned as error. It is argued that the statute names two independent methods in which the offense may be committed, and that as the indictment charges the offense to have been committed in one of the prescribed modes, that of knowingly administering poison, it cannot be established by proving the other method, that of maliciously exposing the poison. Our conclusion is that the instruction given by the court was correct, for the placing of the poison where the horse could get it, and with intent that the horse should get it, constituted the offense of knowingly administering the poison if the horse in fact took the substance in his stomach. There are, indeed, two methods prescribed for committing the offense. The

first method, that of administering the poison, is not complete unless the animal takes it; but the other offense is complete when the poison is maliciously exposed with intent that the same shall be taken or swallowed by any of the animals mentioned, whether the poisonous substance is in fact taken by the animal or not. The two methods differ in that respect. But, after all, exposing the poisonous substance with the intention that the animal shall get it constituted the offense of administering if the animal does in fact get it. Counsel for appellant cited a decision of the Supreme Court of North Dakota (*State* v. *Hakon,* 129 N. W. 234) which sustains their contention, but we decline to take that view of the subject. The statute of North Dakota is very similar to our statute on the subject and the court, in the decision referred to, said that if exposing the poison was not prescribed as an independent method of committing the crime, then it would constitute administering poison, but that because of the fact that it did constitute an independent method it could not be considered as an element of the offense of administering the poison. The reasoning of the case does not appeal to us, for it seems clear to us that notwithstanding the fact that the statute makes the exposing of poison a crime, that may also constitute a part of the crime of administering and thus make out the crime if the animal gets the poison thus exposed with such intentions.

(3) It is also urged that it was improper for the court to permit damages to be awarded, notwithstanding the statute which expressly provides that "the jury who shall try such case shall assess the amount of damages, if any actual damages has occurred, occasioned by such poisoning or intent to poison." No reason is given in the argument why the Legislature cannot authorize the trial together of the civil action for damages and the criminal prosecution. We are aware of no constitutional prohibition against such procedure.

For the error of the court, however, in refusing to allow appellant to challenge the venireman who was a justice of the peace, the judgment is reversed and the cause remanded for a new trial.

ROBINSON v. CITY OF MALVERN.

Opinion delivered May 10, 1915.

1. CRIMINAL LAW—VOID ORDINANCE—VALIDITY OF CONVICTION—RESISTING ARREST.—Appellant was indicted, tried and convicted of the crime of resisting an arrest, under a city ordinance which provided for a maximum fine of $50.00. Kirby's Digest provides a minimum fine of $50.00 for a conviction for said offense. *Held.* While the ordinance under which appellant was tried was not in conformity with Kirby's Digest, § 1960, as to penalty, and was void because it prescribed a less penalty than that prescribed by the State laws, nevertheless, appellant was not prejudiced because the fine adjudged against him was less than he would have had to pay, had he been tried and convicted under the State laws.
2. RESISTING ARREST—AFFIDAVIT—JURISDICTION OF MAYOR'S COURT.—An affidavit before the mayor of an incorporated town, setting forth a charge against appellant of resisting an officer, under Kirby's Digest, § 1960, is sufficient to give the mayor jurisdiction of the offense under Kirby's Digest, § 5586.

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

STATEMENT BY THE COURT.

The appellant was convicted of the crime of resisting an officer in violation of an ordinance of the city of Malvern prescribing, that if any person shall knowingly and wilfully obstruct or resist any sheriff or other ministerial officer in the service or execution of, or in the attempt to serve or execute, any writ, warrant or process, original or judicial, in discharge of any official duty, in case of felony, or in other case, civil or criminal," etc., "he shall be deemed guilty of a misdemeanor and on conviction fined in any sum not to exceed $50.00." The ordinance is an exact copy of section 1960 of Kirby's Digest, except that the maximum penalty under the or-

dinance was $50.00, whereas under section 1960 the minimum penalty is $50.00.

The testimony tended to show that Lee Goodman, who was a deputy marshal of the city of Malvern, was on duty at the park within the corporate limits of the city; that appellant and another negro were fighting and Goodman tried to arrest appellant. He put his hand on appellant's shoulder and told him to consider himself under arrest, saying, "You are arrested." Appellant turned around quickly and struck Goodman. Goodman and appellant clinched and then appellant was arrested by another officer.

At the time the appellant resisted the efforts of the deputy marshal to arrest him the deputy had his badge pinned on the inside of his coat but it could be seen. Appellant was personally acquainted with the deputy and knew that he was an officer. Appellant had seen the deputy make another arrest at the depot in 1913.

The above is substantially the testimony on behalf of the city (appellee here) on which the appellant was convicted.

The appellant testified that while he was engaged in a fight with one Coulter, the marshal ran up behind him and hit him without saying a word. "He didn't tell me," says the witness, "he was an officer, but came up and begun beating on me, and I turned and clinched, as I had to fight both of them to protect myself."

The appellant asked the court to instruct the jury as follows:

"You are further instructed that mere words spoken by Lee Goodman to the defendant to the effect to 'out that out,' or 'come and go,' or any badge is not sufficient in law to inform the defendant of his arrest when the officer is unknown to him as an officer, and if you believe from the evidence in this case that Lee Goodman used such words and the defendant refused to go with him, then the court tells you that this would not be resisting an officer, and that you must find the defendant not guilty."

The appellant also asked the court to instruct the jury "that the city of Malvern has failed to make out a case, and you will find the defendant not guilty."

The court instructed the jury at appellant's request as follows:

"2. Before you can find the defendant guilty of resisting an officer the city of Malvern must prove beyond a reasonable doubt that Lee Goodman was an officer and that the defendant knew it at the time and wilfully and knowingly refused to submit to the officer, and if they failed to prove these facts you should find the defendant not guilty."

"3. Although you may believe from the evidence in this case that the defendant did assault Lee Goodman before he had time to arrest him, when they were both engaged in a fight mutually, and that defendant did not intend to resist him as an officer, this would be a different offense and not the offense of resisting an officer, and you should find the defendant not guilty."

The court also instructed the jury as to the credibility of witnesses and on the presumption of innocence and reasonable doubt, to which no exceptions were reserved.

The jury returned a verdict finding the defendant guilty and assessing his fine at $25.00 and judgment was entered for the fine and costs. The appellant moved in arrest of judgment, setting up that the city ordinance under which he was tried was void because in conflict with sections 1960 and 5464 of Kirby's Digest. The court overruled the motion in arrest of judgment and appellant duly excepted to the ruling of the court. Appellant also filed his motion for a new trial, which was overruled, and he duly prosecutes this appeal.

R. S. Bowers, for appellant.

1. The evidence is not sufficient to support the verdict. The verdict is based on prejudice. Defendant had the right to resist an unlawful attack. 4 Elliott on Ev. § 2837; 49 Ark. 543; Hughes Cr. Law, § 1566; 56 Ark. 348;

Kirby's Dig. § 2124; 84 Ark. 485. Defendant did not know that Goodman was an officer.

2. The ordinance is void. Kirby's Dig. § § 1960, 5464; 87 Ark. 92; 37 *Id.* 356.

W. Morton Carden and *H. Berger,* for appellee.

1. The jury by their verdict has found the evidence sufficient to convict. This court will not disturb the verdict. 57 Ark. 577; 19 *Id.* 684; 13 *Id.* 285; 95 *Id.* 172; 104 *Id.* 162.

2. The court properly instructed the jury. 95 Ark. 172; 104 *Id.* 162; 92 *Id.* 586; 91 *Id.* 224.

3. The ordinance is not void. But the question cannot be raised by motion in arrest. Kirby's Dig. § 2326. The verdict was really too favorable to appellant and he cannot complain. 105 Ark. 598; 93 *Id.* 313.

4. The affidavit for arrest follows the language of the statute substantially. 45 Ark. 538; 86 *Id.* 436; 94 *Id.* 210; 112 *Id.* 98.

WOOD, J. (after stating the facts). The appellant contends that the evidence was not sufficient to sustain the verdict, but this was an issue for the jury and there was evidence to warrant the verdict.

(1) The court did not err in overruling appellant's motion in arrest of judgment. While the ordinance under which appellant was tried was not in conformity with the statute (section 1960 Kirby's Digest) as to the penalty and was void because it prescribed a less penalty than that prescribed by the State laws (section 5464), nevertheless, appellant was not prejudiced because the fine adjudged against him was less than he would have had to pay had he been tried and convicted under the State law, section 1960 of Kirby's Digest.

(2) The affidavit before the mayor, setting forth the charge against appellant of resisting an officer in the language of the above statute (section 1960) was sufficient to give the mayor jurisdiction of the offense under section 5586 of Kirby's Digest.

The evidence, as we have seen, was sufficient to sustain the verdict of guilty of the offense of resisting an officer under section 1960, *supra,* and appellant, under this section, could have been fined in any sum not less than $50.00. He is therefore in no attitude to complain and is not prejudiced by the verdict and judgment. See *Sellers* v. *State.* 93 Ark. 313.

The court did not err in refusing appellant's prayer for instruction No. 4 as the same is abstract, there being no evidence upon which to base it, and, besides, it was argumentative in form. The other instructions correctly presented the issue of fact to the jury.

There being no error in the rulings of the court to the prejudice of appellant, the judgment is affirmed.

HALL v. WATERS.

Opinion delivered May 10, 1915.

1. PLEADING AND PRACTICE—DEMURRER—JUDGMENT FOR COSTS—FINAL JUDGMENT.—Where appellant rested upon his demurrer to the answer, refusing to proceed further, allowing judgment for costs to be entered against him, the judgment was tantamount to a final determination on the issue of law deciding the merits of the case, and was a final judgment from which the appellant could prosecute his appeal and thereby test the ruling of the court on his demurrer.
2. PLEADING AND PRACTICE—DEMURRER TO ANSWER.—Where the answer is sufficient to challenge plaintiff to the proof of the allegations of his complaint, and the plaintiff demurred to the answer, refusing to make proof of the allegations in his complaint, it is proper for the court to overrule the demurrer, to dismiss plaintiff's cause of action, and to render final judgment against him for costs.

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

STATEMENT BY THE COURT.

The appellant instituted this suit against the appellees, alleging that he was the owner of part of a lot in the city of Hot Springs, Arkansas, and that while he was engaged in putting in a plate glass front in

the building thereon, in December, 1911, the appellees unlawfully entered upon the lot and forcibly removed the plate glass front and wilfully and negligently destroyed the same, to appellant's actual damage in the sum of $200.00, and that by reason of the wilful and unlawful trespass appellees were liable to him in treble damages. He therefore prayed for judgment in the sum of $600.00.

The appellees answered, denying specifically each of the allegations of appellant's complaint. They allege that during the month of December, 1911, appellees were officers of the city of Hot Springs; that appellee Waters, Mayor, and appellee Redding, Chief of the Fire Department, constituted two of the three members of the building committee, whose duty it was to pass on applications for permits to build or repair buildings within the boundaries of the fire limits of the city; that appellant's lot was within the fire limits; that on the .... day of December, 1911, one W. H. Hall requested appellee Waters for a permit to install a glass window in the building in controversy, and represented that the installation did not require a change in any part of the building except the removal of the glass front then in the building and the installation of a plate glass instead; that no wood or other inflammable material would be used and that the fire risk would not in any manner be increased; that relying upon the truthfulness of the statements of W. H. Hall, appellee Waters, who was mayor of the city, issued a permit for the change in the glass front. They alleged that W. H. Hall used said permit as a license to remove certain walls, partitions and a stairway and to enlarge the building by the use of wooden walls and partitions, and changed the stairway and added an entirely different frame for the front, that this was done before the appellees were apprised thereof; that these acts were done in the night time and in direct violation of the ordinance of the city and of the permit; that as a result of the unlawful acts of W. H. Hall, appellees caused his arrest, and upon trial before the police court he was fined in the sum of $25.00; that he appealed

and immediately continued with the work of enlarging the building and violating the ordinances of the city, and was again arested and fined in the police court; that appellant J. H. Hall, and W. H. Hall thereupon agreed with appellees and the police judge that W. H. Hall would surrender the permit and not further prosecute the improvements or repairs until it could be determined between the parties whether or not the acts of J. H. Hall were in violation of the fire ordinances; that notwithstanding said agreement and surrender and cancellation of the permit W. H. Hall further undertook to prosecute the work in the night time and to complete the same until he was again arrested by the police; that appellees, as officers of the city, and acting as such, removed only that part of the improvements made after the agreement and after the surrender and cancellation of the permit. They further alleged that all of the acts of W. H. Hall were in violation of the ordinances of the city enacted for the prevention of fire, and that the additions and changes made by W. H. Hall increased the fire risk materially. They denied that appellant J. H. Hall had been damaged, and alleged that appellant and W. H. Hall were responsible for any damage that may have been suffered, the same being brought upon them by reason of their efforts to violate the ordinances of the city.

Appellees further alleged that the appellant instituted an action in the Garland chancery court against the appellees to restrain them from interfering with the appellant in the changes and repairs on the building referred to, and sued appellees for damages for the same amount and the same alleged cause of action as in the present case; that afterwards, on the 20th of December, 1911, the appellant and W. H. Hall filed an amendment to the complaint of appellant, making W. H. Hall a party, and setting up that he had an interest in the subject-matter of the action; that the appellees demurred to the original complaint, and afterwards answered, and made their answer a cross-complaint, which they made exhibits to

their present answer; that on the..... day of December, 1911, the suit in the Garland Chancery Court was, by agreement of all parties hereto settled and was agreed to be and was dismissed; that by the agreement and settlement of that case the appellant and W. H. Hall were permitted to make certain changes and repairs in the building, which were agreed upon by all the parties to that suit; that the appellees, acting in their official capacity, and the appellant and W. H. Hall released the appellees from all liability for any and all damages claimed against the appellees by reason of the trespass alleged against the appellees in that action, and that by the terms of that agreement the appellees dismissed the prosecution instituted against W. H. Hall for violation of the fire ordinances of the city, and that no action was thereafter brought against him within one year after such dismissal of the action against the appellees in the Garland Chancery Court; that the agreement to dismiss the suit pending in the Garland Chancery Court was an adjustment of the issues between the parties in this action; that if the action in the Garland Chancery Court was not dismissed the same is still pending and operates as a bar to the prosecution of the present suit.

The appellant demurred to the answer, setting up:

"First. That the facts stated by the defendants, commencing at the second paragraph and first page and ending on the fourth page thereof, stating as a justification of their trespass that the plaintiff was violating an ordinance of the city of Hot Springs, is not sufficient to constitute a defense, counterclaim or set-off against plaintiff's cause of action.

"Second. That the facts stated by the defendants in their second defense, beginning at the second paragraph on page four and ending at the third paragraph on page five, are not sufficient to constitute a defense, counterclaim or set-off against plaintiff's cause of action."

The court overruled the demurrer and the appellant announced that he desired to stand on his demurrer. The court thereupon rendered a judgment in favor of the appellees against the appellant for costs. The record shows the following: "Comes the plaintiff by his attorney and prays an appeal to the Supreme Court from the order of this court overruling the demurrer of the plaintiff to the answer of the defendants, which was by the court granted."

Davies & Ledgerwood, for appellant.

The answer is not sufficient and the demurrer should have been sustained. 43 Ark. 230; 10 Peters (U. S.) 298; 78 Ark. 202; 46 *Id.* 422; 79 *Id.* 532, 550, 564.

A. J. Murphy, for appellee.

The demurrer is without merit. 84 Ark. 552; 1 Dillow on Mun. Corp. (4 ed.) 411-412; McQuillin on Mun. Corp. 333.

WOOD, J., (after stating the facts). (1) The demurrer to the answer conceded the truth of such allegations therein as were properly pleaded and when the appellant rested on this demurrer and refused to proceed further and allowed judgment for costs to be entered against him, this was tantamount to a final determination on the issue of law deciding the merits of the case, and was a final judgment from which the appellant could prosecute his appeal and thereby test the ruling of the court on his demurrer. See, *Melton* v. *St. Louis, I. M. & S. Ry. Co.,* 99 Ark. 433.

The demurrer alleged: First, that the facts stated by the defendants "commencing at the second paragraph and first page and ending on the fourth page thereof, stating as a justification of their trespass that the plaintiff was violating an ordinance of the city of Hot Springs, is not sufficient to constitute a defense," etc. And, second, "That the facts stated by the defendants in their second defense, beginning at the second paragraph on page four and ending at the third paragraph on page five, are not sufficient to constitute a defense," etc.

(2) The paragraphs of the answer are not numbered, nor are the pages of the answer, as copied in the record, designated. Therefore the grounds of the demurrer are not stated with sufficient certainty for this court to determine whether or not the facts referred to in the first and second grounds of the demurrer stated a defense to appellant's complaint. Furthermore, even if the facts referred to in the first and second grounds of the demurrer did not state a good defense, these were not the only facts stated in the answer as constituting a defense. Each and all of the material allegations of appellant's complaint were specifically denied by the allegations of appellee's answer. The denials were as specific as the allegations. This placed the burden upon the appellant to prove the allegations of his complaint before he could recover, and the answer was sufficient to constitute a defense even if it be conceded that the facts stated in the appellee's answer as referred to in the first and second grounds of the demurrer were not sufficient of themselves to constitute a defense.

The answer being sufficient to challenge appellant to the proof of the allegations of his complaint, and appellant refusing to make such proof, the court did not err in overruling the demurrer and in dismissing appellant's cause of action and rendering final judgment against him for costs.

Affirmed.

HATFIELD SPECIAL SCHOOL DISTRICT v. KNIGHT.

Opinion delivered May 10, 1915.

1. TRIAL—PEREMPTORY INSTRUCTION.—In an action to recover under a contract, a peremptory instruction should not be given for the defendant, when the testimony of the plaintiff on the point at issue is not entirely without probative force.
2. CONTRACTS—PERFORMANCE—BUILDING CONTRACTS.—In an action for the balance due on a contract for the construction of a building and for extras, *held*, under the evidence the defendant was entitled to a peremptory instruction denying a recovery for items

covering repairs on roof, additional lumber, ventilators, plastering and blackboards.

3. CONTRACTS—PERFORMANCE—QUESTION OF FACT.—In an action by a contractor for the cost of materials and labor furnished under a building contract, *held*, when the evidence is conflicting as to whether he acted in accordance with the plans and specifications, the issue was one for the jury.

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

J. I. Alley and *Steel, Lake & Head,* for appellant.

1. The court erred in refusing peremptory instructions asked. There was no question for the jury as to the architect's fraud or mistake. 88 Ark. 213.

2. The court should have given the peremptory instructions as to concrete, roof, cornice, plastering, ventilators, lumber, etc. The architect was the final arbiter. 48 Ark. 522; 68 *Id.* 285; 79 *Id.* 506; 83 *Id.* 136; 88 *Id.* 213.

3. It was error to give instructions Nos. 3 and 4, as there was no evidence to sustain them. There was also error in other instructions, but as they are not set forth in the opinion it is useless to comment upon them.

Pipkin & McPhetridge, for appellee.

No printed brief filed.

HART, J. C. W. Knight sued the Hatfield Special School District to recover a balance alleged to be due him for building a school house for the district. The plaintiff entered into a written contract with the defendant to construct a school house according to certain plans and specifications for the price of $7,090. Five thousand, five hundred and sixty dollars have been paid him and he brought suit for the balance alleged to be due on the contract and for certain other amounts alleged to be due for extra work. The defendant admitted that it was indebted to the plaintiff in the sum of $332.38 and offered to confess judgment for that amount. This is the second appeal in this case. The opinion on the former appeal is reported in 112 Ark. at page 83 under the style of *Hatfield Special School District* v. *Knight.*

The judgment was reversed for error in giving certain instructions.

On a retrial of the case the plaintiff recovered judgment for $826.46, and the defendant has appealed.

The contract provided that the building should be constructed according to the plans and specifications drawn by the architect whose construction as to their meaning should be final; that no alteration should be made except by his order; and that the contractor should, within twenty-four hours after receiving notice from the architect, remove all material condemned and take down any work condemned as improper or as failing to conform to the contract, and to make same good; that if the contractor failed in the performance of any of these conditions the defendant might take possession of the work and complete the building according to the plans and specifications.

The first assignment of error pressed upon us for a reversal of the judgment is that the court should have given a peremptory instruction in favor of the defendant as to the items for the concrete foundation of the building. According to the testimony of the plaintiff the defendant agreed with him for a change in the foundation of the building and agreed to pay him for the additional concrete work made necessary thereby; that the change in the foundation necessitated fifty-two additional yards of concrete which the district agreed to pay for at $6 a cubic yard.

On the other hand, several witnesses for the defendant testified that only eighty-six yards of concrete were put in the foundation of the building and that the original plans and specifications called for eighty-two yards. They admitted that a change was made in the plans for the foundation but said that it was agreed between the district and the contractor that no extra amount should be paid therefor, it being thought at the time that the change in the plans as to the foundation would result in a benefit to the contractor.

(1) Under this view of the proof we do not think the defendant was entitled to a peremptory instruction on this item. The testimony of the plaintiff was considerably weakened on cross-examination but its force was not entirely destroyed. He stated on cross-examination that he did not remember how many yards of concrete the original plans and specifications called for and refused to make a calculation thereof. He does say, however, that he put fifty-two additional yards of concrete in the foundation and we can not say that his testimony to that effect is entirely without probative force.

It follows that the court did not err in refusing the peremptory instruction as to this item.

(2) It is next insisted that the court erred in refusing the peremptory instruction as to the item for repairing the roof and in this contention we think counsel are correct. The contract provided that the roof should be finished with a surface of felt to be covered with a thorough coating of roofing pitch which should be filled while hot with clean, dry gravel not larger than that which would pass through a five-eighth inch mesh screen.

The testimony on the part of the defendant tends to show that chat was used instead of gravel; that it was placed upon the roof after the coating of tar had become cold and that on that account it did not stick; and that one could rake the chat off with his hands.

Several witnesses also testified for the defendant that the roof leaked in seventeen or twenty places.

The plaintiff testified that it leaked in but two or three places and that he repaired those leaks. He admits, however, that he used chat instead of gravel and that the chat was placed on the roof in many places after the tar had become cold.

He admits also that the architect notified him that his construction of the roof was not in accordance with the plans and specifications and that he failed to repair it.

Under these circumstances the defendant had a right to repair the roof and was entitled to the reasonable cost thereof. We think the undisputed evidence is in favor of the defendant on this point and that the court should have given a peremptory instruction in its favor on this item.

(3) It is also contended that the defendant paid out the sum of $60 on account of certain lumber bills for lumber placed in the building contrary to the specifications. The evidence on this point is undisputed and the court should have given a peremptory instruction in favor of the defendant as requested by it.

The proof is also undisputed that the ventilators furnished by the plaintiff did not comply with the specifications and the district was entitled to a peremptory instruction as to the cost of replacing the ventilators which the plaintiff had refused to do upon being notified to do so by the architect.

The testimony of several witnesses for the defendant tends to show that the plastering was not put on the wall in compliance with the specifications. They say that it was not smooth and uniform but that it was rough in many places and fell off in many others. The architect notified the contractor of his failure in this respect and the latter refused to repair the defective work. The evidence on this point is not disputed. The contractor himself admits that the plastering was rough in many places and having failed to repair it when notified to do so by the architect, the district was entitled to the reasonable cost of repairing the same and the court should have given a peremptory instruction in its favor as to this item.

The undisputed evidence also shows that the blackboard was not constructed according to the specifications and the district was entitled to a peremptory instruction as to this item.

It is also insisted by counsel for the defendant that the court erred in not giving them a peremptory instruction as to the metal cornice. On the former appeal there was a controversy as to whether the plans and specifica-

tions called for a wood or a metal cornice. On the retrial of the case Knight admitted that the wood cornice had been eliminated from the plans and specifications when he signed the contract. Therefore the court instructed the jury that the plaintiff was entitled to nothing extra on account of the cornice but refused to instruct that the defendant was entitled to the cost of replacing the cornice.

According to the testimony of the defendant the metal cornice was not placed on the building in accordance with the plans and specifications but we do not deem it necessary to set out the testimony in that respect. Though the preponderance of the testimony seems to be in favor of the defendant in this contention, we do not think the evidence is undisputed. There is some evidence of a substantial character on the part of the plaintiff tending to show that the metal cornice was put up in the manner specified in the contract and for this reason the court did not err in not giving the peremptory instruction as to this item.

In the opinion on the former appeal, which is the law of this case, we held that under the terms of the contract it was provided that the decision of the architect as to whether the school house was built according to the plans and specifications was binding on the parties and that the burden was on the plaintiff to show by a preponderance of the evidence that the decision of the architect was arbitrarily or fraudulently made.

The court further held that in order to meet this burden it was competent for the plaintiff to show by proper evidence that he had done the work in all particulars as called for by the contract, as tending to show that the architect had arbitrarily and capriciously ordered the work to be taken out and new work substituted for it and that such changes were not ordered by the architect honestly and in good faith.

The evidence is conflicting as to whether or not the plaintiff put the metal cornices on the building in compliance with the plans and specifications and in order to

show that the action of the architect in this respect was arbitrary and fraudulent and that the district was not entitled to the cost of replacing the metal cornice it was competent for the plaintiff to show that in all respects he complied with the plans and specifications in regard to putting on the metal cornice.

If the jury believed his testimony they could come to the conclusion that he put on the cornice in every particular according to the plans and specifications, and may have found that the action of the architect in ordering its removal and the substitution of a new metal cornice was arbitrary and amounted to fraud on his part in making his decision. Therefore we do not think the court erred in refusing to give the peremptory instruction as to this item.

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

POLK v. STEPHENS.

Opinion delivered May 10, 1915.

1. BANKRUPTCY—DISCHARGE OF DEBT—SUBSEQUENT ORAL PROMISE TO PAY.—An oral promise to pay a debt which has been discharged by proceedings in bankruptcy, is not binding on the promisor. (Kirby's Digest, § 3655).
2. BANKRUPTCY—DISCHARGE—PARTIAL PAYMENT.—A partial payment on a debt discharged in bankruptcy is not sufficient evidence of a new promise to pay, to revive the debt.
3. BANKRUPTCY—DISCHARGE—PARTIES JOINTLY LIABLE.—The rights of a creditor against third parties liable jointly with the bankrupt or secondarily for him, are not impaired by the bankrupt's adjudication nor by the bankrupt's discharge.
4. BILLS AND NOTES—SURETIES—LIMITATIONS.—Where more than five years elapsed between the last payment on a note and the date action thereon was commenced against the principal and sureties, the claim against the sureties is barred by limitations.
5. BANKRUPTCY—DISCHARGE—PROMISE TO PAY.—The obligation of a debtor to pay a debt discharged by bankrupt proceedings rests solely upon a new promise by him to pay the debt.
6. BANKRUPTCY—DISCHARGE—PART PAYMENT—LIABILITY OF SURETIES.—A. executed a promissory note as principal with B. and C. as

sureties. The note became barred by limitations as to B. and C. and was discharged as to A. by proceedings in bankruptcy. Thereafter A. made a payment on the note. *Held*, the part payment by A. would not prevent the operation of the statute of limitations from barring the debt as to B. and C.

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

G. B. Oliver, for appellants.

1. A discharge in bankruptcy of one obligor does not discharge the others. Bankruptcy Act 1898, section 16a; 5 Cyc. 401, and note 50.

2. The oral promise to pay the debt after discharge was sufficient to revive the debt. 27 Ark. 619; 33 *Id.* 651; *Ib.* 84; 44 *Id.* 108. Since these decisions our Legislature has enacted section 3655, Kirby's Digest. This is very similar to section 5079. Under these a verbal promise is not sufficient, but a payment after the debt is barred revives the debt. 20 Ark. 293; 10 *Id.* 108.

Nowhere has it been held that a part payment *and* promise are not sufficient to revive a debt barred by bankruptcy.

F. G. Taylor, for appellees.

1. 19 Ark. 693, while not expressly overruled by our Supreme Court, is against the great weight of authority. 25 Cyc. 1390, and cases cited; 10 Ark. 117.

2. Part payment is not sufficient to revive the debt. 25 Cyc. 1368, note, Kirby's Digest, § § 3655, 5079; 20 Ark. 171; 10 *Id.* 638; 19 Cyc. 321-2; 22 Ark. 112; 66 Ark. 287.

HART, J. On the 28th day of June, 1914, W. D. Polk and others under the firm name of the Bank of Success instituted this action before a justice of the peace against William Stephens, J. R. Shively and Joe McCracken to recover on a promissory note.

The defendants Shively and McCracken interposed the plea of the statute of limitations; and the defendant Stephens pleaded his discharge in bankruptcy as a defense to the action. Judgment was rendered in favor

of the defendants in the justice of the peace court and an appeal was taken to the circuit court. There the cause was submitted to the court sitting as a jury upon an agreed statement of facts as follows:

"It is agreed by the parties hereto that on June 7, 1905, defendants, Wm. Stephens, J. R. Shively and Joe McCracken executed to the Bank of Success a note for $150 due on the 6th day of August, 1905, and bearing interest from date until paid at the rate of 10 per cent per annum; that Wm. Stephens was the principal in said note and Joe McCracken and J. R. Shively were sureties on same, which fact was known to plaintiffs at the time of execution and delivery of said note to them; that Wm. Stephens made payments on said note as follows: September 26, 1905, $6.25; December 11, 1905, $3.75; February 17, 1906, $3.75; May 14, 1906, $3.75; September 22, 1908, $7.50; March 3, 1913, $1.00; that on the 10th of March, 1908, Wm. Stephens was discharged in bankruptcy and the note sued on was included in his schedule of liabilities in said bankrupt proceedings. At the time Stephens made the payment of $1 on March 3, 1913, he orally promised to pay the balance on the note sued on."

The circuit court found that as to McCracken and Shively the action was barred by the statute of limitations; and as to the defendant Stephens, by his discharge in bankruptcy. Judgment was entered in favor of the defendants and the plaintiffs have appealed.

It is the contention of counsel for plaintiffs that the payment by the defendant Stephens of $1 on March 3, 1913, had the effect of reviving the debt against him and of preventing the statute of limitations from running against the defendants Shively and McCracken.

(1-2) In this contention we do not agree with counsel. Section 3655 of Kirby's Digest provides that no promise to pay a debt or obligation which has been discharged in bankruptcy shall be valid unless such promise is in writing. The promise made by Stephens was an oral one and on that account did not have the effect

of reviving the debt against him. Because the promise can not be implied or inferred it has been generally held that partial payments on a debt discharged in bankruptcy are not sufficient evidence of a new promise to pay, to revive the debt. Remington on Bankruptcy, (2 ed.), volume 3, sec. 2716; *Needham* v. *Matthewson,* 81 Kan. 340, 19 Amer. & Eng. Ann. Cas. 146, and case note, 26 L. R. A. (N. S.) 274, and case note; *Merriam* v. *Bayley,* 1 Cush. (Mass.) 77, 48 Amer. Dec. 591.

It follows that the oral promise of Stephens to pay the note, and the part payment by him of one dollar, did not have the effect of reviving the debt against him and the court properly held that the plaintiff's cause of action against him was barred by the discharge in bankruptcy.

(3) The rights of the creditor against third parties liable jointly with the bankrupt or secondarily for him are not impaired by the bankrupt's adjudication nor by the bankrupt's discharge. Remington on Bankruptcy, second edition, volume 2, section 1510.

(4) More than five years elapsed between the last payment on the note and the date on which this action was commenced. Therefore, as to Shively and McCracken, the court properly sustained their defense of the plea of the statute of limitations.

Counsel for the plaintiffs contend that the payment made by Stephens on the 3d day of March, 1913, after his discharge in bankruptcy, operated to prevent the statute running against Shively and McCracken; and in support of their contention they cite the case of *Hicks* v. *Lusk,* 19 Ark. 692, where the court held that a part payment by one of the several contractors, or partners, before the bar of the statute of limitations had attached, forms a new point from which the statute begins to run as to all.

The holding in that case proceeded upon the theory that the person making the payment was agent for his co-obligors, and has no application to the facts of the present case.

(5) Although the moral obligation to pay the discharged debt by a bankrupt is a sufficient consideration for a promise to pay, the cause of action rests upon the new promise and not upon the old debt.

(6) As we have already seen the part payment made by Stephens was not sufficient evidence of a new promise to pay on his part; and even if it had been sufficient evidence of a promise to pay on his part, the cause of action against him would rest upon the new promise and not upon the old debt. The defendants Shively and McCracken were only liable on the old debt and on that account the part payment by Stephens, after his discharge in bankruptcy, could not have the effect of preventing the statute of limitations from running as to Shively and McCracken.

It follows that the judgment will be affirmed.

HOME FIRE INSURANCE COMPANY *v.* WILSON.

Opinion delivered May 10, 1915.

INSURANCE—FORFEITURE FOR VACANCY—WAIVER.—The act of the agent of an insurance company, with the usual authority of such an agent, when notified of a vacancy of the insured property, and requested to have the policy kept alive by a vacancy permit, in assuring the owner that the property is properly protected, operates as a waiver of a forfeiture of the policy caused by the vacancy.

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

Wynne & Harrison, for appellant.

1. The vacancy of the building avoided the policy *ipso facto.* 109 Ark. 324; 2 Clements on Fire Insurance, 367; 5 So. 768; 42 N. W. 630; 65 Kans. 373; 69 Pac. 345; 69 S. W. 42; 27 *Id.* 122.

2. The local agent had no authority to waive an express provision of the policy. 19 Cyc. 782; 22 Pac. 1010; 7 N. Y. Supp. 589.

3. Appellees were bound by the limitations upon the agent's authority as stipulated in the policy. 2 Clements on Fire Ins., p. 487; 133 N. Y. 356; Ostrander on

Fire Ins., p. 192, § 56; 70 Wisc. 1; 35 N. W. 34; 54 Ark. 75; 26 So. 655; 43 N. W. 810; 120 Ga. 247; 66 Mo. App. 29; 32 S. W. 582.

4. There was no expressed nor implied waiver of the provisions of the policy against vacancy. 87 Ark. 327; 86 Ala. 424.

5. Rhea was appellees' agent. 109 Ark. 324; 109 *Id.* 330.

6. The parol agreement, if any existed, between appellees and the agent will not be enforced and no estoppel arises therefrom. Ostrander on Fire Ins., p. 749; 37 Mich. 613; 111 Ind. 90; Bigelow on Estoppel, (2 ed.) 438; 96 U. S. 544; Ostrander on Fire Ins. 750-751.

7. There was no waiver of the forfeiture by reason of the failure to return the unearned premium. 87 Ark. 327.

C. W. McKay, for appellees.

1. The agent had the authority and power to waive the forfeiture. 109 Ark. 324; 63 *Id.* 187; 62 *Id.* 348; 71 *Id.* 242; 88 *Id.* 506. Notice to the agent was notice to the principal. *Ibid.* The waiver may be oral. 88 Ark. 507.

2. As the insurer had knowledge of the forfeiture before the loss, and failed to return, or offer to return the unearned premium, a waiver resulted. 19 Cyc. 798; 45 N. W. 708; 141 S. W. 15; 110 *Id.* 604; 68 S. W. 889; 100 Am. St. 382; 50 N. E. 772; 12 *Id.* 137; 77 *Id.* 141; 36 *Id.* 990; 32 *Id.* 429; 65 Am. St. 717; 74 N. E. 964.

3. The insurer, through its agent, assured appellees that the insurance was in force, after knowledge of the forfeiture and before the loss. This is an affirmative act and amounts to a waiver. Cases *supra.* 87 Ark. 326; 109 *Id.* 324.

SMITH, J. This is the second appeal of this case. For opinion on the former appeal see *Home Fire Ins. Co.* v. *Wilson,* 109 Ark. 324.

As appears from the statement of facts in the opinion on the former appeal, appellees bought a house and lot upon which there was at the time an outstanding

policy of insurance in favor of their vendor, but by and with the consent of one John Rhea, who was appellant's agent at McNeill, Arkansas, the policy was transferred to appellees. It further appears that appellant's agent was also a rental agent, and that the house in question was listed with this agent for rent. Upon the former trial the cause was tried upon the theory that this agent had been requested to and had agreed to act for appellees, not only in renting this property, but in keeping it insured, and had agreed, at the time it was listed with him, to take whatever action might be necessary to continue the policy in effect. It was said, however, upon the former appeal that this agreement constituted Rhea the agent of the insured, and that in the performance of this agreement he was not acting as the agent of the insurer. And it was further held that this agent could not, by an executory agreement to take some future action, waive any of the conditions of the policy.

Discussing the effect of this agreement it was there said: "But an agent's executory agreement to waive future breaches, if any should occur, is not enforceable, for such an agreement is not a waiver of the effect of an existing condition, but is an amendment to the extent of such an agreement, of the terms of the written contract between the parties, evidenced by the policy of insurance. The understanding between appellees and Rhea, when given the highest effect of any inference that can be drawn from the conversation between them, is no more than an executory contract to keep appellees' insurance in effect, and to do whatever may be necessary for that purpose."

Under the record as then made, we held that judgment had been erroneously rendered against the insurance company, and the judgment was reversed and the cause remanded for a new trial.

Upon the remand of the case a trial was had before the court, sitting by consent as a jury, and the evidence at this trial was substantially the same as at the first trial with this important exception. Mr. Grayson testi-

fied that after the property became vacant he notified the agent of the appellant company of this vacancy, and he was at the time assured by the agent that the insurance was all right and the policy was in force and he would keep it in force. He testified further that he notified Mr. Rhea of the vacancy so that he might look after the insurance, and that Mr. Rhea told him the policy was in force. Mr. Wilson testified to substantially the same facts, and they were not contradicted by the agent, who was present and testified at the trial.

We need not discuss appellees' failure to make this proof at the former trial. The truthfulness of this statement was passed upon by the trial court, and the finding there made is conclusive upon us.

A different question is presented by the record in this case from the one decided upon the former appeal. It was shown at both trials that Mr. Rhea possessed all of the power and authority ordinarily possessed by local agents; that he was furnished by the company with blank applications, and with policies duly signed by its officers; that he had full authority to issue these policies, which were not valid until countersigned by him as agent of the company; that he had issued and countersigned the policy sued on; that he had full authority to consent to the transfer of policies, and did consent to the transfer of this policy from appellees' vendor to appellees; that he collected premiums and was authorized to cancel policies, and did cancel policies, and was authorized to issue vacancy permits, which were subject only to the right of the company to ratify or cancel.

Upon the former appeal we decided that the agent could not, by an executory agreement on his part, change or modify the written conditions contained in the policy, and further, that in any agreement upon his part to thereafter take the necessary action to continue a policy in effect he was thereby acting as the agent of the owner and not as the agent of the insurer. But it has also been frequently held that an agent possessed of the authority vested in Rhea can waive the conditions of the

policy. In the case of *Commercial Fire Ins. Co.* v. *Belk,* 88 Ark. 506, it was said: "Koeningstein was the agent of the defendant, and was entrusted with blank policies signed by the defendant with power and authority to solicit insurance, and, when obtained, to fill the blanks in the policy, receive the premiums and issue the policies, and consequently had the implied authoriy to waive the conditions of the policy. (*State Mut. Ins. Co.* v. *Latourette,* 71 Ark. 242; *Phoenix Ins. Co.* v. *Public Parks Amusement Co.,* 63 Ark. 187; *German-American Ins. Co.* v. *Humphrey,* 62 Ark. 348, and cases cited). He knew that appellee had contracted to sell and convey to Kifer the property insured, when the purchase price agreed upon was paid; he wrote the contract, and with full knowledge of the transaction assured appellee that her policies were 'all right.' The appellant, through its agent, thereby waived the condition in the policies as to sole and unconditional ownership of the insured property. With the assurance that the policies were all right, she rested in the belief that her property was insured until it was destroyed or damaged by fire. Appellant can not now avoid the policies, on account of the condition waived. *German-American Ins. Co.* v. *Harper,* 75 Ark. 98, and cases cited; *Arkansas Mutual Fire Ins. Co.* v. *Claiborne,* 82 Ark. 150, 162."

The proof now shows that appellees did not rely solely upon Rhea's promise to keep the policy in effect, but that, after the property had become vacant and the policy had forfeited and before the loss occurred, and at a time when appellant had the right to cancel the policy, and when other insurance could have been taken out had it done so, the agent of the appellant company assured the owners of the property that the insurance was in force.

The former opinion pointed out the difference between the executory promise of an agent to perform some future service in connection with a policy and his action in regard to a forfeiture which already existed. It was there said: "But this is not the case of property being

vacant at the time of the issuance of the policy, and of that vacancy being known to the agent issuing the policy, for, in such cases as stated, the authorities hold that the insurance company has waived the conditions of the policy against vacancy. Clement, on Fire Insurance, volume 1, p. 418. Nor is this the case of an insured advising the company's agent of a condition which would work a forfeiture, if not waived, yet one which could and would be waived upon the doing of some act by the agent which the insured assumed, in reliance upon the agent's promise, was done or would be done, but which the agent had, in fact, failed to do, for, in such cases, the authorities hold that the agent's neglect does not invalidate the policy."

We there quoted extensively from the opinion delivered by Chief Justice Campbell of the Supreme Court of Mississippi in the case of *Home Ins. Co.* v. *Scales,* reported in 15 So., p. 134. The controlling facts in this Mississippi case were identical with the facts considered by us, and the language of that court was applicable to the facts as developed on the former appeal. We quoted from the Mississippi court the following language: "It was no part of his business, as agent for the company, to keep policies from being avoided by violations of their conditions, whatever obligations he may have assumed by his engagements to the insured, as to which engagement he could not bind the insurer."

But the Mississippi court drew in that case the distinction which we now recognize when it employed the following language: "If Hibler, the agent, had done anything in his capacity as agent, after the house was unoccupied, to mislead the insured, the case would be different, but nothing of that sort occurred There was silence, and that is never ground for estoppel except where it is a fraud which can not be predicated of this silence. The agent had a right to be silent, and give no notice as to the unoccupied condition of the house."

The agent here, who had the authority to issue the vacancy permit, which would have continued the policy

in force, was notified of the vacancy for the purpose, as stated by appellees, of having the policy kept in force, and they were assured by the agent that the insurance was in force, and this assurance must be held to constitute a waiver of the forfeiture. The trial court held in effect that the forfeiture was waived and rendered judgment accordingly, and we think that judgment should be affirmed, and it is so ordered.

YOWELL v. FORT SMITH PURE MILK COMPANY.

Opinion delivered May 17, 1915.

APPEAL AND ERROR—APPEAL FROM ORDER GRANTING A NEW TRIAL.—An appeal from an order granting a new trial in the circuit court, will be dismissed when the appellant has not complied with the statute, Kirby's Digest, § 1188.

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

Holland & Holland, for appellant.

H. C. Mechem, for appellee.

WOOD, J. This appeal is prosecuted from an order of the circuit court sustaining a motion for a new trial on behalf of appellee who was the defendant below. Appellant attempts to appeal from an order of the trial court granting appellee a new trial.

Section 1188 of Kirby's Digest provides, in part: * * * "But no appeal to the Supreme Court from an order granting a new trial, in a case made or, bill of exceptions, shall be effectual for any purpose unless the notice of appeal contains an assent on the part of the appellant that, if the order be affirmed judgment absolute shall be rendered against the appellant."

The appellant does not show that he has complied with this statute, therefore his attempted appeal can not avail him. See, *St. Louis, I. M. & S. Ry. Co.* v. *Hix,* 101 Ark. 90.

The appeal is therefore dismissed.

CASSADY v. NORRIS.

Opinion delivered May 17, 1915.

1. TAX SALES—FRAUDULENT JUDGMENT—BILL TO CONDEMN—FALSE ALLEGATIONS OF OWNERSHIP.—The false allegation in a bill in equity to condemn lands for non-payment of assessments, that the owner thereof is unknown, is not sufficient to constitute fraud on the part of the successful party, in obtaining the judgment of the court.

2. TAX SALES—DECREE—NOTICE.—In an action to set aside the decree of the chancery court condemning certain lands for sale for non-payment of assessments, when the decree recites that proper service was had, an allegation in the complaint as to want of service, *held*, not sufficient to show that the court did not have jurisdiction on that account.

3. JUDGMENTS—COLLATERAL ATTACK.—Mere errors and irregularities are not grounds for vacating a judgment by way of collateral attack; a judgment must be assailed only in a direct proceeding in the nature of a review on error.

4. PARTIES—COLLATERAL ATTACK ON A JUDGMENT.—In an action seeking to set aside a decree ordering certain lands to be sold for certain taxes due an improvement district, the district is not a proper party.

5. JUDGMENTS—COLLATERAL ATTACK—TEST.—If an action or proceeding has an independent purpose and contemplates some other relief, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral.

5. JUDGMENTS—ATTACK—SUFFICIENCY OF ALLEGATIONS.—In an action attacking a decree of the chancery court condemning for sale certain lands for the non-payment of taxes, *held*, the attack being collateral, the decree was valid against the allegations in the complaint seeking to annul it.

7. JUDGMENTS—FRAUD IN PROCUREMENT.—Fraud as the basis of an action to impeach a judgment, must be a fraud extrinsic of the matter tried in the cause; it must not consist of any false or fraudulent act or testimony, the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment that is assailed; it must be a fraud practiced upon the court in the procurement of the judgment.

8. JUDGMENTS—CONFIRMATION OF SALE—IRREGULARITIES—PRESUMPTION.—After the confirmation of a sale has been made by order of the court, all defects and irregularities in the conduct of the sale are cured, and every presumption will be indulged in favor of its fairness and regularity.

9. TAX SALES—CONFIRMATION—OBJECTION.—Under Kirby's Digest, § § 5703 and 5731, the owner of lands which have been sold for non-payment of taxes, can not complain after confirmation, of any irregularities in said sale.

Appeal from Polk Chancery Court; *James D. Shaver,* Judge; affirmed.

STATEMENT BY THE COURT.

On May 13, 1912, the Board of Waterworks Improvement District No. 2 of Mena, Arkansas, filed suit in the Chancery Court of Polk County against unknown owners of real estate in the district for the purpose of collecting delinquent taxes which became due on the 29th of March, 1912, and were delinquent on the 29th of April, 1912. Service was had on the unknown owners by publication of the summons in a newspaper and posting notices on the property. Judgment was rendered against appellant's property on the 15th of June and same was sold under the decree of the court to appellee R. L. Norris. The sale was afterwards confirmed, and the deed was executed and delivered to Norris on August 9, 1913.

The appellant brought this suit September 12, 1914. He made the Waterworks Improvement District No. 2 a party defendant, and also the appellee Norris. He set up in his complaint that he was the owner of the land in controversy; that he was not a party to the suit in which the same was condemned to be sold for delinquent taxes; that Norris, by failing to pay the taxes for the years subsequent to his purchase and allowing appellant to pay the same for those years, without notifying appellant of his purchase, had perpetrated a fraud on the appellant and was estopped from claiming title under his deed. The complaint then alleges various irregularities in the proceedings wherein judgment was rendered condemning the lands to be sold, which, if urged on a direct attack against the judgment, would have been sufficient to have set aside the same and to have rendered the sale thereunder void.

The complaint also alleges several irregularities in the sale, which, if urged before confirmation, would have

been sufficient to render the confirmation void and to have set aside the deed. Among others was an allegation that there was a collusive agreement among the bidders at the sale to suppress competition in bidding.

The prayer of the complaint was that the judgment condemning the land to be sold be set aside; that the sale be declared illegal and the deed set aside, and that "plaintiff's title be quieted in him, and for such other relief as to the court seems equitable and just."

The answer of the Board of Improvement admitted that it brought suit against the unknown owners of real estate in the district for the collection of delinquent taxes and that the lot in controversy was sold under the decree of the chancery court and was purchased by the appellee Norris. It admitted that it had received the full amount of taxes, penalty and costs for which the land was condemned to be sold. It denied that appellant was known to the commissioners to be the owner of the lot and denied that they had any knowledge as to who was the owner; denied that it perpetrated any fraud upon the appellant, and denied that the sale was invalid for any reason, and prayed that the suit be dismissed.

The appellee Norris answered, setting up that the decree under which he purchased was in all things regular; that the sale was in all things regular, and that the sale had been confirmed by the court and the deed made by the commissioner approved by the court, and setting up that the irregularities of which the appellant complained were a collateral attack upon the judgment of the chancery court condemning the lands to be sold.

The court, after hearing the testimony, found, that for the year 1912 an assessment was regularly made upon the real estate in the improvement district and the taxes regularly extended, among other lands, against the lot in controversy; that the taxes were not paid, and that the board of improvement brought suit against the unknown owners of the lands on which the taxes had not been paid, including the lot in controversy; that it was alleged in the complaint that the name of the owner of

this lot was unknown and the same was proceeded against as the land of an unknown owner. The court further found that after due publication and service as provided by law, the chancery court of Polk County rendered its decree condemning the lot in controversy to be sold; that same was sold by the commissioner appointed by the court for $5.90, which was the correct amount of the assessment, penalty and costs, and that the report of the commissioner in making the sale was in all things approved by the court and by it confirmed. The court further found that the property sold was not redeemed within one year; and that the commissioner, on the 8th day of August, 1913, more than one year after the making of the sale, executed to Norris his deed for the lot in controversy; that the decree, the sale and the deed and all the proceedings were regular and valid, and that the irregularities, if any, in the sale were cured by the confirmation thereof. The court further found that the improvement district had no interest in the present suit and dismissed the complaint as to it. The court further found that appellee Norris was not a party to any agreement among the bidders at the sale to suppress competition in bidding; that appellant had paid taxes and assessments since appellee's purchase of the lot amounting to the sum of $33.76 and declared the same a lien upon the land, and directed that upon the payment of this sum the appellee's title be quieted and that he have possession of the land in controversy. To reverse this decree is the purpose of this appeal.

W. Prickett, for appellant.

1. This is a *direct* attack upon a judgment of a court in the exercise of a special statutory power conferred by statute, used in a summary manner and not according to the course of the common law. It is not a collateral attack. 23 Cyc. 1062, 1063, 1081, 1089; Black on Judg. 377; Blackwell on Tax Titles (4 ed.), 719; 36 Ark. 532. Kirby's Dig., § 5731, only makes the deed *prima facie* evidence. It does not cut off all remedies for irregu-

larities in the proceedings. Blackwell on Tax Titles, p. 721.

2. It was the duty of Norris to pay the taxes after his purchase. 11 L. R. A. 817; Desty on Taxation, 7. Besides he is estopped. 69 Ark. 211.

3. The complaint was not verified. Kirby's Digest, § § 6120, 6253; 36 L. R. A. (N. S.) 1064.

4. The owner, if known, must be summoned, if unknown, the fact must be stated, and the suit shall proceed *in rem* against the property. Kirby's Dig., § 5694; 90 N. W. 255; 119 S. W. 879. Service by publication is not conclusive against known owners under a recorded title. 127 S. W. 164; 86 *Id.* 781; Kirby's Dig., § 762. The question of service was jurisdictional. Appellant was not a party to the suit and could not appeal. 69 Ark. 373; 87 *Id.* 610. The finding of the court must be that "service was had." 103 Ark. 450. Due notice must appear affirmatively in the record. Want of notice is fatal. 2 Ark. 124; 10 *Id.* 572; 103 *Id.* 450.

5. The sale was void. Kirby's Dig., § 5700; 68 Ark. 248; 33 L. R. A. 85, and notes; 51 Am. Dec. 781. There was an unlawful agreement among bidders to stifle competition. 82 Am. Dec. 143; Blackwell on Tax Titles, p. 302; 60 Ark. 217.

6. Confirmation does not *cure* all defects. 75 Ark. 9; 90 *Id.* 170. It will not cure a void sale or deed.

Elmer J. Lundy, for appellee.

1. This is a collateral attack on the judgment. None of the allegations of the complaint reach the jurisdiction of the court. 23 Cyc. 1063, 1064; 92 Ark. 611; 93 Pac. 20; 123 *Id.* 159; 95 Miss. 832; 100 Ark. 63, 446.

2. The jurisdiction of the court is the only question that can be raised. The finding of the court is conclusive on this point. 50 Ark. 188; 91 *Id.* 95; 72 *Id.* 101, 112; 94 *Id.* 588. The decree recites due service of process as prescribed by law, and the sale and deed were duly confirmed. This is conclusive. 23 Cyc. 1058; Kirby's Dig., § 5731; 114 Ark. 551.

3. Under Kirby's Digest, § 4434, a judgment can not be vacated until it is adjudged that there was a valid defense to the action. This applies to a judgment by default. 54 Ark. 539; 49 *Id.* 417.

4. As to the payment of taxes since the sale there is no estoppel. The court gave appellant a lien for the amount paid.

WOOD, J., (after stating the facts). The findings and decree of the court are correct.

(1) The appellant does not seek by appeal, writ of error, *certiorari,* nor by bill of review to set aside the judgment for the errors appearing in the face of the record, or on account of newly discovered evidence, nor does his complaint set forth facts sufficient to constitute a cause of action for vacating a judgment after the expiration of the term under Kirby's Digest, section 4431, which provides: "Fourth. For fraud practiced by the successful party in obtaining the judgment."

It is true that the complaint alleges, "Fourth, that said judgment was procured by fraud committed by plaintiff upon this court and this plaintiff, wherein the said plaintiff alleged in its complaint that the owner of said lot was unknown. The plaintiff denies the allegation in the complaint that the owner of said lot was an unknown owner, and states that the plaintiff was the owner at said time and was well known to be the owner; that he was known to be the owner to R. L. Norris, who served the summons, and to the board of improvement," etc. But these allegations were not sufficient to constitute a fraud practiced by the successful party in obtaining the judgment. The allegation in the complaint in the suit to condemn, that the owner was unknown, was sufficient to give the court jurisdiction to proceed against the property. It was not a fraud on the court to make this allegation although it was untrue, for the court had the power to inquire into its jurisdiction and to determine whether or not it was true. The recitals of the decree condemning the lot in controversy to be sold were, in effect, that the owners of the lots were designated as

unknown and that they were unknown to the board of improvement. We must presume, in the face of these allegations, that the court did make inquiry as to its jurisdiction to proceed against the property, and found that it had jurisdiction. In other words, that the complaint alleged that the owners of the lots were unknown and that such was the fact.

(2) Another ground alleged in the complaint for setting aside the judgment is that no service of summons was had against the plaintiff in the suit or against the lot in question; that the officer who served the summons failed to make his return as required by section 5696 of Kirby's Digest, showing that C. C. Cassady was not found in the county. But again the decree of condemnation recites, "that due service of process by summons had been had against each of the defendants for more than fifteen days next prior to this day by the posting of a copy of the summons in a conspicuous place on each of said lots and by publication of said summons for one issue in the Daily Mena Star, a newspaper published in the city of Mena, having a general circulation," etc., following substantially the requirements of the statute, section 5696, Kirby's Digest, in regard to the giving of notice where it was stated in the complaint that the owner was unknown. Therefore, it appears from the recitals in the decree to condemn that the court found that proper service had been obtained to warrant the proceeding *in rem,* and the allegation in the complaint as to the want of service was not sufficient to show that the court did not have jurisdiction.

Another ground alleged for setting aside the decree was "that the complaint in the cause was not verified by the plaintiff nor its solicitor, and that no proof was taken in said cause upon which a decree could be legally rendered, thereby committing a fraud upon this court and against this plaintiff." But the improvement district statute under which the land in controversy was condemned does not require that the complaint be veri-

fied, and in the absence of such verification is not a prerequisite to the court's jurisdiction.

None of the allegations of the complaint state facts sufficient to constitute a direct attack upon the judgment. We have no statute authorizing a judgment to be vacated or set aside upon such allegations as those contained in the complaint.

"Any proceeding provided by law for the purpose of avoiding or correcting a judgment, is a direct attack which will be successful upon showing the error; while an attempt to do the same thing in any other proceeding is a collateral attack, which will be successful only upon showing a want of power." Vanfleets Collateral Attack, p. 5, section 3.

(3) The facts alleged in the complaint as grounds for vacating the judgment were mere errors and irregularities for which, as was said in *McCarter* v. *Neil,* 50 Ark. 188-190, the judgment could be assailed only in a direct proceeding in the nature of a review on error. The complaint here was clearly a collateral attack on the judgment.

(4) The improvement district was not a necessary party to the proceeding. There is no allegation that the taxes due the district were paid or that same were not a legal charge against the land. The judgment condemning the lands for sale had been fully executed and satisfied, the district having received its taxes. Therefore, no such suit could be maintained against the district for these taxes, and the district was not concerned in the controversy between appellant and the appellee Norris, the purchaser of the land, over the title thereto. The court correctly found that the improvement district had no interest in the matter. The primary purpose of the suit was to quiet title by having the deed held by appellee Norris cancelled and set aside. It is a proceeding not in the original suit in any direct manner to have the judgment vacated and set aside, but is merely an independent proceeding and having as its direct purpose the quieting of the title of appellant by setting aside the

deed of appellee Norris. This is the proper characterization of the suit, and it constitutes only a collateral attack upon the judgment of the chancery court under which the land in controversy was condemned and sold.

(5) In 23 Cyc., p. 1063-4, it is correctly stated: "If the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral." See, also, cases cited in note to foregoing quotations. Also *O'Neill* v. *Potvin,* 13 Idaho 721, 93 Pac. 20, 21; Words & Phrases, *Collateral Attack,* 753; *Continental Gin Co.* v. *DeBord,* 123 Pac. 159.

(6) This suit then being only a collateral attack upon the judgment of the chancery court, according to the doctrine announced by this court in many cases, some of them quite recent, the judgment herein assailed is valid and conclusive against the matters alleged in the complaint as grounds for annulling the same.

(7) In the recent case of *Pattison* v. *Smith,* 94 Ark. 588, we held (quoting syllabus): "Where the land of a nonresident was proceeded against for levee taxes, and was sold under a decree which recited that published notice was given as required by the statute, such recital is conclusive upon a collateral proceeding."

Again: "A judgment or decree can not be impeached for fraudulent acts or testimony, the truth of which was or might have been in issue in the proceedings which resulted in the judgment assailed, but must be impeached by proof of a fraud practiced in the procurement of the judgment itself."

In *Pattison* v. *Smith, supra,* it was alleged as one of the grounds for setting aside the decree of the chancery court that the same was obtained by fraud in that the decree was founded upon the nonpayment of levee taxes and that the same were not actually delinquent, but had been paid, and that this was procuring the judgment by fraud. Disposing of this allegation, the court said: "It was therefore, in effect, an impeachment of

the decree relative to a question of fact upon which the court had made a finding and not such an allegation of fraud practiced upon the court in the procurement of the decree for which the decree could be set aside." Citing *Pine Bluff* v. *Levi*, 90 Ark. 166, where the court said: "But the fraud which entitles a party to impeach a judgment must be a fraud extrinsic of the matter tried in the cause. It must not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment that is thus assailed. It must be a fraud practiced upon the court in the procurement of the judgment."

The language used in that case is germane to the issue raised by the allegation in the complaint under review to the effect that the judgment was procured by fraud committed by the plaintiff in the suit for condemnation in alleging that the owner of the lot was an unknown owner, when in fact he was known by the plaintiff in that suit to be the owner. The language above quoted disposes of this issue.

Appellant alleges and contends that the sale was invalid because there was no notice to the effect that "only so much of the property shall be sold as will pay the assessment, costs and penalty and no more." Kirby's Digest, section 5700. Also that the notice did not state the amount due against the lot, and that the sale was advertised to be held at the southeast door of the court house, when it in fact took effect in the circuit clerk's office; and also that the sale was invalid because there was a collusion among the bidders to suppress competition in bidding; also that the commissioner's deed was void because of a defect in the acknowledgment; also that the commissioner's deed was void because the commissioner had removed beyond the jurisdiction of the court and the deed was therefore not executed and acknowledged by the proper party.

(8) In *Bank of Pine Bluff* v. *Levi, supra,* in an adversary proceeding, speaking of the effect of a con-

firmation of a sale, we said: "Before the confirmation of the commissioner's sale, irregularities may be shown, that the sale was not made in accordance with the provisions of the decree; or any misconduct or unfairness shown, in order to set aside such sale. And upon all these matters the chancery court passes when it makes its decree of confirmation. And from such order or decree of confirmation an appeal lies. But after a confirmation of the sale has been made by order of the court all defects and irregularities in the conduct of the sale are cured; and every presumption will be indulged in favor of its fairness and regularity."

(9) The rule thus announced is certainly broad enough to cure all the irregularities of which appellant here complains. But inasmuch as this is not an adversary proceeding it might be urged that the confirmation could not cure the fraud practiced by the bidders in suppressing competition in bidding for the reason that the owner of the land being only constructively summoned and having no actual notice of the sale, could not know of the fraud that was being perpetrated, and that therefore this rule should not apply. But this argument is not sound, because the owners and those interested in the lands by constructive service received all the notice that the law contemplates; and the statute does not authorize the execution of the deed by the commissioner until a period of one year after the sale in which the owner is allowed to redeem. Kirby's Digest, sections 5703 and 5731. Under these provisions it is contemplated that each owner, by proper diligence, may ascertain that his lands have been sold before the time for confirmation of the deed, and that therefore he will have an opportunity to challenge the validity of the deed when the same is before the court for confirmation. Therefore, the fact that the owner may have had no actual knowledge or notice of the fraud in the sale at the time of the confirmation can make no difference in the principle. In contemplation of law he must ascertain if there are any defects before the deed is confirmed, and if he fails to

do so and to challenge the sale at that time he will not be heard to do so thereafter. But even if we were mistaken in this view, the chancellor found that appellee Norris was not a party to any agreement to suppress competition, and this finding is in accord with the evidence.

We find no element of estoppel in the fact that the appellee Norris did not offer to pay the taxes after the sale of the land until the last day when he was authorized under the law to pay such taxes. Appellee was under no obligation to pay these taxes, although the purchaser of the land, until the period of redemption had expired and until after the deed was executed and delivered to him. Certainly no fraud was perpetrated upon the owner by his failure to offer to pay the same when he was not required under the law to do so, and was under no legal duty or obligation to appellant to advise him of his purchase of the land.

The decree of the chancery court is therefore affirmed.

HART and SMITH, JJ., dissenting.

SHANDS v. STATE.

Opinion delivered May 17, 1915.

1. CARNAL ABUSE—EVIDENCE—CONVICTION.—In prosecutions for the crime of carnal abuse, convictions do not depend solely upon the evidence of the prosecuting witness, and a conviction may be had where the proof is sufficient to establish the guilt of the accused beyond a reasonable doubt, without reference to the testimony of the girl alleged to have been carnally abused.
2. EVIDENCE—CONTRADICTION OF OWN WITNESS.—A party producing a witness, when surprised by adverse testimony, may show, for the purpose of impeachment by contradiction, that the witness has made prior statements inconsistent with the one made on the stand.

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

STATEMENT BY THE COURT.

This appeal has been prosecuted from a judgment pronounced upon the verdict of a jury finding appellant guilty of the crime of carnal abuse, and fixing his punishment at imprisonment in the penitentiary for the period of one year. Appellant has not favored us with any brief in the case, but we have carefully considered the errors assigned in the motion for a new trial.

The principal question in the case appears to be whether or not the evidence is legally sufficient to sustain the conviction. The girl upon whom the offense was alleged to have been committed was evidently not responsible for nor in sympathy with the prosecution. Indeed, a consideration of her evidence makes it very apparent that she did not desire his conviction. However, upon her direct examination she did testify that appellant had had sexual intercourse with her, and she stated the time and place where the act was said to have occurred; and there was some evidence upon the part of the State which tended to corroborate this statement in regard to the time and place. Upon her cross examination, however, she repudiated this statement and denied that the appellant had ever at any time or place had sexual intercourse with her. She asserted that the prosecuting attorney had told her she would be fined $25 and put in jail if she did not testify against appellant, and she stated that she had testified against him because she was afraid not to do so. She was called upon to state, and did state, the time and place and circumstances under which these representations were made to her by the prosecuting attorney; and evidence was offered by the State in rebuttal, which was sufficient to show that the statement in regard to the intimidation of the witness by the prosecuting attorney was without foundation. Appellant denied that he had ever had sexual intercourse with the girl, and stated that he had never been in company with her on more than three occasions. He admitted, however, that he had had sexual intercourse with the sister of the prosecuting witness, who

was over the age of consent; and there was proof of certain statements made by him which, if true, amounted to an admission that he had had sexual intercourse with both of the sisters. It was further shown that at the preliminary trial appellant admitted that he had been with the prosecuting witness on many occasions, and the officer who arrested him testified that appellant stated, when the arrest was made, that "he was up against it" and said "he might as well go ahead and take his medicine." The prosecuting witness admitted, upon her cross-examination, that she had been talked with about her evidence and advised what to say, but she refused to state who had advised her what to testify.

The instructions fairly submitted the case to the jury, and no objections were made to any of them; but the motion for a new trial assigns error in the admission of certain evidence, and the action of the court in this respect appears to be the only question in the case in addition to that of the sufficiency of the evidence.

The evidence complained of consists in the testimony of Robert Edwards, the deputy sheriff to whom the defendant stated that "he was up against it and might as well go ahead and take his medicine." But it is not shown in what respect this evidence was incompetent. There is no intimation that the statement was not freely and voluntarily made, and its relevancy is, of course, apparent.

Error was also assigned in admitting the testimony of V. H. Robinson, which was to the effect that appellant had stated to him that he was going to the Exposition at San Francisco and would take a couple of women with him. Appellant's reference to and description of the women indicated that the prosecuting witness and her sister were the women referred to. We see no error in the admission of this evidence, as it tends to show the relationship between appellant and the prosecuting witness, especially in view of the fact that it was further shown that the sister of the prosecuting witness was a married woman, who had separated from her husband,

but was not divorced from him, and who was shown by the proof to be a woman of questionable character.

Error was also assigned in the admission of a letter written to one Walter Shands by the prosecutrix, and also in the admission of an affidavit made by her before a notary public upon which the examining trial was instituted in the justice court. The affidavit was to the effect that appellant had had sexual intercourse with the prosecuting witness, and the letter explained that the prosecuting witness was not responsible for the prosecution. She mentions the possibility that appellant might be sentenced to the penitentiary for a period of twenty-one years, and suggests that he might escape with a shorter term by not resisting the prosecution. The letter manifests the writer's lack of sympathy with the prosecution, but the inference to be drawn from it is unmistakable. This letter was intercepted by the mother of the girl before it was mailed to appellant, but its authorship is not denied. It does not appear what the relationship was between Walter Shands and appellant. A physician testified that at about the time of the institution of the prosecution in this case he made an examination of the prosecuting witness at the request of her mother, and found that the hymen had been ruptured and the bruised condition of the parts indicated recent sexual intercourse. The mother of the prosecuting witness testified that the girl was fourteen years of age.

No brief for appellant.

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

1. The evidence is sufficient. We find no error in the admission of testimony. The instructions submitted the case fairly to the jury.

SMITH, J., (after stating the facts). Convictions in cases of this kind do not depend solely upon the evidence of the prosecuting witness, and a conviction may be had where the proof is sufficient to establish the guilt of the accused, beyond a reasonable doubt, without reference to the testimony of the girl alleged to have been car-

nally abused. Such cases are, of course, unusual, but the beneficent purpose of the law to protect the virtue of girls, who have not reached the age of discretion, might in many cases be defeated if the law were otherwise. In this case, however, we should hold the proof insufficient if the proof of appellant's guilt depended upon the evidence of the girl alone, because her last statement was an emphatic denial that appellant had ever had sexual intercourse with her, and the conviction would not have been proper in the face of such testimony if there had been no other evidence of appellant's guilt. Moore on Facts, section 1271; *Crowe* v. *House of the Good Shepherd,* 56 N. Y. Sup. 223. But, as has been shown, there was other evidence which we think was legally sufficient to sustain the verdict of the jury. The crime of carnal abuse had been committed upon the person of the girl, and appellant's statements tended to show that he was guilty of this crime. The affidavit and the letter set out in the statement of facts were not competent as affirmative matter tending to show the guilt of the accused, but they became competent for the purpose of contradicting and impeaching the prosecuting witness when she testified that appellant had never at any time had intercourse with her. But for this denial they would not have been competent. But the denial made them admissible, as the party producing a witness, when surprised by adverse testimony, may show, for the purpose of impeachment by contradiction, that the witness has made prior statements inconsistent with the one made on the stand. See 3137, Kirby's Digest; *Williams* v. *Cantrell,* 170 S. W. 250, 114 Ark. 542.

There were other errors assigned in the motion for a new trial, but we do not regard them as of sufficient importance to require a discussion, and finding no error in the record the judgment of the court below is affirmed.

HAGLIN *v.* FRIEDMAN.

Opinion delivered May 17, 1915.

BILLS AND NOTES—FAILURE OF CONSIDERATION—RENEWAL.—The defense of failure of consideration is not available to one who, with knowledge of the failure of the consideration for the original note, thereafter executed a renewal note.

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

Geo. W. Dodd, for appellant.

1. The defense of lack of consideration and fraud was not established. The burden was on defendant, for fraud is never presumed; it must be proven. 92 Ark. 509; 78 *Id.* 87; 77 *Id.* 355; 38 *Id.* 419. The note imports a consideration. Recovery is not defeated by mere inadequacy of consideration. 99 Ark. 238; 138 S. W. 457; 8 Ark. 131.

2. The consideration was proven. It need not pass to the maker of the note; it may pass from the payee to a third party. 40 Ark. 69. A benefit to the promisor or a detriment or loss to the promisee is sufficient. 9 Cyc. 308, and note 66; 7 *Id.* 691; *Ib.* 702, and cases, note; 25 Ala. 483; 33 Ind. 184; 22 N. H. 246.

3. The court erred in refusing instructions requested. A general instruction defining consideration was not sufficient. 98 Ark. 455; 131 S. W. 960; 80 Ark. 454; 84 *Id.* 74.

4. Forbearance in collection; extension of time for payment and renewal of a note are sufficient consideration, even where there was an original failure in part. 7 Cyc. 721; 89 Ark. 132; 115 S. W. 1141.

Pryor & Miles, for appellee.

1. The note was secured by fraudulent representations and it was void for lack of consideration. 97 Ark. 265.

2. The note was void and a renewal would not impart any consideration whatever. The question of estoppel and laches are equitable defenses. This was a suit at law.

3. The court properly instructed the jury. Their verdict is decisive of the questions of fact.

SMITH, J. Appellant was the plaintiff below, and sued appellee on a note executed by him to the order of appellant for the sum of $500. The note was dated March 12, 1912, and was payable six months after date. The execution of the note was admitted, but appellee alleged in his answer that its execution had been procured by fraud and that the note was void for lack of consideration. In support of these defenses appellee offered evidence to the effect that the Arkansas Valley Trust Company, as executor of the estate of one Dave Mayo, was selling the saloon and restaurant fixtures of the estate. The sale had been advertised and sealed bids invited, and appellee had put in a bid. The fixtures were located in a building owned by appellant, and there was an outstanding contract for the lease of this building between Mayo and appellant, and Mayo's executor was anxious to make a disposition of the fixtures, which would relieve the estate from liability on account of the lease. That appellant represented to appellee that he would use his influence with the executor of the Mayo estate to have appellee's bid accepted, and that he would consent for appellee to take an assignment of the lease upon the terms agreed upon in the contract for the lease made with Mayo, and that in consideration of this promise appellee executed the note sued on, whereas appellant had already agreed with the representative of the trust company for the substitution of appellee as a tenant, and further that the executor had opened the bids, and had ascertained that appellee's bid was the highest bid received, and that the trust company had already determined to accept appellee's bid.

There were several sharply drawn questions of fact in the case, but the verdict of the jury is decisive of those questions.

The transaction upon which the note was based took place in August, 1908, and the note then given was renewed from time to time and the interest paid thereon,

and the last of the notes so executed is the one now sued on.

Various exceptions were saved to the action of the court in giving and refusing instructions; but the court in effect told the jury that if the facts were found to be as herein stated a verdict should be returned in favor of appellee, and the verdict was so returned.

It is undisputed, however, that appellee bought the fixtures and took possession of the building and occupied it in accordance with the terms of the contract for the lease; and it is also undisputed that appellee was advised, immediately after executing the first note, of all the facts here stated. Thereafter the note was frequently renewed.

The effect of renewing a note which was void for the want of consideration was considered by this court in the case of *Stewart* v. *Simon,* 111 Ark. 358, and the authorities were there reviewed, and the law was stated to be that the defense of failure of consideration was not available to one who, with knowledge of the failure of the consideration for the original note, thereafter executed a renewal note.

Applying the principal there stated to the facts of this case it follows that a verdict should have been directed in appellant's favor, and the judgment of the court below will be reversed and judgment will be entered here for appellant for the amount of the note and the interest thereon.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. OWENS.

Opinion delivered May 17, 1915.

1. RAILROADS—INJURY TO PASSENGER—PLATFORM.—Railroads are required only to exercise ordinary care in providing station platforms that will secure their passengers, insofar as they can do so, against any injury that may result from the use of them.

2. RAILROADS—STATIONS AND APPURTENANCES.—A railroad company is under a duty to exercise ordinary and reasonable care to so con-

struct and maintain station buildings or depots and appurtenances, that they shall be safe for use by passengers.

3. DAMAGES—RAILWAY PASSENGER—PUNITIVE DAMAGES.—Where plaintiff did not board a train before it started, by reason of having fallen over an obstruction on the platform, and the conductor backed the train up once and plaintiff failed to board it, the defendant will not be liable in punitive damages by reason of plaintiff's being left, because of the failure of the conductor to back it up the second time for the plaintiff.

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

Thos. S. Buzbee, John T. Hicks, H. T. Harrison and *C. L. Johnson,* for appellant.

1. Instruction No. 2, holding defendant to the "highest degree of care" as to station or platforms is not the law. Elliott on Railroads, p. 406, par. 1590; 65 Ark. 255; 96 *Id.* 311; 167 S. W. 486.

2. This is not a case for exemplary damages. 53 Ark. 7; 77 *Id.* 115.

Baldy Vinson and *S. M. Wassell,* for appellee.

1. Appellee was a passenger and the carrier is, in effect, *prima facie* responsible for the smallest negligence. There is no error in the court's charge. She obeyed the directions of the carrier's servant. By not waiting a reasonable time, Kirby's Digest, § 6704, was violated.

2. The company was guilty of negligence in the operation of its train. 96 Ark. 315; 65 *Id.* 255.

3. The verdict for exemplary damages is sustained by the evidence. There was willfulness or conscious indifference to consequences from which malice may be inferred. 80 Ark. 164; 58 *Id.* 136; 53 *Id.* 7; 58 *Id.* 136; 78 *Id.* 331. Here there was a willful violation of a statute and an indifference to results. 84 Ark. 248; 42 *Id.* 321. See also 36 Miss. 660; 58 Ark. 136; Hale on Damages, 213; 78 Ark. 331.

McCULLOCH, C. J. The plaintiff instituted this action against defendant railway company to recover for injuries alleged to have been sustained while she was at-

tempting to board one of the trains as a passenger. Negligence of the company's servants is alleged in failing to stop the train a sufficient length of time and at a proper place to enable her to board the train; and that in walking down the platform to get to the coach she stumbled over a rock or other obstruction and sustained severe physical injury. Willful misconduct on the part of the conductor is also alleged in refusing to back the train up to allow plaintiff to get aboard, and that on that account she was denied the privilege of riding to her destination and was forced to walk through the rain and mud a distance of three miles, to her great injury and inconvenience. The plaintiff prayed for compensatory and also for exemplary damages, and the jury awarded $1,000 for the first named element and $500 for the latter.

The occurrence which is the subject-matter of this controversy was at a flag station on defendant's road about three miles east of Argenta. The plaintiff had been working for several weeks at a plant near that station, and relinquished her employment there on the day her injury occurred. It was Saturday night, and she desired to board the train to come to Argenta. It was a local passenger train and passed this station a little before 8 o'clock, and the weather was bad—it was dark and rainy. There were several other passengers besides plaintiff, one of them a man with a lantern, who flagged the train as it approached. There was a small gravel platform, according to the evidence, and the front coach, which was the coach for colored passengers, stopped at this platform. Plaintiff's brother was with her, and they started to board the train, but the porter directed them to go on down to the last coach, and they started in that direction; and after walking a short distance, but before they reached the last coach, plaintiff stumbled over a log or some other obstruction and fell down, her side striking one of the ties, and severe injury was inflicted. The evidence tends to show, also, that the train moved out from the station before the plaintiff and her brother and the other white passengers could get down to the entrance to the coach

where they would be admitted. The train pulled up a short distance—150 or 200 yards—and the man with the lantern again flagged it, when it was stopped and backed down a short distance and the man climbed aboard from the rear. The conductor was informed that there were other passengers, but he declined to back the train down again, stating, according to the testimony of one of the witnesses, that he had passengers aboard who had paid three or four dollars fare and that he would not back up again for six-cent passengers. Plaintiff and her brother walked to Argenta that night and were exposed to the bad weather. The evidence tends to show that the injury received by plaintiff from the fall was painful and severe.

The first assignment of error relates to the ruling of the court in giving one of plaintiff's instructions, which reads as follows:

"If you believe from the evidence that plaintiff, at the regular stopping place prepared for passengers by defendant, offered herself as such passenger and put herself under the control and direction of employees of defendant in charge of its train, then she was a passenger of defendant. The court instructs you further that a carrier of passengers owes its passengers the highest degree of care consistent with the reasonable and practicable operation of its train, and is liable for the smallest negligence which results in injury to its passengers, and if you believe from the evidence that by reason of the failure of the defendant to exercise such high degree of care for protection of plaintiff after she offered herself as a passenger on defendant's train, she received the injury alleged, then defendant is liable, and your verdict should be for plaintiff."

(1) We are of the opinion that this instruction placed upon defendant too high a burden of care, and was erroneous. The injury of plaintiff resulting from the fall, if from any negligence at all, was caused by the failure of the defendant to provide a proper station platform to enable passengers to board the trains, and the rule in such cases is, as we have said, that the railroads are re-

quired only to "exercise ordinary care in providing station platforms that will secure their passengers insofar as they can do so, against any injury, that may result from the use of them." *St. Louis, I. M. & S. Ry. Co.* v. *Barnett,* 65 Ark. 255. The same rule was announced in the later case of *St. Louis, I. M. & S. Ry. Co.* v. *Woods,* 96 Ark. 311.

(2) The correct rule is stated by Mr. Elliott as follows: "A railroad company is under a duty to exercise ordinary and reasonable care to so construct and maintain station buildings, or depots and appurtenances, that they shall be safe for use by passengers. The duty respecting the construction and maintenance of station buildings is not so rigorous as that imposed upon railroad carriers in relation to roadbeds, tracks, cars, appliances and the like. Some of the cases seem to lose sight of the difference between the duty respecting station buildings and that respecting means and modes of conveyance, but the well-reasoned cases recognize the distinction and affirm that a railroad company that exercises ordinary care in constructing and maintaining station buildings and appurtenances in a reasonably safe condition for use is not guilty of negligence." Elliott on Railroads, Vol. 4, § 1590.

The measure of care stated in the instruction which the court gave applies only to the operation of trains, and not to stational facilities. Counsel for plaintiff rely upon the recent case of *Prescott & N. W. Ry. Co.* v. *Thomas,* 114 Ark. 56, 167 S. W. 486, decided by this court. In that case the plaintiff was injured by reason of a slippery substance being placed on one of the steps of the car which caused her to slip and fall when she was undertaking to alight from the train. We held that the higher degree of care applied in that case for the obvious reason that the passenger in stepping down from the coach was still under the immediate care of the servants of the railroad company, and that they still owed her the high degree of care due while in the operation of trains. The steps of the train constitute a part of the appliances for the ac-

commodation of passengers boarding and debarking and the rule of care is the same as if the train was in actual motion, the reason being that the passenger is at that time within the entire control of those who are responsible for the handling of the train. Such is not the case, however, when a passenger is out on the platform and is merely seeking to board the train, and the rule in those cases is that only ordinary care is required; or, in other words, such care as can be measured by the conduct of a reasonably prudent person under the same circumstances. In the Thomas case, *supra,* we called attention to the fact that the language of the instruction in that case only meant ordinary care, for it said that the defendant under the circumstances mentioned owed to the passenger "the highest degree of care which a prudent and cautious man would exercise, reasonably consistent with its mode of conveyance and the practical operation of its trains." The instruction in the present case, however, goes much further and states the law to be, as applicable to the facts of this case, that "a carrier of passengers owes its passengers the highest degree of care consistent with the reasonable and practical operation of its trains and is liable for the smallest negligence which results in injury to its passengers." The instruction says nothing about the degree of care which a prudent and cautious man would exercise under like circumstances. Other instructions along the same line were given and all of them were erroneous, and we think they were prejudicial.

(3) In view of another trial of the case, we deem it proper to say that the evidence was wholly insufficient to warrant a recovery of punitive damages. According to the evidence adduced by the plaintiff, the train had stopped for a few moments, and after it pulled out and moved away 150 or 200 yards it was stopped in response to the signals from the passenger with a lantern, then backed up and again put in motion, and the only particle of evidence upon which the plaintiff attempts to support a recovery is that the conductor wilfully refused to back up the train for the reason, as has been stated, that he

was unwilling to back up for a passenger who was only to pay a fare of six cents. There is no evidence that the conductor knew that any misdirection had been given to the plaintiff or that no time and opportunity had been given her to board the train. All that is shown is that after he had stopped the train and backed it up and took on another passenger he refused to back up again. We have said that negligence, however gross, was not sufficient to warrant the infliction of punitive damages. *Arkansas & Louisiana Ry. Co.* v. *Stroude,* 77 Ark. 109. The most that the evidence shows in this case is that the conductor refused to back the train up again, and it is not sufficient to warrant the assessment of damages by way of punishment to the railway company.

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

MALVERN & CAMDEN RAILWAY COMPANY *v.* HOUSE.

Opinion delivered May 17, 1915.

RAILROADS—OVERFLOW—DAMAGE.—Defendant railroad company purchased a right-of-way over the land of one T. Thereafter T. sold the ten acre tract through which the right-of-way ran to plaintiff. *Held,* plaintiff could not recover damages from defendant because of an alleged overflow on the lands purchased by him from T., it appearing that the railway had properly constructed its roadbed, and that all damages resulting from the proper construction of the road bed along the right-of-way purchased were already paid for in the purchase of the right-of-way, and that plaintiff could not recover damages that must have been considered and compensated in the fixing and payment of the price for the right-of-way.

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

STATEMENT BY THE COURT.

The plaintiff brought suit for damages against the railroad company, alleged to have been caused by the negligent construction of its roadbed and diverting the water from its natural course and overflowing his lands.

The railroad company purchased, prior to the 31st day of May, 1913, a right-of-way from Eldridge Thompson, across the northeast corner of a ten-acre tract of land about two miles south of Malvern, upon which it later constructed its railroad. The appellees on said 31st of May, 1913, purchased from the same grantor the said ten-acre tract of land, "subject to the Malvern & Camden Railroad right-of-way heretofore deeded to it by said Eldridge Thompson and wife," for a consideration of $300.

The complaint alleges that by reason of the construction of the high embankment, the digging of ditches on each side thereof and the placing of pipes under its said embankment, the railroad company had negligently caused water to be diverted from a large territory of land and collected and emptied into a channel, leading through plaintiff's land, causing it to be filled up with clay from its right-of-way and damaging the land by an overflow of waters, negligently diverted thereon.

The defendant denied the material allegations of the complaint. It appears from the testimony that plaintiffs bought a ten-acre tract of land from Eldridge Thompson for a consideration of $300 about a year before the suit was brought and after their grantor had sold the right-of-way across the corner of same to the railroad company, which was excepted from his deed conveying the tract. This company constructed its railroad across the northeast corner of the tract on the right-of-way purchased and its embankment runs from grade to high for about 200 yards through it. The branch runs about the middle of the tract through the field and two or three times as much water is collected by the ditches constructed and the embankment made in building the railroad as had formerly been carried off by the branch. A ditch about twenty feet wide and from three to seven feet deep was made by the railroad through this land which collected, it was shown by some of the testimony, waters which had formerly not been thrown on this land and carried it down to the main channel of the branch, which was carried under the embankment through some large tiling. The effect of

the wash and overflow and the additional amount of water was to carry sand and dirt down from the embankment and fill up the channel of the branch and overflow the land.

Several witnesses testified that the company could have allowed the water collected by another small drain to go through its embankment where it was accustomed to run, instead of diverting it and taking it down to the main channel, as was done. That about three times as much water as had formerly been carried into the main channel was thus diverted to it, causing the land to overflow below the opening or tiling left through the embankment, to the injury of the field.

Numerous witnesses testified that the land was thereby damaged to the extent of $500.

The testimony on the part of the railroad company tended to show that the railroad was properly and not negligently constructed on the right-of-way purchased, that only the water falling upon seven and one-half acres of land was diverted to the main channel of the branch through the field by the filling up of the small drain; that the drainage was not changed except as to the extent of the seven and one-half acres.

Its testimony tended also to show that the branch overflowed the lands by reason of the channel being permitted to fill up with brush and grow up with weeds and that the damage caused to the lands by the diversion of the water was inconsiderable. J. H. House testified that bushes and weeds have been growing in the branch all the time, and if they were taken out the water would go down there all right, but that if they were taken out of the branch the dirt and gravel coming in would fill it up.

The witnesses who stated the land had been damaged $500 in amount, also said that it had increased in value until its market value was from $700 to $800, at the trial.

From the verdict on the judgment against it, awarding $300 damages, the railroad company has appealed.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

Where, as in this case, a railway company has purchased the right-of-way and thereby freed itself from claims for necessary damage to remaining property by the construction of the railroad, the testimony is not sufficient to support a judgment which shows merely, as was done here, that more water goes through the branch than before, that it overflows at times and deposits sand and clay from the railroad embankment on the adjacent land, thereby damaging the same, etc.

Before appellees were entitled to recover, it was necessary to show by the proof that the railroad was constructed in an improper manner.

J. C. Ross, for appellee.

Where one person, by means of embankment, ditches and drains, or by obstruction of the same, diverts either the waters of a stream or surface water over the lands of another, causing damage to such lands, the person causing such diversion is liable to the person whose lands are so damaged. 99 Ark. 132; 95 Ark. 297.

KIRBY, J., (after stating the facts). It is contended for the appellant that it is not liable to the payment of damages resulting to the lands from the construction of its railroad on the right-of-way purchased from appellees' grantor prior to, and excepted from its conveyance to him, unless the road was constructed in a negligent and improper manner and that there was no testimony showing that such was the case.

It is true, as stated by appellant, that the appellee knew when he purchased the land that his grantor had already conveyed a right-of-way through the same, to the appellant company, upon which to construct its railroad and necessarily had been paid for such damage to the remaining tract as would probably result from the proper construction of the railroad.

The engineers who had in charge the construction of the railroad, testified that it was properly constructed in all respects and no witness testified that it was negli-

gently or improperly constructed. The effect of the testimony in behalf of appellees was only to show that the railroad company closed a small drain by its embankment, where it could have left an opening for a drainage pipe that would have carried the water off as formerly, and diverted it to the channel of the main branch by a ditch instead, that a good deal more water was thus caused to flow through the main channel of this drain than had formerly and the land below the embankment was thereby overflowed and damaged.

If this was a suit for condemnation of lands for right-of-way purposes, there is no question but that the damage complained of could have been taken into consideration in estimating the amount of compensation required to be paid to the owner for damages for land taken for the right-of-way, it constituting necessarily a permanent injury. Since it was a proper element of damage, however, to be considered in estimating the value of lands purchased for right-of-way and since the appellant company had purchased of appellees' grantor the right-of-way across this land upon which its road was afterward constructed and from whom appellee purchased the tract of land, subject to appellant's right to construct the railroad, it necessarily follows that all the damages resulting from the proper construction of the road along the right-of-way purchased was already paid in the purchase of the right-of-way and that appellee could not recover damages that must have been considered and compensated in the fixing and payment of the price for the right-of-way. The undisputed testimony shows that the railroad was properly constructed, that only a small amount of surface water from not more than seven and one-half acres of land was diverted from a small drain which was filled up, to the channel of the branch which overflowed and caused appellee's damage. A great amount of water could not have been thus diverted, and the witnesses testified that before the small drain was closed and the water diverted to the main branch that the waters flowing through the main channel of the branch on appellee's land was dis-

charged through the public road on the south of the tract through an opening about one-third of the size now required for the purpose.

It is unnecessary to discuss the alleged conflict of instructions numbered 1, 2 and 3 with those numbered 2, 3 and 4, given for appellant, since there is no testimony sufficient to support the verdict.

The judgment is reversed and the cause dismissed.

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

Opinion delivered May 17, 1915.

1. CARRIERS—NOTICE OF DAMAGE TO FREIGHT.—A requirement by a carrier that a notice of the intention of a shipper to claim damages for an injury received by freight in transit, must be given, is reasonable and enforceable as a condition to recovery.
2. CARRIERS—DAMAGE TO FREIGHT—NOTICE.—Where a notice of damage is stipulated for, the notice can be dispensed with only by showing that the delivering carrier had actual knowledge of the damaged condition of the shipment on arrival, and necessarily that a claim therefor would be made.
3. CARRIERS — DAMAGE TO FREIGHT — NOTICE — PRESUMPTION — BURDEN OF PROOF.—The burden of proof is upon a shipper who fails to give the notice required by the bill of lading, of his claim for damages to freight shipped, to show such actual knowledge of the damaged condition of the shipment upon arrival and delivery to the consignee, as would cause the delivering carrier to know that a claim for damages would be made, so that it might investigate and discover the true condition and protect itself against unjust claims.

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

Thos. B. Pryor, for appellant.

1. The law of this case with reference to the provision in the bill of lading that notice should be given in writing, within thirty-six hours after the arrival of the shipment at place of delivery, of damages thereto, has

been settled by this court on former appeal, namely, that such notice is reasonable, and a condition precedent to recovery. 105 Ark. 406, and authorities cited. See also 90 Ark. 313, and cases cited.

No attempt was made on the part of the plaintiff to prove the allegation in the amendment to his complaint "that the defendant, the general agent for fruit shipment, C. E. Carstarphen, and its local agent at Greenwood, Ark., L. W. Rhodes, knew all of the foregoing material matters." On the contrary, their testimony is that they knew nothing of the peaches arriving in a damaged condition, and nothing of any claim for damages on account thereof until the filing of this suit. The proof is also that the cars of peaches were transported by appellant over its line of road, delivered to connecting carriers and by them to the consignees without objection or protest of any kind, that they were believed to have been properly delivered, and that no claim was ever presented, nor any notice of any claim for damages made until the institution of this suit.

2. The shipments were interstate, and, therefore, governed by the Federal law. 42 Ark. Law Rep. 24.

Robert A. Rowe, C. A. Starbird and *P. E. Rowe,* for appellee.

1. If the delivering carrier examined the peaches upon arrival and knew for itself the condition of the consignment on arrival, it was not necessary, as a condition precedent to recovery to give the notice in writing provided for in the bills of lading. 105 Ark. 406, 412; Hutchinson on Carriers (3 ed.), § 442; 101 Ark. 172; 90 Ark. 308; 63 Ark. 332; 89 Ark. 404.

2. A judgment will not be reversed for error appearing in the record, where, upon the whole record, it appears that the judgment is right. 85 Ark. 568; 96 Ark. 156; 94 Ark. 115. Findings of fact by a court sitting as a jury, are conclusive. 90 Ark. 512; *Id.* 494; *Id.* 375; 91 Ark. 108; 92 Ark. 41; 100 Ark. 166; 86 Ark. 504; 104 Ark. 154; 148 S. W. 148; 96 Ark. 606; 79 Ark. 185; 84 Ark. 359.

KIRBY, J. This is the second appeal of this case, the issue before was raised by demurrer and decided in appellees' favor, the complaint being held sufficient. *Cumbie* v. *St. Louis, I. M. & S. Ry. Co.*, 105 Ark. 406.

The suit was for damages to thirty-five cars of peaches shipped over appellant's line from Greenwood, this State, to Cleveland, Ohio, and various other points, because of the negligent delay in transportation and failure to ice properly in transit.

The bill of lading issued by appellant, the initial carrier, provided: "Claims for damages must be reported by consignee in writing to the delivering line within thirty-six hours after the consignee is notified of the arrival of the freight at place of delivery. If such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable."

This stipulation was pleaded in the complaint passed upon with an allegation that it was unreasonable and void and constituted a restriction or limitation upon the railway's liability and without any allegation that the notice was given. But it was alleged in the amendment to the complaint that the delivering carrier examined said peaches upon arrival and knew for itself the condition of the consignment on delivery, and that its general agent, for such shipments, naming him, and its local agent at Greenwood, knew all the foregoing facts.

It was there held that the complaint was sufficient and that it was not necessary as a condition of recovery that the shipper give the delivering carrier the notice of an intention to claim damages to the peaches since such carrier through its agents examined and knew the condition of the shipment of peaches while in its possession at their destination, according to the allegations of the complaint, which were admitted by the demurrer. The court said, "Where the facts stated show that the delivering carrier had actual knowledge of all the conditions that a written notice could give it, the written notice is not required and a provision requiring it under such circumstances would be unreasonable."

It was also held that it made no difference whether the provisions of the contract of shipment required the notice "of loss or damage to be given" or whether its language provided for written notice of an intention to claim damages, the purport of these provisions being alike and having the same legal effect and also that they were not limitations upon or exemptions from liability of the carrier but only conditions precedent to recovery.

On this trial appellees introduced testimony in support of its allegation that the delivering carrier examined the shipment on arrival at destination and ascertained the damaged condition thereof. Such testimony was to the effect that the depot manager in one instance had an opportunity to see the condition of the fruit, although no employee of the railroad was with the consignee when he inspected the car that had been opened for him before delivery. In another, that no claim for damages was put in, but he notified the delivering carrier verbally that the car was in bad condition. Relative to another car, that it was the custom of the delivering carrier to inspect peaches before delivery and that one of the clerks did inspect it. In other instances, that some yard clerk or some employee of the road saw the car unloaded and knew the damaged and rotten condition of the peaches. The agents of the different delivering carriers, the local freight agents in some instances and the agents to whom the notices of intention to claim damages should have been given, or to whom they would finally have come, as well as the general freight claim agent of the appellant company, all testified that no notice in writing was given to the delivering carrier of the damaged condition of the shipment of peaches nor of an intention to claim damages within thirty-six hours after the arrival of the shipment and that they had no notice of any such damaged condition or intention to claim damages until the bringing of these suits. Said general claim agent stated that he caused an investigation to be made of the handling of the thirty-five cars embraced in this suit and no written notice was given within thirty-six hours after the notice of arrival of cars

at destination or at all upon the delivering lines, as to any claim for damages by the consignee to the agent of the delivering line. His first knowledge of any such claim was the bringing of the suit. That no exceptions or objections were made by the consignees at the time of the delivery of the cars and that they were delivered upon receipts of the connecting carriers and the consignees, showing them to be in good order.

No attempt was made to show that any written notice was given to any delivering carrier of an intention to claim damages within thirty-six hours of the arrival of the shipment, or at all, nor was any testimony introduced tending to show that the local agents of appellant at Greenwood knew of any such material facts as alleged in the complaint and they both testified that they had no knowledge of the peaches arriving in a damaged condition or that the appellee claimed damages on account thereof, until the filing of the suit.

(1-2) The court has not only frequently held that such a provision requiring the written notice of the intention to claim damages given to the delivering carrier is reasonable and a condition precedent to recovery, but has so held in this case on the former appeal as already said. Such notice can only be dispensed with by showing that the delivering carrier had actual knowledge of the damaged condition of the shipment on arrival and necessarily that a claim therefor would be made. The purpose of requiring such notice to be given is to enable the carrier, while the occurrence is recent, to inform itself of the actual facts occasioning the loss or injury that it may protect itself against claims which might be made upon it, after such lapse of time as to make it difficult if not impossible, to ascertain the truth. *St. Louis & S. F. Rd. Co.* v. *Keller,* 90 Ark. 313; *St. Louis, I. M. & S. Ry. Co.* v. *Furlow,* 89 Ark. 404; *St. Louis, I. M. & S. Ry. Co.* v. *Cumbie,* 101 Ark. 172.

In this last cited case, the consignee or his agent, declined to receive the shipment, thinking it damaged in its entire value, and sent a telegram to that effect to the con-

signor, a copy of which was given to the delivering carrier and it was held that that was a sufficient compliance with the provision requiring written notice of an intention to claim damages. The purpose of the clause requiring notice would be utterly defeated and such requirement rendered ineffectual and worthless if it could be disregarded and a recovery had, notwithstanding the failure to give it, upon the testimony of appellee introduced in the trial. The most it tends to show is that some agent or some employee of the delivering carrier saw, or could have seen, if he had endeavored to do so, the damaged condition of the shipment of peaches on arrival and delivery. Nowhere does any one of said witnesses say or intimate that he notified any agent of such carrier in authority that the shipment was so damaged, and that a claim for damages would be made. Of course, the delivering carrier could inspect for itself each car load of perishable freight upon delivery to the consignee and ascertain its condition, and if the testimony was sufficient to show that this had been done and that such carrier had actual knowledge of such damage as must cause a reasonable inference that a claim would be made therefor, it might be required to answer for such damage without the written notice. But here was a reasonable provision of its contract of carriage upon the compliance with which it had the right to rely and which was not attempted to be performed by the consignee who relies for his failure to give the notice upon the alleged fact that such carrier had actual knowledge of the damaged condition of the shipment on arrival at destination and must take notice that a claim would be made for such damages.

(3) The burden of proof was upon the shipper, who failed to give the written notice, to show such actual knowledge of the damaged condition of the shipment on arrival and delivery to the consignee as would cause such delivering carrier to know that a claim for damages would be made, that it might investigate and discover the true condition and protect itself against unjust claims.

The fact that some employee whose duties were not shown to include the investigation of such matters or to report to some agent in authority anything relating to the condition of the shipment was present upon the delivery and saw the damaged condition of the fruit shipped, or could have seen it, is not sufficient to show actual knowledge upon the part of the delivering carrier that would excuse the failure to give the written notice of intention to claim damages as a condition precedent to recovery. It might be that some employee or some agent who had no duty whatever relative to such matters could be present and see the shipment and know of its damaged condition, and still the agents or employees, whose duties required attention to such matters, never be informed about it.

The proof is not sufficient to support the findings and judgment. The judgment is therefore reversed and the cause having been fully developed, must be dismissed. It is so ordered.

WOOD, J., (dissenting). In my opinion, there was ample evidence to warrant the finding by the court that the delivering carrier had knowledge of the damaged condition of the peaches. Such knowledge under *Cumbie* v. *St. Louis, I. M. & S. Ry. Co.,* 105 Ark. 406-14, was sufficient to dispense with the written notice. In that case we held: "It was not necessary, as a condition of recovery, that the appellants give appellee written notice of an intention to claim for damages to the peaches if the delivering carrier, through its agents, examined and knew the condition of the peaches while in its possession after their arrival at destination. * * * Where the delivering carrier has actual knowledge of all the conditions that a written notice could give it, then written notice is not required." Without reviewing the evidence in detail, which could serve no useful purpose, it tends to show that the employees of the delivering carrier, in one instance an employee "who had charge of the car tracks," and who inspected the peaches, who "released the cars" which contained the peaches; in other instances, the "railroad inspector" "went every

morning" and in company with the shipper's agent would "look at" the peaches; a "Mr. McKelvey, the railroad inspector," went at the request of the consignee and "inspected" the peaches, etc. The peaches were shown to have been so badly damaged that their condition could not have escaped the observation of those who had them in charge, and those who inspected same. Therefore, treating the finding of the court on the question of fact the same as if it were the verdict of a jury, as we must do, and giving it at least as much potency as the verdict of a jury to which it is certainly entitled, I can not escape the conclusion that the evidence is sufficient here to sustain the finding of fact by the court. We are not the triers of issues of fact, and the unvarying rule of this court is to uphold the verdict of a jury, or a finding of fact by the court sitting as a jury, where there is any substantial evidence to sustain it. In such case the issue is one of fact and not of law.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. STARBIRD, ADMINISTRATOR.

Opinion delivered May 17, 1915.

1. CARRIERS—DAMAGE TO FREIGHT—NOTICE.—Plaintiff was consignee of perishable fruit, and defendant was delivering carrier. The bill of lading provided that notice of damage to the shipment must be made within a certain time. *Held*, under the facts that no proper notice was given as to the damage to part of the shipment, but that the carrier through its agents received such notice of damage to the remaining part of the shipment, as to render it liable within the meaning of the bill of lading.
2. CARRIERS—DAMAGE TO FREIGHT—NOTICE.—Where it is shown that a delivering carrier has actual knowledge of all the conditions that a written notice could give it, then a written notice is not required.
3. CARRIERS—DAMAGE TO FREIGHT—NOTICE TO AGENT.—Where a bill of lading required written notice of a claim for damage to freight to be given within a certain specified time, the notice must be given to the company in writing, or personal notice must be

given to that employee or agent of the company whose duty it would be, if written notice had been received, to make the inspection to ascertain the nature and extent of the damage, if such employee or agent does not already possess that knowledge.

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

Thos. B. Pryor, for appellant.

1. No notice was given as required by the bill of lading. The provision was reasonable. 105 Ark. 406; 90 *Id.* 314; 82 Ark. 353; 107 *Id.* 48; 108 *Id.* 115; 100 *Id.* 37; 93 *Id.* 430. The court should have found for defendant.

Robert A. Rowe and *P. E. Rowe,* for appellee.

1. The delivering carrier inspected, knew and saw the damaged condition of every car. Notice was unnecessary, as the carrier had knowledge. 101 Ark. 172; 105 *Id.* 332, 412; Hutch. on Car. (3 ed.), § 442; 90 Ark. 308; 63 *Id.* 332; 89 *Id.* 404; 101 *Id.* 436, 172; 80 *Id.* 554. These decisions settle the law of this case.

2. The finding of the court on questions of fact is as conclusive as the verdict of the jury. 90 Ark. 512; 104 *Id.* 154; 84 *Id.* 359; 60 *Id.* 250; 40 *Id.* 144; 36 *Id.* 250.

SMITH, J. The suits embraced in this appeal were originally begun on the 7th of April, 1908, and those causes were removed to the Federal Court, Western District, of this State, where nonsuits were taken in July, 1910. And thereafter the suits were again brought in the Greenwood District of the Sebastian Circuit Court. Ten carloads of peaches are involved in this litigation, and there were originally ten suits, but the causes were consolidated and tried together, and a single appeal has brought the judgment in all of the cases before us for review.

The peaches were shipped from Greenwood, in Sebastian County, to Adam Miller in New York City, and suit was brought by Miller to recover damages to compensate the loss sustained to the peaches in transit. Miller died before final judgment, and the cause was revived in the name of a special administrator.

There was proof to support the finding by the court below that the damage to the peaches resulted from the failure of the railroad to ship the peaches promptly and to ice them properly, and the evidence was also sufficient to sustain the amount of damages found by the court in the case of each of the cars.

The bills of lading for the respective cars all contained the provision that the carrier should not be liable for any damages sustained by the peaches, unless written notice was given within thirty-six hours after the arrival of the peaches at their destination of the damages sustained. It was alleged in the complaint that a written notice had been given; but the proof is insufficient to sustain that allegation. It is very earnestly urged, however, that personal notice was given and that the delivering carrier had such actual knowledge of the damage done the peaches as that a written notice was unnecessary, and would only have advised the delivering carrier of a fact about which it already had full information. The proof on the part of appellee was to the effect that the cars were delivered at the railroad terminal in Jersey City, after which they were switched from the road to a lighter, which was ferried across the Hudson River to a pier numbered 29, which was devoted to the reception of perishable fruits. The cars were taken from the lighter to the dock, which was entirely closed, and no one was allowed inside the dock until the cars had been unloaded and the fruit placed in piles, the crates of peaches in each car being placed in a separate pile. The cars were unloaded by employees of the railroad company, and at midnight bulletins were posted up showing the car numbers and the dealers to whom the fruit was consigned, and at 1 o'clock in the morning the dock doors were opened and the dealers permitted to go in and get their peaches. But no one was permitted in the dock until the peaches were ready for delivery, and no consignee would know whether the cars consigned to him had been received until midnight when the bulletins were posted. The custom was that, if the peaches were sound, they were sold at the dock and

were usually gotten rid of before noon of the day of their receipt; but, if many of them were bad, and had to be sorted out, the authorities at the dock required the consignees to haul the peaches to their places of business and there sort them out, at which time the sound fruit would be repacked in crates and the faulty fruit thrown away.

It is insisted on behalf of appellees that the delivering carrier was necessarily charged with notice of the condition of the fruit at the time of its arrival at its destination; that this is so because the delivering carrier had inspectors at the docks whose business it was to inspect and ascertain the condition of the various shipments, and that the consignments here involved were in such bad shape that the carrier must necessarily have known that considerable damage had been sustained, as the fruit was shipped in crates which were open so that from a superficial examination it could be seen that the fruit had discolored and had become specked and that large quantities of juice from the fruit had run out of the crates over other crates, and that these crates could not have been handled without the railroad company acquiring this knowledge.

The deposition of Adam Miller was taken upon interrogatories in each of these cases, and in five of those depositions he was asked this question: "Interrogatory No. 17. State whether you, or any of your employees, told any of the employees of the delivering carrier of the damaged condition of peaches in said car, and whether or not employees of said railroad company went into the car and inspected the peaches, and, if they did not go into the car, did they unload or see the peaches unloaded, or see them after they were unloaded, and knew of the damaged condition of the peaches, giving name of the employee, if you know, and the position he holds with the company?

"His answer was, 'I don't know.' "

The following question was also asked: "Interrogatory No. 18. State if you know whether the railroad company, at that end of the line, had an employee to inspect said car of peaches, and knew of the condition in which the car arrived?

"Answer to Interrogatory No. 18, 'I don't know.' "

(1-2) These questions were asked and answers given in regard to the following cars involved in this litigation, towit: A. R. T. 8787; A. R. T. 9737; A. R. T. 10756; A. R. T. 9478; A. R. T. 8711.

But different answers were given in regard to the remaining five cars, which had the same initials and were numbered as follows: 10640; 8683; 10875; 10542; 10052. As to these last-numbered cars, the witness answered the Interrogatory No. 17 as follows: "I called the attention of the dock foreman to the bad peaches, and told him they were not iced and had gone bad. I do not know the dock foreman's name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car which was lightered from Jersey City to New York. I don't know his name. He looked at them and went away." And, in response to Interrogatory No. 18, he testified: "The railroad company has a man at the dock who inspects the peaches as they come on the dock off the cars and see the condition which they arrive in."

We have today handed down an opinion in a companion case. See *St. Louis, I. M. & S. Ry. Co.* v. *Cumbie et al.,* 118 Ark. 478. In that case we reviewed our previous decisions on the question of the validity of the stipulation contained in the bill of lading requiring notice to be given of the damaged condition of the goods within thirty-six hours after arrival at their destination. The validity of the stipulation was again upheld in that case, as it had been in several prior decisions, and the judgment recovered in that case was reversed because the proof did not show a compliance with this condition. That case also stated the rule as to the circumstances and conditions under which the knowledge of the carrier in regard to the condition of the damaged goods would be held to dispense with the necessity of giving notice. That opinion quoted with approval from the case of *Cumbie* v. *St. Louis, I. M. & S. Ry. Co.,* 105 Ark. 406, the following language:

"Where the facts stated show that the delivering carrier has actual knowledge of all the conditions that a written notice could give it, then written notice is not required, and a provision requiring it under such circumstances would be unreasonable."

The purpose of this notice is manifest, and has been stated in our decisions upholding it. Its object is that the carrier may inspect the goods and ascertain the nature and extent of the damage while the truth in regard to any claim for damages may be known. But where the carrier possesses this information independently of the notice, the giving of the notice can serve no necessary purpose.

(3) It is insisted that the carrier should be charged with notice of any information possessed by any of its servants or employees. But we can not agree with this contention. None of our cases so hold, nor has it been so held in the decisions of any other jurisdiction of which we are aware. To so hold would render the provision in regard to notice practically nugatory. In the present case the laborers who unloaded the cars were called longshoremen, and some of these men unquestionably knew that some of the peaches contained in the cars were in a damaged condition; but this is not the knowledge contemplated by the bill of lading. To comply with the terms of the bill of lading it is essential, either that the notice be given to the company in writing, or, if this is not done, that personal notice be given to that employee or agent of the company whose duty it would be, if written notice had been received, to make the inspection to ascertain the nature and extent of the damage, if such employee or agent does not already possess this knowledge. These longshoremen were under no duty to inspect the peaches. They had no duty to perform except that of taking the crates of peaches out of the cars and piling them on the dock, and they would not know whether written notice had been given to the company or not, and there is nothing in the record to indicate that any duty of inspection would have devolved upon them had the written notice in fact been given. There is much evidence in this record tend-

ing, on the one hand, to corroborate Mr. Miller, and, on the other hand, to contradict him. But we are not called upon to weigh this evidence, nor to pass upon the credibility of the witnesses. It is our duty simply to determine whether or not the evidence is legally sufficient to sustain the verdict. We will not undertake to review the evidence in detail, but state our conclusion to be that, as to the five cars first mentioned, there was no proof of knowledge of the damage sufficient to supply the failure to give the notice in writing provided for by the bill of lading, and as to these cars the judgment must be reversed, and as the case has been fully developed the suits as to them will be dismissed. But we think a different rule must be applied to the last five mentioned cars. As to them the proof showed that the peaches were placed in piles as they were unloaded from the cars, and that neither the consignee nor his representative was allowed in the dock until the cars had been completely unloaded, and that Miller went to the foreman of the dock, who was the man in authority there, and reported to him the damaged condition of the peaches, and that the foreman went with Miller to these peaches and saw the peaches, but left without making any comment, and that this foreman was the representative of the delivering carrier. The proof further shows that an inspection of the peaches by the railroad company could have been made then and there. The answer to the eighteenth interrogatory shows that the railroad company maintained an inspector at the dock. Yet, notwithstanding this fact, we do not hold the railroad company liable for the first five mentioned cars, because the proof does not show that this inspector had any duty to perform concerning them. Upon the other hand, we can not assume that there was any uncertainty about Miller's purpose in hunting up the dock foreman and reporting to him the condition of the five remaining cars, and in going with this foreman to the piles of peaches about which the complaint was being made. The proof does not show that Miller stated to the dock foreman that it was his intention to sue for the damage to the peaches; but it is not indispensable that

the written notice should have contained this statement. The purpose and effect of Miller's statement to the foreman was to advise the representative of the delivering carrier, in authority of the fact that damage had been done, and the giving of this notice under the circumstances must be held sufficient to charge the delivering carrier with knowledge of the fact that compensation would be claimed.

The depositions of Miller, upon motion of appellant, had been suppressed at a former term of court for the reason, principally, that the certificate of the notary was defective. This certificate was amended, and upon motion of appellee the court set aside its former order suppressing the depositions and permitted them to be read upon the hearing of the cause. There was no intimation that the integrity of the depositions had not been preserved, neither was there any question about the depositions having been properly transmitted by the clerk. No prejudicial error was committed in this respect.

As to the five cars last mentioned, the judgment will be affirmed; but as to the others, the judgment is reversed and the cause dismissed.

BANKERS SURETY COMPANY v. WATTS.

Opinion delivered May 17, 1915.

SURETYSHIP—BREACH OF BUILDING CONTRACT.—Defendant was surety on a building contract. The contract provided that the work should be completed on September 1, and provided a penalty for every day of delay thereafter. *Held*, the latter provision fixed the damages for a breach of the contract, and did not provide for an extension of time, and that when the plaintiff failed to notify the surety of the breach, within the time specified in the contract, that the surety was discharged from liability.

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

STATEMENT BY THE COURT.

Samuel C. Watt instituted this action in the chancery court against the Bankers' Surety Company and Thomas J. Prichard to recover on a building contract. Several other persons filed interventions claiming liens on the building for materials furnished by them which were used in the construction of it.

On the 5th day of May, 1910, the plaintiff, Samuel C. Watt, entered into a written contract with the defendant, Thomas J. Prichard, whereby the latter was to erect for him in Hot Springs, Ark., a two-story brick veneer residence in accordance with certain plans and specifications which were made a part of the contract. The contract price was $12,910, which included $800 that the contractor was to give for a five-room cottage, which was then situated on the lots where the dwelling was to be erected.

The contract also provided that the contractor should deliver said building complete in all its parts and free from all liens and claims to the owner on or before the first day of September, 1910, under penalty for delay of ten dollars per day for each and every day after said date, during which said building should remain incompleted and unfinished.

There was a clause in the contract which provided that the owner should withhold 20 per cent of the estimate made by the architect until the final payment; and another clause provided that notice in writing should be given to the surety on the bond of any proposed change or addition to the contract in case it should involve or cost an extra expense of $500 additional to the contract price.

The Bankers' Surety Company executed a bond as surety of Prichard for the faithful performance of all the terms, covenants and conditions of the contract on his part. The first condition of the bond provided that in event of any default on the part of the principal a written statement of the particular facts showing such default and the date thereof should be delivered to the surety by registered mail within ten days after the owner of the building should learn of such default; and that the surety

should have the right within thirty days after receipt of such statement to proceed or to procure others to proceed with the performance of the contract and should be subrogated to all the rights of the principal.

Another clause of the bond provided that no claim, suit or action by reason of any default should be brought against the principal or surety after the first day of December, 1910; and that no recovery should be had for damages accruing after that date. This clause was afterward changed by extending the date to March 1, 1911.

The contractor did not finish the building by September 1, 1910, and it was not finished until some time in February, 1911, when the owner took charge of it and finished it. The contractor also failed to pay several materialmen for materials furnished to be used in the construction of it.

On November 23, 1910, the owner gave written notice to the surety that the building had not been completed by the first of September and that materialmen's liens were about to be enforced against the building. The record shows that the owner knew these facts on the first of September, 1910, but that he did not make them known to the surety until November 23, 1910. The record shows also that the surety company had no notice until November 23.

The bond given by the surety company was in the sum of $6,500.

The chancellor found in favor of the plaintiff and the defendant, Bankers' Surety Company, has appealed.

Rector & Sawyer, for appellant.

1. No notice of the failure of the contractor to complete the building within the time designated was given by the owner to the surety, as required by the contract, and the surety is discharged. 79 Ark. 523; 96 S. W. 745; 125 Fed. 887; 60 C. C. A. 623; 125 Fed. 892; 103 *Id.* 427; 173 S. W. 241.

2. There was no extension of time nor waiver. 103 Fed. 435. Mere silence is not a waiver. 112 S. W. 200; 88 Ark. 291.

C. Floyd Huff, for appellee.

The surety was not released, under the contract, by the failure to give notice. 79 Ark. 523; 89 Mo. App. 201; 222 U. S. 460; 231 *Id.* 474.

HART, J., (after stating the facts). By the terms of the contract the building was to be completed September 1, 1910. As a matter of fact, it was not completed until some time in February, 1911. No notice of the failure of the contractor to complete the building within the designated time was given by the owner to the surety within ten days as required by the contract. The defense of the surety company rests mainly upon this failure to give notice.

It is not claimed that the surety in fact assented to the extension of time, but it is claimed that it will be deemed to have assented thereto by the terms of the contract itself which, it is said, contemplates that additional time for the completion of the building might be granted.

Counsel bases this contention on that clause of the contract which provides for the completion of the building by the first day of September, 1910, under penalty for delay of ten dollars per day. They contend that the contract definitely contemplated that it might be necessary to extend the time and that the surety company must be held to have contemplated it also. In support of their contention they cite *Graham and the Title Guaranty & Surety Co.* v. *United States,* 231 U. S. 474, and *United States* v. *McMullen and Other Administrators,* 222 U. S. 460. We do not think either of these cases sustain the position assumed by counsel.

The contract in the McMullen case provided that no extension of time was to be granted except upon the authority of the Secretary of the Navy in accordance with the terms of the contract; and the secretary granted an extension.

In the Graham case the bond in terms contemplated an extension of time and the contract provided for a waiver of the time limit.

Here the facts are essentially different. There was no provision in the contract which contemplated an extension of the time. If the payment of ten dollars per day as provided in the contract for each day of delay be construed as a penalty, as was done in the case of *Wait v. Stanton,* 104 Ark. 9, it is unenforceable and has no binding force whatever; on the other hand, if it be construed as liquidated damages it simply has the effect of the parties contracting in advance what the damages for a breach of the contract shall be. It does not have the effect of providing for an extension of time. It only fixed the measure of damages in the event the contractor committed a breach of the contract and was not justified in so doing.

When the contractor failed to complete the building by the first of September, 1910, he committed a breach of the contract; and, under the express terms of the contract, in order to hold the surety company liable it was the duty of the owner to give written notice within ten days thereafter. The object of giving this notice, as shown by the contract itself, was to enable the surety company, seasonably, to take such practical action as might minimize its loss by reason of the contractor's default.

We are of the opinion that the contractor committed a breach of the contract when he failed to complete the building on the first day of September, 1910, and that this failure constituted a default within the meaning of that word as used in the contract. It was, therefore, the duty of the owner of the building to notify the surety company of this default if he wished to hold the surety company liable for the breach of the contract. This the owner failed to do.

There is no testimony in the record tending to show that the surety company waived the giving of this notice to it; neither is there anything in the record to show that the surety company assented to the extension of the time for the completion of the building or that the failure of the contractor to finish the work on time was justified or excused by the conduct of the owner.

It follows that the decree will be reversed and the cause remanded with directions to the chancellor to dismiss the complaint for want of equity.

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

Opinion delivered May 17, 1915.

1. JUDGMENTS—NUNC PRO TUNC ORDER—NOTICE—WAIVER.—When the attorney and manager of a company were in court, at a time that a judgment against the company was corrected, made objection to such correction, and moved to set aside and vacate the judgment entered *nunc pro tunc*, it will be held that the notice required to be given of the proceedings to amend the record were waived.
2. JUDGMENT—CORRECTION OF RECORDS—NUNC PRO TUNC ORDER.—The court has authority at any subsequent term to correct its record by the entry *nunc pro tunc* of a judgment that was rendered at a former term.
3. JUDGMENTS—ORDER NUNC PRO TUNC.—The authority of the court to amend its record by a *nunc pro tunc* order, is to make it speak the truth, but not to make it speak what it did not speak, but ought to have spoken.
4. GARNISHMENTS—LIABILITY OF GARNISHEE.—Where a garnishee admits that it holds certain money belonging to the defendant, it should pay the money into court to be delivered to which ever party the court should decide was entitled to it, and if it pays the money to some one not entitled thereto, it will also be liable therefor to the panty finally adjudged to be entitled to it.
5. JUDGMENTS—CORRECTION AND AMENDMENT.—Where a judgment expresses the entire judicial action taken at the time of its rendition, the court has no authority, after the expiration of the term, to enlarge or to diminish it in matter of substance or in any matter affecting the merits.

Appeal from Fulton Circuit Court; *J. W. Meeks*, Judge; affirmed.

STATEMENT BY THE COURT.

This is the second appearance of this cause here, a statement of which appears in the former opinion wherein the complaint was held sufficient. *Citizens Bank* v. *Commercial National Bank*, 107 Ark. 142.

The Wood Grocery Company first brought suit in the justice court by attachment to subject certain funds in the hands of the Citizens Bank to the payment of its debt against L. Starks Company. The garnishee answered, admitting that it held the funds which it offered to pay into court.

The Commercial National Bank intervened, claiming to be the owner of the funds in the hands of the garnishee. Its intervention was denied by the justice and it appealed to the circuit court, the Citizens Bank becoming surety on its appeal bond. Upon the trial in the circuit court between the intervener and the Wood Grocery Company, the court rendered a judgment from which the Wood Grocery Company prayed and was granted an appeal.

The complaint herein alleges that the judgment was wrongfully and fraudulently entered against the Citizens Bank, which had already paid the funds in its hands to the Wood Grocery Company after the judgment was rendered against the intervener in the justice's court, when in fact judgment was rendered by the circuit court against the Wood Grocery Company and not the Citizens Bank.

A demurrer was sustained to this complaint on the first trial in the circuit court, from which an appeal was taken, and this court held, as already said, the complaint sufficient and reversed and remanded the case for further proceedings.

The Citizens Bank amended its complaint and alleged that it had in fact paid the garnished fund over to the Wood Grocery Company, after the intervention of appellee herein was dismissed in the justice court, upon the order of the justice and before an appeal was taken from the order of dismissal, and also alleged more specifically the entry of judgment against it by misprision of the clerk when no judgment had in fact been rendered by the circuit court against it, "That the court at that time rendered judgment against the Wood Grocery Company, a party to that action, and that by mistake or clerical misprision, said judgment was unlawfully and wrongfully entered of record against this plaintiff."

The Commercial National Bank admitted that it had procured the judgment against the garnishee and that same was entered upon the records of the circuit court, but denied that it was unauthorized or procured by fraud, clerical misprision or mistake or entered without authority. It denied that the garnishee was without notice of the proceedings in the circuit court and alleged that it appealed from the judgment dismissing its interplea in the justice's court in open court on the day of the trial and that the garnishee bank became its surety on the appeal bond and had full knowledge of the pendency of the proceedings in the circuit court. Denied also that the garnishee paid over the funds in its hands before the appeal was taken from the justice's court.

Both the attorneys representing the Wood Grocery Company in the first trial in the circuit court testified, the deposition of Sam Davidson, who had since died, being read and also A. P. Campbell, who was the manager of the Wood Grocery Company. The attorneys of appellee bank and the circuit court judge also testified.

It appears from the testimony that the circuit court rendered judgment against the Wood Grocery Company, both the attorneys and the manager thereof stating positively that such was the fact and the judge's minutes showing, "Judgment for amount against Wood Grocery Company."

The testimony relating to the alleged payment of the money by the garnishee upon the order of the justice, to the Wood Grocery Company after the dismissal of appellee's interplea, shows that the appeal was prayed and granted on the day of the trial, in open court, and the affidavit and bond filed within an hour or two thereafter. The attorney for the Wood Grocery Company and the cashier of the garnishee bank testified that immediately after the judgment of dismissal was rendered that the bank paid the garnished funds to the Wood Grocery Company upon the order of the justice and took a receipt therefor some little time before the affidavit and bond for appeal were filed.

The testimony also shows that Campbell, the manager of the Wood Grocery Company, agreed to repay the fund to the Citizens Bank or hold it harmless if it should be compelled to pay the fund to the Commercial National Bank, upon the appeal to the circuit court.

The entries in the justice's docket show that the case was tried and the appeal granted on May 21, and the receipt for the garnished fund shows it to have been paid on the 25th. The cashier of the garnishee bank and the manager and also the attorney of the grocery company and the attorneys as well testified that it was paid on the same day of the trial and immediately after the dismissal of the interplea, the justice also saying that his docket entries were not always made up at the time of filing papers and the occurrence of the proceedings.

The court set aside the judgment against the garnishee, the Citizens Bank, and entered judgment *nunc pro tunc* against the Wood Grocery Company. It also found that while the intervener was endeavoring to perfect its appeal from the judgment of the justice of the peace, that the justice ordered the Citizens Bank to pay the money garnished in its hands to the Wood Grocery Company, "with the understanding that in case of an appeal, and it was declared that the Wood Grocery Company was not entitled to it and the Citizens Bank was required to pay the money to the Commercial National Bank, that the Wood Grocery Company would reimburse it for the said amount, and therefore judgment should be rendered against it, the Citizens Bank also," and rendered judgment accordingly; and from this judgment this appeal is prosecuted.

David L. King, for appellant.

1. This case has been here before (107 Ark. 142), and was reversed and remanded. On remand there was but one issue, whether or not the judgment *entered* of record should be vacated and set aside. This was all plaintiff asked. The Citizens Bank was relieved of liability. 107 Ark. 145.

2. The court had no authority to render the *nunc pro tunc* judgment. There never was a judgment against appellant and the entering of the same upon the record was either a fraud of misprision. But if the court really rendered judgment, and it was never entered of record, the court lost jurisdiction after the term lapsed, and could not, three years later, without notice, enter a *nunc pro tunc* judgment. 40 Ark. 224; 41 *Id.* 75; 51 *Id.* 34; 53 *Id.* 21. The purpose of a *nunc pro tunc* order is to make the record speak the truth and reflect the facts as they actually took place. 106 Ark. 470; 72 *Id.* 21; 92 *Id.* 299; 99 *Id.* 234.

3. Judgments without notice are void. Kirby's Dig., § 4424; 58 Ark. 181.

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

1. The appeal should be dismissed for failure to comply with the rules.

2. The *nunc pro tunc* judgment against the Wood Grocery Company was properly entered. The record of a judgment is only evidence of its existence, its enforcement does not depend upon its being entered of record. 59 Ark. 588; 57 *Id.* 185; 4 *Id.* 591; 40 *Id.* 224; 12 *Id.* 670; 35 *Id.* 278; 78 *Id.* 364; 103 *Id.* 484. If a judgment was in fact rendered, it can be entered of record afterward. A court can not set aside or modify a judgment after the term has lapsed. 78 Ark. 364.

3. The Citizens Bank has nothing to appeal on. It filed no motion for new trial and failed to allege error in the trial in any way. The only question raised is the jurisdiction of the court. No prejudice is shown. All parties were before the court and subject to its jurisdiction.

4. The judgment is right and correct. It is sustained by the pleadings and should stand. There is ample evidence to support it. The answer will be treated as amended to conform to the proof. 100 Ark. 537; 98 *Id.* 312; 97 *Id.* 576; 91 *Id.* 292; 88 *Id.* 363; 74 *Id.* 37.

5. The *nunc pro tunc* judgment was properly entered at a subsequent term of court. 35 Ark. 278; 33 *Id.*

218. Where there is an error in a judgment, clearly shown of record, the error may be corrected *at any time* by *nunc pro tunc* order. *Ib.*

KIRBY, J., (after stating the facts). Appellant contends that the court was without jurisdiction to render the judgments. It insists that the Wood Grocery Company had no notice of the proceeding and that the judgment *nunc pro tunc* against it is therefore void.

The attorneys who represented the Wood Grocery Company in the former litgation and A. P. Campbell, the manager of said company, now one of the owners of its successor, were both in court, both testified unequivocally that a judgment was in fact rendered against the Wood Grocery Company by the circuit court; that it prayed and was granted an appeal therefrom, which was not finally perfected, because a judgment was entered against the Citizens Bank. They and the cashier of the Citizens Bank all testified that the funds garnished were paid to the Wood Grocery Company after the intervention of the Commercial National Bank was dismissed in the justice court and before the affidavit and bond for appeal were filed by intervener, upon the understanding that the said grocery company would reimburse the Citizens Bank and hold it harmless on account of such payment if it was compelled to pay the fund to the Commercial National Bank upon appeal to the circuit court, and the Citizens Bank also became surety upon the Commercial National Bank's appeal bond. Said attorney of the Wood Grocery Company and A. P. Campbell, the old manager thereof and one of the owners of its successor, were both in court and the Wood Grocery Company appeared, after the judgment *nunc pro tunc* was entered, by the same attorney, and moved that the judgment be vacated and set aside for want of notice.

It will also be seen that its attorney was an attorney for the Citizens Bank, which alleged in its amended complaint the rendition of the judgment in fact against the Wood Grocery Company at the former term, which was entered by the court on this trial *nunc pro tunc.*

(1) The correction of the record by the entry of a *nunc pro tunc* judgment after the expiration of the term at which the original judgment was rendered, should be made with caution and the purpose of requiring notice given to the person against whom the entry of the order *nunc pro tunc* is sought, is to give him an opportunity to be present and protect his rights. It is true no formal notice had been served of this proceeding upon the Wood Grocery Company, but the manager of the said company and its attorney, were both in court testifying that the judgment against it was in fact rendered at the former trial and after their testimony was accepted and acted upon by the court and the judgment entered *nunc pro tunc* against it, said company appeared and moved to vacate the judgment for want of notice of the proceeding. Its motion contained no allegation that the judgment against it was not properly rendered and suggested no reason whatever against the entry of it *nunc pro tunc* except that it was not notified of the application therefor. Its appearance at the time this judgment was corrected, objection thereto, and motion to set aside and vacate the judgment entered *nunc pro tunc* was a waiver of the notice required of the proceedings to amend the record. *Simpson* v. *Talbot,* 72 Ark. 185.

(2) The court has authority at any subsequent term to correct its record by the entry *nunc pro tunc* of a judgment that was rendered at a former term. *Melton* v. *St. Louis, I. M. & S. Ry. Co.,* 99 Ark. 435; *Liddell* v. *Bodenheimer,* 78 Ark. 364; *Bobo* v. *State,* 40 Ark. 224; *St. Louis & N. Ark. Rd. Co.* v. *Bratton,* 93 Ark. 234; *Hershy* v. *Baer,* 45 Ark. 240.

(3) The purpose of a *nunc pro tunc* order is to make the record reflect the transaction that actually occurred and as often announced by this court, "The authority of the court to amend its record by a *nunc pro tunc* order is to make it speak the truth, but not to make it speak what it did not speak but ought to have spoken." *Lourance* v. *Lankford,* 106 Ark. 470. The court did not err, therefore, in amending its record by the *nunc pro tunc*

entry of the judgment rendered at the former term against Wood Grocery Company.

It is likewise undisputed that the court not only rendered, but entered judgment against the Citizens Bank, which had no interest in the controversy except that of stake-holder, being in possession of the fund on the first trial.

All of the attorneys testified that the precedent or form of judgment against the Citizens Bank was prepared by the attorney of the Commercial National Bank, which recovered the judgment in the case, was submitted to and approved by the attorneys of the Wood Grocery Company and then examined and approved by the court and directed to be and was entered of record.

(4) The Citizens Bank, garnishee, having answered in the justice court and admitted that it held the fund garnished was liable to the payment thereof upon the court's order and "if the garnishee desired to relieve itself of liability in the matter, it should have paid the money into court to be delivered to whichever party the court should decide was entitled to it." Not having done so, it can not in this suit, by alleging that it paid the money to the plaintiff in the attachment suit before the appeal of the interpleader was taken, relieve itself of liability. *Citizens Bank* v. *Commercial Bank,* 107 Ark. 142.

On the former appeal this court said that the garnishee bank was in the justice court and had notice that an appeal had been taken from the order dismissing the interplea of the Commercial National Bank, and signed its appeal bond, and it was properly in court, the appeal by the interpleader bringing up the case as against it. The only question upon the appeal was whether the money in the hands of the garnishee was the property of the claimant or the defendant, Wood Grocery Company, and the court there said, speaking of the Citizens Bank, which is also appellant here, "If appellant had desired to be relieved of its liability in the case, it should have paid the money into court before the appeal was taken."

It was there held that the money garnished in the hands of the Citizens Bank was the property and money of the Commercial National Bank to the amount of $255, and that the Commercial National Bank should have judgment against said Citizens Bank in that amount, its debt, this court saying that the judgment of the circuit court might have been based upon the finding that the money was then in the hands of the appellant, that the judgment might have been erroneous, depending upon the facts before the court, but, "If erroneous, it could have been set aside on appeal, but the validity of it can not be attacked except on account of fraud."

The court also said what the proper order should have been and how costs should have been adjudged, but that these were matters of error which could have been corrected on appeal.

If the garnishee in fact paid the fund garnished over to the Wood Grocery Company before the appellee herein took an appeal from the justice judgment denying its interplea claiming to be the owner of the fund, as the testimony taken in the last trial tends to show, it is a matter as already held, that should have been presented on the former trial in the circuit court, wherein the judgment was rendered against it in favor of the intervener, the appellee herein, which judgment is conclusive, not having been appealed from upon that question.

(5) The circuit court should not have set aside the judgment against the Citizens Bank, garnishee, and rendered another judgment against it on the finding that it had paid the fund garnished to Wood Grocery Company upon the express agreement that it was to be reimbursed by said company in case it was required to pay same to the appellee. "The entry in the record should correspond with the judgment which was actually pronounced, and the court has the power, and it is its duty, even at a subsequent term, to make such changes in the entry, as to make it conform to the truth. But where the judgment expresses the entire judicial action taken at the time of its rendition, the court has no authority, after the expira-

tion of the term, to enlarge or to diminish it in matter of substance or in any matter affecting the merits. Under the guise of an amendment, there is no authority to revise a judgment, or to correct a judicial mistake, or to adjudicate a matter which might have been considered at the time of the trial, or to grant an additional relief which was not in the contemplation of the court at the time the judgment was rendered." *St. Louis & North Ark. Rd. Co.* v *Bratton,* 95 Ark. 234.

No prejudice resulted from such action, however, since the same result was accomplished as if a proper order had been made refusing to set aside the said judgment.

No prejudicial error is disclosed by the record and the judgment is affirmed.

MADDING v. STATE.

Opinion delivered May 17, 1915.

1. CRIMINAL LAW—HOMICIDE—SUFFICIENCY OF INDICTMENT—AUTOMOBILE ACCIDENT.—An indictment charging defendant with second degree murder, caused by striking deceased with an automobile, the same being operated in an unlawful manner, held sufficient to put defendant upon notice of what crime he was charged with committing, and to sufficiently describe the same.
2. HOMICIDE—INVOLUNTARY MANSLAUGHTER—INTENT.—An involuntary killing without design, in the commission of some unlawful act, or in the improper performance of some lawful act, constitutes the crime of involuntary manslaughter.
3. TRIAL—HOMICIDE—REMARKS OF PROSECUTING ATTORNEY.—In a prosecution for homicide when deceased was killed by defendant while in the reckless and unlawful operation of an automobile, argument of counsel on the fact of defendant's recent marriage, held not prejudicial.
4. HOMICIDE—AUTOMOBILE—RECKLESS DRIVING.—In a prosecution for homicide when deceased was killed by the reckless and unlawful operation of an automobile, an instruction held proper which charged the jury that "no man has the right to use a public street of a city as a speedway, but every man has a right to drive an automobile on the streets, just as much right as a man has to

drive a buggy in it, or to cross it on foot, but whenever any man uses a dangerous machine, he must guard the exercise of that right with proper care and due regard for the lives and safety of people who have an equal right to be upon the streets."

5. HOMICIDE—AUTOMOBILE—DUTY OF CARE.—It is the duty of the driver of an automobile on the streets of a city to keep his machine under such control as to be able to check the speed or stop it absolutely if necessary to avoid injury to others, where danger could reasonably be expected or was apparent.

6. HOMICIDE—CONVICTION—AUTOMOBILE.—In a prosecution for homicide; *held*, under the evidence that defendant was guilty of wanton and reckless carelessness in driving his automobile and killing deceased, and that a conviction of involuntary manslaughter would be sustained.

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant was indicted for murder in the second degree alleged to have been committed by running down and killing James H. Harrod, with an automobile, upon the streets of the city of Little Rock. He was found guilty of involuntary manslaughter and sentenced to ninety days' imprisonment in the penitentiary, and from the judgment of conviction prosecutes this appeal.

The indictment charges:

"The grand jury of Pulaski County, in the name and by the authority of the State of Arkansas, accuse J. E. Madding of the crime of murder in the second degree committed as follows, towit: The said J. E. Madding, in the county and State aforesaid, on the 15th day of August, A. D. 1913, unlawfully, wilfully, wantonly, feloniously and with malice aforethought did kill and murder J. H. Harrod, by then and there striking and causing to be struck the said J. H. Harrod with an automobile, said automobile being then and there operated, managed and driven by said J. E. Madding in an unlawful, wilful, wanton, careless and negligent manner by the said J. E. Madding, and while he, the said J. E. Madding, was then and there driving, managing, operating and driving said automobile in an unlawful, wilful, careless, wanton and negligent man-

ner, and without due regard for the rights and life of persons, he, the said J. E. Madding, did then and there unlawfully, wilfully, feloniously, wantonly and carelessly and with malice aforethought, strike the said J. H. Harrod, and cause him to be struck by said automobile, and by reason of the said J. H. Harrod being struck by the said automobile, while it was being unlawfully, wilfully, feloniously, wantonly, carelessly and negligently managed, operated and driven by the said J. E. Madding, he, the said J. H. Harrod, died on the said 15th day of August, 1913, from the effects of said striking, by said automobile, against the peace and dignity of the State of Arkansas."

A demurrer was interposed and overruled and afterward a motion in arrest of judgment was made on the ground that the indictment did not state facts sufficient to constitute a public offense, which was also overruled.

Hon. James H. Harrod was struck and killed by an automobile driven by the defendant at the intersection of Fifteenth street and Broadway in the city of Little Rock. He had alighted from the street car going west on the west side of Broadway and walked around the back end of the car going south across Fifteenth street, and was struck by the rapidly approaching automobile going east, as he came from behind the car, and hurled thirty feet through the air, and instantly killed.

The defendant was driving a blue racing car of high power which he had bought at a garage in town and which had been stripped of the fenders for repairs. He got the car from the garage at the request of his friend, Asa Gracie, to drive him and a young lady he was accompanying home, meeting them at Third and Louisiana streets. They went down to Main Street and drove out south to Twenty-third, going at so rapid a rate that when they passed Henry McCain and J. H. Martin in another car, McCain's attention was attracted to the speed and he exclaimed, "It's going like a bat out of hell."

They turned in to Twenty-third Street, went west to Gaines and turned north on Gaines, driving at such a

rapid rate as to attract the attention of Dolly Stark, who was sitting at the fire station, and cause him to exclaim, "Go, you blue devil."

Mrs. Adamson, who stated she was accustomed to driving an automobile and knew and was acquainted with the speed of automobiles, was standing on her front porch on Gaines Street, and saw this car pass and exclaimed, "Mercy, how fast it is going," said, "It went by like a flash."

Other witnesses estimated the speed at forty or fifty miles an hour on Gaines Street. The automobile slowed down as it turned off Gaines into Fifteenth Street two blocks from the place of the injury, but passed the street car two blocks east, and struck Judge Harrod while going at a high rate of speed, variously estimated at thirty to forty miles an hour.

The defendant stated that they were not going so very fast after coming on to Fifteenth, that he noticed the street car standing, was driving along at from twelve to fifteen miles an hour when the driver of a delivery wagon started diagonally across the street from the south side to go down Broadway; that he swerved the automobile in close to the street car to prevent a collision with the wagon and struck the right fore wheel of the delivery wagon, and Judge Harrod immediately stepped from behind the car and was struck by the automobile. That he threw the brake into the emergency, as soon as he saw he was going to strike the wagon, but it was impossible to keep from striking him, for as he struck the wagon "something came out from behind the street car and stepped into the automobile and fell back."

A witness in the street car testified that as he looked up he saw a blue automobile or "something go by like a bird flying, or a shadow"—that it was all in an instant. He noticed a wagon near the sidewalk and the automobile near the wagon and the street car, and turned and saw Judge Harrod fall. He did not see the automobile strike him.

Ed Linzell stated he was on the northwest corner of Fifteenth and Broadway, facing to the northeast toward the Davis home. His attention was attracted to the automobile going by and about that time the car stopped and "he looked and saw Mr. Harrod falling; looked like he fell from the top of the automobile. He was up in the air and fell about the middle of the street, a little to the west. He fell about the middle of Broadway and about on the north rail of the car line on Fifteenth Street. The automobile was going east and it was going fast. It looked like it went under Mr. Harrod. I did not see it strike him but I saw him fall. It looked like he fell from the back seat of the automobile."

J. B. Wood heard the street car stop on the northwest corner of the street and just after it started he heard a shout, turned and saw a man lying in the street. Did not see an automobile. Said the street was in full view when he turned but he did not see nor hear an automobile nor any horn. "The boy who was struck was lying down at the corner of Senator Davis' place."

Dallas Herndon testified he was on the street car and saw the automobile running at a very rapid rate of speed. Saw it first on Main Street. He was standing on the front end of the street car as the automobile came into Fifteenth Street from Gaines, and it was going at a high rate of speed on Fifteenth, higher than cars ordinarily run. He noticed it until it passed the street car and it continued at an unusual rate of speed; he did not notice the slowing of the speed at the time it passed the front end of the street car, and it was his opinion that the automobile was going from thirty to forty miles an hour. That instantly after it passed the front of the street car he heard a crash—did not see the car strike Mr. Harrod. He alighted from the car and found Harrod's body lying diagonally between the tracks across the street, somewhere near the center of the intersection of the two streets, Broadway and Fifteenth. That the automobile came into Fifteenth Street from Gaines after the street car stopped at Broadway and passed the front end of the

street car just as it started to move up. He did not notice the express wagon, his attention being directed to the automobile.

Ben Smith testified that he saw Mr. Harrod get off the street car and looked up Fifteenth Street, about the middle of the block, and saw a little blue car coming toward the street car running fast, and exclaimed, "Look, Mr. Wood; ain't that car coming some!" The next thing he saw the wagon coming down by the side of the street car, nearly even with it, and then he heard a crash and thought the automobile ran into the wagon. He went to the back platform and saw Judge Harrod lying on the north track of the car line, about the middle of Broadway Street.

The defendant stopped his car as soon as possible after striking Mr. Harrod, expressed deep regret over the occurrence, which he said was an accident that could not possibly have been avoided, and went immediately for a physician.

Jas. A. Gray, X. O. Pindall and *Mehaffy, Reid & Mehaffy,* for appellant.

1. The indictment was not sufficient to secure defendant his substantial rights upon the trial. The unlawful act, the essence of the offense, is not charged. 99 Ark. 188. No excessive rate of speed is charged, nor any violation of any city ordinance. The indictment is misleading and indefinite. 26 Ark. 323; 27 *Id.* 494; 29 *Id.* 165; 34 *Id.* 263; 102 *Id.* 598.

2. The remarks of the prosecuting attorney were prejudicial. 12 Cyc. 589; 140 Am. St. 378; 9 *Id.* 559, and note.

3. The instructions of the court that, "No man has the right to use the public streets * * * as a *speedway;* and "But when a man uses a *dangerous machine* he must guard the exercise of the right with a proper care and due regard for the lives and safety of people," etc., were error. They assumed that defendant was using the street as a speedway and that an automobile is *per se* a danger-

ous machine. 59 Ark. 417; 111 N. Y. Supp. 1057; 70 L. R. A. 627.

4. Incompetent testimony was admitted and it was prejudicial. 100 Ark. 232.

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

1. The indictment is sufficient. 33 L. R. A. (N. S.) 403, 405; 216 Mo. 420; 115 S. W. 1011.

2. The prosecuting attorney's remarks were not prejudicial. He merely stated his opinion on the weight of the evidence. 79 Ark. 25; 91 *Id.* 576; 109 *Id.* 594, 602.

3. No incompetent testimony was admitted. 100 Ark. 232, 235.

4. There is no error in the instructions. 168 S. W. 35, 37; 8 L. R. A. 1228, 1230; 18 Ann. Cas. 236.

KIRBY, J., (after stating the facts). It is insisted first for reversal that the indictment is insufficient and that the court erred in not sustaining the demurrer and granting the motion in arrest of judgment.

(1) There is no merit in the contention that the allegations of the indictment are so indefinite and uncertain as not to put the defendant on notice of the crime with which he is charged, nor was it defective for failure to allege with more particularity the manner of causing the death of the deceased. It charges that the defendant "unlawfully, wilfully, wantonly, feloniously and with malice aforethought, did kill and murder J. H. Harrod, by then and there striking and causing to be struck the said J. H. Harrod, with an automobile, said automobile being then and there operated, managed and driven by said defendant in an unlawful, wilful, wanton, careless and negligent manner," etc.

We think the allegations of the indictment sufficient to put the defendant on notice that he was charged with killing the deceased by striking him with an automobile, driven in an unlawful, wilful, careless and negligent manner, in effect notifying him that it was not being operated

in accordance with either the laws of the State or the ordinances of the city regulating the use of automobiles.

In *Schultz* v. *State,* 33 L. R. A. (N. S.) 403, the Supreme Court of Nebraska, in holding sufficient an indictment of about the same tenor and effect as the one herein, upon demurrer, said:

"A like question was before the Supreme Court of Missouri in *State* v. *Watson,* 216 Mo. 420, 115 S. W. 1011, upon a similar information, in which defendant was charged with killing a pedestrian while carelessly, recklessly and negligently running his automobile over and upon a certain street of St. Louis. Speaking of the information in that case, the court said: 'This in our opinion is a sufficient charge, and fully informed the defendant of the nature and character of the offense he was called upon to answer. It was not, in our judgment, essential that the information should undertake to set out in detail in what such carelessness, recklessness and culpable negligence consisted, but the charge that he operated and propelled this automobile along a public street, carelessly, recklessly and with culpable negligence, was in effect notifying the defendant that he was not using, operating or propelling his automobile in accordance with the law or the ordinances of the city, regulating the use and operation of such machines."

(2) The defendant was only convicted of involuntary manslaughter and the manner of the killing was not material in any event, since it would only have tended to show the disposition of mind or the intent with which the act was committed and no intent to kill is required to constitute the offense of involuntary manslaughter.

An involuntary killing without design in the commission of some unlawful act or in the improper performance of some lawful act, constitutes the offense. *Tharp* v. *State,* 99 Ark. 188.

Neither do we think the testimony concerning the exclamations of the different witnesses upon noticing the running automobile were incompetent, being only indicative of their opinion of its speed. Each of these witnesses

also gave his estimate of the rate of speed of the automobile and some then said it was going so fast as to cause them to make the exclamations complained of. Like involuntary remarks and exclamations by witnesses not shown to be acquainted with the speed of automobiles were held competent in the case of *Bowen* v. *State,* 100 Ark. 232.

In closing the argument the prosecuting attorney made the following statement, which was objected to:

"It seems to me, gentlemen of the jury, that they have lugged in here of their own accord—it certainly would be improper for me to make any reference except it had been lugged in here before you against our will—I would not for one moment say aught to wound the feelings of any one, and much less the beautiful bride that had married him, but I say, gentlemen of the jury, they lugged that in here before you, but they knew before they entered the bonds of matrimony the indictment was pending here against the defendant for murder in the second degree. They knew that. And I say I wouldn't refer to these things but for the fact that it has been lugged in here and hammered upon—why, it seems even in that sacred act the defendant went on with that reckless disregard of the propriety of the occasion that he manifested evidently under the evidence here in this case when he killed and murdered and butchered James H. Harrod."

(3) We think there was no reversible error committed in the making of this statement, which appears from other statements of the record to have been invited, and it was at most but a statement of the prosecuting attorney's opinion of the weight of the testimony in the case. *Smith* v. *State,* 79 Ark. 25; *Holt* v. *State,* 91 Ark. 576; *Valentine* v. *State,* 108 Ark. 594.

(4) It is next contended the court erred in its charge to the jury, as follows:

"No man has the right to use a public street of a city as a speedway, but every man has a right to drive an automobile on the streets, just as much right as a man has to drive a buggy in it, or to cross it on foot, but wherever

any man uses a dangerous machine, he must guard the exercise of that right with a proper care and due regard for the lives and safety of people who have an equal right to be upon the streets."

There was no error in the charge as given, which does not assume that defendant was using the street as a speedway, and although an automobile may not be a dangerous machine when not in operation, it evidently becomes so to such an extent when operated without care on the crowded streets of a city, that there could have been no error in this instruction. This was a racing car of high power, stripped, and was being operated recklessly as the jury found, at a high and unlawful rate of speed, at a place where the presence of persons alighting from the car, pedestrians and others crossing the street, should have been anticipated. *Allen* v. *Bland,* 168 S. W. (Tex.) 35.

(5) Neither did the court err in telling the jury that it was the duty of the defendant to keep his machine under such control as to check the speed or stop it absolutely if necessary to avoid injury to others where danger could reasonably be expected or was apparent. The defendant was driving his racing car on the city street at a high rate of speed, past a street car standing for allowing passengers either to get on or off, in violation of the city ordinances, and where he could have reasonably expected that some one might come from behind the street car from out of his sight into a place of danger from his machine. He made no effort to stop his automobile, swerved it in next to the street car, to avoid it is true, a collision with a delivery wagon on the right, but necessarily where he could not see a pedestrian coming from behind the car. He made no effort, according to his own statement, to check the speed of his car until it was apparent that it would collide with the delivery wagon, notwithstanding he could see both the wagon and the standing street car, before he came near enough to endanger the safety of any one crossing the street at the place. *Gregory* v. *Slaughter,* 8

L. R. A. (N. S.) (Ky.) 1228; *State* v. *Campbell,* 18 Ann. Cas. 236.

(6) The defendant, it is true, was not well acquainted with the city, nor its streets, but he was accustomed to driving an automobile, and if the State's testimony be true, he was driving the car at the time of the accident with reckless abandon and wanton disregard of the rights of others upon the street and without care as to their safety. It is not claimed that he had any intent to injure his victim, the deceased, and he has doubtless suffered much anguish of mind because of the unfortunate occurrence in which he caused his death, but the fact remains that he drove his racing car at great speed past a standing street car, beyond and behind which he could not see, and killed the man who was stepping out from behind the street car, because he was not able to sooner see him nor stop his car to prevent the injury.

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

MOORE v. MORRIS.

Opinion delivered May 17, 1915.

1. DEEDS—QUITCLAIM—INNOCENT PURCHASER.—The mere fact that there is a holding under a quitclaim deed does not defeat the claim of an innocent purchaser. The purchaser may show, notwithstanding the form of the conveyance, that he was in fact without information of any other claim of ownership.
2. ADVERSE POSSESSION—CLAIM OF TITLE—LOSS OF TITLE.—Where D. acquired title to lands by adverse possession, he will be *held* to have lost such title, when he abandoned the same and the land was wild, and the original owner complied with the terms of the Act of March 18, 1899.
3. ADVERSE POSSESSION—WILD LANDS—TITLE.—The Act of March 18, 1899, which applies only to wild lands which are unimproved and uninclosed, *held* not to mean that the lands never have been in any other state, but may apply to improved lands, which have been permitted to return to a state of nature.

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

Block & Kirsch, for appellant.

1. The description in the deed from Schultz to DeMoss was bad and the deed was void. Besides it was never shown that Schultz had title. The deed was not recorded and was not notice. Appellant did not hold under Schultz and was not bound to look for adverse claims. 69 Ark. 95; 76 *Id.* 525; 2 Devlin, Deeds (2 ed.), § § 712, 713; 59 Penn. St. 167-171. The Lester heirs had the paper title and there was nothing to put appellant upon notice or inquiry. Appellant was an innocent purchaser. 69 Ark. 95.

2. Jesse Morris and Julia A. Brown were barred by the seven-year tax-paying statute and the general statute of limitation. Adverse possession is not shown, but even if DeMoss was ever in possession he would be confined to only that part he actually had in possession his deed being void. 3 Ark. 18; 30 *Id.* 657; 60 *Id.* 487. The land was wild and unimproved. The statute of limitations did not run during the Civil war. 28 Ark. 506.

3. Appellant is a *bona fide* purchaser for value. He had neither record nor actual notice of any adverse claim.

Spence & Dudley, for appellees.

1. The land was *not* unimproved and unenclosed within the meaning of the law. The rightful owner is deemed in possession until he is ousted or disseized. Possession follows the title in the absence of actual *adverse* possession. 60 Ark. 163; 102 U. S. 333; 73 Ark. 353. There can be only one actual seizure of the same land and at one and the same time.

2. Appellant was in no way misled or injured by the delay of the true owner to pay the taxes. Laches can not be charged against appellees. 99 Ark. 506; 92 *Id.* 407; 102 *Id.* 60.

3. The true owner of land can not be divested of title by the mere failure to pay taxes and the enhancement in value. 99 Ark. 500.

4. Appellant was not an innocent purchaser. 4 Words & Phrases, 3628; 95 *Id.* 582; 76 *Id.* 25; 77 *Id.* 309; 49 *Id.* 207; 55 *Id.* 47. Moore purchased with notice (76 Ark. 27) both actual and constructive.

5. He was put on notice by accepting a quitclaim deed. Warvelle on Abstracts of Title, 219.

6. The deed to DeMoss was not void. The testimony shows it was a warranty deed regularly executed, acknowledged and recorded. The record was burned. The only defect in the abstract was the use of the word "east," instead of north. Courts take judicial knowledge of the U. S. system of land surveys, (88 Ark. 52; 34 Ark. 227; 68 *Id.* 561), and that township 21, in range 6 east is in Clay County. The error was that of the recorder of deeds.

7. There is no such thing in Arkansas as losing title by abandonment, unless accompanied by estoppel and limitation. 105 Ark. 667.

McCULLOCH, C. J. This controversy concerns the title of a tract of land in Clay County, Arkansas, containing eighty acres and described as the east half of the northeast quarter, section 18, township 21 north, range 6 east. Appellant has a clear paper title. The land was patented by the United States to the State of Arkansas July 5, 1856, and the State in turn patented to P. K. Laster and T. J. Melon. Melon quitclaimed to Lester and the heirs of the latter, who died intestate in the year 1877, sold and conveyed the land to appellant in February, 1911. Appellees claim title under their ancestor, Louis DeMoss, and attempt to prove that the latter acquired title by adverse possession. They instituted this action at law to recover the possession of the land from appellant, and on the latter's motion the cause was transferred to equity where he filed a cross-complaint asking that his title be quieted. Appellees undertook to show that a conveyance was executed by one Schultz to DeMoss dated March 10, 1852, and actual occupancy of the land by DeMoss for a period of more than seven years. The proof shows that DeMoss entered upon the land in the year 1862 and built a house thereon and cleared and

put in cultivation a considerable portion of the land, the quantity varying, according to the testimony of witnesses, from twenty-five to sixty acres. He lived on the land until his death, which occurred in 1869, and was buried there in a private burying ground. His widow married again, but continued to occupy the land and rent it out to tenants until she died in 1873, and the land was controlled by a guardian of one of the heirs, who was a minor, for several years thereafter. The land was subsequently abandoned—the exact time is not shown in the record—and the house was destroyed by fire, the fences rotted down and became obliterated, and the cleared lands grew up again. The land remained in that condition until about 1905 or 1906 when a man by the name of Sharp purchased a small tract adjoining this land and in clearing it up got a few acres over the line. After Sharp left the place, a man named Phillips, with his family, moved into the house in 1907 and continued to enlarge and fence the clearing on the land in controversy. At the time appellant purchased the land from the Lester heirs, Phillips' widow was occupying it; that is to say, she was living in the house on the adjoining Sharp land and was cultivating the newly cleared land on the place in controversy. There is a controversy as to the amount of the cleared land at that time. The testimony adduced by appellant tends to show that there were only nineteen acres, but the testimony adduced by the other side tends to show a much larger quantity. Neither Phillips nor his wife asserted any title to the land and never attorned to anyone as landlord until after the purchase by appellant, when Mrs. Boyd (formerly Mrs. Phillips) attorned to appellant and executed to him a rental contract for the year 1911. Phillips and his wife were mere "squatters" on the land, and, as before stated, asserted no claim of ownership. About two weeks before appellant purchased the land from the Lester heirs, he went to see the occupant, Mrs. Boyd, and she told him that she was not asserting any claim to it, but said that she had as much right to it as anyone else. Thereupon he went over to another county where the Lester heirs lived and

made the purchase for the sum of a thousand dollars. One hundred dollars was paid in cash and the remainder was paid on a subsequent date. The Lester heirs executed to appellant a special warranty deed, which was subsequently lost or destroyed, and a quitclaim deed was then executed.

Appellant testified that at the time he made the purchase he had no information whatever that appellee or anyone else made any claim to the land or that there had ever been any occupancy of the land by DeMoss. He is corroborated in this by other witnesses. One of the Lester heirs testified that he had never heard of the DeMoss heirs asserting any claim to the land until after it was sold to appellant, or that the land had ever been occupied by DeMoss.

The testimony shows clearly that as far back as the year 1898 all the improvements on the land had been destroyed and that it had grown up with timber. In other words, it had returned to its wild state of nature, leaving very little evidences of any improvements ever having been made. The testimony adduced by appellees does not tend to show that any claim was asserted by the DeMoss heirs until after the purchase by appellant, nor does it show that appellant had any information that there was a claim made by the DeMoss heirs except that Mrs. Boyd testified that when appellant came to see her about the land he showed her a deed and said that it was a deed from the DeMoss heirs. This, however, was contradicted and we think the preponderance of the testimony is against the conclusion that appellant made any such statement to Mrs. Boyd. The evidence establishes clearly the fact, we think, that appellant was entirely innocent of any knowledge or information that there was an adverse claim to the land at the time he made the purchase from the Lester heirs. The tax receipts exhibited in the record show that the Lester heirs paid the taxes on the land continuously from the year 1892 up to the time the sale was made to appellant. One of the heirs testified that Lester had always paid taxes on the land, but there is no evidence of it in the way of tax re-

ceipts exhibited prior to the year 1892. It seems that the record of Clay County was destroyed by fire that year. All the records, including the records of deeds, were destroyed. The only evidence of the alleged conveyance from Schultz to DeMoss is that deduced from the books of an abstracter of titles. There was no official record, in other words, showing this deed. The abstract books contain a notation indicating that there was an error in the description as to the particular township, indicating that the record showed the township to be 21 *east.* The abstracter testified that from his recollection in copying the abstract, and from what he could infer from the notation, the range number was correct but that there was a clerical error in the record of the township number.

(1-2-3) It may be conceded (without so deciding) that appellees have made sufficient showing to establish title in their ancestor by adverse possession under color of title; nevertheless, the testimony shows very clearly that appellant is entitled to have a decree quieting his title and declaring his right of possession. This results upon two distinct grounds. In the first place, appellant was an innocent purchaser for value. According to the undisputed testimony, the occupancy of the heirs of DeMoss had been abandoned several years prior to the year 1887. The testimony of a witness who described the condition of the land during that year shows that the part formerly in cultivation had been entirely abandoned and was an old, thrown-out field, with no buildings of any kind on it, or fences. He stated that all evidences of fences had been obliterated. The land was then growing up, and witnesses who describe it at different periods thereafter show that it grew up completely. The condition, as described by a witness, in the year 1898 was that it was grown up then in timber, and those who describe it up to the years 1905 or 1906, when Sharp began clearing up a little of it, was that it was in its original wild state, leaving very little evidences of former cultivation. Some of the witnesses say that there were a few fruit trees on the land and occasional evidences of the land having once been in cultivation, but that to the ordinary

observer it was in a wild state, covered with timber. Appellant had no notice of the claim of the DeMoss heirs, either actual or constructive. Even if the record of the deed from Schultz to DeMoss (which was not in the line of appellant's title, and notice of which could not be chargeable against him, *Turman* v. *Sanford,* 69 Ark. 95), could ever have been treated as constructive notice of the DeMoss claim, the record had been destroyed by fire in the year 1892, and, the occupancy by the DeMoss heirs having been completely abandoned, there was nothing whatever to constitute constructive notice of the DeMoss claim. The evidence is quite convincing that neither the Lester heirs nor appellant had any intimation whatever that DeMoss or his heirs had ever occupied the land or that the heirs were making any claim of title. Learned counsel for appellees rely upon the fact of appellant holding under a quitclaim deed as charging him with notice of defects in the title. That contention, however, is unsound for this court has decided that the mere fact that there is a holding under a quitclaim deed does not defeat the claim of an innocent purchaser. That fact is merely considered as a circumstance in determining whether or not the purchaser was in fact innocent of knowledge of any adverse claim, but the purchaser may show, notwithstanding the form of conveyance, that he was in fact without any information of any other claim of ownership. *Miller* v. *Fraley,* 23 Ark. 735; *Brown* v. *Nelms,* 86 Ark. 368. All of the records and all the circumstances in this case tend to support appellant's claim that he purchased the land in good faith, relying upon the fact that his grantors had the record title, and without any notice that there were any adverse claims. There is, it is true, evidence to the effect that some people living in the neighborhood had information of the original DeMoss occupancy, and that the DeMoss heirs would or could assert a claim of ownership, but it was not information so notorious that appellant is presumed to have known about it, and there is no evidence that he did in fact know of it. The land was in a wild state and the Lester heirs were paying taxes on it from year to year and

they had the record title. We are of the opinion, therefore, that appellant fully made out his claim of an innocent purchaser and that the decree should have been in his favor on that ground. The occupancy of Phillips and his wife was without any claim of ownership and therefore was not sufficient to put appellant upon notice that there were any adverse claimants.

We are of the opinion, also, that even if DeMoss or his heirs acquired title by adverse possession, that title was reacquired by the original owners, the Lester heirs, by payment of taxes under color of title under the Act of March 18, 1899.* The undisputed evidence is that Lester and his heirs paid taxes on the land continuously up to the time it was sold to appellant. Their paper title, which constituted absolute title up to the time the ownership was wrested from them, if at all, by the adverse occupancy of DeMoss, continued thereafter at least as color of title, and the payment of taxes while the land was in a wild state and unoccupied restored the title to them by adverse possession according to the terms of the statute. The lands were, according to the testimony, wild and unoccupied within the meaning of the Act of 1899, at least from the year 1898 up to the year 1905 or 1906, when Sharp commenced clearing over the line. Three payments were therefore made after the passage of the Act of 1899. The statute applies only to "unimproved and uninclosed land;" that is to say, land that is wild and in a state of nature. This does not mean, however, that the lands must never have had any other status, for improved lands may be permitted to return to a state of nature. The statute relates to the condition of the lands at the time the payment of taxes is made under color of title, regardless of the former state of the lands; and if at that time they are unimproved and uninclosed, that is to say in a wild state as before the improvements were first made, then they fall within the terms of the statute and such payments amount to occupancy which will in

*Act No. 66, p. 117, Acts 1899.

course of time ripen into title by limitation. *Fenton* v. *Collum*, 104 Ark. 624.

The decree of the chancellor is therefore reversed and the cause is remanded with directions to enter a decree for appellant in accordance with this opinion.

MONROE COUNTY v. BROWN.

Opinion delivered May 17, 1915.

1. COUNTY COURT—ALLOWANCE OF CLAIMS—JUDGMENT—COLLATERAL ATTACK.—A county court, in the allowance of claims against the county, acts judicially and its judgments are not open to collateral attack except for fraud or lack of jurisdiction.
2. COUNTY COURT—WARRANTS—FRAUD—SUBSEQUENT REJECTION.—Under the statute authorizing the county court to call in all outstanding warrants, and to reject those fraudulently or illegally issued, those warrants may be rejected, which could not have been valid claims against the county, or where the judgment of allowance was obtained by fraud practiced.
3. COUNTY COURT—ALLOWANCE OF CLAIM—EXCESSIVE AMOUNT.—The mere fact that the county court has erroneously allowed a claim for an excessive amount, does not call for reinvestigation and review in subsequent proceedings under the statute, but if fraud has been practiced in the allowance itself, the claim is an illegal one and the judgment may be inquired into and set aside.
4. COUNTY COURT—ALLOWANCE OF CLAIMS—COLLUSION.—Where there has been collusion between a claimant and the county judge, for the purpose of having the amount of a claim illegally augmented, this constitutes fraud on the county, which the court is authorized to correct in a subsequent proceeding by setting aside the judgment.
5. COUNTY COURT—ALLOWANCE OF CLAIM—FRAUD—NEW WARRANTS.—Where claims have been allowed against a county, fraudulently, for an excessive amount, and the judgment making such allowance has later been corrected, on appeal, the circuit court, after determining that the original judgment of allowance should be set aside for fraud, may render a judgment allowing the correct amount due the original claimants, and direct that new warrants be issued for such amounts.
6. ROAD DISTRICTS—APPROPRIATION—CONTRACTS.—Under Act of 1905, p. 226, contracts for road purposes are limited to the estimated amount of funds to be raised by the tax, and any contract in excess of the amount appropriated and to be collected, is void. In a

special case, before a contract will be declared void it must be shown that the contract was made after the appropriation was exhausted.

7. ROAD DISTRICTS—CONTRACTS—ASSESSMENTS—VALIDITY OF ACT.—Acts 1905, p. 226, limiting the contract-making power of a road improvement district is not in conflict with Amendment No. 5, authorizing a special levy for road purposes.

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

Manning, Emerson & Morris and *C. F. Greenlee,* for appellant.

1. Demands against a county must be verified according to law. Kirby's Dig., § § 988, 1453, 1179. County courts are expressly prohibited from allowing any greater sum than is actually due in money. 47 Ark. 80; 44 *Id.* 437; 31 *Id.* 552. On appeal the circuit court can only render such judgment as the county court should have rendered. 90 Ark. 195; 52 *Id.* 502. The affidavit is a prerequisite to the allowance of the claim.

A county court when passing on the question of reissue or cancellation of a warrant can not enter into a trial of the questions which should have been tried when the claim was presented, and hear new testimony, but it must cancel the warrant if illegally issued, and the circuit court, on appeal, can only order the warrant cancelled.

2. On appeal, the circuit court had no authority to try the merits of the claims. 52 Ark. 502. The case of 84 Ark. 249, does not apply here.

3. The road warrants were issued in excess of the amount appropriated and collected. Kirby's Dig., § 7288. There can be no innocent purchaser of county warrants. 98 Ark. 229; 103 U. S. 74.

Thomas & Lee, for appellees.

1. The county court is clothed with authority to go into all the evidences of indebtedness, and if a legal demand or claim is shown, it is its duty to reissue the warrant. Kirby's Dig., § § 1179, 1375. It has original exclusive jurisdiction to settle all demands against the

county. 47 Ark. 80; 44 *Id.* 225. The court acts in its administrative capacity for the county as do the council of a city or the Legislature for the State, and is clothed with discretion in the performance of its duties. 107 Ark. 301.

2. Warrants issued for more than the amount due are void only as to the excess. 4 Dillon, 209; 2 *Id.* 493; 4 N. D. 339.

3. An affidavit verifying a claim is not jurisdictional, but the affidavit may be made on appeal, in the circuit court. Kirby's Dig., § 7288; 84 Ark. 331; Kirby's Dig., § 3517. On appeal the matter is tried *de novo*, and amendments may be made that do not change the original cause of action. 61 Ark. 253; 55 *Id.* 282. Settlement of claims and issuing warrants have not the force of judicial judgments, which conclude the party or county. So the holder of a warrant is entitled to a reissue for at least the amount actually due him. 19 Ia. 117, 248; 6 Kans. 510; 11 Minn. 31; 19 Wall. 468; 4 Dillon, 209.

4. The road tax had been voted and the appropriation for roads duly made. Kirby's Dig., § § 7288; Amend. No. 5. The contract may exceed the appropriation. 73 Ark. 526; 54 *Id.* 645; 61 *Id.* 74; 63 *Id.* 397.

5. The services were rendered and the warrants transferred to appellees for value who became the equitable assignees of the claim, or, at least, of the proportionate share actually and legally due. The judgment is right and should be affirmed.

McCULLOCH, C. J. This appeal is in a case where the county court of Monroe County called in the county warrants for reissuance or cancellation pursuant to the terms of a statute which provides that the county court of any county may "call in the outstanding warrants of said county in order to redeem, cancel, reissue or classify the same, or for any lawful purpose whatever" and shall make an order fixing the time for the presentation of said warrants, etc. Kirby's Digest, section 1175. The three appellees, L. K. Brown, R. N. Counts, and the Bank of Clarendon, are the separate holders of certain

warrants, and the county court, on presentation thereof, ordered the same cancelled on the ground that they were based on illegal allowances. Appellees took an appeal to the circuit court and on the trial there the court found that the original allowances were for excessive amounts and cancelled the warrants, but ordered reissuance for the amounts found to be actually due to the original claimants, appellees being merely purchasers and holders of the warrants.

The warrants held by appellee Brown were based upon allowances to laborers under contract for working the public roads, the warrants being drawn on the road tax fund collected pursuant to Amendment No. 5 of the Constitution which authorizes a special fund to be raised for road purposes when voted by the electors of the county. The affidavit attached to each of the allowances involved in the controversy concerning the warrants held by appellee Brown were made by the road overseer and not by the claimants themselves, and the contention is that the allowances were void because of the failure to comply with the statute which requires all claimants to verify their claims by affidavit. The circuit court allowed the affidavits to be filed in accordance with the statute and then directed the reissuance of the warrants.

The warrant held by appellee Counts was also a warrant drawn on the road fund and was based upon an allowance made to a laborer, and, as in the Brown case, the affidavit was made by the overseer and not by the claimant. It appears also that pursuant to an understanding between the county judge and the road overseer the account was increased from $6 to $8 on account of the discount in value of the warrants, the account of the treasurer being at that time overdrawn. The circuit court allowed a new affidavit to be filed by the original claimant, the same as in the Brown case, but ordered reissuance of the warrant only to the extent of the sum of $6, which was the correct amount of the original claim before it was increased.

The Bank of Clarendon case involves warrants which were issued, based upon allowances to the county made

upon a claim presented by the electric light company for lights furnished the county and for telephone charges. Those warrants were issued on the general fund of the county, and as county scrip was depreciated in value to the extent that it was only worth about 33 1/3 cents on the dollar the amount of the account was, by express understanding between the claimant and the county judge, increased three-fold, and that part of the statutory affidavit which declares that "the bill was not enlarged, enhanced or otherwise made greater in consequence of an estimated, supposed or real depreciation in the value of county warrants" was erased from the printed blank and omitted. The circuit court cancelled the warrant, but ordered a reissue for the amount actually due the original claimant, that is to say one-third of the amount of the account, thus striking out the increase incorporated in the claim on account of the depreciated value of county warrants.

(1) This court has in its decisions steadily adhered to the rule that a county court, in the allowance of claims against the county, acts judicially, and that its judgments are not open to collateral attack except for fraud or lack of jurisdiction. *Jefferson County* v. *Hudson,* 22 Ark. 595; *State, Use Izard County* v. *Hinkle,* 37 Ark. 532; *Cope* v. *Collins, Admr.,* 37 Ark. 649; *Lincoln County* v. *Simmons,* 39 Ark. 485.

In *State, Use Izard County* v. *Hinkle, supra,* Chief Justice English, speaking for the court, laid down the following as the true interpretation of the force and effect of the judgments of county courts and the methods in which they may be attacked: "An order of allowance, made by the county court, may be reviewed or opened in several modes: First. By appeal to the circuit court. Second. It may be quashed on *certiorari* by the circuit court, where it appears from the face of the record that the claim was not, by law, a charge against the county, and the court had no authority or discretion to allow it upon any evidence that might have been introduced. * * * Third. The statute empowers the county courts as often as once in three years, to call in all outstanding

warrants, to examine and cause them to be renewed, if legally issued, and, if not, to reject them. Thus the Legislature has empowered county courts to review allowances made at previous terms, and, if made without authority of law, to reject warrants issued upon them, and also to reject warrants otherwise illegally or fraudulently issued, as held in *Desha County* v. *Newman, supra.* Fourth. An order of allowance may be opened in chancery, as any other judgment, for fraud, accident or mistake, on a proper case made."

In the case of *Desha County* v. *Newman*, 33 Ark. 788, the opinion was also written by Chief Justice English, and it was cited with approval in the *Hinkle case, supra.* That was a case, like this, where the county court called in the warrants for cancellation or reissuance, and involved the question of the power of the county court in that proceeding to cancel a warrant based upon allowance for a printing account presented against the county. In discussing the effect of the statute and the power given to the county court thereunder, this court said: "The statute empowers the county courts as often as once in three years to call in all outstanding warrants, to examine and cause them to be renewed if legally issued, and if not to reject them. * * * Thus the Legislature has empowered county courts to review allowances made at previous terms, and if made without authority of law, to reject warrants issued upon them, and also to reject warrants otherwise illegally or fraudulently issued. Warrant holders take them subject to the exercise of such power by the county courts, the statute conferring the power being the law of the contracts. (Citing *Parsel* v. *Barnes & Bro.*, 27 Ark. 261). The allowances in favor of appellee for magistrates' blanks are not attacked collaterally, but in a direct proceeding to review them authorized by statute."

(2) The effect of our previous decisions, therefore, is to hold that a proceeding of this kind by the county court reviewing its orders of allowance rendered at former terms, does not constitute a collateral attack upon these judgments, but that it is a direct attack. The stat-

ute empowers the county court to reject warrants illegally or fraudulently issued, and this necessarily gives the power to determine what warrants fall within that class. The statute is not construed to mean that the county court is authorized to review former judgments of the court for mere errors in the allowance of claims, but they are authorized to reject claims which have been illegally or fraudulently issued. In other words, where the claim against the county was one which, under any evidence which might have been adduced, could not have been a valid claim against the county, or where the judgment of allowance was obtained by fraud, it may be set aside and warrants issued pursuant thereto cancelled. However, to carry the review beyond that and to permit investigations for mere errors of the court, would make it purely a collateral attack on the judgment, which is not authorized by the statute.

This distinction is illustrated by our two decisions in *State* v. *Perkins*, 101 Ark. 358, and *Fuller* v. *State, for use of Craighead County,* 112 Ark. 91. In the former case we held that there could be no review of a judgment of the county court adjusting the settlement of a collector merely because there had been an error discovered in the amount of commissions allowed; but in the last cited case we held that there could be a review where the court allowed commissions which were wholly unauthorized by the statute, as such an allowance constituted fraud in law.

(3-4) The case of *Desha County* v. *Newman, supra,* is illustrative of the scope and effect of the authority conferred upon the county court by the statute authorizing the calling in of warrants. That case involved a claim for printing and there was no statute which authorized the allowance of such claim, and it was held that the judgment was wholly void because the claim was illegal and one which should not have been allowed under any evidence which might have been introduced. The mere fact, however, that a claim has been erroneously allowed for an excessive amount does not call for reinvestigation and review in subsequent proceedings under

the statute. If however, fraud has been practiced in the allowance itself, the claim is an illegal one and the judgment may be inquired into and set aside. Where there has been collusion between a claimant and the county judge, for the purpose of having the amount of the claim illegally augmented, this constitutes a fraud on the county which the court is authorized to correct in a subsequent proceeding by setting aside the judgment.

(5) It is thus readily seen that the warrants involved in the *Counts* case, and those also involved in the *Bank of Clarendon* case, fall within the rule just stated, and the county court had the power to set aside the allowances because the collusion between the claimant and the county judge amounted to fraud which avoided the judgments of allowance. In each of the cases, the circuit court, as has already been shown, directed new warrants to be issued for the amount actually due by the county to the original claimant, and that is the feature of the order from which the county has appealed. It is insisted that if the original allowances were void, neither the county court nor the circuit court on appeal had any authority to order a reissue of the warrants for any part of the amount claimed. We are of the opinion, however, that that would not be the just rule to apply in a case of this character. The statute manifestly was enacted for the purpose of protecting the county against fraudulent or illegal allowances and to authorize the county court to set aside former judgments purely for the purpose of protecting the county. The object of the statute is fully attained when the county is protected from the wrongful allowances, and the original judgment of allowance can only be set aside to the extent of its wrongful effect. In other words, when the allowance is purged of its illegality and fraud, the application of plain principles of equity and justice demands that the judgments of allowance shall stand for the amount to which the original claimant was entitled. That principle is read into any statute which authorizes the setting aside of judgments unlawfully obtained, for, after all, it is only the unlawful part of a judgment which falls within

the purview of the statute. This view is expressed by Judge Dillon in the case of *Shirk* v. *Pulaski County,* 4 Dillon, 209. That was a suit on warrants, and not a proceeding for calling in the warrants, and it was held there that the warrants were absolutely void because they were allowed fraudulently, but that the holder of the warrants would be treated as the equitable assignee of so much of the original claim as was legal and that a judgment would be rendered for that amount.

We conclude therefore that the circuit court was correct in ascertaining, after determining that the original judgment of allowance should be set aside for the reasons stated, the correct amount due the original claimants and directing new warrants for such amounts.

(6-7) It is also contended by counsel for appellant that the road warrants held by appellees Brown and Counts should not have been reissued for the reason that the amount of the collection and appropriation of road tax had been exhausted. There was a special statute in force in Monroe County concerning the method of working the public roads and making contracts with reference thereto, and collecting and disbursing the road funds. See Acts of 1905, p. 226. Section 4 of the act reads as follows: "No contract shall be made by the county judge or county court for the building of bridges or repairing of same, or for working the roads, until after the county court has levied the taxes for roads and bridges under this act for the ensuing year, and then not until an estimate shall be made of the amount of money that will be raised by such levy and collection for roads and bridges within twelve months of the date of the levy; and all contracts made and to be made within one year from date of the levy of taxes shall be in amount not to exceed the estimated levy." This statute is not in conflict with Amendment No. 5, authorizing the special levy for road purposes, and this case, on account of the special features of the act applying in Monroe County, does not call for a construction of Amendment No. 5, nor of the general statutes of the State with reference to expenditure of money raised pursuant to that provision. It is clear,

however, from a consideration of the language of the special statute quoted above, that it was intended to limit contracts for road purposes to the estimated amount of funds to be raised by the tax, and that any contract in excess of the amount appropriated, and to be collected, is void.

Now, it is shown in the present case that the total amount of road warrants exceeded the amount of the appropriation and the amount actually collected for the years named, but it does not appear that the contracts upon which the warrants held by the appellees were based, exceeded the estimate or appropriation. It shows that the total amount of warrants did in fact exceed the estimate, but these warrants may have been based upon contracts made before the appropriation was exhausted. There is therefore not enough in the present record to show that the allowances were void for the reason that the appropriation and collections were exceeded. The county court in this proceeding has the right to ascertain whether or not the contracts embraced in the original claims were made before or after the appropriation of the road tax was exhausted, and if made afterwards to declare the allowance void, for in that case the county court was without power to make the allowance and the judgment could be set aside in a subsequent proceeding calling in the warrants.

We find no error in either of the judgments involved in this appeal so the same are affirmed.

GREEN v. HOLZER.

Opinion delivered May 17, 1915.

1. HOMESTEAD—SALE OF—JURISDICTION OF EQUITY—REMEDY.—Where the homestead of minor children is sold, under order of the chancery court on a petition for partition, it not appearing that the land was a homestead, the sale is not void, but chancery having jurisdiction, the error could have been corrected by appeal.

2. HOMESTEAD—SALE OF—VALIDITY—ACTS OF MINORS—RIGHT OF PURCHASER TO REPUDIATE.—The homestead lands of minors were sold under partition, and appellants were substituted for the pur-

chasers, and executed a bond for the purchase price. After the minors became of age they executed a deed to the lands and tendered the same to appellants. *Held*, thereafter neither the minor heirs nor appellants could challenge the validity of the sale.

3. MINORS—SALE OF LANDS—PRESUMPTION.—In the absence of a showing to the contrary, in a sale of lands of minors on partition, it will be presumed that the court made all proper orders for the protection of the minors according to law, in ordering the sale of the land for partition.

4. ADMINISTRATION—SALE ON PARTITION OF DECEASED'S LANDS BEFORE PAYMENT OF DEBTS.—Lands belonging to the minor heirs of deceased were sold for partition and purchased by A., for whom appellants were later substituted. Appellants had knowledge of all the facts and were voluntary parties to the proceedings. *Held*, the sale would not be set aside, when appellants collaterally attacked the decree on the ground of fraud, because of the fact that when the lands were sold, that all the debts of the deceased were not paid, and that the lands sold for partition would be required to pay the same.

Appeal from Garland Chancery Court; *A. Curl*, Special Chancellor; affirmed.

STATEMENT BY THE COURT.

The facts as stated by the chancellor are substantially as follows:

On the 12th day of April, 1911, the defendants, Agatha M. Goodlet, Janette Frisby, William Becker, Jr., deceased, Margaret Brock, Lucy Becker, Mamie and Frank Becker, minors, by guardian and next friend, Agatha M. Goodlett, and Edward Donnelly, Lawrence Donnelly, Dorothea Donnelly, minors, by their father and next friend, E. C. Donnelly, filed their suit in the chancery court against Florence Holzer, for partition of certain lands belonging to the plaintiffs and defendant as heirs at law of William Becker, deceased. Florence Holzer, the defendant, was regularly summoned but failed to appear and default was entered against her. The court found that the property was not susceptible of partition in kind and decreed a sale of the same. The property was sold and two of the lots were purchased by Otto Holzer. H. A. Green and J. A. Riggs became sureties on the bond executed by Holzer for the payment of the purchase

money of the property, the bond being in the sum of $1,490. The sale was reported to the court and approved. Riggs and Green, by consent of Holzer, intervened and were subrogated to the rights of Holzer in the land, and the court directed that upon the payment of the purchase money the commissioner should execute a deed to them for the property. The court found that the purchase money was past due and unpaid and ordered execution issued against Holzer, Riggs and Green for the purchase money. Execution issued and the sheriff levied the same on the property belonging to Riggs. At the sheriff's sale Riggs bought the property in for $1,490 and executed a bond with M. J. Henderson as surety for the payment thereof within three months. The amount named in this bond was not paid. After the maturity of the last bond Riggs and Green instituted the present suit against Otto Holzer and the heirs of William Becker, setting up that the sale under the partition decree was void for the reason that the land sold was the homestead of William Becker at the time of his death and was the homestead of his minor children at the time of the partition decree, and that this fact was concealed from the court, and therefore the sale was void. They asked that the entire proceedings growing out of the partition decree, including the sale of the property of Riggs, be set aside.

The court found that it was true that the land purchased by Holzer at the commissioner's sale, and for the payment of the purchase price of which Green and Riggs became surety on the bond of Holzer was, at the time of the death of William Becker, his homestead; that Frank and Mamie Becker were under twenty-one years of age at the time the land was sold under the decree for partition; that they were made parties to the suit for partition by their guardian, Agatha M. Goodlett; that the petition for partition, however, did not show, nor did any of the evidence in the suit for partition disclose that the land partitioned had been the homestead of their father, William Becker. It was alleged in the petition for partition that Frank and Mamie Becker were in need

of their share of the property for their maintenance and education. The court further found that before the institution of the present suit by Green and Riggs to vacate the judgment for partition Frank and Mamie Becker had attained their majority and had executed and tendered to Green and Riggs a quitclaim deed to the property.

The court further found that there had been claims probated against the estate of William Becker, deceased, amounting to the sum of $550, and that there were no funds in the hands of the administrator with which to pay these sums, and that it would be necessary to use the proceeds of the land sold in the partition suit to pay these claims.

The court thereupon ordered that the administrator be made a party to the suit instituted by Riggs and Green and directed him to file a statement of the claims probated against the estate of William Becker remaining unpaid, together with a statement of the unpaid costs of administration of said estate in the chancery court, and directed that on the receipt of the purchase money for the property sold in the partition suit the same be subject to the further order of the court, and retained control of the case for any further orders that might be necessary for the protection of the parties and others "that may by proper proceedings become parties to the suit," and dismissed the complaint of the plaintiffs for want of equity. Green and Riggs have duly prosecuted this appeal.

Thurston P. Farmer, for appellants.

1. In an action for partition, the court is without jurisdiction to order a sale of the homestead of minors, and a sale of their homestead under such an order is void, and can not be ratified by the minors after coming of age. 31 Ark. 145.

2. If the sale was void the Donnelly heirs did not part with their interest and have not and can not ratify the same. Moreover, even if the proceedings had been regular and the sale valid, they were not protected by the

bond required by statute. Kirby's Dig., § 5800; 119 S. W. (Ky.) 769; 112 S. W. (Ky.) 665; Knapp on Partition, 414, 415; *Id.* 423.

3. Before the petition for partition was filed and the sale made, the estate of Wm. Becker, deceased, was being administered in the probate court of Garland County, a large amount in claims had been filed and allowed, and were and still are unpaid. The chancery court, after the probate court had taken charge of the estate had no authority to supersede the jurisdiction of the probate court in the matter of these claims.

M. S. Cobb, for appellees.

1. The judgment should be affirmed for failure of the appellants to present a sufficient abstract of the pleadings, records and evidence as required by rule nine. 80 Ark. 259; 88 Ark. 449; 75 Ark. 471; *Id.* 349; 83 Ark. 133; 84 Ark. 552; 85 Ark. 123; 101 Ark. 207.

WOOD, J., (after stating the facts). It is unnecessary to set out and discuss in detail the evidence. The findings of fact of the chancellor are in accord with the preponderance of the evidence.

The appellants contend that the court had no jurisdiction to order a sale of the homestead of the minors in a suit for partition, and that for that reason the sale was not voidable but was absolutely void, and therefore one that could not be ratified by any subsequent conduct of the minors after becoming of age.

(1) The contention of the appellants is unsound. The court looked to the allegations of the complaint or petition in partition to determine its jurisdiction. In that complaint it was not revealed that the land sought to be partitioned was the homestead of minors. The chancery court had jurisdiction over the subject-matter, that is, the partition of the lands, and while it might have been erroneous for the chancery court to have ordered a sale of the land that constituted the homestead of minors, this error was one that did not render the decree absolutely void, and the error could have been corrected by appeal in the same case.

(2) The court having jurisdiction of the subject-matter, correctly held that Frank and Mamie Becker, the minors of William Becker, whose homestead right was sold under the decree for partition, having reached their majority, and having executed and tendered a deed to the appellants to the land constituting the homestead, could not thereafter challenge the sale of the land to appellants, and also correctly held that the appellants, by the consent of the purchaser, having been substituted in his stead and executed a bond for the payment of the purchase money, were in no position to challenge the validity of the sale.

(3) Learned counsel for appellants, in their brief, suggest that the Donnelly heirs, who were minors and also heirs of William Becker and interested in his estate, had not ratified the sale, and that the sale should be cancelled because no bond had been executed by the guardian of the Donnelly minors for the protection of their shares as required under the provisions of section 5800 of Kirby's Digest. But the appellants do not abstract any pleadings showing that this was alleged by the appellants in their complaint as one of the grounds why the judgment should be vacated, and there is no testimony abstracted which shows that this was made an issue in the court below. It must be presumed, in the absence of anything appearing to the contrary in this record, that the court made all proper orders for the protection of the minors according to law in ordering the sale of the land for partition, and in the absence of proof to the contrary, it must be presumed that the guardians of the Donnelly minors had executed the bond that they were required to give as such guardians before receiving any proceeds that might be coming to their wards as heirs out of the estate of William Becker, deceased. Moreover, the appellants had been made parties to the suit for partition and if the provisions of section 5800 of Kirby's Digest in regard to the execution of a bond by the guardians of the Donnelly minors had not been complied with doubtless upon the suggestion of this fact to the chancery court it would have made all proper orders in the prem-

ises before exacting payment of the purchase money by the appellants. It is too late to raise this issue here for the first time, even if it had been sound when properly presented in the court below, which we do not decide.

Appellants allege as one of the grounds for vacating the decree that at the time the decree was rendered the estate of William Becker was in process of administration by the probate court, and that more than $500 of claims had been probated and allowed, but not paid, and that he had no property with which to pay these claims except the lots that the chancery court had ordered sold in partition; that these facts were known to the parties to the partition suit and were knowingly concealed from the court for the purpose of perpetrating a fraud on the court and the appellants; that the appellants at the time they signed the bond of the purchaser at the sale for the purchase money of the lot did not know of the fraud and they still did not know of such fraud at the time they were made parties to the partition suit and were, by order of the court, subrogated to the rights of Otto Holzer, the purchaser.

(4) The court, as already stated, had jurisdiction to partition the land in controversy, and appellants voluntarily were made parties to the suit in partition before the commissioner in said suit was directed to collect the purchase money for which the land was sold, and for the payment of which by the purchaser, appellants had executed their bond. The matter of the estate of William Becker being in process of administration and the probation of claims against the estate being all prior to the filing of the suit for partition and the decree of the court ordering the sale of the land for partition, these were matters pending before the probate court and of public record before appellees were made parties to the suit for partition. They could and should have been set up in that suit by the appellants and if the court had proceeded to distribute the proceeds of the sale in the face of allegations and proof that the estate was indebted and in process of administration and that these lands were the only assets of the estate out of which the debts

could be paid, and had nevertheless entered a decree for final distribution of the proceeds, this would have been an error which appellants could have corrected on appeal. Being parties to the partition proceedings before the final judgment was rendered confirming the sale and disposing of the proceeds of that sale, they should have presented these matters in that case and corrected any error of the court by direct attack on that judgment on appeal. Their suit here is but a collateral attack on the judgment of the chancery court having jurisdiction over the subject-matter and the parties, and that judgment is conclusive of the matters in regard to the administration pending in the probate court which appellants now seek to have considered as a ground for vacating the judgment. Moreover appellants, by voluntarily executing the bond for payment of the purchase money by the purchaser and by having themselves made parties and substituted in his stead; and, as the abstract by the appellees shows, having procured a deed from the purchaser and taken possession of the property and held the same out as their own, they are not in a position in this collateral proceeding to repudiate the sale which they had by their voluntary conduct ratified. Furthermore, the chancery court has directed the proceeds of the purchase money to be paid by the appellants and, when collected by the commissioner, to be held to await the further orders of the chancery court. The chancery court thus has it in its power to prevent any irreparable injury to the appellants before the distribution of the money paid by them has been made.

The court was correct in dismissing the appellants' complaint for want of equity, and its decree is in all things affirmed.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY v. SHARP & WHITE.

Opinion delivered May 17, 1915.

1. TELEPHONE COMPANIES—NATURE OF BUSINESS—REASONABLE REGULATIONS—RATES.—Telephone companies are public service corporations and take and hold their charters subject to the obligation of rendering service at uniform and reasonable rates and without discrimination; but a telephone company may require its charges to be paid in advance, and may extend credit for such charges to such persons as it may deem desirable, without rendering itself liable to a charge of discrimination.
2. TELEPHONE COMPANIES—CHARGES—PAYMENT IN ADVANCE.—Telegraph and telephone companies may make rules and regulations which require that charges shall be paid for a reasonable time in advance by their subscribers, and may enforce such regulations by the refusal of service to persons who do not comply therewith.
3. TELEPHONE COMPANIES—LONG DISTANCE CALLS—PAYMENT.—It is a reasonable rule for a telephone company to require that the telephone where long distance calls originate shall be responsible for the payment of the charges therefor, and the company has the right to enforce such rule.
4. TELEPHONE COMPANIES—CHARGES—RULES—ABROGATION.—A telephone company had a rule making the subscriber responsible for the charges for long distance calls at whose 'phone the call originated. *Held*, the rule was not abrogated by the company upon a showing that upon a few occasions, subscribers were asked to O. K. calls originating at their 'phones.

Appeal from Craighead Circuit Court, Jonesboro District; *J. F. Gautney*, Judge; reversed.

STATEMENT BY THE COURT.

V. S. Sharp and H. D. White, partners as Sharp & White, instituted this action in the circuit court against the Southwestern Telegraph & Telephone Co. to recover penalties under our statute for alleged discrimination against them by the defendant in furnishing telephone service. The testimony taken at the trial was voluminous, but we think the issues raised by the appeal are simple and may be briefly stated as follows:

The defendant telephone company owns, maintains and operates a telephone exchange in the city of Jonesboro, Arkansas, and also operates a long distance line

from the city of Jonesboro to various towns in the State of Arkansas and elsewhere.

The plaintiffs are court stenographers and maintain an office in the city of Jonesboro. For several years they have been subscribers to the defendant's telephone service. Telephone subscribers pay a stated rental for service in the city of Jonesboro and extra compensation for long distance service. Under the rules and regulations of the company in regard to long distance messages each subscriber was charged and required to pay for all long distance messages originating from his telephone. The plaintiffs declined to pay for such messages originating in their office unless the messages were O. K'd. by them. The telephone company refused to credit them for service over the long distance telephone unless they would agree to pay for all such messages originating in their office, regardless of whether they were O. K'd. by plaintiffs. Hence this suit.

Other facts will be stated in the opinion. The jury returned a verdict for the plaintiffs for $175 and the defendant has appealed.

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

The court properly held that the rule adopted by appellant was a reasonable one; but the appellees failed to bring themselves within the requirements of the law by complying or offering to comply with the reasonable rules and regulations of the appellant.

The extension of credit is a matter of grace, and a telephone company may select whom it shall credit. When appellees demanded long distance service on credit upon terms or conditions prescribed by themselves, that is, that they would only pay for such long distance calls originating at their telephone as they put in, or "O. K'd." they did not bring themselves within the requirements of the statute. We do not believe a telephone company ought to be penalized for refusing to furnish service and extend credit under such conditions. 81 Ark. 486; 100 Ark. 546; 2 Hutchinson on Common Carriers, (3 ed.),

§ 567; 51 Fed. 472; 61 Fed. 158; 88 Fed. 659; 86 Fed. 407; 130 S. W. 1050.

The right to recover a penalty must be dependent upon the right to demand the service; and only he who has paid or tendered the proper charges has a right to make such demand. *Supra;* 95 Ind. 29; 89 Ga. 777; 172 S. W. 433.

The evidence does not disclose any discrimination by the appellant in favor of any subscribers in like situation with appellees.

Baker & Sloan, for appellees.

1. The alleged rule has lost its existence through nonenforcement. Appellees were in a like situation with Lamb, Westbrooke, Applegate, and other parties who reverse calls or have charges transferred.

2. The rule is unreasonable. The reasonableness of a rule adopted by a public service corporation is a question for the court, and not for the jury. 73 Am. 205, 208.

The excuse offered by appellant for adopting such a rule is that the nature of its business is such that it is subject to a certain amount of fraud, and imposition. The company is not justified, in order to avoid this, in adopting a rule that will transfer the burden of such fraud and imposition from itself to the subscribers who are no more responsible for the situation than the company itself. 6 Wis. 539; 70 Am. Dec. 479. See, also, 122 Ala. 428, 25 So. 232; 137 O. St. 301, 41 Am. Rep. 500; 17 Wall. (U. S.) 357; 39 Ark. 148; 47 Ark. 97; 90 Ark. 138; 108 Ark. 115.

3. The compliance or offer to comply with the reasonable regulations of the company is a requirement contained in a proviso clause of the statute under which this suit was brought. The burden therefore was on the company throughout to prove the rule and its continued existence, and of showing that the appellees did not comply or offer to comply with the rule. 46 Ark. 306, 310; 63 Ark. 556, 559; 74 Ark. 302, 306; 83 Ark. 26, 29; 84 Ark. 332.

4. Appellant's argument with reference to the right to extend or deny credit is beside the issue. However, where parties are solvent and entitled to receive credit as much as the other patrons or subscribers of a public service company, it has been held that there may be discrimination as to credit. 147 Ia. 626, 125 N. W. 208, 31 L. R. A. (N. S.) 319. See, also, 42 S. W. 351.

Walter J. Terry, for appellant in reply; *A. P. Wozencraft,* of counsel.

Every witness called, testified that for a number of years he had known of the rule. The burden is on the corporation to show that it has established and promulgated a given rule; but when that is done the burden is on the party attacking it to show that it has been abrogated or abandoned. 115 Ark. 308.

HART, J., (after stating the facts). This suit was brought under an act approved February 25, 1913. See Acts 1913, p. 346.

Section 1 of that act is as follows:

"Section 1. That section 7948 of Kirby's Digest shall be amended so as to read as follows:

"Section 7948. Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality, within ten days after written demand therefor; provided, such applicants comply or offer to comply with the reasonable regulation of the company, and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under a penalty of one hundred dollars, and five dollars per day for each day from the expiration of said notice until said demand is complied with or suit is instituted for penalty for failure to comply with said demand, for such dis-

crimination, after compliance or offer to comply with the reasonable regulations of such company and the time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused. And any persons denied such telephone facilities shall also have the right to proceed by mandamus or other proper remedy to enforce the furnishing of same and the courts shall hear such applications either in vacation or in term time and make such temporary orders relative to the furnishing of such facilities as the facts may justify, and may enforce compliance therewith, until such orders are vacated by order of the court or the judge at chambers, or such suit is finally determined."

In the case of the *Southwestern Tel. & Tel. Co.* v. *Danaher,* 102 Ark. 547, we held that telephone companies have the right to make and enforce reasonable rules and regulations for the guidance of their subscribers and, in case the subscriber refuses to obey such regulations, may refuse to furnish telephone service without being guilty of discrimination. The statute under consideration there was practically the same as that in this case except in regard to the penalty prescribed for its violation.

(1) Being public service corporations, telephone companies take and hold their charters subject to the obligation of rendering service at uniform and reasonable rates and without discrimination. In recognition of the right of the telephone company to prescribe and enforce reasonable rules and regulations for the guidance of its subscribers, this court has held that a telephone company may require its charges to be paid in advance and may extend credit for such charges to such persons as it may deem desirable, without rendering itself liable to a charge of discrimination. *Yancey* v. *Batesville Telephone Co.*, 81 Ark. 486.

(2) It is the general rule that telegraph and telephone companies may make rules and regulations which require that charges shall be paid for a reasonable time in advance by their subscribers and may enforce such regulations by the refusal of service to persons who do

not comply therewith. See case note to 34 Am. & Eng. Ann. Cas., at page 119.

(3) In the case before us there was no refusal of credit to plaintiffs but under the rules and regulations adopted by the telephone company subscribers were required to pay for all long distance messages which originated from the subscriber's telephone. The plaintiffs refused to pay for long distance messages originating from their office telephone unless these messages were from themselves or were O. K'd. by them.

We think the regulation adopted by the telephone company was a reasonable one, and that it had a right to enforce it. The undisputed evidence shows that Jonesboro was a growing city; that there were 1,033 subscribers to the Jonesboro exchange and about 200 service stations in the country; that they were also connected with the Nettleton exchange which had about 200 telephones in town and country; that on account of the number of subscribers it was difficult for the operators to recognize the voices of the persons making long distance calls and in order to keep the telephone company from being imposed upon it was necessary that long distance calls be charged to the telephone from which they originated. It was also shown that it was an easy matter for the subscriber to control the use of his phone. Of course when the plaintiffs were in their office they could personally control it; and when they were out the telephone could be locked in the desk so that no one else could use it. Hence we are of the opinion that the rule adopted by the telephone company was a reasonable one and that it had a right to enforce it.

It is contended by counsel for the plaintiffs that, however just and proper the rules were in themselves, they were so enforced as to constitute an unjust discrimination against them. We do not think the evidence in the record shows that the rule sought to be enforced against the plaintiffs was ignored in regard to others in like situation. In order to sustain this issue plaintiffs introduced two witnesses each of whom stated that at one time the company had charged his office with

a message which had not been authorized by him and that he refused to pay it. The evidence on the part of the telephone company tends to show that they uniformly attempted to enforce this rule and the mere fact that they did not enforce it on the two occasions in question does not amount to a discrimination against the plaintiffs.

(4) It was also shown by the plaintiffs by several other witnesses that frequently the long distance operators asked them to O. K. messages which came from their phones. The mere fact, however, that in some instances the long distance operators requested subscribers to O. K. messages was not sufficient to show that the rule under consideration had been abrogated or was not being enforced. The operators, at the times mentioned, may have had a suspicion that the subscriber was being imposed upon and did this for the purpose of protecting the subscriber. At any rate, we do not think the fact that the long distance operators would sometimes request that messages be O. K'd. by subscribers is sufficient to show either an abrogation of the rule or its nonenforcement.

It was also shown by plaintiffs that the company frequently received calls which were "reversed." For instance, a person would be in Jonesboro and would desire to talk to his home or office in Paragould, Arkansas, and would request the long distance operator to call his office or home and charge the message to that end of the line. This testimony did not tend in any way to show that the rule in question had been abrogated or was not being enforced. The reversing of calls had nothing whatever to do with the rule in question. It was an entirely different rule and adopted for an entirely different purpose. The testimony on the part of the telephone company, which was not disputed, tended to show that this practice was permitted for the benefit of its subscribers; that when the operator became satisfied that the person talking was a subscriber to a phone in another town, he was permitted to have his message charged to his home phone; that the company so far

had not lost anything by adopting this rule; and that if as the exchange grew larger it should be found that this rule operated injuriously to the best interest of the company or should not be beneficial to the subscriber, it would be abrogated.

The record shows that the agents of the defendant tried in every way to induce the plaintiffs to accept service in accordance with its rules and regulations and never at any time refused to serve them until they had refused to comply with its rules and regulations in regard to the use of the long distance telephone. We think the undisputed testimony shows that the telephone company sought to enforce the rule under consideration against its subscribers alike and that it only restricted the use of the long distance telephone when requested to do so by its subscriber or when they refused to obey the regulations in regard thereto.

It follows that the court erred in not directing a verdict for the defendant and for that error the judgment will be reversed; and, inasmuch as the case appears to have been fully developed, the cause of action of plaintiffs will be here dismissed.

HAMBURG BANK v. AHRENS.

Opinion delivered May 17, 1915.

1. BILLS AND NOTES—FAILURE OF CONSIDERATION—RECOUPMENT.—A defendant may show, in defense of a suit upon promissory notes, a partial failure of the consideration therefor by way of recoupment in abatement of so much of the consideration as has failed.
2. BILLS AND NOTES—PARTIAL FAILURE OF CONSIDERATION—DEFENSE—STATUTE OF FRAUDS.—The consideration of B's signing certain notes was that appellant would turn over to him certain insurance business, this the appellant failed to do. *Held*, although the agreement was within the statute of frauds, still in a suit on the notes, it could be availed of as a defense to the notes, being a partial failure of the consideration therefor.
3. BILLS AND NOTES—FAILURE OF CONSIDERATION—STATUTE OF FRAUDS.—Where appellant procured the execution of certain notes by one B. upon the agreement to furnish to B. enough insurance business to

enable B. to pay them off, it can not then refuse to perform its agreement because it was not in writing, and seek to hold B. to the full amount of the notes.

4. BILLS AND NOTES—PURCHASER FOR VALUE—BURDEN OF PROOF.—In an action on a promissory note, where it appears that the holder purchased the same for value, and before maturity, the burden is on the maker to show that he had notice of defense thereto, otherwise it is presumed that he is a purchaser in good faith.

Appeal from Ashley Circuit Court; *H. W. Wells,* Judge; reversed as to Doyle; affirmed as to Hamburg Bank.

STATEMENT BY THE COURT.

The appellees executed as principal and sureties, a series of notes to the Hamburg Bank, dated December 16, 1909, in a sum equal to $50 each, with 10 per cent interest from date till maturity and bearing 10 per cent after maturity until paid, the last note being payable March 16, 1914.

The first sixteen notes were paid as they fell due and on January 6, 1913, nineteen of the notes were past due, and on that date the Hamburg Bank endorsed for value to the appellant, T. N. Doyle, the remaining sixteen notes of the series which had not matured.

When all the notes were past due, suits were brought in the justice court on each one and from the judgment an appeal was taken to the circuit court, where the cases were consolidated for trial.

The defendant admitted the execution of the notes, pleaded failure of consideration and denied that T. N. Doyle was a *bona fide* purchaser for value without notice.

It appears from the testimony that Elmo Ahrens was an insurance agent at Hamburg in 1907; greatly indebted to the companies he represented and also to the Hamburg Bank in the sum of $3,500, and that W. H. Tebbs and W. L. Blanks, officers of the bank were sureties on some of the agent's bonds to the insurance companies and secondarily liable on his indebtedness to the bank. They induced Elmo to sell his insurance agency to his cousin, Albert Ahrens, and turn over to them the proceeds of the sale.

Albert Ahrens, Ed Ahrens, appellee, and C. J. Brown, executed on August 24, 1907, and conditionally delivered, seven short term notes to said Tebbs and Blanks, for the aggregate sum of $3,500, to cover all of Elmo's indebtedness, the balance over, if any, to be paid to Albert. It developed, however, that it could not be ascertained from the account books of the agency, the amount of Elmo's indebtedness. The deal was then abandoned with Albert Ahrens, who proceeded to establish an insurance agency of his own.

In 1907 Albert agreed that the said notes for $3,500 were to be treated as having been delivered unconditionally and Tebbs and Blanks agreed to pay that part of Elmo's indebtedness, for which they were secondarily liable and turn over to him as much of the Elmo agency as they could, being only one or two companies, to which Elmo was not indebted and the renewal list, from which he could get the expiration of outstanding policies and be in a position to procure renewals thereof and agreed to throw him all the insurance business of the officers of the bank and all that could be controlled by the bank and a large portion of the insurance of the Beal-Doyle Dry Goods Co. of Little Rock.

The indebtedness of Elmo Ahrens Insurance Co. was not paid and Albert abandoned the agency and repudiated the notes dated August 24, 1907.

C. J. Brown arrived at Hamburg about the 1st of October, 1907, intending to establish an independent insurance agency and Albert Ahrens left there. Brown had a few companies, some of those that had been represented by Elmo, to whom he had paid Elmo's indebtedness, and one or two he had procured from Albert. Blanks and Tebbs induced him to take over the agency and assume the payment of the $3,500 notes toward discharging Elmo's debts. Brown owed them nothing and was not under obligations to them at the time.

As an inducement they agreed to pay off the remaining debts due by Elmo Ahrens to the companies that he had represented, so they could be transferred to

Brown's agency, and to give him sufficient patronage of the officers and customers of the bank to enable him to pay the notes as they fell due. They estimated the volume of business assured to him, listed it and demonstrated that his commissions would be sufficient for the purpose. They made no writing to that effect, however.

Brown agreed to assume the $3,500 of the notes in consideration therefor. In 1909 Brown had paid something on the notes, but was behind.

J. P. Blanks, the president of the bank, then approached him and told him that he had been talking to Ed Ahrens, the surety, and Brown's father, and the bank wanted the notes put in small amounts so that he could meet them promptly. The matter was discussed several days and the new notes made directly to the Hamburg Bank, signed by Ed Ahrens, C. J. Brown and Brown Bros., for that part of Elmo's indebtedness to the insurance companies, for which Tebbs and Blanks were sureties.

These notes were executed upon the same agreement that the Hamburg Bank would give to Brown's agency the insurance of its officers, and all other business it could control, as well as a large part of the business of Beal-Doyle Dry Goods Co., Brown's testimony showing that the latter would amount to $100 a year commission.

The series of new notes, upon part of which these suits were brought, were executed and delivered to the bank on December 16, 1909, and the old notes for the $3,500 cancelled. The officers of the bank gave their insurance business to Brown to an extent that was satisfactory for 1907, to and including the first half of 1912. The business from the Beal-Doyle Dry Goods Co. was never given to him, however, and in the summer of 1912 he was some five or six months in arrears in the payment of the notes. He then told J. P. Blanks that W. L. Blanks intended to give most of his insurance business to another agent and unless he was required to continue with the Brown agency, that he would not pay any more

of the notes. J. P. Blanks said he could not control W. L. Blanks' business and Brown refused thereafter to pay the notes, the business being taken from his agency.

On January 6, 1913, the Hamburg Bank sold to T. N. Doyle, of the Beal-Doyle Dry Goods Co., for cash, the sixteen notes of the series that were not matured and indorsed them to him on that day, and J. L. Blanks, the president, endorsed them personally. At this time there were nineteen of the notes due and unpaid owned by the bank, and J. P. Blanks knew that Brown had refused to pay any more of them. J. P. Blanks was a stockholder in the Beal-Doyle Dry Goods Co. and a salesman for it and had been for ten years, and was president of the appellant bank in 1913. Between the first of January, and the first of March, 1913, the bank had on deposit with said dry goods company $20,000, subject to check and T. N. Doyle was a stockholder and officer of said dry goods company during January, 1913. Blanks stated that Doyle was seeking an investment for some money which his company did not wish to pay 8 per cent on and that he recommended the purchase of these notes and endorsed them personally and said nothing whatever to Doyle about the refusal of Brown to pay them. That Doyle had no knowledge of any such refusal or of any defense to the notes, all of which were paid for by and transferred to him before maturity.

The court instructed the jury, giving, over appellant's objections, instruction numbered 1, for appellee, and refusing appellant's requested instruction numbered 19, as follows:

(1) "The court instructs the jury that all valid contracts must be based upon a good and valuable consideration; therefore if they find from the evidence in this case that the consideration for which the notes sued on were given has failed, or has not been performed on the part of the plaintiff, then they may find for the defendants.

(19) "Even if you should believe that W. L. Blanks and others, being under promise to do so, failed to give

some part of their insurance to defendant, and that such failure was not due to the defendant's inability to meet rates or take care of the insurance, this could not be considered by you as a total failure; unless it appears from a preponderance of the evidence what was the damages in dollars and cents on account of such failure, the defendants can not recoup as to partial failure, you will find for the plaintiffs the full amount of the notes sued on and interest."

The jury returned a verdict for the defendants and from the judgments thereon, plaintiffs appealed.

J. C. Knox, Moore, Smith & Moore and *H. M. Trieber,* for appellants.

1. The alleged verbal agreement to throw the insurance to Brown was within the statute of frauds and not available as a defense. 103 Ark. 79. This court has ruled, 99 Ark. 458, that in an action on a note the defendant is entitled, by way of recoupment, to abatement for so much of the consideration as had failed, whenever the circumstances are such that he could maintain a cross-action for damages; but the necessary converse of this rule, *i. e.,* that recoupment can not be had upon an agreement which would not support a cross-action, is what we contend for here. 56 N. E. 713; 175 Mass. 427.

2. The court erred in refusing instruction 19 requested by appellants, to the effect that if Blanks and others, being under promise to do so, failed to give some part of their insurance to defendant, and if such failure was not due to the defendant's inability to meet rates or take care of the insurance, this could not be considered by the jury as a total failure; and unless a preponderance of the evidence showed in dollars and cents what was the damages on account of such failure, the defendants could not recoup as to partial failure. 99 Ark. 458.

3. Since the evidence shows no more than a partial failure of consideration, instruction 1, which authorized the jury to find a total want or failure of consideration, was abstract, and should not have been given.

Williamson & Williamson, for appellees.

1. This was not a contract "not to be performed within one year from the making thereof." It might not be performed within a year, or it might be terminated within a year. The statute of frauds applies only to contracts which, by their terms, are not to be performed within a year. 54 Ark. 199; 96 U. S. 404; 56 Ark. 629. But the statute of frauds was not pleaded in the lower court, was not an issue made, and can not avail appellants here. 32 Ark. 97; 56 Ark. 263.

2. Partial failure of consideration was available as a defense in this case. 99 Ark. 458. Instruction 19 was properly refused as misleading and confusing. It is not the province of the witnesses to fix "in dollars and cents" the amount of damages, but to state the facts only, and from the facts so stated the jury are to determine the extent of the damage.

KIRBY, J., (after stating the facts.) It is contended first that the court erred in not excluding from the consideration of the jury the testimony of the witnesses relative to the parol agreement to deliver to Brown's insurance agency the insurance business of the officers of the bank and its customers, which could be controlled by it, it being claimed that if such an agreement was made, it was not to be performed within a year and was within the statute of frauds and therefore the failure to carry it out could not constitute a failure of consideration of the notes.

(1) This court has held that a defendant may show in defense of a suit upon promissory notes a partial failure of the consideration therefor by way of a recoupment in abatement of so much of the consideration as has failed. *Webster* v. *Carter,* 99 Ark. 458; *Dutton* v. *Million,* 169 S. W. 1184, 114 Ark. 330.

Brown testified that he executed the notes upon the agreement of the bank's officers to deliver to his agency their insurance business and the insurance business of such other customers as it could control. That he did this after they had shown him a list of the business that

would come to his agency which was sufficient to take care of the notes as they matured; said that he got none of the companies of the old Elmo agency because Brown and Tebbs had failed to pay his indebtedness to the companies and that the list of the dates of expiration of the policies was secured through Albert Ahrens' agency and "that the agency, the bank agreed to turn over to him was not worth anything at all."

After the bank refused to continue to have the insurance business of its officers and others given to the Brown Agency in accordance with the agreement, Brown declined to pay any of the remaining notes and sold his agency for barely enough to pay the indebtedness due from him to the insurance companies he represented. Brown had paid sixteen of the series of notes.

(2) The first instruction, telling the jury that if they found that the consideration for which the notes sued on was given had failed or had not been performed by the plaintiffs that they should find for the defendants, was not erroneous as being abstract, Brown's testimony showing that the officers of the bank had at first given enough business to his agency to justify his paying the notes maturing, that the agency they agreed to deliver was worthless and that they had finally failed to perform the agreement to deliver the insurance business to his agency. It may be that the agreement to deliver such insurance business, since the last of the series of notes in consideration of which it was made was not due for more than two years thereafter, was not to be performed within one year from the time it was made, but there was no legal obstacle to the performance of this agreement by the bank and its officers and certainly it was a moving consideration for the execution of the notes, the makers of which declined to pay the remaining notes after the failure of the bank to deliver any considerable portion of the insurance business in performance of its agreement.

Conceding that the agreement was within the statute of frauds and could not be enforced by Brown against a

plea thereof in another proceeding, it still could be availed of as a defense to the notes, the partial failure of consideration of which may be shown upon the theory that it was a recoupment and not a set-off or counterclaim and the right to reduce the claim sued on continued as long as plaintiffs' cause of action thereon existed. *State* v. *Ark. Brick & Mfg. Co.,* 98 Ark. 129.

(3) If the bank was allowed to procure the execution of these notes upon agreement to furnish enough insurance business to the agency to enable its manager to pay them off and then refuse to perform its agreement because it was not in writing and in contravention of the statute of frauds and collect the notes notwithstanding, it would be perpetrating a fraud under the forms of law and the terms of a statute designed to prevent and protect against fraud.

The court did not err in refusing plaintiffs' said requested instruction 19, telling the jury that a failure to deliver part of their insurance to the defendant by Blanks and others under a promise to do so, not due to his inability to meet the rates of other companies, could not be considered as a total failure of consideration, unless it appeared from a preponderance of the testimony what was the damage in dollars and cents on account of such failure and that no recoupment could be had for a partial failure. It had already instructed the jury in appellee's requested instruction numbered 2 that if the plaintiffs partially failed to perform the consideration for which the notes sued on were given, and that by reason of the breach of contract the defendants were damaged in an amount equal to or greater than the amount of the notes sued on, they would find for the defendant and the jury must have understood from the instructions given that in order to relieve the defendants from the payment of the notes, that the bank's officers had failed to deliver enough insurance business under the agreement so to do to damage the makers of the notes in a sum equal to or greater than the amount due thereon. And there is substantial testimony from which the jury might have found

that the failure to carry out the agreement to deliver insurance business to Brown's agency caused him a loss of more than the amount of the notes sued on by the bank. Sixteen of the series of notes had already been paid and the defense is not available against the notes sued on by T. N. Doyle.

(4) It is understood that he purchased them for a valuable consideration before maturity and the testimony does not show that he had notice of any defect therein or any defense thereto. The burden was upon appellees to show after the testimony disclosed that Doyle had purchased the notes for value before maturity that he had such notice of failure of consideration as would prevent his being a *bona fide* purchaser, the presumption otherwise being that he was a purchaser in good faith without notice. *Harbison* v. *Hammons,* 113 Ark. 120, 167 S. W. 849; *Little* v. *Ark. National Bank,* 113 Ark. 72, 167 S. W. 75.

The testimony does disclose that J. P. Blanks, the president of the bank, knew of the infirmity in the notes, that he negotiated the sale of them to T. N. Doyle for the bank and that he was salesman for and a stockholder in the Beal-Doyle Dry Goods Co., a corporation in which said Doyle was largely interested. Blanks was not the agent of Doyle, however, but of the bank in the sale and he stated that he did not tell the purchaser anything about any defense to the notes or refusal of the makers to pay same, but on the contrary recommended them as a good investment. There was nothing shown in the transaction that would impute notice to the purchaser of these notes before maturity, who paid an adequate consideration therefor, of any defense thereto.

It follows that the judgment against appellant Doyle, there being no testimony to support the verdict, must be reversed and a judgment will be entered here in his favor.

The record not disclosing any prejudicial error, the judgment against the bank will be affirmed. It is so ordered.

LaCotts v. LaCotts.

Opinion delivered May 24, 1915.

APPEAL AND ERROR—REVERSAL WITH DIRECTIONS—CONCLUSIVENESS.—The reversal by the Supreme Court of a decree in chancery with directions to the chancery court to enter a certain decree, is conclusive of all the issues that were presented in the case or that could have been presented.

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

Samuel Frauenthal, W. N. Carpenter and *J. M. Brice,* for appellant.

1. The appellant is not estopped. The question of the validity and legality of the decree upon which the appellee, George LaCotts' title is based, was not passed upon or acted on by this court, on the former appeal. The question is not *res adjudicata.* 50 Ark. 190; *Ib.* 338; 97 *Id.* 611; 21 *Id.* 364; 105 *Id.* 5.

Whatever pleadings or matters were set up in the former case, they were simply a *collateral* attack upon the decree and the issue here has never been decided. 97 Ark. 450; 96 *Id.* 540; 75 *Id.* 1; 91 *Id.* 394.

2. The question is not *res adjudicata.* 2 Am. & E. Ann. Cas. 650; 3 *Id.* 86; 8 *Id.* 773; 122 Ala. 611; 20 So. 660; 90 Kans. 196; 135 Wisc. 38; 75 Ark. 150; 89 Ark. 509.

3. The decree in *LaCotts v. Gibson,* is fatal, defective and void on appeal, or direct attack. 97 Ark. 151; 72 *Id.* 185; Kirby's Dig., § 4424.

Botts & O'Daniel, for appellee.

1. The questions raised were settled on the former appeal. The matters are *res adjudicata.* 109 Ark. 335, 341; 105 *Id.* 493; 76 *Id.* 423; 94 *Id.* 351-2; 82 *Id.* 1; 94 *Id.* 332;, 184, 188; 43 Ark. L. R. 424; 44 *Id.* 165; 106 *Id.* 295; 74 *Id.* 322; 91 *Id.* 394.

2. The chancery court was correct in rendering judgment in accordance with the mandate of this court. 109 Ark. 335; *Ib.* 525, 52; 106 *Id.* 292; 81 *Id.* 440.

McCULLOCH, C. J. This is the second appeal in this case. The former opinion is published in volume 109 of the reports, page 335, where the facts are fully set out. It is a controversy concerning the title to a quarter section of land situated in Arkansas County. The judgment of this court was that the decree of the chancery court be reversed and the cause remanded with directions to enter a decree in favor of the appellant, George LaCotts, who is the appellee in the present appeal.

When the mandate of this court reached the chancery court, the present appellant, John A. LaCotts, who was the defendant and cross-complainant below, filed a supplemental answer and cross-complaint attacking a decree in another cause which forms the basis of this title of appellee, George LaCotts, the land having been sold to the latter pursuant to the terms of that decree, which was against John A. LaCotts. The chancellor decided that the issues presented in the amended answer and cross-complaint had been adjudicated by this court and sustained a demurrer to the same and entered a decree in favor of appellee, George LaCotts, in accordance with the mandate of this court. We are of the opinion that the chancery court was correct and that the former judgment of this court was in fact conclusive of the questions sought to be presented in the amended answer and cross-complaint. The action was instituted by George LaCotts, the present appellant, against John A. LaCotts, the present appellee, in which the plaintiff asserted title to the land under the decree mentioned and sought to have his title quieted and the defendant in that action enjoined from interfering therewith. Defendant answered, attacking the validity of the decree under which the sale was made and also alleging that the plaintiff had purchased the land and took the title thereto under the sale as trustee for the defendant and that the plaintiff should be held to be a trustee *ex maleficio*. The chancery court decided the case in favor of the defendant, but on appeal to this court the decree was reversed and, as before stated, the cause was remanded with direction

to enter a decree in favor of the plaintiff. Even if the question of the validity of the decree, which formed the basis of appellee's title, had not been expressly attacked in the pleadings, it was necessarily raised for the reason that appellee's title was in issue and that called for any attack upon the decree which involved the question of the validity and strength of appellee's title.

The principles announced by this court in several cases are absolutely decisive of the present case in appellee's favor. *Chicago Mill & Lumber Co.* v. *Osceola Land Co.*, 94 Ark. 183; *Gaither* v. *Campbell,* 94 Ark. 329; *Baker* v. *Hudson,* 117 Ark. 560. According to the decisions in those cases, a reversal of a decree in chancery, with directions to the chancery court to enter a certain decree, is conclusive of all the issues that were presented in the case or that could have been presented. However, as a matter of fact, the record of original pleadings in the case shows that the questions raised in the amended answer and cross-complaint were also raised in the original answer and cross-complaint. It appears that appellant abandoned the attack on the decree by failing to take any proof to sustain the cross-complaint, but that did not eliminate it as an issue in the case, and a decree of the chancery court or of this court on appeal, necessarily resulted in an adjudication of that question.

Appellant also treats his plea as a bill of review in the former proceedings in which the decree was rendered under which the land was sold, and has brought up the record in that case and had it consolidated with this. It necessarily follows that the last decree of the chancellor, holding that the judgment of this court bars any further inquiry into the title, eliminates the first decree from the case, and an affirmance of the chancellor's last decree is conclusive of the whole matter.

The decree is, therefore, affirmed.

ARKANSAS LAND & LUMBER COMPANY *v.* SECRIST.

Opinion delivered May 24, 1915.

1. MASTER AND SERVANT—INJURY TO SERVANT—INDEPENDENT CONTRACTOR.—While the owner of a building has the right to see that the building is constructed according to the plans, the mere exercise of this right does not create the relation of master and servant between the owner and the servant of an independent contractor, employed to construct the building, unless the owner undertakes to direct the manner in which the laborer shall work in the discharge of his duties.
2. MASTER AND SERVANT—INJURY TO SERVANT—INDEPENDENT CONTRACTOR.—Mere supervision over the work of an independent contractor does not make a principal employer the master of the servants employed by the contractor, and who perform the work, if such supervision consists only in seeing that the plans have been followed, and does not go to the extent of saying who shall do the work, or how it shall be done.
3. MASTER AND SERVANT—RELATIONSHIP—INDEPENDENT CONTRACTOR.—A servant remains the servant of an independent contractor if the right of direction and control abides with the independent contractor.

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

STATEMENT BY THE COURT.

Appellee alleged in his complaint that on the 10th of January, 1914, he was engaged as a laborer in helping to construct extensive mill sheds for the appellant company and that in the construction of these sheds the appellant company had negligently and carelessly caused the carpenters constructing them to place the joists on which the roof rested without any bracing of any kind whatever to support the same, the only support for said joists being nails at the ends thereof, and that the appellant company knew that said manner of supporting the joists without bracing and with only nails at the ends thereof was insufficient and dangerous to employees working on top of the shed. That appellee had nothing to do with the construction of said sheds, being employed in conveying lumber and other material from one part of the sheds to other parts thereof for the use

of those actually carrying on the work of construction, and that he did not know of the defective, dangerous and negligent manner in which said construction work was being done; and that while he was engaged in helping to remove and distribute a large pile of lumber negligently placed on top of the shed by appellant's servants in such quantity that the shed negligently constructed as aforesaid would not support, collapsed by reason of the joists giving away, and appellee was precipitated to the ground, and parts of the lumber fell upon him, inflicting serious injuries.

Appellee recovered judgment for a very substantial sum, which is not claimed to be excessive. Without setting out the proof in detail showing the circumstances under which appellee sustained the injury sued for, it may be said that the proof is sufficient to support the finding of the jury that appellee's injury was due to the manner in which the joists had been constructed in conjunction with the negligent placing on the top of the shed of a pile of lumber containing a thousand or twelve hundred feet.

But the principal defense in this case is that appellee was not the servant of appellant at the time of his injury, but was the servant of one D. G. Allen, who was engaged in the construction of the sheds as an independent contractor. The proof shows, without dispute, that Allen was a contractor engaged in the construction of the various kinds of buildings, and had been operating as a contractor for several years, and that appellee, together with the other servants engaged in the construction of the shed in question, had all been employed by Allen, or by a Mr. Pryor, who was his foreman, and that appellee and all other servants employed on this job were paid their wages by Allen. Allen had a contract in writing under which he was operating at the time of appellee's injury, which consisted in a proposition made by him to construct the shed and the acceptance of his offer by the manager of the appellant company. This writing was as follows:

"D. G. Allen, contractor and builder. Estimates furnished on application. Telephone No. 206, Malvern, Ark., June 4, 1913. Mr. G. E. Mattison, City. Dear Sir: I will build your shed for $6.40 per thousand feet, you to furnish all material, in a convenient place to building site and all piers ready for posts to be set. Will build your tram under same conditions for $5.40 per thousand feet. Yours truly, (Signed) D. G. Allen.

"Accepted 8-1-1913. Ark. L. & L. Co., G. E. Mattison, Mgr."

Allen testified that the appellant company had nothing to do with the work except to see that the shed was constructed in accordance with the plans, and that the appellant company had nothing to do with employing or discharging the labor, and that it had no authority to give, and did not give, any orders or directions to any of the laborers in regard to the manner of performing their work, but that any suggestions or directions concerning the work made by appellants were given either to him or to his foreman, and were given for the purpose of conforming the work to the plans. He testified that the lumber company furnished the plans and specifications to go by, and that certain changes were made by its superintendent in the plans, but such changes were indicated on the blueprint. That on one occasion the superintendent made some changes in the material to be used, but no directions were ever given by any representative of the appellant company to the men about their work, but that he and his foreman at all times had sole authority and supervision over the appellee and all other laborers. It is shown, however, that appellant's general manager and superintendent were both about the work once or twice a day, and sometimes oftener, and Allen's foreman and one of the laborers both testified on cross-examination that it was their duty to do as they were told by appellant's superintendent, and that they were subject to his orders in the performance of their duties. But a consideration of all the evidence given by these witnesses make it plain that they only intended to say that the superin-

tendent had the right to prescribe plans for the building, and that it was their duty to execute these plans.

Much importance is attached by appellee to the statement of Pryor as to his recognition of the authority of appellant's superintendent to direct the construction of the work; but in explanation of this statement he said that Mr. Mattison (the superintendent) did not have any more authority to direct him in that work than the owner of a house that he might be building would have in coming in and suggesting what to do about the house in connection with the plans of it, and that neither Mr. Mattison nor Mr. Rowland, appellant's mill foreman, had any authority, nor had they undertaken to exercise any authority, to direct the details of the construction work further than to be on the job and to see whether or not it was done in accordance with the contract. There was proof to the effect that on one occasion Pryor and a carpenter named Hendershot discussed the safety of the plans, which called for only one stringer when they thought two would be safer. Hendershot says that before this work was done, Pryor consulted Mattison, and while he did not know what conversation took place between them, he did know that only one stringer was used. No attempt was made, however, to show by either Mattison or Pryor that Mattison had given any directions in this particular. It was shown that on one occasion appellants' superintendent went to where the work was going on and ordered certain tram posts cut off; but it was further shown that this was done because the appellant company, which was putting in the foundation, had put the foundation to a certain height and the posts had to conform to that, and as they had been put in too high they had to be cut off to conform to the foundation. It was also shown that at another time Mr. Mattison gave some directions about a change in the size of material used; but this direction was given to Mr. Allen, and it was not shown that any directions at any time were given by any representative of the appellant company except to Allen or his foreman.

Wynne & Harrison, for appellant.

Appellee was in the employ of an independent contractor and the court should so have instructed the jury and directed them to return a verdict for the appellant. The question whether or not Allen was an independent contractor was one of law addressed to the judgment of the court. 19 Am. & Eng. Ann. Cases, 1 and notes; 76 S. W. 987; 114 S. W. 538; 104 S. W. 495; 53 S. E. 733; 101 Pac. 681; 38 Col. 440; 77 Ark. 551; 3 Elliott on Railroads, par. 1063; 92 Pac. 360; 52 So. 476; 147 Ill. App. 575; 151 Ill. App. 144; 131 S. W. 917; 162 Ala. 396; 45 Cal. 96; 117 Ky. 655; 2 N. Y. L. 337; 19 Ind. App. 565; Sherman & Redfield on Negligence, § 165; Cooley on Torts, 549; 2 Thompson on Negligence, 899; 46 L. R. A. 367; 95 Pac. 398; 62 S. E. 436; 104 S. W. 495; 102 N. Y. S. 783; 40 So. 1007.

John C. Ross, for appellee.

1. The fact that a person is in the general employment and pay of one person does not of itself make that person his master. 57 Ark. 615; 105 Ark. 482.

2. The supreme test is the right of control over the work of the employee. L. R. 6 Q. B. Div. 532; L. R. 2 C. C. 37; 57 Vt. 252; Sherman & Redfield on Negligence, § 73; 1 Labatt, Master & Servant, § 18; *Id.* p. 56; *Id.* § § 64, 52; 103 Mass. 194; 118 Mass. 116; 212 U. S. 215; 126 N. Y. Supp. 538; 83 Vt. 44; 1 Labatt, Master & Servant, p. 173.

3. The right of an employer of a contractor to control the details of the contractor's work, determines the employers responsibility, and not the actual exercise of control. If the employer retains such right of control, whether he exercises it or not, he is liable as a master for all the consequences of negligence resulting from such work, and if he exercises such right, his responsibility is clear. Moll, Independent Contractors & Employer's Liability, § 19; *Id.,* § 20; 137 Mass. 123; 105 Ark. 477, 482; 1 White, Personal Injuries, § § 276, 277; 82 Fed. 177; 17 L. R. A. (N. S.) 370; 111 Pa. 343; 43

Ill. App. 105; 71 Mo. 303; 15 Wall. 649; 39 La. Ann. 1011; 45 Ill. 455; 52 Minn. 474; 106 La. 371; 173 S. W. 184.

4. Where there is any conflict in the evidence as to who has the right to control and who does control the party committing the negligence complained of, the question of whether the contractor is independent or a mere servant is for the jury. Moll, Independent Contractor & Employer's Liability, § § 27, 29; 1 Thompson on Negligence, § 640; 94 Va. 60; 1 White, Personal Injuries, § 280; 177 Mo. 427; 76 S. W. 987; 145 Ill. 189; 98 Md. 43; 181 Mass. 416; 171 N. Y. 507; 118 Ia. 417; 66 Minn. 76; 9 App. (N. Y.) 145; 86 Minn. 458; 154 Mass. 419; 78 Pa. 25; 88 Pa. 269; 68 Minn. 23; 76 S. W. 987; 91 Tex. 18; 206 Ill. 283; 122 Mass. 481; 132 N. C. 151; 66 L. R. A. 941; 111 Ark. 91.

5. Where an injury may be due to unsafe plans furnished by the employer, he is liable for such injury as for work he authorized the contractor to do, and becomes in such case, in effect, the master of the work, and those engaged therein become, in effect, his servants. 1 Labatt, M. & S., § 41; 77 Ark. 551; 1 White, Personal Injuries, § 286; 68 Am. Dec. 345; 92 Mo. 460; 62 Kan. 25; 1 Daly (N. Y.) 128; 125 Mass. 232; 82 Wis. 289.

SMITH, J., (after stating the facts). No serious objection is made to any of the instructions given by the court except that appellant insists that the undisputed evidence shows that appellee was the servant of an independent contractor, and that under no view of the evidence was the appellant company responsible for his injury.

The law of this question was stated in the opinion of this court in the case of *Arkansas Natural Gas Co.* v. *Miller,* 105 Ark. 477, in which case we quoted with approval the following statement of the law from Elliott on Railroads, volume 2, section 1063, as follows:

"In general, it may be said that the liability of the company depends upon whether or not it has retained control and direction of the work. But neither the reservation of the power to terminate the contract when in the

discretion of the engineer the work is not progressing satisfactorily, the right to exercise general supervision and inspect the work as it progresses, nor the right to enforce forfeitures, will change the relation so as to render the company liable."

And it was there further said: "According to this well settled principle of the law, the defendant was not liable for the negligent acts of the contractors or their servants, merely because it furnished an inspector to see that the work was done according to the contract."

(1) The evidence in this case, when subjected to the test here stated, did not call for the submission to the jury of the question of appellant's liability for appellee's injury. We think the fact is undisputed, when the evidence has been viewed in the light most favorable to appellee, that Allen was an independent contractor, and that no representative of the appellant company was shown to have had any authority or supervision over appellee, and that no representative of appellant company directed, or offered to direct, appellee in the discharge of his duties. The owner of a building, or principal employer has the right always to see that the building is constructed according to the plans, and the mere exercise of this right does not create the relation of master and servant between the owner and the servant, and does not place upon the owner any liability to the servant, unless the owner undertakes to direct the manner in which the laborer shall work in the discharge of his duties. And the same thing is true in regard to any mere change in the plan of construction. The making of this change does not alter the relation between the owner and the servant, unless the owner undertakes to direct and supervise the manner in which the servant shall do his work in making the change.

Nor do we agree with appellee in the importance to be attached to the inference which he says should be drawn from the proof in regard to the conversation between Pryor and Mattison concerning the use of one stringer instead of two in a certain part of the work,

even if we should conclude that the evidence supported the inference that Mattison had directed that only one stringer should be used. The use of one stringer, instead of two, did not occasion the appellee's injury, and the proof that Pryor sought Mattison's advice would not make Allen any the less an independent contractor, because the use of two stringers instead of one would have been only one of those changes in the plans which the owner had the authority to make.

(2-3) Neither the directions given in regard to cutting off the posts, nor any other similar directions, could change the relationship of the parties, because such directions were given in the exercise of the owner's right to see that the work conformed to the plans, and, as was stated in the case of *Arkansas Natural Gas Co.* v. *Miller, supra,* such supervision over the work of the independent contractor does not make the owner or principal employer the master of the servant who performs the work if such supervision consists only in seeing that the plans have been followed, and does not go to the extent of saying who shall do the work or how it shall be done. The servant remains the servant of the independent contractor if the right of direction and control abides with the independent contractor.

Appellee asserts an additional right of recovery, that is that appellee had furnished unsafe plans for building the sheds. But we need not discuss the law of that question, because the proof does not show that appellee's injury was due to any defective plans. Appellee proved, and the fact is undisputed, that a lot of lumber, containing a thousand or twelve hundred feet, had been negligently piled together, and that this great weight caused the giving away of the joists which resulted in appellee's injury; and the stacking of this lumber was no part of the plans.

Moreover, this ground of liability was not alleged in the pleadings, and appellant's liability on that account was not submitted to the jury in any of the instructions asked or given, and we will not remand this cause for a trial upon that issue. In our view of this evidence

the court should have instructed the jury that Allen was an independent contractor, and that the proof was insufficient to show that the appellant company had exercised any control or supervision over appellee in the discharge of his duties which made it liable for his injury, and a verdict should, therefore, have been directed in his favor. And for the error in so refusing to direct a verdict the judgment will be reversed and the cause will be dismissed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* COBB.

Opinion delivered May 24, 1915.

1. EVIDENCE—NON-EXPERT TESTIMONY—PHYSICAL CONDITION OF PLAINTIFF—PERSONAL INJURY ACTION.—Where one person is acquainted with another, and they come in contact with each other frequently, it is not a matter of expert knowledge for the one to tell whether the other appears to be sick or well, and such testimony is competent.
2. EVIDENCE—PHYSICIAN—APPARENT CONDITION OF PATIENT.—A physician may testify as to the apparent condition of his patient, whom he treats.
3. NEGLIGENCE—PERSONAL INJURIES—PROXIMATE CAUSE.—Plaintiff was carried past her station by defendant railroad company, and got off at the next station, where she alleged she was drenched by rain, and suffered damages by reason of the failure of the railway company to build a fire in the waiting room. *Held*, under proof of the facts alleged it was a question for the jury to say whether the facts alleged and testified to were the proximate cause of the damages sustained.
4. RAILROADS—CARRYING PASSENGER PAST STATION—DAMAGES.—Where a passenger is wrongfully carried past his station, the amount of his recovery should be such sum as the jury finds from the evidence will fairly compensate him for the exposure, inconvenience and physical pain and suffering occasioned by the negligent act.
5. RAILROADS—WAITING ROOM—FIRE.—It is the duty of a railroad to exercise ordinary care to keep its waiting rooms comfortably warm, and if it fails to exercise such care, and a passenger suffers injury as a direct result of such failure, the railroad company will be liable in damages.

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

STATEMENT BY THE COURT.

This is a suit by the appellee against the appellant to recover damages for alleged negligence in carrying appellee beyond her destination and in refusing to keep a fire in its waiting room at such a season of the year when it was sufficiently cold to make a fire necessary for appellee's comfort. The appellant denied the grounds for recovery alleged in the complaint, and denied the allegations of damage, and set up negligence on the part of appellee.

Appellee testified that she purchased tickets for herself and children from Texarkana to Hatton, a flag station on appellant's road, and they became passengers on the 5th of May, 1914; that when the train reached Hatton it was about two hours late, and that she notified the conductor and brakeman in charge of the train that she wished to debark at Hatton; that she had received a telegram that her father was in a dying condition; that Hatton was her nearest station to him and she was anxious to reach him at the earliest possible moment; that the train failed to stop at Hatton and appellee was carried on to Vandervoort, a station north of Hatton about two miles, where she debarked; that it was not raining as the train passed through Hatton, at least not enough to wet anyone; that it was raining torrents as she got off at Vandervoort, and as a consequence she was drenched. She was clad in thin summer clothes. There was no fire in the waiting room. She told the man there having charge of the depot that she was cold and wanted a fire. She was not cold when she first went in but in ten or fifteen minutes she was shaking with a hard ague. The agent did not make a fire. She remained there nearly an hour, and left on the south-bound train to return to Hatton, after buying a ticket and paying six cents therefor. It was daylight when she reached Hatton. There was a cold wind blowing that morning. Her health had been good before that for nearly a year, but she had not been in good health since; had suffered with headaches, backaches, nervousness, loss of sleep and loss of appetite,

and that she became dangerously ill at her father's; had a jerking in the back of her neck, and her menstruation was irregular, which had not been the case before. Her menstruation period was on during that trip.

One witness testified that he saw appellee at her father's soon after she arrived and she "looked bad, like she was sick." He saw her several times at her father's and she seemed to be in bad health; seemed to be in good health before that.

Dr. W. A. Sanders testified that he lived at Vandervoort and treated Mrs. Cobb on the occasion mentioned, during her visit to her father's. She was complaining of her side the first day she came. She was up while witness was talking to her. He made no examination of her. He prescribed liniment externally. "She seemed to be in fairly good health; did not seem to be anything wrong. Had only just taken cold." Witness did not go there to treat her. She came into the room where witness was. Appellee said she had a pain in her left side and wanted something to apply externally and witness prescribed what she wanted.

Dr. E. A. Badgett testified that he was appellee's family physician and had known her for some years, and had prescribed for her frequently. He prescribed for her on May 8 and had written two or three prescriptions since that time. He made no physical examination of her. Her health seemed to be going down in the last six months. Witness took her word as to her complaints. He treated Mrs. Cobb for one of her lungs—pleurisy; treated her two or three times; did not recall when he treated her for lung trouble, but it was two or two and a half years ago. Appellee had the appearance at the time of the trial of a tubercular patient.

Other witnesses testified that they knew appellee, and that she looked to be in good health the first of the year; did not appear at the time of the trial to be in the same condition of health as she was when the witnesses had seen her before.

The night operator in charge of the station at Vandervoort stated that it was warm on the night the appellee debarked at Vandervoort, and that she made no request of witness to build a fire. It was not cold enough for a fire. Witness's wife had been in the station room that night without any wraps, and witness was working in his shirt sleeves and did not get cold.

The train auditor testified that appellee stated before the arrival of the train at Hatton that she had decided to go on to Vandervoort where it was customary for her to get off. Witness stated that appellee did not give him any notice that she wished to get off at Hatton and made no complaint to witness as the train was going out of Hatton. Hatton was not a regular stop. There was only a sort of a shed there for a station, and it was pouring down rain as the train passed through Hatton.

The conductor and brakeman also testified to the same effect. The conductor also testified that after appellee had gone in the waiting room at Vandervoort he told her that he had spoken to the auditor to pass her back and that she replied, "That is all right."

The physicians on behalf of appellant testified in substance that tuberculosis would cause many other troubles, among them irregular menstruation.

Among other instructions, the court told the jury, at the instance of the appellant, that appellant was not liable to appellee for any injury resulting to her due to her getting wet in going from the coach to the waiting room, even though she was carried beyond her station against her consent.

And on its own motion the court instructed the jury that it was the duty of the appellant to exercise ordinary care to keep its depot and waiting room in a reasonably comfortable condition for its passengers, and that if appellant failed to exercise ordinary care in keeping its waiting room at Vandervoort comfortably warm it was liable to the appellee in such sum as would reasonably compensate her "for any and all injuries she may have

sustained as a direct and proximate result of such failure to exercise such care."

The jury returned a verdict in the sum of $1,000.

From a judgment in favor of the appellee in the sum of $1,000 this appeal has been duly prosecuted. Such other facts as may be necessary will be stated in the opinion.

James B. McDonough, for appellant.

1. It was error to admit nonexpert witnesses to testify as to plaintiff's appearance and health.

2. Doctor Sanders' testimony as to plaintiff's apparent condition was inadmissible. Her cold was due to getting wet in going from the train to the station, for which the company can not be held liable.

3. A verdict should have been directed for defendant. It was not responsible for the rain or the wetting. A carrier is liable only for the probable and natural consequences, resulting from carrying a passenger beyond her destination. 67 Ark. 123; 101 *Id.* 90; 82 *Id.* 598; 94 *Id.* 324. Fires are not usual in May; besides, the testimony shows she did not request a fire. But if requested and necessary, it was made so by a sudden and unforeseen exigency. 70 Ark. 136; 79 *Id.* 59.

4. There is no proof that the cold was due to the failure to build a fire. 83 Ark. 584. Nor that the disease was due to exposure. Where an injury is due to one of two causes, for one of which the carrier is liable, and for the other it is not, there can be no recovery when the proof fails to show that the injury was due to that cause making the carrier liable. 105 Ark. 161; 102 *Id.* 581; 46 *Id.* 585; 83 *Id.* 584; 179 U. S. 658; 159 S. W. 214.

5. There must be some evidence tending to show that the injury was due to defendant's negligence. 101 Ark. 117. There was no evidence of delay, inconvenience or expense. 67 Ark. 123.

J. I. Alley, for appellee; *H. H. Thomas,* of counsel.

1. The damage claimed by reason of the failure to stop the train at Hatton is applicable under sections 6634, 6704-5, Kirby's Digest.

2. It is the duty of railroads to keep their waiting rooms comfortably heated at all proper times and seasons. Kirby's Dig., § 6634. If damage results from such failure the company is liable. 70 Ark. 136; 92 *Id.* 74; White, Pers. Inj. on Railroads, vol. 2, § 622, p. 948.

WOOD, J., (after stating the facts). (1) Appellant contends that the court erred in permitting nonexpert witnesses to testify in effect that soon after the injury appellee "appeared to be suffering." That "she looked bad; looked like she was sick; seemed to be in bad health." That "a short time before the injury she appeared to be in very good health."

The testimony comes within the rule approved by this court in *St. Louis, Iron Mountain & S. Ry. Co.* v. *Osborne,* 95 Ark. 310-317, where we held that it was not error to allow nonexpert witnesses to state facts within their knowledge and observation as to the plaintiff's physical condition, habits, etc., before and after the date of the alleged injury.

Judge Elliott, in his treatise on Evidence, volume 1, section 679, states: "An ordinary witness may testify in a proper case as to the state of his health. Thus, he may testify that he has suffered pain, or state his physical condition generally. * * * So, such a witness may testify that another person seemed to be sick, suffering pain, nervous, or in good or bad health." See also sections 675, *et seq.* 676.

Where one person is acquainted with another and they come in contact with each other frequently, it is not a matter of expert knowledge for one to tell whether the other appears to be sick or well. These are matters of common experience and observation. And a nonexpert witness, after stating the facts upon which his opinion is based, may even give his opinion in such matters. Jones on Evidence, vol. 2, § § 360, *et seq.* 366.

The appellee herself had testified as to her condition of health before the alleged occurrence of which she complains, and the testimony of these witnesses but tended to corroborate her, and their testimony was competent.

(2) Appellant complains that the court erred in admitting the evidence of Dr. W. A. Sanders. This witness was at appellee's father's house on the day she arrived there and had prescribed for appellee. The only portion of his testimony to which appellant objects was as follows: "Q. What was her apparent condition? A. Why, she seemed to be in fairly good health, all right; didn't seem to be anything wrong; had only just taken cold. Of course, I could not say; I did not make an examination." This testimony was competent and certainly was not in any manner prejudicial to appellant. If it could have had any effect at all on the jury, it was rather in appellant's favor than otherwise. There can be no question about a physician, an expert in the treatment of diseases, being permitted to testify as to the apparent condition of the patient whom he treats. As we have seen, the law permits even a nonexpert to testify as to whether such person appears to be sick or well, such matters not being peculiarly of expert knowledge.

(3) Appellant contends that there was no evidence to sustain the verdict inasmuch as neither the appellee nor any of her witnesses testified to the effect that the failure on the part of the agents of the appellant to build a fire in the depot resulted in the cold and other ailments of which appellant complains and about which she testified.

The appellee testified, in effect, that while she was at Texarkana her menses appeared; that when the train reached Hatton, her destination, it was not raining, but that by the time the train reached Vandervoort, the place where she debarked, "it was raining torrents," and, as a consequence, she "was drenched." The waiting room at Vandervoort was not heated, and in ten or fifteen minutes after she entered it she was shaking with a hard ague. Before this she had explained to the agent that she was cold and wanted a fire. He did not make the fire. She

remained in this waiting room nearly an hour and took the south-bound train to Hatton and arrived there about daylight; the morning was very cold, and a cold wind blowing from the east. Her health before had been good for nearly a year. After she arrived at her father's she became dangerously ill, and has since been afflicted with ailments, which she specifically described.

Under these circumstances, it was a question for the jury to determine as to whether or not appellee's injuries and ailments resulted proximately from appellant's failure to put appellee off at Hatton or from a failure upon its part to keep its waiting room for passengers at Vandervoort in a comfortable condition. If appellant negligently carried appellee by her station of Hatton, or negligently failed to keep its waiting room for passengers at Vandervoort comfortably heated, it would be liable in damages to the passenger for any injury sustained by reason of such failure. Kirby's Digest, § § 6704, 6707 and 6634.

The above facts show that it was a question for the jury to determine whether the alleged failure in either or both of the above alleged particulars was the proximate cause of the injuries of which appellee complains. It was unnecessary for the appellee or any witness in her behalf to testify specifically that the ailments which she described resulted from these alleged negligent causes. That was a deduction which the jury was authorized to make from the testimony. See *St. Louis, I. M. & S. Ry. Co.* v. *Hook,* 83 Ark. 584. And in coming to such conclusion, the jury were not merely exploring realms of speculation, but their findings were only such reasonable and natural inferences as intelligent minds might make from the facts which appellee's testimony tended to prove.

(4) The court, at the instance of the appellant, instructed the jury, in effect, that even though the plaintiff was carried beyond her station against her consent that she could not recover for any damages she may have suffered by reason of being wet while going from the coach to the waiting room.

Appellant contends that under the evidence the only damage, if any, to appellee aside from the inconvenience and delay, was that caused by reason of her exposure to the rain and getting wet, and that under the above instruction appellant was not liable. True, appellant succeeded in having the court grant the above prayer, but a verdict of the jury will not be set aside where there is substantial evidence to support it, even though the verdict is not in accord with an erroneous instruction. The above instruction was not the law. It is obvious from the amount of damages assessed that the jury found that the injuries of which appellee complains were caused by reason of her being wet. There was no evidence to warrant them in finding the sum of $1,000 merely for the inconvenience and delay of being wrongfully carried by her station.

Now, as we have seen, the jury were warranted in finding that the proximate cause of appellee's getting wet was the fact that she was negligently carried by her station, and in order to reach her father's in time she had to debark at the next station; that in doing so she was exposed to a drenching rain and became wet, resulting in the injuries of which she complains. The proof shows that it was not raining at Hatton at the time the train passed that station, and but for appellant's negligence in carrying her beyond her station she would not have been exposed to the rain. Therefore, as we have shown, the jury might have found from the testimony that the proximate cause of appellee's injuries was the negligent act of carrying her beyond her station, thereby exposing her to the rain which resulted proximately in the injuries for which she seeks damages.

On the ground of alleged negligence in being carried by her station, the jury might have found, under the testimony, that appellee was entitled to recover damages for the injuries she received by reason of being exposed to the wet and cold.

In *St. Louis, I. M. & S. Ry. Co.* v. *Evans*, 94 Ark. 324, where a passenger was wrongfully carried beyond her station, we approved the rule that the amount of her re-

covery should be such sum as the jury should find from the evidence would fairly compensate her for the exposure, inconvenience and physical pain and suffering occasioned by reason of the negligent act. See, also, *St. Louis S. W. Ry. Co.* v. *Knight,* 81 Ark. 429; *Texarkana & Ft. S. Ry. Co.* v. *Anderson,* 67 Ark. 123.

(5) On the issue as to whether appellant was negligent in failing to keep its waiting room comfortably heated, the court instructed the jury, in effect, that it was the duty of the appellant to exercise ordinary care to keep its waiting room at Vandervoort comfortably warm, and that if appellant failed to exercise such care and appellee suffered injury as the direct result of such failure, they should find for her on that issue.

The court further instructed the jury that ordinary care was such care as a person of ordinary prudence would have exercised under all the circumstances existing at the time and place.

The appellant asked the court to instruct the jury as follows: "The defendant was not required to keep a fire in the waiting room to meet the exigencies or needs brought about by a sudden storm. If the weather was cold and if that cold was due to a sudden storm the defendant would not be required to build a fire so as to meet that sudden demand." The court refused this prayer, and the appellant contends that the court erred in its rulings.

In *St. Louis, I. M. & S. Ry. Co.* v. *Wilson,* 70 Ark. 136, speaking of the duty of railroads in regard to keeping their waiting rooms comfortable, we said: "It was the duty of railroads independent of the statute of March 31, 1899, to provide reasonable accommodations for passengers at their stations. This duty requires the exercise of ordinary care to see that station houses are provided with reasonable appointments for the safety and essential comfort of passengers, or those intending to become passengers, while they are waiting for trains."

The instruction of the court was in conformity with the law as thus announced and fairly submitted the issue as to the duty of appellant to keep its waiting rooms at

all proper times comfortably heated as required by section 6634 of Kirby's Digest. The issue, under the evidence, was for the jury. The instruction given by the court properly declared the law on the subject, and it was not error to refuse appellant's prayer in regard to the exigencies of a sudden storm. There was no testimony tending to prove that the rainstorm to which appellee was exposed on the occasion under review, early in the month of May, was in the nature of an unprecedented exigency or one that could not have been reasonably anticipated during that season of the year. Therefore, the court did not err in refusing to tell the jury that the appellant was not required to keep a fire in its waiting room to meet the exigency of a sudden rainstorm. The prayer for instruction ignored the duty of appellant to do those things which a person of ordinary prudence would have done, considering the season of the year, and the natural conditions of the weather that might be reasonably anticipated during such season. In other words, the prayer rejected ignored the question of ordinary care. But the instruction which the court gave completely covered the subject.

There is no prejudicial error in the record, and the judgment must therefore be affirmed.

McCULLOCH, C. J. (Dissenting.) There was no evidence to justify the finding that appellee's ailment resulted from getting wet when she left the train at Vandervoort or from the failure of appellant's servant to build a fire in the waiting room, and the verdict was based on mere speculation as to the cause of plaintiff's ailment. *St. Louis, I. M. & S. Ry. Co.* v. *Hook,* 83 Ark. 584, was a border-line case—recognized as such by the judges of this court when it was decided—but in that case there was expert testimony of a physician tending to show that the plaintiff contracted or developed pneumonia from exposure caused by negligence of the defendant. In the present case there was no such testimony. No person testified that plaintiff's illness resulted from getting wet or from failure to get to a fire.

SMITH, J., concurs in the dissent.

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

Opinion delivered May 24, 1915.

RAILROADS—INJURY TO STOCK ON TRACK.—Evidence held to show that when a railway train ran into and killed certain horses which were on the right-of-way, that the engineer and fireman were either not keeping a proper lookout, or upon discovering that the stock was on the track, failed to make an effort to stop the train.

Appeal from Drew Circuit Court; *H. W. Wells,* Judge; affirmed.

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

The evidence does not make out a case of liability. The testimony of the engineer as well as that of the fireman, was consistent, and uncontradicted, and their testimony shows that the killing of the stock was unavoidable. No negligence is shown. 80 Ark. 396; 89 Ark. 120.

Williamson & Williamson, for appellee.

The verdict of the jury is justified by the evidence and will stand. In order to rebut the statutory presumption of negligence, it was necessary for the appellant to show that the engineer and fireman were not guilty of negligence, whereas the fireman, who could have seen the stock, had he kept the lookout on his side, did not do so because he was not at his post. 64 Ark. 236; 45 Ark. 295; 54 Ark. 214; 57 Ark. 192; 75 Ark. 61; 76 Ark. 37; 78 Ark. 252; 79 Ark. 247; 80 Ark. 273; *Id.* 284; 81 Ark. 605; 85 Ark. 121; 116 Ark. 47.

HART, J. On June 28, 1914, about 3 o'clock in the morning, the north-bound passenger train of appellant, consisting of an engine and five coaches, ran into a herd of twelve or fifteen head of horses and mules at a road crossing just north of Tillar. Four mules and one mare belonging to appellee were killed. This suit was brought to recover damages therefor. The jury returned a verdict for appellees, and, to reverse the judgment, appellant prosecutes this appeal.

It appears from the record that the railroad was fenced at the crossing where the stock were killed; that the stock had been down in the bottoms and were on their way home; that the tracks at the crossing tended to show that twelve or fifteen head of stock had stopped there on the west side of the railroad and the crossing looked like horses had been stamping around there all night.

Four of the animals were thrown over the fence, two of them on each side, about 150 feet from the crossing and about forty feet from the right-of-way. The mare was thrown up against the fence but not over it. The crossing where the stock was killed was thirty or forty feet wide. The mare weighed about 1,100 pounds. Three of the mules weighed about 800 pounds each; the remaining mule about seven hundred pounds. Their value was testified to by the owners.

Both the engineer and the fireman testified for appellant. They said that they whistled for the crossing and that the railroad track curves to the right just before the crossing is reached; that the headlight was burning brightly and that the engineer did not discover the animals on the track until he was in two or three hundred feet of them; that he was keeping a lookout, and just as soon as he saw them applied the brake in emergency but was unable to stop the train before it reached them. He said that the train never did come to a full stop; that they were going at the rate of between twenty and thirty miles an hour, and that it would have required 650 feet to stop the train after the emergency brake was applied.

At the time the accident happened the fireman was down shoveling coal but raised up as soon as he heard the stock alarm signal sounded.

It is earnestly insisted by counsel for the appellant that the *prima facie* case of negligence against appellant was overcome by the testimony of the engineer and fireman; but we do not agree with them. The evidence shows that there were twelve or fifteen head of stock which had stopped at the crossing and their tracks showed that they were resting there. All except five of them suc-

ceeded in getting off the crossing. These were all pretty good sized stock. The crossing was thirty or forty feet wide and there was a fence on each side of it. The testimony shows that two of the mules were thrown through the fence on one side and two on the other. The mare was also thrown up against the fence. Under these circumstances the jury was justified in finding that the train approached the stock without any effort being made to check its speed.

The evidence shows that the land west of the crossing was cleared for a considerable distance and that there was a field there. That there was timber to the east of the crossing; but that for about 100 yards there were but few trees. When the situation of the stock and the surrounding circumstances are considered, the jury was warranted in finding that the engineer and fireman were not keeping the proper lookout, or that when they discovered the stock on the track at the crossing they made no effort to stop the train.

The judgment will be affirmed.

MEFFERT v. MEFFERT.

Opinion delivered May 24, 1915.

1. DIVORCE—INDIGNITIES—EVIDENCE.—In an action for divorce in determining what indignities to the person are sufficient to render one's condition intolerable, regard must be had to the particular circumstances of each case, and to the mental and physical condition of the party charged.
2. DIVORCE—INDIGNITIES—GROUNDS FOR DIVORCE.—The remedy of absolute divorce contemplated by the fifth subdivision of section 2672 of Kirby's Digest, is for evils which are unavoidable and unendurable and which can not be relieved by any exertions of the party seeking the aid of the courts.
3. DIVORCE—INDIGNITIES—EVIDENCE.—In an action for divorce under the provisions of the fifth subdivision of § 2672 of Kirby's Digest, the evidence held insufficient to warrant the granting of a decree.
4. DIVORCE—CUSTODY OF CHILD.—Where a petition for divorce is denied, but the chancellor awarded the custody of a child of eight

years to the mother, the order is not final, and may be changed at any future time by the chancellor for cause.

5. DIVORCE—ALIMONY—CHANGED CONDITIONS.—Under Kirby's Digest, § 2683, the chancery court has the power to alter an allowance of alimony at any time when the changed conditions of the parties justifies such action.

Appeal from Benton Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

W. N. Ivie, for appellant.

1. The father, unless he is incompetent or unfit, is the natural guardian and entitled to the custody and control of his minor children. Kirby's Dig., § 3757; 32 Ark. 96; 95 Ark. 355; 37 Ark. 30. Even as against the mother, he is generally allowed the custody of the children. 82 Ark. 461.

2. The evidence fully makes out a case in favor of the appellant. Certainly, there could be no greater indignities offered to a man of strong religious convictions than for his wife secretly, and without his consent, to take his children and have them baptized into a religious faith which she knew was repugnant to him, nor a condition more intolerable to such a man than for her to continuously bemean his faith and his church with vile and profane epithets, and that, too, in the presence of the children. We have a stronger case here than the *Mosher* case, 12 L. R. A. (N. S.) 820, or the *McGee* case, 72 Ark. 355. See also 85 Ark. 471; 9 Ark. 507; 38 Ark. 119; 44 Ark. 429.

Appellee, pro se.

1. Whether the religious views of the parties are irreconcilable or not, these can not be made the basis of a suit for divorce. Kirby's Dig., § 2672; 115 Ark. 32.

Adopting the view most favorable to appellant, the most that can be said for him is that his condition has become unpleasant or unhappy, but the evidence falls short of showing that his condition has been rendered intolerable. Indignities, to be sufficient to constitute a ground for divorce, must be something more than mere matrimo-

nial bickerings and uncongenialities which render the parties unhappy. They must consist of a course of conduct systematically pursued by the offending spouse which evinces a settled feeling of hatred and estrangement toward the other. 104 Ark. 381; 38 Ark. 119; 9 Ark. 507.

If appellee be guilty of all the conduct charged against her, she is not guilty of such indignities as constitute grounds for divorce. 105 Ark. 195; 104 Ark. 381; 53 Ark. 484; 44 Ark. 429.

If the parties are equally at fault, neither party is entitled to divorce. 80 Ark. 451; 77 Ark. 94; 53 Ark. 484.

2. The custody of the children was properly awarded to the mother. Kirby's Dig., § 2681; 85 Ark. 471; 78 Ark. 193; 75 Ark. 22; 29 Cyc. 1588; *Id.* 1596; 86 Ark. 473; 64 Ark. 521.

HART, J. J. K. Meffert sought a divorce from Emma Meffert on the ground that she had offered such indignities to his person as to render his condition intolerable. From a decree dismissing his petition for divorce and awarding his wife the custody of their young child and allowing her alimony, the plaintiff prosecutes this appeal. It appears from the record that these parties were married November 4, 1903, in Kansas City, Missouri, by a probate judge. The plaintiff was a member of the Methodist Church and the defendant of the Roman Catholic Church. After their marriage they lived in various towns in the States of Missouri and Oklahoma until December, 1911, when the plaintiff moved to Rogers, Arkansas. The defendant joined her husband in February, 1912. Prior to this time three children had been born as fruits of their marriage, two of whom had died. In November, 1912, another son was born who, at the time of the trial, was fifteen months old. The other remaining living child was a little daughter, then eight years old, named Bernice.

On the 29th day of September, 1913, the wife left her husband's home and went to visit her mother in another State. She returned on the 29th of October, 1913, and

this suit was instituted by the husband on the 31st day of October, 1913.

J. K. Meffert testified in his own behalf substantially as follows:

Prior to our marriage my wife agreed that she would renounce the Catholic faith, but after we were married she refused to do so. We lived at various towns in the State of Oklahoma, and in some of these towns I was a member of the choir of the Methodist Church. My wife was jealous of my attention to other women, although I never gave her any cause to be so. After we came to Rogers I to some extent engaged in church work and was a member of the choir of the Methodist Church. My wife became jealous of my attention to several lady members of the choir, but I gave her no cause to be so. She frequently cursed and abused me, calling me a "darn old hypocrite," or a "damn old hypocrite." She seemed to be angered because I went to the Methodist Church and carried our little daughter, Bernice, there. She was extravagant and very neglectful of our home. On September 29, 1913, she left my home and declared that she would never return to live with me. She did return, however, on October 29, 1913, and gave a number of reasons for returning. One of them was that she wanted our little daughter, Bernice, and I refused to let her have her. In a few days I instituted this suit for divorce.

Several servant girls who worked for the parties to this suit while they lived at Rogers testified that the plaintiff was always kind and considerate toward his wife, but that she frequently cursed and abused him, calling him a "darn old hypocrite," or a "damn old hypocrite," and that one of her most frequent expressions was, "un-God." They stated that the plaintiff most of the time bathed and dressed his little daughter and took her to Sunday School; that his wife objected to his doing so and objected to his going to choir practice and church so often. They said that she frequently quarreled with him about his church and religion and used profane and vulgar language to and about him.

The defendant, Emma Meffert, testified in her own behalf substantially as follows:

My husband and I never had any serious quarrels until we came to Rogers. Prior to that time our married life had been a happy one. I have not been very well since the birth of our daughter, Bernice, who is now eight years of age. At the time of our marriage I was twenty-three years old and weighed 110 pounds. I now weigh only eighty pounds. After we came to Rogers and the birth of our son in November, 1912, I got worse and have been ill most of the time since then. I never objected to my husband taking our little daughter to the Methodist Church and Sunday School; but, on the contrary, encouraged it. I felt, however, that he neglected me and his home for his choir practice and his church work. I particularly objected to his attention to one of the female members of the choir and told him so. I never thought there was any criminal intimacy between them and did not charge him with that, but I thought he paid her too much attention for a married man and complained about it. He paid no attention to my complaint. I was not extravagant, and I attended to my household duties the best I could, considering the state of my health. When I left in September, 1913, I had no intention of staying away, but went to visit my mother. When I returned home I asked my husband if he was glad to see me, and he replied that he was not, pushed me away from him, and said that I better go back to Kansas. My mother lived there. I then asked him what about Bernice, and he said that he had an old lady who was coming to keep house for him. I told him that I would not leave, and he replied that the law would make me go. Subsequently, he served notice on me and my brother, who had come with me to vacate the house. I never used profane or vulgar language toward or about him. At times when I was excited I may have used the phrase "un-God." I had trouble with most of the servant girls who stayed with me after I came to Rogers, but this was due to the manner in which they did their work.

Other witnesses, who belonged to the Methodist and Presbyterian churches, testified that they lived near the home of the parties to this suit and visited Mrs. Meffert frequently. They said that she did not use profane or vulgar language, but that she at all times conducted herself as a good wife. That she was not extravagant and did not even dress as well as her husband; and that she was nervous and excitable because she had been ill ever since the birth of her son in November, 1912.

One of these witnesses stated that at the time she left in September, 1913, she stated that she was just going home on a visit. Others stated that Mr. Meffert was frequently seen on the streets with one of the members of the choir, and that this was a source of great worry and annoyance to his wife. One of them stated that on one occasion shortly after the baby was born she was called over to attend Mrs. Meffert, who was very ill at the time, and that while there she saw Mr. Meffert walk by the house with this member of the choir and that he did not stop to inquire about his wife.

Another of the witnesses stated that she and Mrs. Meffert, while walking on the streets one day, saw Mr. Meffert and the member of the choir, above referred to, talking. Mr. Meffert left before they came up and Mrs. Meffert said to the young lady, "It is funny to me that I never see you without you are talking to my husband," and the young lady answered, "Maybe you don't like it?" Then Mrs. Meffert said, "No, I don't like it," and the young lady again replied, "You surely don't trust him."

A physician who had attended Mrs. Meffert for about a year prior to the time he testified said she had during all that time been in a very nervous condition and that he had several times feared she would break down with nervous prostration. He testified that her condition rendered her highly excitable and that she was at all times very nervous.

(1) The record in this case is very long and other matters testified to by the various witnesses might be set out at great length, but we do not think a detailed state-

ment of the evidence or a specific review of it would be of any value to the parties to this suit or be of any use to future actions as a precedent. For in determining what indignities to the person are sufficient to render one's condition intolerable, regard must be had to the particular circumstances of each case and to the mental and physical condition of the party charged.

(2) This action was brought under the fifth subdivision of section 2672 of Kirby's Digest. In discussing the provisions of the latter clause of that section in the case of *Cate* v. *Cate,* 53 Ark. 484, Chief Justice COCKRILL said:

"The latter provision does not require that a party shall show that she, or he, lives in a state of danger or apprehension of personal violence, in order to warrant judicial interference. *Haley* v. *Haley,* 44 Ark. 429. But the courts are not quick to interfere in domestic quarrels, and where the parties are equally at fault, it must be shown at least that there is something that makes cohabitation unsafe, to move the courts to interfere. Unhappiness sufficient to render the condition of both parties intolerable may arise from the mutual neglect of the conjugal duties; but when the parties are thus at fault the remedy must be sought by them, not in the courts, but in the reformation of their conduct. The remedy is in their own hands, and, until it has been tried without effect by the party complaining, the court will not give effect to the complaint. Until this home remedy has been tested and failed, the condition of each may be said to be due to his or her own acts, and one must bear the consequences of his own misconduct." See, also, *Arnold* v. *Arnold,* 170 S. W. Rep. 486; 115 Ark. 32.

So it may be said that the remedy of absolute divorce contemplated by this clause of our statute is for evils which are unavoidable and unendurable and which can not be relieved by any exertions of the party seeking the aid of the courts. In *Hoff* v. *Hoff,* 48 Mich. 281, 12 N. W. 160, Mr. Justice Cooley said:

"It is true of divorce cases, as in others, that a party must come into a court of equity with clean hands. Divorce laws are made to give relief to the innocent and not to the guilty."

We have read the long record in this case with much care, and have come to the conclusion that when the evidence is stripped of the insinuations and innuendoes of the parties and their witnesses, it falls short of making a case in favor of the plaintiff. The plaintiff testified that his wife had always been of a jealous disposition and had been jealous of his harmless attentions to women before they came to Rogers. His wife denied this. She said their married life had been happy until they came to Rogers. Be that as it may, there is no testimony tending to corroborate the husband as to what occurred before the parties moved to Rogers, and his right to relief must be predicated upon the occurrences at Rogers. The record shows that after they came to Rogers their married life was not a happy one. Each party, as is usual in such cases, laid the blame on the other. The husband testified that the wife neglected their home; that she was extravagant and seriously objected to his church connection; and that she objected to his taking his little girl to church and Sunday School. He testified that she sneered at his religion and studiously adopted a contemptuous manner toward him. His testimony is corroborated in a general way by the various servants who worked for them during this time. But when the testimony is analyzed we think it falls far short of establishing the contention of the plaintiff.

For instance, on one occasion, according to the record, they had a violent quarrel about their religion, but it came up in this way: A neighbor's servant girl, who belonged to the Catholic Church, was visiting their servant girl, who was a member of the Methodist Church. The servant girl of the parties to this suit made some very derogatory remarks about the priests of the Catholic Church. This angered the defendant, and she began to upbraid the servant for it. The husband took the part

of the servant, and said she had a right to say what she pleased.

At other times the wife made harsh remarks about the husband, but for the most part it was because she objected to his attention to a member of the choir and to his refusal to cease such attention. She admits that on several occasions she called him a "darn old hypocrite," and says that she did this because of something he had said which angered her. She admits that she was very nervous and easily excited, but denies that when she left home in September, 1913, she had no intention of returning, but, on the contrary, said it was her intention to return home and to live with her husband.

Instead of being an extravagant woman, as her husband testified, her neighbors testified that she was a frugal one, and that her husband dressed very much better than she did. They also said that instead of being a coarse and vulgar woman, her conduct was always exemplary, and that there was nothing about her life which indicated that she was accustomed to use profane or vulgar language.

According to the testimony of defendant and her witnesses, she did not object to their little daughter going to church and Sunday School, but on the contrary encouraged her to do so.

When the whole situation is summed up and the surrounding circumstances taken into consideration, it seems that the parties to this suit were in the habit of quarreling frequently but that these quarrels were due to their differences in religion and to the fact that the wife objected to his paying too much attention to a member of the choir.

The record shows that the husband was a strong, healthy man, and that the wife was a weak, nervous woman, easily excited. They both seemed to be devoted to their daughter, and they do not seem to have any settled dislike for each other. There appears to have been nothing in the conduct of the husband with the member of the choir referred to in this record other than that which may

be characterized under the well known term, "flirting." Still, the husband persisted in his attention to her after he knew that his wife objected to it. He knew that his wife's condition was such that she was easily excited, and, under the circumstances, he should have refrained from paying any further attention to another woman but should have devoted his life to his wife and children.

If the parties had practiced the principles of their religion, instead of talking about them so much, it is probable that their family differences would have adjusted themselves. Under their marriage vows it was their duty to exercise mutual forbearance and tolerance of the faults of each and to bear the burdens incident to the marriage relation and to life itself.

Neither of the parties to this suit is vicious or immoral. As above stated, they both seem to be devoted to their little daughter, and there seems to be no substantial reason why they may not live together in peace if not in happiness. The record does not show anything in the life of either of these parties which makes it impracticable for them to again live together.

(3) The chancellor found the issues in regard to the divorce in favor of the defendant, and, when the whole record is considered, we are of the opinion that his finding is not against the preponderance of the testimony.

The chancellor also awarded the custody of the daughter to the mother. At the time the case was heard and determined by the chancellor Bernice was eight years old. The testimony shows that both of her parents were devoted to her and that prior to the unhappy condition brought about by this suit she was very devoted to both her parents. Considering her tender age, and the fact that she needs a mother's care, we do not think the chancellor erred in awarding her custody to the mother.

The father was given the right to visit the child at all proper times, and she may be the means of bringing about a reconciliation between them.

(4) It must be remembered, however, that the order of the court awarding the child to the mother is not a final

one, and that it may be changed at any future time by the chancellor for cause. It then behooves the parties to this suit to teach the child to love and respect both its parents. If either of the parents should try to teach the child disrespect to the other, this course, if persisted in, might be a ground for the chancellor to change the custody of the child if the mother should be the guilty party; or to restrict the visits of the father, should he be in fault in that respect.

The record shows that the husband is in debt about $1,300; that he was agent of the railway company at Rogers and that his salary was $125 per month. The court awarded to the defendant the sum of $65 per month alimony. Under the circumstances, we can not say that the chancellor erred. The husband is a stout, robust man, in the prime of life, and the wife is a weak, nervous woman, who, while devoted to her two children and capable of taking care of them, is not capable of earning any money by her own exertions.

It is the duty of the husband to support his family; but it is equally the duty of the family to reside with him. The award of alimony made by the chancellor is subject to alteration under changed conditions.

The record shows that the husband ordered his wife out of the house after she returned from a visit to her mother in the fall of 1913. He claims that he had good reasons for doing so, but the court has held otherwise. His wife said she had come home to again live with her husband, and it is her duty to do so if he should honestly and in good faith repent and ask her to come home again.

(5) Section 2683 of Kirby's Digest provides that upon the application of either party, the court may make such alterations from time to time as to the allowance of alimony and maintenance as may be proper. Under this clause of our statute, the court has the power to alter the allowance of alimony at any time when the changed conditions of the parties justify such action. *Pryor* v. *Pryor*, 88 Ark. 302.

The decree will be affirmed.

SLOAN v. WILLIAMS.

Opinion delivered May 24, 1915.

1. JUDGMENTS—NUNC PRO TUNC ORDER.—A court has authority at any subsequent term to correct its record by the entry *nunc pro tunc* of the judgment that was rendered at a former term.
2. JUDGMENTS—NUNC PRO TUNC ORDER—PURPOSE.—The purpose of a *nunc pro tunc* order is to make the record reflect the transaction that actually occurred.
3. JUDGMENTS—NUNC PRO TUNC ORDER—PAROL TESTIMONY.—Parol testimony alone, if of satisfactory character and sufficient weight, will warrant the *nunc pro tunc* entry of a judgment.
4. JUDGMENTS—NUNC PRO TUNC ORDER—SUFFICIENCY OF EVIDENCE.—Where it was sought to have a judgment corrected by an order *nunc pro tunc*, the finding of the chancellor that the evidence was not sufficient to warrant the entry of the order, held correct.

Appeal from Mississippi Circuit Court, Osceola District; *D. F. Taylor,* Special Judge; affirmed.

A. F. Barham and *Baker & Sloan,* for appellant.

1. Parol evidence alone, if of satisfactory character, is recognized in this State as sufficient to warrant a *nunc pro tunc* entry of a judgment. 40 Ark. 224; 78 Ark. 364, 115 Am. St. Rep. 42; 75 Ark. 12. As to degree or character of proof required, see above cases, also 84 Ark. 100, 106, and cases cited.

2. The function of the *nunc pro tunc* entry or amendment after the lapse of the term, is not to correct some error of law made by the court in rendering the judgment or order, but to cause the record of such judgment or order to speak the truth, to show what was the *actual* judgment or order rendered by the court. 93 Ark. 234; 23 Cyc. 864; 17 Am. & Eng. Enc. of L. (2 ed.) 818.

In addition to the power inherent in the courts, to amend their records so as to speak the truth, we have statutory provision therefor. Kirby's Dig., § 4431.

3. The evidence shows that at the first trial an order of dismissal was made as to Sloan.

J. T. Coston, for appellee.

1. The evidence is conflicting as to whether or not the case was dismissed as to Sloan, and the court's finding thereon is, therefore, conclusive.

Moreover, no reason has been shown why the case should have been dismissed as to him. The mere fact that he did not have "any notification that the note was not paid when it was due," if true, did not release him. Kirby's Dig., § § 7921, 7922; 48 Ark. 254; 35 Ark. 463.

2. Even if no evidence had been offered on the part of appellee, the court had the right to disregard the testimony of all the witnesses for Sloan for the reason that all of them, except one whose testimony was not material, were interested and contradicted each other.

In a *nunc pro tunc* proceeding the court has a right to rely on his own recollection and to disregard any testimony in conflict therewith. 54 Ark. 215; 100 S. W. 765; 109 S. W. 1015; 128 S. W. 857, 858; 125 S. W. 1033; 82 Ark. 86; 86 Ark. 27; 95 Ark. 144; 93 Ark. 548.

3. A bare announcement by counsel for appellee that he would dismiss as to Sloan, not followed by an order or judgment of the court dismissing the action as to him, would not be sufficient to discharge him from the case; and, if such announcement was made, when Sloan permitted the case to go to the jury without objection on his part, and allowed instruction to be given them submitting his defense, he waived any rights acquired by reason of the announcement of counsel for appellee. 106 S. W. 1174.

KIRBY, J. This appeal comes from a judgment denying appellant's motion to correct the record by a *nunc pro tunc* order of a judgment of dismissal, claimed to have been rendered in his favor in 1913, instead of a judgment against him as entered.

Appellee herein appealed from said former judgment, the record of which was attempted to be corrected by the petition for a *nunc pro tunc* order, to this court, and judgment was rendered here in his favor, reversing

the cause and remanding it for a new trial. *Williams* v. *Uzzell,* 108 Ark. 241.

Upon the trial anew the court directed a verdict in his favor and judgment was entered against Eula Sloan Uzzell and Homer F. Sloan. Upon the issuance of execution against appellant, he filed this motion to correct the former record by an order *nunc pro tunc,* alleging that the suit had been dismissed as against him on the first trial by a judgment rendered and that the clerk had by misprision wrongfully omitted same from the record.

Appellee filed a response and denied that the cause was dismissed as to Homer F. Sloan; that any judgment of dismissal was rendered in his favor and not entered through error or misprision of the clerk; alleged that a verdict was rendered in favor of the defendants, Eula S. Uzzell and also Homer F. Sloan, and that upon appeal to the Supreme Court it was reversed, and denied that upon the new trial Homer F. Sloan was not a party to the suit.

Several witnesses testified that the attorney for appellee dismissed the suit as to Homer F. Sloan upon the trial at January term of court, 1913, of the case of Williams v. Eula Sloan Uzzell and Homer F. Sloan, not alleging as to when or why it was done, some of them testifying it was dismissed after the jury had been selected; others after the testimony had been heard, and still others, after the instructions were given to the jury by the court and during the argument. They state, appellant's attorney turned to the court and said, "We dismiss as to Homer F. Sloan," and appellant testified that he paid no further attention to the suit and did not know that a judgment had been rendered against him upon the new trial thereof, after it was remanded by the Supreme Court, until the sheriff came to levy an execution upon his property.

The transcript of the record of the first case was introduced in evidence and also a copy of appellee's brief filed on the former appeal. The brief shows the style of the case "Percy H. Williams, Appellant, v. Eula S. Uzzell

and Homer F. Sloan, Appellees," and was signed by these parties and not by counsel. It was argued therein that there was no issue except as to the balance due upon the note and stated that "the court instructed the jury to regard the testimony of Mr. Uzzell only, insofar as it pertained to the interest of Homer F. Sloan in this action," etc., and "The appellee, Homer F. Sloan, had the right to the benefit of his testimony," etc.

When the verdict was directed upon the new trial, the precedent for the judgment was prepared by appellee's attorney and bears the endorsement of appellant's attorneys, "O. K.—A. F. Barham," immediately under the clause, entering judgment against both Eula S. Uzzell and Homer F. Sloan. Mr. Barham admitted this was his signature, but stated he had no recollection of the matter at all and doubtless signed it without reading it, not thinking judgment would be attempted to be entered against any one but Eula S. Uzzell, against whom only judgment was rendered.

(1) "The court has authority at any subsequent term to correct its record by the entry *nunc pro tunc* of a judgment that was rendered at a former term." *Melton* v. *St. Louis, I. M. & S. Ry. Co.* 99 Ark. 435; *Citizens Bank* v. *Commercial National Bank,* 118 Ark. 497.

(2) The purpose of a *nunc pro tunc* order, however, is to make the record reflect the transaction that actually occurred; the authority of the court to amend its record by the *nunc pro tunc* order extending only to make it speak the truth, but not to make it speak what it did not speak, but ought to have spoken. *Lourance* v. *Lankford,* 106 Ark. 470; *Citizens Bank* v. *Commercial National Bank,* 118 Ark. 497.

"But where the judgment expresses the entire judicial action taken at the time of its rendition, the court has no authority after the expiration of the term, to enlarge or to diminish it in matter of substance or in any matter affecting the merits. Under the guise of an amendment there is no authority to revise a judgment, or to correct a judicial mistake or to adjudicate a matter which might

have been considered at the time of the trial, or to grant an additional relief which was not in the contemplation of the court at the time the judgment was rendered. *St. Louis & N. Ark. Rd. Co.* v. *Bratton,* 93 Ark. 234."

(3) Parol testimony alone, if of satisfactory character and sufficient weight, will warrant the *nunc pro tunc* entry of a judgment. *Bobo* v. *State,* 40 Ark. 224; *Liddell* v. *Bodenheimer,* 78 Ark. 364; *Murphy* v. *Citizens Bank,* 84 Ark. 100.

(4) In the case last cited the court said: "We are aware that proof to change and correct a record should be clear, decisive and unequivocal to the effect that the written memorial does not reflect the facts."

It cannot be said that the testimony herein is not sufficient to support the court's finding and its action denying the motion to enter a judgment of dismissal *nunc pro tunc* is affirmed.

SCHOOL DISTRICT NO. 22 *v.* TRAYWICK.

Opinion delivered May 24, 1915.

SCHOOL DISTRICTS—CONTRACT WITH TEACHER.—Where, at a legal meeting of the school directors, at which all are present, and a contract executed by a majority, the contract will be held binding.

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

Appellant, pro se.

There were three qualified directors of the district, as appears by the evidence. No previous written notice was given of the meeting at which appellee claims to have been elected; and the meeting in which Rowell participated was called, not for the purpose of electing a teacher, but for the specific purpose of signing the notices of the annual school election, and for that purpose only. The district was not bound by the alleged election of Traywick 69 Ark. 159.

James E. Hogue, for appellee.

No previous notice is necessary where all of the directors are present and participated in the business brought before the directors. Rowell was present and participated in all of the business of this meeting along with the other directors. Kirby's Dig., § 7541.

SMITH, J. This appeal involves the validity of a contract which appellee claims to have made with the directors of the appellant district to teach school. He recovered judgment for a sum which is conceded to be due him if he had a valid and binding contract, as he was not permitted to teach the school which he alleges he had contracted to teach.

The contract on which he sues was signed by two of the directors of the district, and the question in the case is whether or not the meeting of the board of directors at which the alleged contract was signed was a legal one.

The cause was submitted to the jury under proper instructions, and we think the evidence warranted the verdict of the jury.

The authority of two directors to contract in the name of their district for the employment of a teacher without the consent of the third director, has been discussed in a number of decisions of this court, the last of which was the case of *Rice* v. *School District No.* 20, 109 Ark. 125. It was there said: "But there must be a meeting, the law contemplates that the directors shall have the power to contract in the name of the district, only after consultation and deliberation, and for this purpose requires the directors to meet. The mere presence together of the three directors is not a school meeting, where they have not met pursuant to notice, unless it is made so by the participation for that purpose of all the directors."

J. M. Rowell was the director of the appellant district who refused to sign appellee's contract. This director testified that a meeting of the directors had been called for the 29th of April, 1914, at which time it was expected that the directors should prepare notices of the

approaching annual school election, and he testified that he met with the other directors for this purpose alone. He does admit, however, that the question of the employment of appellee as a teacher was discussed, but he said that he protested against this action for the reason that at a previous meeting the district had contracted with a Mr. Broughton to teach the only school in the district. The validity of that contract was questioned, but Mr. Rowell insisted that the district was morally bound, if not legally, to give the school to Broughton, and he insisted that Broughton was competent and qualified and entitled to the school. After thus expressing his views he said to appellee, who was present, that he hoped appellee would not be displeased at his action but that he would not agree to give the school to any one else for $25, and thereafter he left the meeting, when appellee's contract was prepared and signed. The evidence of the other two directors is even more favorable to appellee than that of Mr. Rowell; but we think the proof set out shows there was a meeting at which all of the directors were present and in which they all participated. Mr. Rowell expressed himself fully and freely and gave to the other directors the benefit of his opinion on the subject, but he failed to convince the other directors of the correctness of his view. This meeting met the requirements of the law. There was a meeting, a consideration by all the directors of the question covered by the contract, and a conclusion reached by a majority of the board, and the contract became a valid and binding one when reduced to writing and signed by the teacher and two of the directors, which was done at this meeting.

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

APPENDIX

I.

OPINONS NOT REPORTED.

St. Louis S. W. Ry. Co. *v.* Hemmert; appeal from Lonoke Circuit Court; Eugene Lankford, Judge; affirmed February 22, 1915, *per* Smith, J.

Steen *v.* Sirrine; appeal from Hempstead Circuit Court; Jacob M. Carter, Judge; affirmed April 5, 1915, *per* McCulloch, C. J.

Atkinson *v.* Preston; appeal from Desha Chancery Court; Zachariah T. Wood, Chancellor; affirmed April 5, 1915, *per* Kirby, J.

Hughes *v.* Sebastian County Bank; appeal from Sebastian Chancery Court, Greenwood District; Wm. A. Falconer, Chancellor; affirmed April 12, 1915, *per* McCulloch, C. J.

Pope *v.* Lawson; appeal from Howard Circuit Court; Jefferson T. Cowling, Judge; affirmed April 12, 1915, *per* Kirby, J.

The John Kapp Stave Co. *v.* Stevens; appeal from Van Buren Circuit Court; George W. Reed, Judge; reversed April 19, 1915, *per* McCulloch, C. J.

Matteson *v.* Mitchell and McIntosh; appeal from Cleburne Circuit Court; George W. Reed, Judge; affirmed April 26, 1915, *per* Wood, J.

Pyles *v.* Farmers Bank; appeal from Mississippi Circuit Court, Chickasawba District; J. F. Gautney, Judge; affirmed April 26, 1915, *per* Wood, J.

State *v.* Chapman; appeal from White Circuit Court; J. M. Jackson, Judge; affirmed May 3, 1915, *per* Wood, J.

Carnahan-Allport Lumber Co. *v.* Puckett; appeal from Lonoke Circuit Court; Eugene Lankford, Judge; reversed May 3, 1915, *per* Kirby, J.

Bloom *v.* Miller & Co.; appeal from Jefferson Circuit Court; Antonio B. Grace, Judge; affirmed May 10, 1915, *per* Smith, J.

Bliss-Cook Oak Co. *v.* Mormon; appeal from Drew Circuit Court; H. W. Wells, Judge; affirmed May 10, 1915, *per* Smith, J.

St. Louis, I. M. & S. Ry. Co. *v.* Baldwin; appeal from Saline Circuit Court; W. H. Evans, Judge; affirmed May 24, 1915, *per* McCulloch, C. J.

Wisconsin & Arkansas Lumber Company *v.* Heegel; appeal from Hot Spring Circuit Court; W. H. Evans, Judge; affirmed May 24, 1915, *per* Kirby, J.

Twitty *v.* State; appeal from Lafayette Circuit Court; George R. Haynie, Judge; affirmed May 24, *per* Kirby, J.

White *v.* Puckett; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed May 24, 1915, *per* Smith, J.

II.

CASES DISPOSED OF ON MOTION.

Will P. Klapp *v.* The State of Arkansas; Craighead Circuit Court, Jonesboro District; W. J. Driver, Judge; appeal dismissed on appellee's motion April 5, 1915, for failure of appellant to comply with the condition of the statute in misdemeanor cases; *per curiam.*

Pearl Starr *v.* The City of Fort Smith; Sebastian Circuit Court, Fort Smith District; Paul Little, Judge; settled and appeal dismissed April 5, 1915; *per curiam.*

Clarence Brickey *et al. v.* Continental Gin Company; Conway Circuit Court; Hugh Basham, Judge; appeal dismissed on appellant's motion April 5, 1915; *per curiam.*

The Southern Lumber Company *v.* Mrs. M. A. Lowe, Administratrix, *et al.;* Bradley Circuit Court; H. W. Wells, Judge; submission set aside and appeal dismissed by consent May 17, 1915; *per curiam.*

INDEX

ACTIONS:

where a cause, properly cognizable in equity, is tried at law without objection, and judgment rendered upon proper equitable principles, the judgment will be affirmed upon appeal. *Hill* v. *Kavanaugh*, 134.

a cause of action may be dismissed in vacation, when. *St. Louis, I. M. & S. Ry. Co.* v. *Ingram*, 377.

where plaintiff was injured by the negligence of a railroad company he must ask all damages which he desires to recover in one action. *Hydrick* v. *St. Louis, I. M. & S. Ry. Co.*, 402.

a civil and a criminal action may be tried together, when. *Hankins* v. *State*, 419.

ADMINISTRATION:

sale on partition of deceased's land before payment of debts. *Green* v. *Holzer*, 533.

ADVERSE POSSESSION:

effect of recognition of original ownership after statutory period. *Hutt* v. *Smith*, 10.

loss of title to lands acquired by adverse possession; wild lands. *Moore* v. *Morris*, 516.

Kirby's Digest, § 5057, which applies only to wild lands, may apply to improved lands which have returned to a state of nature. *Id.*

ANIMALS:

maliciously exposing or administering poison, crime of. *Hankins* v. *State*, 419.

APPEAL AND ERROR:

a specific objection to an instruction amounts to a waiver of all other objections to it. *Foohey Dredging Co.* v. *Mabin*, 1.

objection to introduction of incompetent testimony must be made, when. *Poinsett Lumber & Mfg. Co.* v. *Traxler*, 128.

right to object to the admission of incompetent testimony after cross-examining the witness upon the same. *Id.*

APPEAL AND ERROR—*Continued.*

a verdict, to be sustained on appeal, must be supported by some substantial evidence. *Osborne* v. *Hittson*, 349.

when the testimony of a disinterested witness is both reasonable and consistent, the jury has no right arbitrarily to disregard it. *Id.*

a party does not waive his right to go to the jury, when, after his request for a peremptory instruction is refused, he asks other instructions on the merits of the case. *St. Louis, I. M. & S. Ry. Co.* v. *Ingram*, 377.

test of the validity of a peremptory instruction. *Id.*

an appeal from an order granting a new trial in the circuit court will be dismissed when the appellant has not complied with the statute. *Yowell* v. *Fort Smith Pure Milk Co.*, 448.

conclusiveness of order of Supreme Court reversing a decree in chancery with directions to enter a certain specific decree. *LaCotts* v. *LaCotts*, 558.

the finding of the chancellor that the evidence was not sufficient to warrant the entry of a *nunc pro tunc* order will not be disturbed on appeal. *Sloan* v. *Williams*, 593.

ASSUMED RISK:

doctrine of, defined. *Kansas City Southern Ry. Co.* v. *Livesay*, 304.

ATTORNEY AND CLIENT:

right of president of a bank to call in an attorney for the bank; liability of bank for fee. *Dent* v. *Peoples Bank of Imboden*, 157.

AUTOMOBILES:

homicide due to reckless driving. *Madding* v. *State*, 506.

BANKRUPTCY:

effect of promise to pay after discharge. *Polk* v. *Stephens*, 438.

partial payment as evidence of a new promise, after discharge. *Id.*

liability of third parties jointly liable with a person who has been discharged. *Id.*

liability to pay a discharged debt rests solely upon a new promise to pay the debt. *Id.*

BANKS AND BANKING:

a bank may credit a deposit made with it on a note which it holds, made by the depositor but barred by limitations, but this act will not toll the statute of limitations. *Desha Bank & Trust Co.* v. *Quilling*, 114.

BANKS AND BANKING—*Continued.*

liability of stockholders for public funds deposited in a bank; effect of deposit in the name of a public official. *Hill* v. *Kavanaugh*, 134.

authority of president to employ an attorney for a bank; liability of bank for fees. *Dent* v. *Peoples Bank of Imboden*, 157.

solvency of bank; capital and surplus as a liability. *Skarda* v. *State*, 176.

liability of officer of bank for receiving deposits knowing the bank to be insolvent. *Id.*

BENEFIT INSURANCE:

effect of an act of the insured violating the law and resulting in death; provision in certificate covering same. *Howle* v. *Eminent Household of Columbian Woodmen*, 226.

BILLS AND NOTES:

right of bank to credit deposit on note of depositor which is barred by limitations. *Desha Bank & Trust Co.* v. *Quilling*, 114.

burden of proof to show *mala fides*. *Conqueror Trust Co.* v. *Reves Drug Co.*, 222.

where the holder of a note is not shown not to be an innocent purchaser, testimony is inadmissible, as to fraud in the execution of a note. *Id.*

where a contract for the purchase of land is extended, effect of such extension on a note given in payment of the purchase price. *Calhoun* v. *Ainsworth*, 316.

effect of payment by maker of note which has been assigned, to the original payee. *Id.*

note given in payment for patented article must be drawn to conform to the statute. *Jonesboro Trust Co.* v. *Nutt*, 368.

sureties on a note are relieved by limitations when an action on the note against the principal is not commenced within five years after the date of the last payment. *Polk* v. *Stephens*, 438.

effect of renewal of a note which had failed for lack of consideration. *Haglin* v. *Friedman*, 465.

failure of consideration; recoupment in abatement of so much of the consideration as has failed. *Hamburg Bank* v. *Ahrens*, 548.

a defense to an action on a note, although falling within the statute of frauds, may be shown, in order to establish a failure of consideration. *Id.*

burden of proof to show *mala fides*. *Id.*

BILLS OF EXCEPTIONS:

may be signed by judge in vacation, when. *Southern Lbr. Co.* v. *Lowe*, 355.

may be filed in vacation. *Id.*

effect of filing within time allowed but after the commencement of the succeeding term. *Id.*

may be filed before the expiration of the succeeding term; effect of adjourned sessions. *Id.*

BOUNDARIES:

State boundary; boundary between Arkansas and Tennessee on islands in the Mississippi River. *Means* v. *State*, 362.

BUILDING CONTRACTS:

right to recover for extras. *Hatfield School District* v. *Knight*, 432.

surety on, relief from liability, when. *Bankers Surety Co.* v. *Watts*, 492.

CARRIERS:

right to limit in advance, liability for injury to employees. *Chicago, R. I. & P. Ry. Co.* v. *Pearce*, 6.

damages for delay in shipment of freight; title, who may sue. *Isbell-Brown Co.* v. *Stevens Gro. Co.*, 17.

liability for loss of an article without market value. *St. Louis, I. M. & S. Ry. Co.* v. *Dague*, 277.

in an action against a carrier for damages for the loss of an article, the trial court may refuse a new trial, where the lost article is discovered, and tendered into court, after verdict. *Id.*

liability for penalty for charging excessive fare. *Smith* v. *St. Louis, I. M. & S. Ry. Co.*, 291.

effect of stipulation in bill of lading limiting time in which a shipper of freight must notify the carrier of a loss; the time runs from the knowledge of the shipper of the loss. *St. Louis, I. M. & S. Ry. Co.* v. *Bliss-Cook Oak Co.*, 323.

duty of shipper to minimize damages, where carrier has failed to make proper delivery of freight shipped. *Id.*

the State may regulate the business of common carriers by appropriate legislation. *St. Louis, I. M. & S. Ry. Co.* v. *Paul*, 375.

an action for failure to furnish freight cars must be brought within what period. *Id.*

liability of carrier for injury or ill-treatment of passenger by employee. *St. Louis, I. M. & S. Ry. Co.* v. *Jackson*, 391.

liability for wilful act of employee. *Id.*

liability of carrier for injury to passenger done by another passenger who was attempting to retaliate on an employee of the carrier who was guilty of misconduct toward the last named passenger. *Id.*

CARRIERS—*Continued.*

liability of delivering carrier for damages to freight shipped over connecting lines; presumption. *St. Louis, I. M. & S. Ry. Co.* v. *Hudgins Produce Co.*, 398.

a common carrier as an insurer of freight shipped. *Id.*

exceptions to the rule. *Id.*

damages to freight from concurring causes, negligence and *vis major*. *Id.*

presumption where damage to freight is unexplained. *Id.*

carrier may be charged with liability for special damages to freight because of failure to deliver, how. *Chicago, R. I. & P. Ry. Co.* v. *Thomas*, 406.

notice of loss of freight and claim for damages may be restricted as to time by stipulation in the bill of lading. *Chicago, R. I. & P. Ry. Co.* v. *Foster*, 409.

duty to maintain platform and station buildings in proper repair. *Chicago, R. I. & P. Ry. Co.* v. *Owens*, 467.

reasonableness of requirement for notice of damage to freight. *St. Louis, I. M. & S. Ry. Co.* v. *Cumbie*, 478.

knowledge of carrier as waiver of notice of damage to freight. *Id.*

burden of proof to show notice or knowledge of the carrier. *Id.*

knowledge of carrier of damage to freight will relieve a shipper of the duty to give notice, when. *St. Louis, I. M. & S. Ry. Co.* v. *Starbird*, 485.

written notice of damage to freight not required, when. *Id.*

nature of the notice required by the bill of lading; notice to agent. *Id.*

liability of railroad company for damage resulting from carrying a passenger past her station. *Kansas City Southern Ry. Co.* v. *Cobb*, 569.

CHATTEL MORTGAGES:

rights of mortgagee of chattel where the vendor of the mortgagor reserved title in the chattel; waiver by the vendor. *Holiman* v. *Roush*, 255.

CIRCUIT COURTS:

jurisdiction of Mississippi County Circuit Court over islands in Mississippi River between Arkansas and Tennessee. *Means* v. *State*, 362.

records showing adjournment, ambiguity. *Ex Parte Baldwin*, 416.

CITIZENS:

right of resident of the State to the protection of laws. *Jonesboro Trust Co.* v. *Nutt*, 368.
"resident" is synonymous with "citizen," within the meaning of Kirby's Digest, § § 512-516. *Id.*

CONSTRUCTIVE TRUSTS:

a constructive trust arises when the purchase money for land is paid by one person and the deed taken by another; intention of the parties. *Jones* v. *Jones*, 146.
burden of proof to establish a constructive trust. *Id.*

CONTRACTS:

liability for extras under building contract. *Hatfield Special School District* v. *Knight*, 432.

CONTRIBUTORY NEGLIGENCE:

question for jury in action for personal injuries received at a public railroad crossing. *St. Louis, I. M. & S. Ry. Co.* v. *Eichelman*, 36.

COUNTY COURT:

a judgment of a county court allowing a claim may be attacked, how. *Monroe County* v. *Brown*, 524.
where county warrants are called in, what warrants may be rejected. *Id.*
where a claim for an excessive amount has been allowed, the error may be corrected, how. *Id.*
practice in circuit court where claims have been fraudulently allowed by the county court. *Id.*

COURTS:

legality of order of court calling special term; right to amend order. *Reece* v. *State*, 310.

CRIMINAL LAW:

summoning special grand jury, presumption as to reason therefor. *Davis* v. *State*, 31.
improper description of scene of crime, plea of former jeopardy where crime is later charged in a proper indictment. *Id.*
right of defendant to object to consolidation of separate cases under different indictments, for the purpose of trial. *Id.*
acceptance of deposit by officer of insolvent bank; sufficiency of indictment to charge the crime of. *Skarda* v. *State*, 176.

CRIMINAL LAW—*Continued.*

validity of indictment charging the officer of a bank with having received deposits knowing the same to be insolvent; misdescription of officer's title. *Id.*

variance between indictment and proof in prosecution for receiving deposits with knowledge that the bank was insolvent. *Id.*

belief of officer as to the solvency of the bank. *Id.*

special term of criminal court may be called, how. *Reece* v. *State*, 310.

what must be set out in order calling a special term. *Id.*

who may be tried at a special term. *Id.*

administering and maliciously exposing poison to an animal. *Hankins* v. *State*, 419.

specific intent as part of crime of. *Id.*

validity of conviction for crime of resisting arrest under a void city ordinance. *Robinson* v. *Malvern*, 423.

sufficiency of indictment to charge murder, caused by striking deceased with an automobile. *Madding* v. *State*, 506.

CRIMINAL PROCEDURE:

consolidation of separate cases for purposes of trial, right of defendant to object. *Davis* v. *State*, 31.

DAMAGES:

in personal injury action, loss of earnings and injury to business as elements of damage. *St. Louis, I. M. & S. Ry. Co.* v. *Eichelman*, 36.

loss of profits from invested capital as an element of damages in personal injury action. *Id.*

verdict of $25,000 in personal injury action, not excessive, when. *St. Louis, I. M. & S. Ry. Co.* v. *Coke*, 49.

injury to traveler due to negligent repair of public crossing, verdict of $5,000 not excessive. *St. Louis, I. M. & S. Ry. Co.* v. *Smith*, 72.

for mental anguish, where train does not stop at station where plaintiff intended to attend a funeral. *Chicago, R. I. & P. Ry. Co.* v. *Mizell*, 153.

proof of plaintiff's moral character, as well as his habits of sobriety and industry, is admissible in an action for personal injuries in estimating the damages. *Biddle et al., Receivers*, v. *Riley*, 206.

form of verdict in action for damages for wrongful death. *St. Louis, I. M. & S. Ry. Co.* v. *Rodgers*, 263.

wrongful death, measure of damages sustained by minor child. *Id.*

measure of, for loss of article without market value, in an action against a carrier. *St. Louis, I. M. & S. Ry. Co.* v. *Dague*, 277.

DAMAGES—*Continued*

basis of award against physician for negligence in the treatment of a patient. *Dunman* v. *Raney*, 337.

in action for damages resulting from the act of a fellow-passenger on a railroad train provoked by the malicious tort of an employee a verdict of $500 is not excessive. *St. Louis, I. M. & S. Ry. Co.* v. *Jackson*, 391.

liability of railroad for punitive damages for leaving plaintiff at a station. *Chicago, R. I. & P. Ry. Co.* v. *Owens*, 467.

DEEDS:

a purchaser of land is affected with notice of all recitals in the title deeds of his vendor, whether recorded or not. *Graysonia-Nashville Lbr. Co.* v. *Saline Development Co.*, 192.

construction of deed conveying land to L. for and during her natural life with remainder to the heirs of her body. *Plumlee* v. *Bounds*, 274.

one may be an innocent purchaser under a quitclaim deed. *Moore* v. *Morris*, 516.

DEFINITIONS:

"saloon" defined as used in a lease restricting the use of premises. *Kahn* v. *Wilhelm*, 239.

DEMURRERS:

finality of judgment on, as controlling costs. *Hall* v. *Waters*, 427.

effect of demurrer to an answer which has properly raised the issues in the action. *Id.*

DIVORCE:

indignities to the person, as ground for. *Meffert* v. *Meffert*, 582.

decree of chancellor awarding custody of child is not final. *Id.*

decree awarding alimony may be changed, when. *Id.*

DOWER:

effect of death of widow on dower lands. *Burrus* v. *Butt*, 335.

jurisdiction of probate court to entertain a suit in the name of a widow's administrator to collect rents due on dower lands, and accruing before the widow's death. *Id.*

DRAINAGE DISTRICTS:

liability of contractor for overflow. *Foohey Dredging Co.* v. *Mabin*, 1.

EMPLOYER'S LIABILITY ACT: See MASTER AND SERVANT.

construed and upheld. *St. Louis, I. M. & S. Ry. Co.* v. *Ingram*, 377.

EVIDENCE:

admissibility of evidence of reconstruction of a bridge in personal injury action. *St. Louis, I. M. & S. Ry. Co.* v. *Coke*, 49.
discretion of trial court in limiting extent of cross-examination. *Id.*
in personal injury action growing out of collapse of railroad bridge, admissibility of evidence of change in construction of the bridge after the accident, and in the nature of repairs made on the same. *Id.*
proof of knowledge of officer of bank, that he knowingly received a deposit knowing that the bank was insolvent. *Skarda* v. *State*, 176.
in personal injury action, plaintiff may testify as to the cost of the services of a nurse. *Biddle et al., Receivers*, v. *Riley*, 206.
in personal injury action, physician may testify as to the physical condition of the plaintiff, how. *Id.*
expert testimony, hypothetical question must be stated in what terms. *Id.*
proof of plaintiff's moral character, as well as his habits of sobriety and industry, is admissible in an action for personal injuries in estimating the damages. *Id.*
opinion of plaintiff concerning his own condition in an action against a physician for improperly setting a broken leg. *Dunman* v. *Raney*, 337.
when the testimony of a disinterested witness is both reasonable and consistent, the jury has no right arbitrarily to disregard it. *Osborne* v. *Hittson*, 349.
evidence of witness given at former trial, is inadmissible in subsequent trial, when. *St. Louis, I. M. & S. Ry. Co.* v. *Ingram*, 377.
impeachment of one's own witness. *Shands* v. *State*, 460.
right of one person to testify as to the apparent physical condition of another. *Kansas City S. Ry. Co.* v. *Cobb*, 569.
a physician may testify as to the apparent condition of his patient, whom he treats. *Id.*

EXECUTIONS:

personal liability of sheriff for failure to make return. *Lewis* v. *Pearson Company*, 271.
a contingent remainder in land is not subject to sale under execution. *Plumlee* v. *Bounds*, 274.

FIRE INSURANCE:

waiver of condition in policy not brought to the attention of the assured. *Great Southern Fire Insurance Co.* v. *Burns & Billington*, 22.
failure to pay loss, liability for attorney's fees and penalty. *Id.*
mortgage clause, knowledge of assured, waiver by company. *Id.*
fine print. *Id.*

FRAUDULENT CONVEYANCES:

in an action to set aside a fraudulent conveyance, the creditor need not show an execution upon the judgment with a *nulla bona* return thereon. *Fluke* v. *Sharum*, 229.
in an action to set aside, insolvency may be established, how. *Id.*
a voluntary transfer will be presumed to be fraudulent as to creditors, when. *Id.*
inadequacy of consideration as showing fraud; but inadequacy will be evidence of fraud, when. *Id.*
proof of good faith of the purchaser, inadequacy of consideration. *Id.*
voluntary conveyance from husband to wife is fraudulent, when. *Id.*
right of creditor to follow land which the debtor has permitted to forfeit for taxes, and which was purchased by a relative of the debtor. *Id.*
voluntary conveyance of homestead is not fraudulent. *Id.*

GARNISHMENTS:

duty of garnishee to pay funds into court; effect of payment to party not entitled thereto. *Citizens Bank* v. *Commercial National Bank*, 497.

HOMESTEAD:

sale of homestead of minor children may be set aside on appeal. *Green* v. *Holzer*, 533.
the sale of a minor's homestead is binding, when ratified by the minor after attaining majority. *Id.*

HOMICIDE:

involuntary manslaughter defined. *Madding* v. *State*, 506.
homicide resulting from reckless driving of automobile; instruction of court as to use of streets. *Id.*
duty of care of driver of automobile. *Id.*
conviction for manslaughter where defendant was guilty of wanton and reckless driving, upheld. *Id.*

IMPROVEMENT DISTRICTS:

the petition for the formation of an improvement district is jurisdictional, and its recitals must conform to the statute. *Cox* v. *Road Improvement District No. 8 of Lonoke County*, 119.
effect of uncertainty in the petition for the formation of. *Id.*
town property may be assessed to build or improve roads in the county outside the corporate limits; test. *Id.*
the Legislature is without authority to group together independent improvements, and arbitrarily declare them to be a single improvement. *Swepston* v. *Avery*, 294.
sale of land for non-payment of assessments; in action to set aside decree, the district is not a proper party. *Cassaday* v. *Norris*, 449.

INDEPENDENT CONTRACTOR: See MASTER AND SERVANT.

nature and extent of liability for unskillfulness or negligence in his work. *Foohey Dredging Co.* v. *Mabin*, 1.
liability of principal employer. *Arkansas Land & Lumber Co.* v. *Secrist*, 561.
a servant remains the servant of an independent contractor if the right of direction and control abides with the independent contractor. *Id.*

INFANTS:

presumption where sale of land belonging to a minor is made by order of court. *Green* v. *Holzer*, 533.
sale of minor's homestead may be set aside, how. *Id.*

INSOLVENCY:

how proved. *Fluke* v. *Sharum*, 229.

INSOLVENT BANKS:

criminal responsibility of officer receiving deposit knowing the bank to be insolvent. *Skarda* v. *State*, 176.
what constitutes insolvency. *Id.*

INSURANCE: See FIRE INSURANCE.

act of agent as constituting a waiver of a forfeiture for vacancy. *Home Fire Insurance Co.* v. *Wilson*, 442.

JUDGMENTS:

collateral attack on a judgment for mere errors and irregularities. *Cassaday* v. *Norris*, 449.
a judgment may be assailed only in a direct proceeding in the nature of a review on error. *Id.*
collateral attack upon; test. *Id.*
a collateral attack upon a decree in chancery ordering the sale of lands for the non-payment of assessments can not be sustained. *Id.*
fraud in procurement of a judgment as the basis for an attack upon the same. *Id.*
presumption as to validity of a judgment ordering a sale after confirmation of the same; presumption as to irregularities. *Id.*
amendment of judgment *nunc pro tunc*, waiver of notice. *Citizens Bank of Mammoth Spring* v. *Commercial National Bank of Chicago*, 497.
a judgment may be corrected *nunc pro tunc*, when. *Id.*
a judgment may not be enlarged or diminished after the expiration of the term. *Id.*
a judgment may be corrected by an entry *nunc pro tunc*, when. *Sloan* v. *Williams*, 593.
the purpose of a *nunc pro tunc* order is to make the record reflect the transaction that actually occurred. *Id.*
parol testimony alone, if of satisfactory character and sufficient weight, will warrant the *nunc pro tunc* entry of a judgment. *Id.*
the finding of the chancellor that the evidence was not sufficient to warrant the entry of an order *nunc pro tunc* will not be set aside on appeal. *Id.*

JURIES:

validity of challenge of juror on ground that he is a justice of the peace; made in apt time, when. *Hankins* v. *State*, 419.

LARCENY:

removing goods stolen to another county; indictment may be laid in what county. *State* v. *Alexander and Moore*, 357.
application of the principle above to property which is the subject of larceny both at common law and by statute. *Id.*

LEASES:

construction of a lease providing that the lessee "will use said premises as a hotel and saloon, and for no other purpose whatever." *Kahn* v. *Wilhelm*, 239.

LEASES—*Continued*

effect of lessor's willingness that the premises be used for purposes other than those recited in the lease. *Id.*

lease of steamboat; abatement in rent because of conditions rendering the operation of the boat impracticable. *Daniels* v. *Little Rock Packet Co.*, 330.

LIBEL AND SLANDER:

words actionable *per se*. *Simonson* v. *Lovewell*, 81.

a newspaper article charging defendant with dishonesty in public office, held libelous *per se*. *Id.*

compensatory damages may be awarded in libel action, when. *Id.*

LIMITATIONS:

where title is acquired by, effect of recognition of the original ownership. *Hutt* v. *Smith*, 10.

right of bank to credit deposit on note of depositor barred by limitations. *Desha Bank & Trust Co.* v. *Quilling*, 114.

although same may be credited on the outlawed note, the act does not toll the statute of limitations. *Id.*

an action on a note is barred as to the sureties thereon, when *Polk* v. *Stephens*, 438.

Kirby's Digest, § 5057, which applies only to wild lands, may apply to improved lands which have been permitted to return to a state of nature. *Moore* v. *Morris*, 516.

LIQUOR:

"saloon" defined as used in a lease, where the use of the premises is restricted. *Kahn* v. *Wilhelm*, 239.

LIS PENDENS:

right of purchaser of land subject to lien for assessments where no *lis pendens* notice has been filed. *Hudgins* v. *Schultice*, 139.

LOCAL IMPROVEMENTS:

lien upon real property in the district for the assessments. *Hudgins* v. *Schultice*, 139.

practice in foreclosure proceedings for failure to pay local assessments. *Id.*

right of owner to redeem. *Id.*

rights of purchaser of land subject to lien for local assessments in the absence of the filing of a *lis pendens* notice. *Id.*

nature and basis of special assessments. *Swepston* v. *Avery*, 294.

a statute undertaking to form over 95 per cent of one county into a single road improvement district held invalid. *Id.*

The Legislature is without authority to group together independent improvements, and arbitrarily declare them to be a single improvement. *Id.*

MASTER AND SERVANT:

right of master, by contract with employee, to limit in advance, its liability for an injury to the employee. *Chicago, R. I. & P.* v. *Pearce*, 6.

duty of master to furnish safe tools and a safe place in which the servant may work. *St. Louis, I. M. & S. Ry. Co.* v. *Coke*, 49.

injury to servant from structural defects, liability. *Id.*

Federal Employer's Liability Act will be held to apply where the servant was engaged in interstate commerce, when. *Id.*

liability of railroad for injury to servant growing out of use of defective rail. *Id.*

injury from concurrent causes. *Id.*

injury to servant in sawmill, what constitutes negligence. *Poinsett Lumber & Mfg. Co.* v. *Traxler*, 128.

assumption of risk of injury negligent act of fellow-servant. *Id.*

the defense of assumed risk is not abolished by the Federal Employers' Liability Act. *Kansas City S. Ry. Co.* v. *Livesay*, 304.

the duty of the master to furnish his servant with a safe place in which to work, held discharged, when. *Id.*

a servant assumes all obvious risks, including the risk of injury from the manner in which he knowingly sees and observes that the business is being operated and the work done. *Id.*

the Employers' Liability Act, Act March 8, 1911, page 55, held constitutional. *St. Louis, I. M. & S. Ry. Co.* v. *Ingram*, 377.

the Employer's Liability Act applies only to those employees engaged in the operation of trains. *Id.*

the act held to include every employee who, when injured, was performing some work in the line of his duty directly connected with, and incident to, the use and operation of a railroad. *Id.*

although a presumption of negligence is raised under the act, the issue of negligence should be submitted to the jury. *Id.*

relation between the owner of a building which is being constructed, and the servant of an independent contractor. *Arkansas Land & Lumber Co.* v. *Secrist*, 561.

mere supervision by the principal employer over certain work, does not raise the relation of master and servant between him and the servant of an independent contractor. *Id.*

a servant remains a servant of an independent contractor if the right of direction and control abides with the independent contractor. *Id.*

MEDICAL JURISPRUDENCE: See PHYSICIANS; see also NEGLIGENCE.

v. *Raney*, 337.

liability of physician for negligent treatment of patient. *Dunman*

MUNICIPAL CORPORATIONS:

authority of city council to contract for lighting the city. *City of Mena* v. *Tomlinson Brothers*, 166.

where a quorum of the city council is not present, those present may adjourn the meeting to another day. *Id.*

validity of action taken at adjourned meeting of city council. *Id.*

where a contract for public lighting goes into effect, its binding force is not affected by the contractor's delay in installing the work, occasioned by an attempt to refer the ordinance to a vote of the people. *Id.*

NEGLIGENCE:

injury to traveler at railroad crossing; duty of both railroad company and traveler as to care. *St. Louis, I. M. & S. Ry. Co.* v. *Eichelman*, 36.

instruction on proximate cause in personal injury action, where the injury resulted from two concurrent causes. *St. Louis, I. M. & S. Ry Co.* v. *Coke*, 49.

causal connection is not established in an action for damages growing out of mental anguish suffered by plaintiff where the train did not stop for her by reason of the negligence of the railway company, where she desired to attend the funeral of a relative. *Chicago, R. I. & P. Ry. Co.* v. *Mizell*, 153.

plaintiff may take advantage of general presumptions of negligence, although he has made specific charges in his complaint. *Biddle et al., Receivers* v. *Riley*, 206.

burden of proof under plea of contributory negligence. *St. Louis, I. M. & S. Ry. Co.* v. *Rodgers*, 263.

assumed risk, doctrine of, defined. *Kansas City Southern Ry. Co.* v. *Livesay*, 304.

negligent care of patient by physician; liability of physician for damages. *Dunman* v. *Raney*, 337.

in action against physician for negligent treatment, element of contributory negligence by patient will be considered. *Id.*

proximate cause of injury where plaintiff is carried past station. *Kansas City Southern Ry. Co.* v. *Cobb*, 569.

NEW TRIALS:

necessity for diligence where a new trial is sought on the ground of newly discovered evidence. *St. Louis, I. M. & S. Ry. Co.* v. *Coke*, 49.

discretion of trial court where a new trial is asked on the ground of the discovery of new evidence. *St. Louis, I. M. & S. Ry. Co.* v. *Dague*, 277.

in an action for damages against a carrier for the loss of an article, the trial court may refuse a new trial, where the lost article is discovered, and tendered into court, after verdict. *Id.*

OVERFLOW:

liability of railroad for, arising out of construction of roadbed. *Malvern & Camden Ry. Co.* v. *House*, 473.

PATENTED ARTICLE:

note given for purchase of must conform to a certain form. *Jonesboro Trust Co.* v. *Nutt*, 368.

PARTIES:

effect of failure to secure service on one of several defendants. *Biddle et al., Receivers* v. *Riley*, 206.

plaintiff may take non-suit as to parties improperly joined. *Id.*

in an action to set aside a decree ordering a sale of land for non-payment of improvement taxes, the improvement district is not a proper party. *Cassady* v. *Norris*, 449.

PHYSICIANS AND SURGEONS:

liability of physician for negligence in the treatment of a patient resulting in damage. *Dunman* v. *Raney*, 337.

PLEADING AND PRACTICE:

in action for wrongful death plaintiff may be required to elect, where he has brought a single action for the estate and for the next of kin. *St. Louis, I. M. & S. Ry. Co.* v. *Rodgers*, 263.

finality of judgment upon a demurrer as affecting costs. *Hall* v. *Waters*, 427.

effect of demurrer to an answer which has properly raised the issues in the action. *Id.*

RAILROADS:

injury to traveler at railroad crossing; jury must say whether plaintiff was negligent, under the circumstances, in driving upon the railroad track. *St. Louis, I. M. & S. Ry. Co.* v. *Eichelman*, 36.

duty of railroad company and of traveler at public railroad crossings. *Id.*

injury to traveler at railroad crossing caused by his horse becoming frightened by the escape of steam from a locomotive engine. *Id.*

contributory negligence, question for jury, when. *Id.*

RAILROADS—*Continued.*

injury to servant by use of defective rail. *St. Louis, I. M. & S. Ry. Co.* v. *Coke*, 49.

injury from concurrent causes. *Id.*

liability for overcharging fare; intention as controlling liability. *St. Louis, I. M. & S. Ry. Co.* v. *Baker*, 69.

duty to maintain crossings at public highways in good repair. *St. Louis, I. M. & S. Ry. Co.* v. *Smith*, 72.

liability for injury growing out of condition of public crossing due to defendant railroad's neglect. *Id.*

amount of damages for such injury. *Id.*

no liability for mental anguish suffered by passenger where train did not stop for her where she desired to attend a funeral. *Chicago, R. I. & P. Ry. Co.* v. *Mizell*, 153.

duties and liabilities of receivers of a railroad company to passengers carried on trains. *Biddle et al., Receivers* v. *Riley*, 206.

where injury results from a collision, a *prima facie* case of negligence is shown. *Id.*

liability for tort of servant in maliciously beating a passenger. *St. Louis, I. M. & S. Ry. Co.* v. *Jackson*, 391.

duty to require safe platform at station, for use of passengers. *Chicago, R. I. & P. Ry. Co.* v. *Owens*, 467.

duty to maintain station building and appurtenances in safe condition for use of passengers. *Id.*

liability for overflow caused by construction of roadbed. *Malvern & Camden Ry. Co.* v. *House*, 473.

liability for carrying plaintiff past station. *Kansas City Ry. Co.* v. *Cobb*, 569.

duty to keep waiting room comfortably warm. *Id.*

liability for injury to stock on right-of-way. *St. Louis, I. M. & S. Ry. Co.* v. *Erwin*, 580.

REAL PROPERTY:

construction of deed conveying lands to L. for and during her natural life, and the remainder to the heirs of her body. *Plumlee* v. *Bounds*, 274.

sale of contingent remainder under execution. *Id.*

RECEIVERS:

liability of receivers of railroad company for injury due to negligence. *Biddle et al., Receivers* v. *Riley*, 206.

RECEIVING STOLEN GOODS:

necessity for allegation charging intent. *State* v. *Bills*, 44.

RESISTING ARREST:

conviction for crime of, under void city ordinance. *Robinson* v. *Malvern*, 423.

jurisdiction of mayor's court over the crime of resisting arrest. *Id.*

ROAD IMPROVEMENT DISTRICTS:

establishment, construction and maintenance of. *Cox* v. *Road Improvement District No.* 8 *of Lonoke County*, 119.

petition of majority of landowners for formation of. *Id.*

assessment of city property for county road; test of jurisdiction of county court. *Id.*

invalidity of statute undertaking to form more than ninety-five per cent of a county into a single road improvement district. *Swepston* v. *Avery*, 294.

a single district to construct diverse, independent, and remote roads, can not be formed. *Id.*

Act 192, page 797, Acts of 1913, creating the Crittenden County Road Improvement District, held invalid. *Id.*

contracts may not be made for amounts in excess of appropriation. *Monroe County* v. *Brown*, 524.

the act of 1905, page 226, limiting the contract-making power of a road improvement district, is not in conflict with amendment No. 5, authorizing a special levy for road purposes. *Id.*

SALES:

shipment of freight, delivery to carrier, title, right of action for delay. *Isbell-Brown Co.* v. *Stevens Grocer Co.*, 17.

shipment of goods to seller's order, title passes, when. *Id.*

where goods are shipped to shipper's order, who may sue for damages growing out of carrier's delay. *Id.*

shipment of goods under bill of lading in favor of seller or his agent, with draft attached, delivery not to be made until draft is paid, title remains in seller until performance of conditions. *Id.*

waiver of reservation of title in sale of chattel. *Holiman* v. *Roush*, 225.

right of seller of hogs infested with cholera to collect purchase price. *Osborne* v. *Hittson*, 349.

nature of note to be executed in payment for the purchase of a patented article. *Jonesboro Trust Co.* v. *Nutt*, 368.

SCHOOL DISTRICTS:

contract of majority of school directors, when binding. *School District No.* 22 v. *Traywick*, 597.

SHERIFFS:

personal liability for failure to make return on execution. *Lewis* v. *Pearson Company*, 271.

SPECIFIC PERFORMANCE:

duty of person desiring the remedy of. *Henley* v. *Engler*, 283.

failure of plaintiff to perform conditions imposed upon him is a defense to an action for, when. *Id.*

STATUTES CITED:

KIRBY'S DIGEST:

§ 81 146
512-13, 516 373
841-843 164
1175 526
1188 448
1814 178
1830 45
1892 420
1960 423
1990 137
2219 34
2230-1 35
2672 588
2683 592
3137 464
3228 276
3286 273
3655 440
3899 239
4431 454
4537 421
5149 142
5443-48 173
5464 425
5478 173
5586 426
5601 173
5607 172
5643 172
5684 143
5691-5709 143
5696 455
5700 458
5703 459
5731 459
5800 538
6167 383
6168 382
6191 214
6222 356
6297 237
6620 70-292
6634 576
6704 576
6707 576

MANSFIELD'S DIGEST:

§ 642 277

ACTS:

1899, Act 66, p. 117 523
1905, p. 226 532
1905, p. 116 76
1905, Act 339 35
1907, Act 193, p. 453 376
1907, Act 418, p. 1106 250
1909, Act 262 290
1909, Act 290 364
1911, Act 88, p. 55, Employers' Liability Act .. 383
1913, Act 105 360
1913, Act 192, p. 797 296
1913, Act 212 121
1913, p. 346, Amending Kirby's Digest, § 7948 .. 544

CONSTITUTION OF ARKANSAS:

Art. 7, § 32 273
9, 4 239
19, 27 126
Schedule to Constitution, Sec. 1, being § 62, Revised Statutes 273
Amendment No. 5 298-527

CONSTITUTION OF UNITED STATES:

14th Amendment, § 1 384

STATUTES OF OTHER STATES:

Shannon's Code of Tenn., § 84 364
Criminal Code of Nebraska, § 116 47
Statutes of Wisconsin 1898, § 4541 187

ACTS OF CONGRESS:

Federal Employers' Liability Act, Act Apl. 22, 1908, ... 8-67-386
Act of Congress, April 22, 1908, Amended April 5, 1910 264

STEAMBOATS:

lease of; abatement of rent for reasons stipulated. *Daniels* v. *Little Rock Packet Co.*, 330.
abatement of rent, where operation of steamboat is rendered impracticable by natural conditions. *Id.*

SURETYSHIP:

liability of surety on building contract; extension of time; failure to notify surety of breach. *Bankers Surety Co.* v. *Watts*, 492.

TAXATION:

sale for non-payment of taxes; collateral attack upon the sale. *Fleischer* v. *Wappanocca Outing Club*, 287.
right of owner of land to redeem, where the collector by mistake refused to accept the taxes tendered on same. *Id.*

TAX SALES:

effect of false allegation in bill in equity to condemn for non-payment of assessments, to the effect that the owner is unknown. *Cassaday* v. *Norris*, 449.
in action to set aside an allegation of want of service is insufficient, when. *Id.*
right to complain of irregularities in sale after confirmation. *Id.*

TELEGRAPH COMPANIES:

failure to deliver message, duty of plaintiff to perform certain acts as basis of recovery. *Western Union Telegraph Co.* v. *Crain*, 13.
recovery for damages sustained by reason of mental anguish, caused by failure to deliver message, denied when. *Western Union Telegraph Co.* v. *Mulkey*, 201.

TELEPHONE COMPANIES:

are public service corporation, and may not discriminate as to service and rates. *Southwestern T. & T. Co.* v. *Sharp & White*, 541.
right to require payment for services in advance. *Id.*
right to make rules governing liability for long-distance calls. *Id.*
abrogation of rule with reference to charges for long-distance calls. *Id.*

TIMBER:

sale of, stipulation for expeditious removal of, construction of deed. *Burbridge* v. *Arkansas Lumber Co.*, 94.
sale of timber to agent; right of principal against seller. *Id.*
a conveyance of timber is a conveyance of an interest in land. *Graysonia-Nashville Lumber Co.* v. *Saline Development Co.*, 192.

TIMBER DEEDS:

construction of. *Burbridge* v. *Arkansas Lumber Co.*, 94.
stipulation in, allowing reasonable time to remove timber. *Id.*
expeditious removal. *Id.*
recitals in purchase deed, when notice to subsequent purchaser. *Graysonia-Nashville Lumber Co.* v. *Saline Development Co.*, 192.

TRIAL:

improper remarks of trial judge; duty of party complaining to object specifically. *St. Louis, I. M. & S. Ry Co.* v. *Coke*, 49.
discretion of court in limiting the extent of cross-examination in technical matters. *Id.*
province of court and jury in a trial. *Simonson* v. *Lovewell*, 81.
where jury is unable to agree, right of judge to impress upon them their duty to arrive at a verdict; duty of minority to yield to majority. *Id.*
practice where both sides ask for an instructed verdict. *Hill* v. *Kavanaugh*, 134.
an amendment to the complaint may be made at any stage of a trial, which will not operate to the prejudice of the defendant in his preparation for trial. *Biddle et al., Receivers* v. *Riley*, 206.
a party does not waive his right to go to the jury, when, after his request for a peremptory instruction is refused, he asks other instruction on the merits of the case. *St. Louis, I. M. & S. Ry. Co.* v. *Ingram*, 377.
test of the validity of a peremptory instruction. *Id.*
a peremptory instruction for the defendant should not be given, when. *Hatfield Special School District* v. *Knight*, 432.
in a prosecution for homicide remarks of counsel on the fact of defendant's recent marriage, held not prejudicial. *Madding* v. *State*, 506.

TRUSTS: See CONSTRUCTIVE TRUSTS.

VENDOR AND PURCHASER:

right of vendor to lien for unpaid purchase money as against the purchaser and his grantees. *Graysonia-Nashville Lumber Co.* v. *Saline Development Co.*, 192.
a purchaser of land is affected with notice of all recitals in the title deeds of his vendor, whether recorded or not. *Id.*

VERDICT:

form of in action for wrongful death. *St. Louis, I. M. & S. Ry. Co.* v. *Rodgers*, 263.
a verdict must be supported by some substantial evidence. *Osborne* v. *Hittson*, 349.

WITNESSES:

impeachment of own witness. *Shands* v. *State*, 460.

WORDS AND PHRASES:

"saloon" defined in a lease which provides that the lessee "will use said premises as a hotel and saloon, and for no other purpose whatever." *Kahn* v. *Wilhelm*, 239.

WRONGFUL DEATH:

election of remedies. *St. Louis, I. M. & S. Ry. Co.* v. *Rodgers*, 263.
form of verdict in action for. *Id.*
measure of damages sustained by minor child of deceased. *Id.*